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OFCOM[1], Information-Convergence and the Never Ending Drizzle of Electric Rain

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> "Information gently but relentlessly drizzles down on us in an invisible, impalpable electric rain."
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> -- Prof. Hans Christian von Baeyer, "Information: The New Language of Science", (London: 2003, p. 3).

I. Introduction:

It is commonly asserted that convergence is the joining together of telecommunications and broadcasting through digital technology. [3] In the simplest of characterisations, telecommunications could be seen as the transmission of electronic signals through a network of copper wires. Similarly, broadcasting could be seen as the transmission of electric signals encapsulated in radio waves sent through the air. The development of digital networks and broadband capability, however, has fused broadcasting and telecommunications together in such a way that the two are now, in fact, inseparable. Broadcasters now access their customers through broadband access provided through the telephone network's 'local loop'. Mobile telephone operators use bandwidth that was once the exclusive reserve of radio and television broadcasters.

As the technologies converge, so too pressures have emerged for the law to take a similar approach. [4] The Communications Act 2003 (the "Act"), which received the Royal Assent on 17th July 2003, and the accompanying creation of OFCOM (which opened for business on 29th December 2003) called for therein, must thus be seen in proper context. It is nothing less than an all-encompassing

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[3] *A New Future for Communications* Cm 5010 (2000), p. 104.
[4] Ian Lloyd and David Mellor, "Telecommunications Law", (London, 2003), p. 26.

manifesto to manage and develop electronic information transmission in the United Kingdom. In essence, Parliament has posited in OFCOM the responsibility for administering and developing the electronic 'nervous system' for Britain.

While it is true that the Act leaves out large swathes of territory from the jurisdiction of OFCOM, *i.e.*, the Internet, the BBC, etc., over time these areas will probably be added to the regulatory penumbra of OFCOM for a variety of reasons. First, it will be more cost effective and administratively efficient to 'fence these areas in' rather than to keep them out. Second, the exclusion of the BBC and the Internet is an artificial exclusion that cannot be justified from a technical standpoint. For instance, the Internet is generally accessed through modem and broadband 'hook-ups' provided through the very same electronic communications networks OFCOM is charged to oversee. Additionally, once Britain 'pulls the plug' on analogue broadcasting and goes wholly digital (as it is envisioned to do so before the decade is out), the very platform that the BBC will be using will be an OFCOM-regulated medium.

Of course, the BBC remains subject to OFCOM stipulated broadcast guidelines and standards in areas such as decency, etc. However, real direct day-to-day oversight function of the BBC is vested in BBC board of governors under the Royal Charter. Rather, the decision to exclude BBC from OFCOM oversight is a political decision made by Parliament for reasoning that cannot be technologically justified. Now with the Hutton Report heavily critical of how the BBC management and governors perform their oversight functions, it is highly likely that the 'knotty issue' of oversight of what to do with the BBC will fall to OFCOM. This is not, however, universally seen as desirable: "Given that the BBC is resolving its problems internally…the corporation does not need the nannying that the cultural engineers at OFCOM would inevitably offer."[5] Moreover, if Parliament gains confidence in OFCOM management, it is likely that it will place in OFCOM some oversight function for the Internet as well which is currently split between the Department of Trade and Industry ("DTI") for commercial matters and law enforcement for criminal matters.

[5] Comment, "Off Target at OFCOM: The media regulator needs fewer luvvies and more sense", The Times, 2/2/04, p.18.

This article will examine the role that OFCOM will play in the information age by reviewing actual provisions of the Act, various public pronouncements made thus far by OFCOM regulatory executives and weighing these against criticisms levelled by some that OFCOM has been too 'high-handed' in its handling of certain matters to date. In particular, this article will argue that in order for OFCOM and its management to be successful in their function it will require a keen appreciation for our changing concept of what information is and how it is affected by the various media through which it emanates. While OFCOM may be seen as primarily a governmental entity charged with the mundane task of implementing of sound public policy in the electronic communications area, OFCOM has significant potential to impact society through attention to the content transmitted to the general public over differing information networks. Essential to having any critical impact over content as it moves through infrastructure, OFCOM will have to understand the physical nature of information flow in electronic communications networks. Yet, nothing can be more elusive than coming to terms with the physical side of information, the very real bits and electronic pulses that constitute the elemental components of digital content.

Prof. Hans Christian von Baeyer makes the case eloquently in his book, "Information: The New Language of Science" (London, 2003), of the need not only for scientists but for regulators and society as a whole to come to terms with the physical construction of information in the digital age. Describing information beautifully as something that "gently but relentlessly drizzles down on us in an invisible, impalpable electric rain,"[6] the physicist speaks of information flow -- from television and radio transmitters, satellites, mobile phones, garage door openers and so on and so forth -- encapsulated in radio waves which are then converted into sound and light by antennas, amplifying the minute electrical impulses they catch, converting them into sound and light.[7] Moving from radio waves, Prof. von Baeyer speaks of the wire pipelines of copper and glass which flow into a laptop from a modem connection and how this traffic is rapidly bursting out of the confines of cables and optical fibres,

[6] *Ibid.*, p.3.
[7] *Ibid.*

joining the wireless world.[8] While some traffic is comprehensible, most is encrypted, understandable only to those who are meant to read such information.[9] The information which comes in the form of electrical pulses is normally encoded in the rudimentary alphabet of computers – zeroes and ones – the fundamental stuff of information.[10] It is only when these symbols are organised into distinct patterns that the information will emerge, hence, furnishing the substrate of information.[11]

By extrapolation from Prof. von Baeyer's argument, OFCOM in order to be an effective regulator of information technology will have to have a very precise understanding of the elemental components that make up information. Just as the abstract can illuminate the practical, *e.g.*, mathematician Alan Turing's complicated logic theorems led to the cracking of the German army's Enigma code during World War II[12], OFCOM must be prepared to invest some time to understand the ethereal elements of information theory in order to better perform its more mundane regulatory functions.

For guidance in comprehending the 'metaphysics' of convergence, OFCOM can, of course, start with the writings of Marshall McLuhan.[13] McLuhan wrote three decades ago that 'when IBM discovered that it was not in the business of making office equipment or business machines, but that it was in the business of processing information, then it began to navigate with clear vision.'[14] Similarly, for OFCOM to have a clear vision it must realise that it is not merely regulating broadcasting, telecommunications or even electronic communications networks, but that it is regulating information convergence. Convergence -- the meshing of diverse and competing technologies into a single unified medium (digital transmission) – will profoundly affect the way information is produced. No longer will we be so concerned with the idea of how information is conveyed from point A to point B. Rather, we will be focused on

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[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*, p. 24.
[13] Marshall McLuhan was an archetypal figure of the 1960s known for his writings on media theory.
[14] Marshall McLuhan, "Understanding Media", (New York, 1964), p. 9 quoted at von Baeyer, *op cit.*, p. 5.

how information itself will be distorted when viewed through the prism of convergence.

Proposition 2.01201 of Wittgenstein's *Tractatus Logico-Philosophicus*[15] sets forth the following: 'Just as we are quite unable to imagine spatial objects outside space or temporal objects outside time, so too there is no object that we can imagine excluded from the possibility of combining with others.' Extrapolating from Wittgenstein's supposition, information, therefore, cannot be isolated in any meaningful way from the converged technology that produced it and thus the end-product "information" cannot in reality be distilled from the "convergent technology" that produced it. This new type of information -- "converged-information" – is as distorted by the prism of network culture as much as messages transmitted between children in a playground playing the game "telephone" are when relaying messages to each other. Taking Wittgenstein's proposition to its extreme in the context of the regulatory sphere of OFCOM, any attempt by OFCOM to regulate this "converged-information" merely adds to the level of distortion as opposed to clarifying it. Thus, in the end OFCOM must realise that when it is regulating information infrastructure policy, it is in reshaping or distorting the very information that is carried along such infrastructure in ways that OFCOM may itself not be aware of at the time it formulates what it believes to sound and rational "converged-information" policy.

The phenomenon of convergence, in and of itself, can be characterised as what physicist Per Bak describes as a 'tipping point', a moment in nature where quantitative change that has been building up over time suddenly leads to a qualitative change.[16] In studying the nature of "converged-information", this article will argue two theories from a public policy perspective: first, that the radical restructuring of telecommunications and broadcasting law envisioned by the Act is justified and appropriate given the rise of the new technology of digital content delivery; and, second, that the way that convergence will change how telecommunications and broadcasting are to be regulated will have profound effects on the content of and form of information flow that is to be produced for transmission through the digital infrastructure.

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[15] Ludwig Wittgenstein, "Tractactus Logico-Philosophicus", (London, 2001), p.6.

[16] See Per Bak, "How Nature Works: The Science of Self-Organized Criticality", (New York, 1996). The "tipping point" concept is concisely explained at Mark C. Taylor, "The Moment of Complexity", (Chicago, 2001) p. 148.

The newly constituted OFCOM finds itself dealing with two particular areas of critical concern: first, regulation of the delivery of content through broadcasting and telecommunications networks which hereafter shall be referred to as "infrastructure regulation"; and, second, regulation of the actual content delivered through those broadcasting and telecommunications networks which hereafter shall be referred to as "content regulation." With respect to infrastructure regulation, no adage is more accurate to describe where we are today than that coined by Marshall McLuhan, namely, that "the medium is the message."[17] In the context of the convergence of telecommunications and broadcasting, infrastructure regulation as opposed to content regulation will be more significant in determining the nature and type of content that will be transmitted through the digital networks than the actual policies promulgated to regulate content in and by itself. A corollary to this thesis is that the sound application of public policy to infrastructure regulation will enhance the free flow of content and the ideas reflected therein, whilst poor public policy and regulation will have a negative impact on the development of the ideas represented by such content.

In addition to paying significant attention to infrastructure regulation, OFCOM regulators also have to wrestle with the complex legal, social and moral dilemmas presented by the need for society to regulate decency, good taste and respect for public sensitivities in the content to be delivered to the general public. In the short term, those who continue to shock sensibilities by pushing the edge of the creative envelope such as television programming that relies upon gratuitous sex and violence[18] will continue to face close scrutiny from regulators. However, over time, the sheer volume of material that content regulators will have to review in performing their tasks will make content regulation largely a

[17] McLuhan's theory is paraphrased succinctly in Christopher Horrock's chapter, "Marshall McLuhan and Virtuality" published in W. Self, ed., "The End of Everything", (London, 2002), p. 238.

[18] In a previous article, "The Medium is the Message: The Legal and Policy Implications of Creation of OFCOM in the Age of Convergence", [2003] CLTR 161-173, this author suggested that recording artist Eminem as someone whose lyrics might be of the sort that broadcast regulators might find worthy of criticism. In fact, we need not go across the Atlantic to find examples to consider. The high-art BBC television production "Charles II" was replete with acts of violence and debauchery that would even cause Eminem to blush. To the author's knowledge, this programme, however, historically accurate and fascinating to watch as it was did not receive censure from broadcast standards regulators.

perfunctory function to be performed on an *ad hoc* basis only when exceptional circumstances warrant closer examination.

Given this paradigm, the real battle for content control will be won by OFCOM regulators behind closed doors and away from public scrutiny at the level of infrastructure regulation. In its function as the controlling gatekeeper of the UK telecommunications and broadcasting infrastructure, OFCOM will wield considerable power to proscribe content by enforcing facially neutral infrastructure policies that will impact the content to be produced. By determining media ownership, which entities possess significant market power that must be curtailed and what technology platforms will dominate the communications infrastructure, OFCOM will be able to exercise "stealth control" over the type of content that will be made available to the general public through a more tightly regulated infrastructure with the built in advantage of avoiding claims that it is proscribing freedom of speech, thought or expression. Since the role of the telecommunications-broadcasting regulator has never been as critical as it is now in the age of convergence, the new situation begs the following questions: first, what are the changes that the Act makes to the regulation of telecommunications and broadcasting that reflect the development of convergence; second, what are the specific content regulations OFCOM now must administer and how might specific provisions of the Act that ostensibly deal with infrastructure matters end up affecting the substance of the content to be regulated; and third, what are the public policy implications of the new regulatory structure.

II. Changes to the Regulation of Telecommunications and Broadcasting Reflecting the Development of Convergence:

The single most important theme and catalyst for the Act is convergence, the coming together of the telecommunications and media industries, *e.g.*, the availability of moving images on mobile phones and interactive digital television.[19] The Government's white paper on communications (the "White Paper") views convergence as the combining of personal computers, telecommunications and television such that providers of communication systems

[19] N. Baylis, "The Communications Bill and the Media", [26/09/02], London: Lawtel (Sweet & Maxwell).

can deliver products and services that compete with products and services now delivered by other networks.[20] For instance, an end user has an increased choice in the equipment he or she can use to carry out a particular task – an Internet TV can combine some of the functions of a radio, TV, PC and phone.[21] It is the growth of digital media that, in the view of the Government, has revolutionised the information society blurring the boundaries of industries: telecommunications companies want to become broadcasters, while broadcasters are moving into e-commerce, and Internet service providers are offering television channels.[22]

The Act radically restructures the current system for media and communications regulation by combining nine separate regulators covering television, radio and telecommunications with different regulators covering issues of taste and decency and economics and competition into one regulatory body responsible for both the communications and media industries.[23] This one regulatory body – OFCOM – will cover telecommunications, television and radio, content and communications networks promote competition and also manage spectrum.[24] Ostensibly, the Government believes that having separate regulators responsible for discreet and disparate parts of the telecommunications and broadcasting fields will impede the development of a converging industry.[25] Whilst the current system with multiple regulators has functioned adequately for the way communications has developed in the 20th century with different content and distribution channels, the Government believes that this model is outdated in light of the technological convergence and commercial consolidation now taking place.

The Government hopes that OFCOM will have the vision to see across converging industries, to understand the complex dynamics of competition in both content and the communications networks that carry services.[26] In creating a super-sized regulator, the Act eliminated five regulators – the Broadcasting Standards Commission, Office of Telecommunications ("OFTEL"), the Radio Authority which granted licenses to provide radio broadcasts and regulates

[20] *A New Future for Communications* Cm 5010 (2000), p. 104.
[21] *Ibid*.
[22] *Ibid*, p. 9
[23] *Ibid*, p. 11
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid*.

independent radio, the Independent Television Commission which regulated all UK television broadcasting except that provided by the British Broadcasting Company ("BBC") and the Radiocommunications Agency which managed and monitored the radio spectrum and granted licenses to run systems in the relevant part of the spectrum.[27] In this article, we shall consider whether the consolidation of regulatory authority into one super-agency with responsibility for both infrastructure and content is the optimal approach from a policy perspective to the regulation of telecommunications and broadcasting at the outset of the age of convergence.

The Act provides for:

- The transfer of functions to OFCOM from the bodies and office holders which previously regulated the communications sector (which broadly speaking encompasses telecommunications, broadcasting and spectrum management);
- The replacement of the old system of licensing for telecommunications systems with a new framework for the regulation of electronic communications networks and services;
- The power to develop new mechanisms to enable radio spectrum ("Radio Spectrum") or radio frequencies to be traded in accordance with regulations made by OFCOM, and a scheme of recognised Radio Spectrum access;
- The development of the current system for regulating broadcasting to reflect technological change, to accommodate the switchover from analogue to digital broadcasting, and to rationalise the regulation of public service broadcasters;
- The establishment of a consumer panel ("Consumer Panel") to advise and assist OFCOM and to represent and protect consumer interests;
- The establishment of a content board ("Content Board") to advise OFCOM in relation to the content of anything broadcast or otherwise transmitted by means of an electronic communications network and media literacy;
- The concurrent exercise by OFCOM of powers under the Competition Act 1998 and the Enterprise Act 2002 across the whole of the communications sector (including broadcasting); and

[27] C. Jeffery, "Draft Communications Bill – All Change In Telecoms And Broadcasting", [September 2002] Corp Briefing 16.8(6).

- Procedures for appeal of decisions relating to networks and services and rights of use for Radio Spectrum.[28]

Five bodies or office holders who exercised regulatory responsibilities in the communications sector were replaced by OFCOM as of 29 December 2003:

- The Broadcasting Standards Commission ("BSC"), a non-departmental public body that had statutory responsibilities for standards and fairness in broadcasting. It had three main tasks, as established by the Broadcasting Act 1996 (the "1996 Act"). These were to produce codes of conduct relating to standards and fairness; to consider and adjudicate on complaints; and to monitor, research and report on standards and fairness in broadcasting;
- The Director General of Telecommunications ("DGT"), who was responsible for running OFTEL, which was the non-ministerial government department that was the UK telecommunications regulator. The DGT was responsible under the Telecommunications Act 1984 for administering and enforcing the licences that regulated telecom operators. The DGT's duties included those of ensuring that adequate telecommunications services were provided throughout the UK; of promoting the interests of consumers; and of maintaining effective competition;
- The Independent Television Commission ("ITC"), the statutory body that licensed and regulated independent television services in the UK, including cable and satellite. Operating under powers derived from the Broadcasting Act 1990 (the "1990 Act") and the 1996 Act, its responsibilities included setting and maintaining the standards for programmes, economic regulation, public service obligations, research, advertising and technical quality;
- The Radio Authority ("RA"), which was the statutory body responsible for regulation and licensing of independent radio broadcasting in the UK, that is to say all non-BBC radio services. Operating under powers derived from the 1990 Act and the 1996 Act, its responsibilities included frequency planning, the awarding of licences, the regulation of programming and radio advertising, and the supervision of the radio ownership system; and
- The Secretary of State ("SOS"), who had a regulatory role in respect of the allocation, maintenance and supervision of non-military radio spectrum in the UK. (When SOS is used in the context of the Act, it refers to matters within the

[28] Communications Act 2003, Chapter 21, Explanatory Notes, p. 1.

responsibilities of both the SOS for Trade and Industry and the SOS for Culture, Media and Sport. Whether one or the other or both ministers carry out a specific function is to be determined in their respective ministerial portfolios). This role was exercised by the SOS through the Radiocommunications Agency ("RCA"), an executive agency of the DTI.[29]

- The Office of Communications Act 2002 established OFCOM to prepare to assume the regulatory functions described above that were in the past handled by BSC, DGT, ITC, RA and the RCA.[30]

One of the central objectives of the Act was the smooth transfer to OFCOM of the functions, property, rights and liabilities of the bodies and officeholders that in the past regulated the communications sector.[31] This appears to have been largely accomplished, although not without some controversy. OFCOM has for the most part finished what its Chief Executive, Stephen Carter, called the 'plumbing phase' of setting up OFCOM.[32] The 'plumbing phase' involved combining five existing regulators into one, reducing staffing levels from 1200 to approximately 960 and reducing costs across the board by about 5% exclusive of exceptional restructuring costs. Ironically, one area where a 'bad taste' was left was in the combining of the legal staffs of the various agencies into the super-regulator. In eliminating the general counsel function at OFCOM, some of the most experienced public sector legal advisors at the predecessor regulators were let go in favour of retaining pricey "superstars" from private practice and the Bar.[33] There is a concern that the new legal team is deficient in understanding the pre-OFCOM regulatory history and lacks firsthand familiarity with the complexities of bureaucratic in-fighting.

Some of the criticism has been scathing: "OFCOM's behaviour during its first few weeks of existence raises serious questions about the quality of its personnel and the clarity of its mission."[34] This editorial in the The Times goes

[29] *Ibid*, p. 2.
[30] *Ibid*, p. 3.
[31] *Ibid*, p. 3.
[32] Address of Stephen Carter, Chief Executive, OFCOM, before the Royal Television Society Cambridge Convention, 19 September 2003, at: http://www.ofcom.org.uk/media_office/speeches_presentations/carter_20030919
[33] Stephen Hoare, 'Ofcom's general counsel role ditched in legal team overhaul', The Lawyer, 17 November 2003.
[34] "Off Target at OFCOM", The Times, 2 February 2004, Comment, p. 18.

on to criticise the selection of Luke Johnson, multi-millionaire pizza mogul, as Chairman of Channel 4:

> If nothing else Mr. Johnson's ownership of the Ivy, a classy eatery for supposedly cerebral celebrities, will have acquainted him with the extra-large egos of the media elite. This odd choice gives the impression of an organisation that prefers the young and fashionable over those whose experience would make them duller companions on the journey to the Converged Future.
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> Experience is needed because only hardened executives could hope to fashion this unwieldy monolith into anything approaching a sensible regulator. OFCOM has swallowed up five other regulators, and been lumbered with 130 additional duties by over-zealous bureaucrats. Its responsibilities range from overseeing broadcasting standards and encouraging competition in telecoms, to reviewing media mergers under the cyber-sensitive catchphrase of "serving citizen-consumers in the digital age."[35]

The cost concerns with OFCOM are significant. The Times editorial points out that:

> The attempt to combine so much power in one bureaucracy has already spawned more bureaucracy, and the organisation has admitted that its costs will soar by 27 per cent in the next financial year. Mr Carter has stated baldly that providing cheaper regulation has never been promised as of the main purposed of OFCOM. Yet this was always part of the Government's explanation for merging so many different entities."[36]

Admittedly, OFCOM does have a lot on its plate, but, is it as Mr Carter argues a focused and managed entity dealing with complex restructuring costs that are to be incurred one-time only or is it a costly refuge for "among others, New Economy know-its-alls, London luvvies and apparatchiks looking for a generous salary."[37]

The functions and general powers of OFCOM consist of those that prior to commencement were carried out by the SOS and the pre-commencement regulators that were transferred to OFCOM and all other functions conferred on OFCOM by other legislation to be enacted and the Act.[38] "Pre-commencement

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[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] Communications Act 2003, ch, 21, part 1, cl. 1.

regulators" means the BSC, the DGT, the ITC, the RA and the RCA.[39] Although the Act transfers certain SOS functions that were performed by the RCA to OFCOM, the SOS will not cease to exist, unlike the other five regulators.[40]

The functions that were transferred to OFCOM relate to wireless telegraphy, the licensing of television and radio services, the Channel 4 Corporation ("C4C"), the proscription of foreign satellite services, Gaelic language broadcasts, the national television archive, the reservation of digital capacity to the BBC, listed events, fairness and privacy in broadcasting and standards for transmission services.[41] The functions also relate to warrants to enter and search premises to enforce broadcasting licence provisions, variation of existing Channel 3 and Channel 5 licences and reviewing digital television broadcasting.[42]

The general duties of OFCOM are to further the interests of consumers in relevant markets, where appropriate by promoting competition, to secure the optimal use of the Radio Spectrum, to secure the availability throughout the UK of a wide range of television and radio services which are both of high quality and calculated to appeal to a variety of tastes and interests and to secure that standards for the protection of the public are applied to all television and radio services.[43] The Act identifies standards that OFCOM must assure for the general public. First, OFCOM must insure that television and radio services do not broadcast offensive and harmful material. Second, OFCOM must prevent members of the public and all other persons from falling victim to unfair treatment or unwarranted infringement of privacy resulting from the activities of radio and television broadcasters.[44]

In fulfilling its duties, OFCOM must perform its function keeping in mind the following as they may be relevant in the circumstances:

a. The desirability of promoting competition in relevant markets;
b. The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;

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[39] *Ibid*, Part 1, cl. 2.
[40] Explanatory Notes, *op cit.*, p. 4.
[41] *Ibid*, p. 5.
[42] *Ibid,* p. 6.
[43] *Ibid.*
[44] *Ibid.*

c. The desirability of promoting and facilitating the development and use of effective forms of self-regulation;
d. Any other principles appearing to OFCOM to represent the best regulatory practice;
e. The desirability of encouraging investment and innovation in relevant markets;
f. The different needs and interests, so far as the use of the Radio Spectrum is concerned, of all persons who may wish to make use of it;
g. The need to secure that the application in the case of television and radio services of standards is in the manner that best guarantees an appropriate level of freedom of expression;
h. The vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
i. The needs of persons with disabilities, of the elderly and of those on low incomes;
j. The desirability of preventing crime and disorder;
k. The opinions of consumers in relevant markets and of members of the public generally; and
l. The different interest of persons in the different parts of the UK and of those living in rural and in urban areas.[45]

OFCOM is to establish and maintain the Content Board with functions identified as follows:

Those OFCOM may impose upon the Content Board pursuant to the powers granted OFCOM under the Schedule to the Office of Communications Act 2002;

Functions in relation to matters that concern the contents of anything that is or may be broadcast or otherwise transmitted by means of electronic communications networks;

Functions in relation to the promotion of public understanding or awareness of matters relating to the publication of matter by means of the electronic media; and

[45] The Act, *op cit.*, Part 1, cl. 3.

To assure that OFCOM in its regulation of the television and radio industries are aware of the different interests and other factors that need to be taken into account as respects the different parts of the UK.[46]

OFCOM is also charged with significant functions for the protection of consumers such as ascertaining:

The state of public opinion from time to time about the manner in which electronic communications networks and services are provided;

The state of public opinion from time to time about the manner in which associated facilities are made available;

The experiences of consumers in the markets for electronic communications services and associated facilities, in relation to the manner in which electronic communications networks and services are provided and associated facilities made available;

The experiences of such consumers in relation to the resolution of disputes with communications providers or with persons making associated facilities available; and

The interests and experiences of such consumers in relation to other matters that are incidental to, or are otherwise connected with, their experiences of the provision of the electronic communication networks and services or of the availability of associated facilities.[47]

The Content Board and OFCOM are to both keep abreast of public tastes, preferences and predilections in the broadcast fields. For instance, the Content Board must maintain intimate knowledge of:

The state of public opinion from time to time concerning programmes included in television and radio services;

Any effects of such programmes, or of other material published by means of the electronic media, on the attitudes or behaviour of persons who watch, listen to or receive the programmes or material; and

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[46] *Ibid*.
[47] *Ibid*, Part 1, cl.12.

The types of programmes that members of the public would like to see included in television and radio services.[48]

In addition to the Content Board, OFCOM has to establish and maintain effective arrangements for consultation about the carrying out of their functions with:

- Consumers in the markets for the services and facilities in relation to which OFCOM have functions;
- Consumers in the markets for apparatus used in connection with any such services or facilities;
- Consumers in the markets for directories capable of being used in connection with the use of an electronic communications network or electronic communications service; and
- Establishment and maintenance of a Consumer Panel charged with the function of advising both OFCOM and others of what the Consumer Panel thinks fit.[49]

A particular spectrum of the general public that the Consumer Panel must specifically concern itself with is to give advice to OFCOM on the interests of domestic and small business consumers in relation to:

- The provision of electronic communications networks;
- The provision and making available of electronic communications services, associated facilities, directory enquiry facilities, a service consisting in the supply of information for use in response to directory enquiries or of an electronic programme guide;
- The supply of apparatus designed or adapted for use in connection with any such apparatus or such a directory is supplied;
- Standards of service, quality and safety for such services, facilities, apparatus and directories;
- The handling of complaints made by persons who are consumer in the markets for such services, facilities, apparatus or directories to the persons who provide the services or make the facilities available or who are suppliers of the apparatus or directories;

[48] *Ibid*, Part 1, cl. 13.
[49] *Ibid*, Part 1, cl. 14.

- The resolution of disputes between such consumers and the persons who provide such services or make such facilities available, or who are suppliers of such apparatus or directories; and
- Any other matter appearing to the Consumer Panel to be necessary for securing effective protection for persons who are consumers in the markets for any such services, facilities, apparatus or directories.[50]

Balancing the citizen interest with the consumer interest and determining whether there is to be an explicit hierarchy between the two is a matter that concerns OFCOM. The OFCOM Chief Executive, Stephen Carter, prefers not to support this distinction:

> We are all citizen-consumers. In some aspects of our lives we are more one than the other, but to separate them or rank them is an increasingly artificial process. It is this interlinked interest of the citizen-consumer, that will be the benchmark against which OFCOM's decisions will be checked.[51]

The Act also tasks OFCOM with significant responsibility in the implementation of the new package of EC measures for a common regulatory framework for electronic communications networks and services (the "Communications Directives") that were adopted by the European Parliament and the Council of Ministers in February 2002. Accordingly, OFCOM must act in accord with such Communications Directives so as:

To promote competition in relation to the provision, servicing and facilitation of electronic communications networks and services;

To secure that their activities contribute to the development of the European internal market;

To promote the interests of all persons who are citizens of the European Union;

To take account of the desirability of carrying out of OFCOM functions in a manner which, so far as practicable, does not favour one form of electronic communications service, associated facility or one means of providing or making available such a network, service or facility, over another;

To encourage the provision of network access and service interoperability;

[50] *Ibid.*
[51] Address, 19 September 2003, *Ibid*.

To further the purpose of securing efficiency and sustainable competition in the markets for electronic communications networks, services and associated facilities and the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available;

To encourage compliance for the purpose of facilitating service interoperability and securing freedom of choice for the customers of communications providers;

To meet standards or specifications from time to time drawn up and published: (1) in accordance with Article 17 of the Framework Directive; those adapted by the European Committee for Standardisation; (2) those adapted by the European Committee for Electro technical Standardisation; (3) those adapted by the European Telecommunications Standard Institute; and (4) those international standards and recommendations from time to time adapted by the International Telecommunication Union, the International Organisation for Standardisation or the International Electro technical Committee; and

Where it appears to OFCOM that any of the EC requirements conflict with each other, they must secure that the conflict is resolved in the manner OFCOM think best in the circumstances.[52]

III. A Review of Specific Provisions of the Act Designed to Regulate Content and Infrastructure:

Convergence is not specifically discussed in the Act. In fact, the word is not to be found in the statute at all. However, it would be wrong to conclude from this fact that OFCOM is not a creature of convergence. Moving beyond the basic policy functions already discussed, the very proposed structure and operations of OFCOM is a product of convergence: the regulation of content and infrastructure are so intertwined so as to be indistinguishable from each other. In this section, we shall analyse the phenomenon of how regulation of content and infrastructure have become so enmeshed with each other that in essence the only effective way of regulating telecommunications and broadcasting at this juncture is through an approach that takes into account the convergence hypothesis. We will review the new content regulation provisions that OFCOM will have to administer, especially those in the broadcast area. Moreover, we will also

[52] The Act, *op. cit.*, Part 1, cl. 4.

consider how certain provisions intended to affect only the regulation of infrastructure in the communications arena may, in fact, have significant impact on the content such infrastructure may carry.

Stephen Carter, OFCOM Chief Executive, in speaking of convergence sees it primarily in terms of the UK evolving into a truly digital society:

> We had some hiccups on the path to the projected utopia of 100% digital take-up. OFCOM was conceived in the heady days of the late 1990's, and after an elephantine gestation period has been born in an altogether more cautious world and a topsy-turvy one at that. In broadcasting, digital has so far proved to be predominately a platform, infrastructure and packaging business....but whether we get to 80%, 90% or 100% digital penetration without government or regulatory intervention, switchover will, as the Secretary of State said yesterday, need to be planned, phased and managed. Switchover was originally envisaged as a 'big bang'. But we know now it will have to be more gradual – area by area, as the issued around digital switchover vary from area to area.[53]

However, Carter notes that the switchover to digital must not be done at taxpayer expense: 'the State does not, will not and cannot pay, for the sort of digital infrastructure that we all aspire to in both broadcasting and telecommunications.'[54]

Networks, Services and Radio Spectrum:

The Act provides a new regulatory framework applicable to all electronic communication networks, electronic communications services, associated facilities and content services.[55] Clause 32 sets forth the definitions of these important terms that originated with the Framework Directive of the EC Communications Directives.[56] An "electronic communications network" is defined as a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy of signals of any description, and associated apparatus, software and stored data such as satellite networks, fixed networks such as the Internet, mobile ground-based networks and networks used for radio

[53] Address, 19 September 2003, *op cit.*
[54] *Ibid.*
[55] Explanatory Notes, *op cit.*, p. 18.
[56] *Ibid.*, p. 19. See *Ibid*, Appendices 2 and 3. These Appendices provide an excellent reference source to see how the Act implements the EC Communications Directives.

and television broadcasting including cable TV networks. An "electronic communications service" is defined as a service consisting, or having as its principal feature, the conveyance, by means of an electronic communications network, of signals except in so far as it is a content service such as telecommunications services and transmission services in networks used for broadcasting. An "associated facility" is defined as a facility which is available for use in association with an electronic communications network or service in order to make the provision of that network or service possible such as a conditional access systems and electronic programme guides.[57] A "content service" is defined as a service consisting in the provision of material with a view to it being comprised in signals conveyed over an electronic communications network or the exercise of editorial content over the contents of signals conveyed by means of such a network. These specific definitions expand the notion of a telecommunications network to incorporate so much more than the traditional standard voice-to-voice telephonic systems that were once the emphasis of telecommunications law in the UK. Much of the law and regulation regarding switching, interconnection, etc. will now fall by the wayside as telecommunications technology has embraced digital and electronic delivery systems.

For instance, Part 2, Chapter 1 of the Act repeals several provisions of the Telecommunications Act 1984 dealing with licensing provisions, public telecommunications systems, modification of licences, enforcement of licences and standards of performance of designated public telecommunications operators.[58] In doing so, these provisions are replaced with text from the EC Communications Directives[59] that express a general intent that national regulatory authorities take the utmost account of the desirability of making

[57] *Ibid.*, p.19, explores these concepts in-depth and provided the examples mentioned in this paragraph.
[58] *Ibid*, p. 23.
[59] Framework Directive – Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, 2002 O. J. L108/33. Access Directive – Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities, 2002 O. J. L108/7. Universal Service Directive – Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, 2002 O. J. L108/51.

regulations technologically neutral.[60] In reality, however, decisions made in respect of universal service, access, privileged suppliers or industry participants with significant market power ("SMP") will have, in the final analysis, the net effect of determining content by selecting and favouring the development of some formats over others and, as such, can never be technologically nor content neutral in application. Since most of the telecommunications format developers these days are content providers as well, it can only mean that even neutral-policy based decisions made by OFCOM may, in the end, have the unintended consequence of determining the content that is transmitted through electronic communications networks. Given the rise of content providers with significant capital investment in developing new digital delivery systems, e.g., Time Warner AOL, SONY, etc., OFCOM's stated desire of not letting content issues inform policy decisions on delivery formats may be a case of the "tail wagging the dog". Once OFCOM makes a policy decision on network development issues, this decision correspondingly affects the type of content that will be transmitted through such networks, even if this effect is unintentional.

OFCOM is permitted pursuant to Chapter 1, Part 2, Cl. 45 of the Act[61] to set conditions upon persons seeking to or actually providing a network or service. The conditions must be either related to one of the following general conditions (Chapter 1, Part 2, Cl. 51 (1) of the Act):

a. Conditions making provision for protecting the interests of the end-users of public electronic communication services;
b. Conditions making such provision as may be appropriate for securing service interoperability and for securing, or otherwise relating to, network access;
c. Conditions making such provision as may be appropriate for securing the proper and effective functioning of public electronic communications networks;
d. Conditions for giving effect to determinations or regulations made for sharing of the burden of universal service obligations;

[60] 2002 O.J. L108/33 at Article 8.
[61] Explanatory Notes, *op cit.*, p.23.

e. Conditions requiring or regulating the provision, availability and use, in the event of a disaster, of electronic communications networks, electronic communications services and associated facilities;

f. Conditions making such provision as appropriate for securing the protection of public health by the prevention or avoidance of the exposure of individuals to electro-magnetic fields created in connection with the operation of electronic communications networks; and

g. Conditions requiring compliance with relevant international standards.[62]

The conditions above, however, are subject to clause 46(2) that provides that general conditions must be of general application in that the same general conditions must apply equally to all providers of the particular class of network or service to which they are expressed to apply.[63]

Notwithstanding the proviso of clause 46(2), ample room exists in conditions (a) through (g) above to pursue policies and procedures that could effectively shut out network developers who are not able to invest in several different types of delivery platforms simultaneously. For instance, were OFCOM to decide that one particular type of electronic communications network did not meet a number of the conditions set forth above, the network's operation could be seriously curtailed by an administrative decision from OFCOM hampering the network's operation even though the decision was framed in the context of a broad decision that affected other similarly situated networks. Moreover, if this class of network were the only network that a particular market participant operated, the end result of OFCOM's actions would be to drive this player out of the market. Those who have not invested in and developed the kind of technologies favoured by OFCOM might find themselves "locked out" due to the preferences and policy objectives of OFCOM regulators. OFCOM must be careful not to transform itself from being the regulator to becoming market maker by granting favour to one type of network platform over other platforms or else it will be in danger of becoming a *de facto* SMP.

An examination of the OFCOM function with respect to Radio Spectrum supports the argument that the distinction between content and infrastructure is to a large extent, artificial, if not irrelevant. Under the Act, the licensing and

[62] Act, *op cit.*, p. 51.

[63] *Ibid*, pp. 46-47; Explanatory Notes, *op cit.*, p. 26.

enforcement functions of laws governing access to and use of Radio Spectrum[64] have been transferred to OFCOM in addition to new functions set forth in Chapter 2 of Part 2 of the Act. The Act introduces a new scheme of recognised spectrum access and continues the market-based approach to spectrum management introduced by the Wireless Telegraphy Act 1998 by allowing trading as a means of gaining access to spectrum.[65] Additionally, Chapter 2 of Part 2 and Schedule 17 contain a large number of amendments to the existing law on wireless telegraphy, mainly for the purpose of implementing the EC Communications Directives.[66]

Upon direction from the SOS, OFCOM may reserve certain frequencies for different classes of use, for example, broadcasting, mobile telecommunications, private business systems, air traffic control or radio astronomy, or within a class, for example for the provision of additional digital television services or radio broadcasting multiplexes.[67] The decision of the Government with respect to the reservation of certain frequencies of the Radio Spectrum will have significant impact on the development of content. For example, were the Government to decide that additional digital television channels be made available, additional content would be needed from content providers. Moreover, more content outlets may increase diversity in content providers. Yet, if the Government wish to reserve more Radio Spectrum for private business systems, less content will be developed and there will be less diversity of content to be had in the UK. Thus, the allocation of Radio Spectrum by the Government has indirect content implications that cannot be ignored.

Television, Radio Services and TV Reception Licensing:

Inevitability, it is in the field of broadcasting regulation that we find in the Act the clearest proof that it is nigh impossible to separate content from infrastructure in the regulation of broadcasting and telecommunications. First off, in the context of content regulation, it is interesting to note that the Act exempts OFCOM from exercising day-to-day authority and control over the BBC that will still largely be governed by the Board of Governors of the BBC pursuant

[64] Wireless Telegraphy Acts 1949, 1967 and 1998, the Marine, etc., Broadcasting (Offences) act 1967 and Part VI of the Telecommunications Act 1984.
[65] Explanatory Notes, *op cit.*, p. 70.
[66] *Ibid*.
[67] *Ibid*, p. 71.

to its Royal Charter and licence from the Government. Thus, an initial question that must be raised here is whether there is a two-tier system for content control in the UK: first, one in effect for the BBC which is largely set by its own governors; and, second, that provided for all other content providers by OFCOM. And, second, assuming the continuation of the likelihood of the existence of this two-tier system in the future, will programming at the BBC enjoy greater content freedom than that enjoyed by the privately owned broadcasting television programmers who remain subject to intensive OFCOM content scrutiny?

Generally, the significant changes to the regulation of television broadcasting services are as follows:

OFCOM shall regulate the BBC's services to the extent that there is specific provision for OFCOM to do so in any agreement between the BBC and the SOS and pursuant to certain provisions of the Act and of Part 5 of the 1996 Act where the BBC engages in an act of unfairness or cause an unwarranted infringement of privacy[68];

C4C shall be able to carry on it its activities of securing continued provision of Channel 4 and the fulfilment of C4C's public service remit, subject to OFCOM oversight[69];

OFCOM shall regulate the services provided by the Welsh Authority including the continued provision of S4C and S4C Digital[70];

OFCOM shall appoint the members of the Gaelic Media Service and secure that they adequately represent the interests of holders of licences to provide regional Channel 3 services, independent television and radio production industries and Gaelic language broadcasting for Scotland[71];

OFCOM shall regulate independent television services ("Independent Television Services") in accordance with the Act, the 1990 Act and the 1996 Act. Independent Television Services are defined in Clause 211 as, first, television broadcasting services (other than those broadcast only from a satellite), restricted television services and additional television services broadcast or provided from places in the UK, and television licensable content services and digital television programmes services provided by persons under UK jurisdiction. Independent

[68] *Ibid*, p. 87.
[69] *Ibid*.
[70] *Ibid*, p. 89.
[71] *Ibid*, p. 91.

Television Services in this first category provided by the BBC or the Welsh Authority are not regulated by OFCOM. Second, OFCOM shall regulate multiplex television[72] services provided from places in the UK and digital additional television services provided by persons under UK jurisdiction (except when either of these services are provided by the BBC)[73];

Licensing and regulation of Digital Channel 3 and Channel 5 licences in conjunction with the abolishment of licensing for local cable systems under the 1990 Act[74]; and

OFCOM has the duty to secure the provision of a public teletext service and insuring proper licensing and operation of the same[75].

Specifically in the area of content, OFCOM is charged with regulating television licensable content services. A "television licensable content service" is defined as any service which is provided (whether in digital or analogue form) primarily as a service to be made available for reception by members of the public, consisting of television programmes and/or electronic programme guides (or both) and is broadcast from a satellite or is distributed by an electronic communications network to European Economic Area ("EEA") states.[76] If a content service is broadcast by means of a television multiplex service, exclusively through the Internet or through a closed-circuit broadcast system (e.g., the type found at bookmakers or stockbrokers), it will not be considered a licensable content service.[77] OFCOM's authority to license television content providers is pursuant to the authority provided for under the 1990 Act whilst remaining subject to compliance with any standard code issued by OFCOM and the code of fairness issued under Part 5 of the 1996 Act.[78] OFCOM has the power to take remedial action against a provider who breaches a condition of his service licence, to revoke a service licence or take legal action against a service

[72] A "television multiplex service" is defined in Clause 241 of the Act as a "service provided for broadcasting for general reception but otherwise than from a satellite." Subsection 3 of the same Clause 241 provides that it is not an offence to provide a television multiplex service that is not licensed under the 1996 Act.

[73] Explanatory Notes, *op. cit.*, pp. 84-85.

[74] *Ibid.*, p. 94.

[75] *Ibid.*, p. 97.

[76] *Ibid.*, p. 104.

[77] *Ibid.*, p. 105.

[78] *Ibid.*, p. 107.

license holder who incites crime or disorder.[79] Finally, the SOS may, by order, extend the regulatory authority of OFCOM to local digital television services if he or she decides such regulation is warranted or advisable.[80]

In terms of OFCOM's function with respect to statutory review of public service broadcasting contained in Part 3, Chapter 4, Section 264 (OFCOM reports on the fulfilment of the public service remit), Stephen Carter notes that the Act "requires an independent regulator [OFCOM] – not the Government, not the BBC – but an independent regulator to take a holistic view across all the Public Service Broadcasters including the BBC. So therefore must our definition."[81] Chief Executive Carter also notes that for the first time the Act requires delivery of public service broadcasting by ITV, Channel Four, Five and the BBC to be "taken together – the mix is explicitly up for grabs."[82]

In terms of regulation of independent radio services, OFCOM has authority to regulate: national, local or restricted sound broadcasting services (so long as not broadcast solely by satellite); radio licensable content services; additional radio services; radio multiplex services; digital sound programme services; and digital additional sound services provided that such services are broadcast from the UK and are not broadcast by the BBC.[83] Just like television licensable content services, radio licensable content services includes all sound programmes broadcast primarily for reception by members of the public from a satellite, through electronic communications networks to places in the EEA, whether in analogue or digital form.[84] Services that are not radio licensable content services include sound broadcasting services that is satellite broadcast only that is a national, local or restricted in service area or services provided with a view to their being broadcast by means of radio multiplex services.[85] If the content service is broadcast by means of a radio multiplex service, exclusively through the Internet or through a closed-circuit broadcast system (e.g., the type found at bookmakers or stockbrokers), it will not be considered a licensable

[79] *Ibid.*, p. 108.
[80] *Ibid.*, p. 110.
[81] Address, 19 September 2003, *op. cit.*
[82] *Ibid.*
[83] Explanatory Notes, *op cit.*, p. 111. See the same for definitions of "additional radio service", "digital additional sound service" and "digital sound programme services."
[84] *Ibid.*, p. 111.
[85] *Ibid.*, p. 114.

content service.[86] The SOS may modify the meaning of "radio licensable content services" and may redefine those services that are not to be considered as such.[87] Pursuant to authority granted in the 1990 Act, OFCOM has the authority to licence radio licensable content services and local licences as well as extend or modify the licence period of either.[88] With respect to "simulcast radio services" which are national services provided in digital form, OFCOM have the power to promote and regulate this area pursuant to the 1990 Act.[89] The SOS may by order modify the Bill and the 1990 Act and 1996 Act, respectively, to make special provision for radio services broadcast mainly for the benefit of the public rather than for commercial reasons.[90]

Regulatory Provisions:

OFCOM is to use the authority under the Act, the 1990 Act and the 1996 Act to secure compliance of all licence holders.[91] There is, of course, great concern that this authority of OFCOM not be misused so as to direct licence holders to produce certain kinds of content in favour of others. For instance, concerns about "political correctness" come to mind when one thinks that the infrastructure regulator is also charged with supervising content. While facially neutral, the regulations prohibit broadcasters from using the airwaves to further their own political and social agenda. OFCOM must take heed that the political and social agenda of the elites that run OFCOM not be imposed on broadcasters through content control mechanisms.

When it comes to regulation of broadcasting, Chief Executive Stephen Carter laid down some guidelines:

> In broadcasting, we will seek to umpire or police where necessary or required, but to facilitate where possible. Despite the nonsense in some of the press about fat cat salaries, nobody, least of all myself, is in this line of work to make money. We are in it to make a difference, because it matters.

[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*., p. 116.
[91] *Ibid*., p. 116.

> We want a strategic relationship with licensees and operators. Not micro-management, nor the paternalism which still echoes faintly from the old IBA days. But there are obligations that go with this: zero toleration of abuses of competition and zero tolerance of regulatory arbitrage or gaming.
>
> Regulation in broadcasting has historically been to stop things going wrong and no doubt there will still be policing to be done. But OFCOM should be oxygen rather than the fire extinguisher. Importantly, independent of Government, our aim will be to serve the audience's interest and to help secure a flourishing communications industry.[92]

It remains to be seen whether Mr. Carter's ambitious goals as set forth above will be realised.

On a more down-to-earth plane, OFCOM is required to include programming quotas for independent productions[93], original productions[94] and news and current affairs programmes[95] in the licences of all public service channels. Additionally, OFCOM have to include with each Channel 3 and Channel 5 licence certain programming conditions to be met involving provision of news, regional programming, programme production work to be made outside the Greater London area and networking arrangements.[96] OFCOM is to include in the Channel 4 licence a condition prohibiting C4C from being involved in making programmes to be aired on Channel 4, except as permitted by OFCOM.[97] A "whiff" of social engineering appears to be at play here in that where content is produced will often determine what kind of content will, in fact, is produced. For instance, television production in Scotland or Wales will tend to focus on regional issues and be less politically or celebrity focused as London television programming.

OFCOM's standards code for the content of television and radio services must include:

Objectives relating to the protection of minors;

The prohibition of material likely to encourage crime or disorder;

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[92] Address, 19 September 2003, *op cit*.

[93] Explanatory Notes, *op cit*., p. 122.

[94] *Ibid*.

[95] *Ibid*.

[96] *Ibid*., p. 124.

[97] *Ibid*., p. 124.

The impartiality of broadcasting services;

The accuracy of the news;

The content of religious programmes;

The protection of the public from offensive and harmful material;

The prevention of unsuitable advertising and sponsorship;

The prevention of undue discrimination between advertisers; and

The prohibition of broadcasts of subliminal material.[98]

With respect to religious broadcasting, the code must safeguard against the improper exploitation of religious susceptibilities or the abusive treatment of religious views or beliefs.[99]

Subsection (4) of Section 319 sets forth factors that OFCOM must consider in devising the codes such as:

The degree of harm or offence like to be caused by the content of programmes;

The probable size and composition of the audience;

The expectation and state of awareness of the audience as to a programme's content; the danger of accidental exposure of a person to content, the nature of which they were unaware;

The desirability of indicating wherein there is a change affecting the nature of the service being watched or listened to; and

Maintaining independent editorial control over the content of a programme.[100]

Section 320 imposes specific particulars -- that are to be expanded under OFCOM's standards codes -- on service providers to insure that programming is free from bias:

The service provider must not air its own views on such matters (unless they concern television or sound broadcasting);

As regards television broadcasting services, teletext service, national radio services and national digital sound broadcasting services, the service provider must remain impartial about such matters, particularly major matters of political or industrial controversy or relating to current public policy; this is an overall goal of the programming and need not be measured on a programme by programme basis; and

[98] *Ibid.*, p. 136.
[99] *Ibid.*, p. 137.
[100] *Ibid.*

As regards local radio services, local digital sound programme services and radio licensable content services, the service provider must ensure that disproportionate weight is not given to any particular viewpoint about such matters; this can be done by considering the entire service rather than on a programme by programme basis.[101]

In reality, the imposition of a broadcast standards code will be a political minefield for OFCOM. In many ways, OFCOM will find itself torn between different constituencies wanting different types of programming. On the one hand, if OFCOM is supportive of programming that portrays same-sex couples in a positive light, they will feel a "backlash" from those groups who may find this morally offensive. Any coverage of political matters will also suffer the same fate. If OFCOM gets involve in regulating political coverage, it will be seen as suppressing political freedom. In the area of religious broadcasting, how does one balance the needs of the Christian majority against the right of minority faiths to watch religious programming that is not exclusionary of their beliefs? To a certain extent, these controversies concerning content control are unavoidable in a free and diverse society. Yet, it is hoped that OFCOM can promulgate content standards in such a manner so as not to find itself part of the controversy and not the solution thereto. OFCOM should study the blunders that the US Congress and the FCC have made in these areas by unwittingly getting themselves involved in with content control.

Not only is television programming subject to content control, but, the television commercials that crop-up so inconveniently during television programmes are also subject to content and frequency of airing controls. OFCOM is required to set standards to insure that unsuitable advertising in television and radio is prevented.[102] Subsection (2) of Section 321 imposes a duty to secure a general prohibition on political advertising and advertising related to industrial disputes in the broadcast media.[103] In spite of the decision of the European Court of Human Rights ("ECHR") in the case of Vgt Verein gegen Tierfabriken v. Switzerland, the Government does not believes that the ban on political advertising will be found incompatible with the Human Rights Act 1998

[101] *Ibid.*
[102] *Ibid.*, p. 138.
[103] *Ibid.*, p.139.

were the ban to be challenged in the UK courts or to be considered by the ECHR.[104] Additionally, all licences related to the provision of television broadcasting services, the public teletext service and other teletext services must comply with OFCOM's directions on maximum time to be given to advertisements in any given time period, the minimal interval that must elapse between two periods of advertisements, the number of advertisement slots that are allowed in any programme or hour or day, and the exclusion of any advertisement from a specified part of a service.[105]

A major area that has generated significant controversy is the section of the Act that concerns media ownership and control.[106]

Most significantly, Section 348 subsection 1 amends Part 2 of Schedule 2 to the 1990 Act by providing that persons not resident or established in the EEA are no longer disqualified from holding broadcast licences.[107] Similarly, the disqualification of advertising agencies has been lifted.[108] "The Government is standing by its commitment to open up Britain's commercial broadcasters to American corporations, and many of their lordships are not wholly convinced that the regulatory muscle of OFCOM will be sufficient to stand between us and TV dominated by Mickey Mouse," says journalist Steve Barnett.[109] While there has been much public criticism of these provisions as laying the groundwork for an American "invasion" of the UK broadcast world, another argument could be made that the introduction of American broadcast involvement in and competition with local players would serve only to increase the quantity and quality of content available. In other words, were the BBC and others force to compete with a significant US player such as HBO the end result would be that BBC programming would become more competitive and responsive to viewer needs.

Section 350 relaxes the 1990 Act restrictions on accumulations of interests and on licence holding by newspapers and telecommunications providers and on license holding by newspapers and telecommunications

[104] *Ibid*., p.138.
[105] *Ibid*., p.139.
[106] Part 3, Chapter 5, Sections 348 to 357.
[107] Explanatory Notes, *op cit*., p. 146.
[108] *Ibid*.
[109] Steve Barnett, "On Broadcast: Sky's the limit if Channel 5 is sold to Rupert", The Observer. March 23, 2003, p.6.

providers.[110] A person may not hold a Channel 3 licence if he runs a national newspaper with more than a 20 percent of the total national market share.[111] No one may own a regional Channel 3 licence if he runs local newspapers which together have more than a 20 per cent of the local market share in the coverage area of the service.[112] With respect to holding a Channel 3 licence, no one may hold more than 20 per cent chare in such a company if he runs national newspapers with more than 20 per cent share of the total national market share.[113] A person is running a newspaper if he is either the proprietor of the newspaper or controls a body of which is the proprietor.[114] The meaning of "control" is set forth in paragraph 1 of Schedule 2 to the 1990 Act and in section 350.

We have previously considered how decisions on what formats to exploit may alter the "mix of players" in the broadcast field. Similarly, lifting limitations placed on ownership of media outlets based on nationality or ownership of printed media will have the same net effect as content control. Given that there are very few large media empires in existence today, a cynical viewpoint would suggest it would appear that some of these limitations are implicitly designed to prevent a certain famous "press barons" of a more politically conservative bent from acquiring greater control of media in the UK:

> "[The Government] is much less certain of victory on cross-ownership, an issue on which a growing number of peers across all parties are showing commendable signs of unrest and rebellion. The proposal is that for the first time in British media history a mass audience commercial channel – Channel 5 – should be available for purchase by a major newspaper owner. At the moment, there is only one potential beneficiary from this reckless act of liberalisation: Rupert Murdoch…Murdoch is not the issue…[t]he real issues are about pluralism and overweening industrial power. If you want to maintain a variety of voice in the mass media, you don't hand over one of the only two private sector terrestrial commercial channels to someone who owns 37 per cent of national newspaper circulation."[115]

[110] Explanatory Notes, *op cit.*, p. 148.
[111] *Ibid.*
[112] *Ibid.* In calculating the relevant market share of any proposed licensee, he is to be treated as though he and every person connected with him are one person.
[113] *Ibid.* A company in which such a newspaper proprietor holds more than a 20 per cent share cannot be a participant with more than a 20 per cent share of a company that holds a licence. No licence holder may own more than a 20 per cent share of any national newspaper company.
[114] *Ibid.*
[115] Barnett, *op cit.*

Query, however, whether OFCOM or any other Government authority for that matter should be regulating media ownership and concentration in a free society. Certainly, Steve Barnett, Professor of Communications at the University of Westminster, believes as such stating that it is the duty of the state to preserve a diverse media system which is not subject to the overweening power of a single individual "lest we end up having our very own Silvio Berlusconi."[116]

Section 350 reserves the right to the SOS to impose limits on the number of licences that any person can own or on a person owning any licences at all in certain circumstances. This clause works as an overall "fairness valve" to prevent what the Government sees as unwise situations involving media ownership in the UK. Some of the factors to be considered include:

the degree of overlap of the different services involved;

the size of the potential audience for those services and the times when they would be made available;

the extent to which there would be other persons with licences to broadcast to the same potential audience, the number of those persons and the audience size and coverage area of their stations;

whether that person runs national newspapers, and the national market share of those newspapers;

whether that person runs local newspapers that serve any part of the coverage area for which they would hold a radio licence, and the newspapers' local market share; and

whether and to what extent the coverage area of the licence in question overlaps with the coverage area of a regional Channel 3 service for which he also owns the licence.[117]

The Act also covers the licensing of TV reception as Section 363 prohibits the installation or use of a television receiver without a TV licence. It is an offence, punishable by a fine, for a person to install or use a television receiver without a TV licence or to have a television receiver in his or her possession or control with the intent to install or use said television receiver without a TV

[116] *Ibid.*
[117] Explanatory Notes, *op cit.*, p. 149.

licence.[118] The requirement of every household that wants TV in the UK to buy a TV licence to help fund BBC operations is perhaps the clearest proof in support of the thesis of this article, namely, that the regulator who regulates infrastructure ends up shaping the content to be produced and broadcasted over such infrastructure. No matter whether an individual viewer wants to watch BBC or finds its material objectionable, he or she is obligated in wanting to watch TV to pay for and subsidise the BBC and its television programming. In making payment of the TV licence fee the key to entering the broadcast gateway, the Government have given BBC an unfair advantage over its private competitors by forcing those who do not want to pay for or watch BBC to subsidise its programming. In fact, elimination of the compulsory TV licence in its entirety or making one available for a reduced fee without access to BBC programming would in fact make UK content much more competitive. Recent challenges to the TV licence in the courts both at the UK and the European level may, in the end, result in the elimination of this anachronistic holdover. Access to television programming should be through the viewer's choice of digital access system. Thus, if the viewer does not wish to view BBC programming or if the BBC is not providing the physical infrastructure through which the viewer accesses television programming, the BBC should be entitled to a reduced fee or no fee at all depending on the licence holder's individual preferences.

Competition in Communication Markets:

Chapter 1 of Part 5 of the Act allows OFCOM to exercise concurrent powers with Office of Fair Trading ("OFT") under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002 ("EA 2002").[119] The concurrent powers have been redefined to cover matters in relation to "communication matters" which include:

provision of electronic communications networks;

provision of electronic communications services;

making available of services or facilities in association with a network or service or for facilitating the use of a network or service;

apparatus used for any of the above; and

[118] *Ibid*, p. 154.
[119] *Ibid.*, p. 157.

broadcasting and related matters.[120]

OFCOM has concurrent jurisdiction with the OFT to apply and enforce the provisions of Part 4 of the EA 2002 (market investigations), with certain limitations exceptions, in relation to commercial activities connected with communications matters.[121] OFCOM will now be able to conduct "market investigations" pursuant to Part 4 of the EA 2002.[122] "Market investigations" are a means of supplementing the Competition Act 1998 by providing a means of addressing problems in markets where competition does not appear to be working but where there is no apparent breach of existing competition law.[123] The Explanatory Notes provide the following example: a market investigation might take place would be a situation where a few large firms supplied almost the whole of the market and, without being there being any agreement between them, they all tended to follow parallel courses of conduct, while new competitors faced significant barriers to entry into the market, and there was little of no evidence of vigorous competition between the existing players (i.e., a non-collusive, uncompetitive oligopoly).[124] Section 370 also sets forth a formula for the sharing of power between OFCOM and OFT so that duplicative work is not undertaken.

Similarly, OFCOM has been granted concurrent control with OFT to apply and enforce Part 1 of the Competition Act 1998 (the "1998 Act") insofar as it relates to communications matters.[125] The 1998 Act (which is based on Articles 81 and 82 of the EC Treaty) contains two prohibitions: first, of agreements which prevent, restrict or distort competition and which may affect trade within the UK; and second, on conduct which amounts to an abuse of a dominant position in a market which may affect trade within the UK.[126] The Act makes provision for the repeal of existing newspaper merger regime provisions and the integration of newspaper mergers into the overall structure of the EA 2002 merger regime.[127] The EA 2002 provides for decisions on the majority of

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[120] *Ibid.*, p. 157.
[121] *Ibid*, p. 158.
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*, p. 160
[126] *Ibid.*, p. 161
[127] *Ibid*, p. 162.

non-newspaper mergers to be taken by the independent competition authorities (the OFT and the Competition Commission) against a new competition-based test of whether they result in a substantial lessening of competition.[128] Public interest considerations such as national security can be considered when doing merger analysis in the newspaper field.[129] OFCOM is charged with providing the SOS with advice and recommendations on any newspaper public interest consideration to be had in any proposed newspaper merger.[130] In line with this, OFCOM has a responsibility to provide general information duties on any newspaper merger pursuant to 105 EA 2002.[131] This is in addition to OFCOM responsibility pursuant to the Section 391 of the Act to carry out regular reviews of the operation of all media ownership and news provider provisions.

The origin of the joint prosecutorial function exercised by both OFCOM and OFT arises from the concern that OFCOM may be better equipped than OFT to bring actions in the telecommunications and broadcasting field. As OFCOM will have the technical and regulatory expertise that OFT will lack, it is thought that OFCOM may have to lead in enforcement actions in the two areas regulated under the Act. While convergence does not raise new issues with respect to the continuance of this dual enforcement scheme, a policy issue should be addressed. Namely, is it wise for the agency charged with day-to-day regulation of telecommunications and broadcasting and the respective companies participating in those fields to be empowered to bring enforcement actions against the companies? After all, is there not an inherent conflict of interest here in that the regulators may feel excessively beholden to the interests of the companies that they regulate on a day-to-day basis? In reality, OFCOM will be subject to pressure from the businesses that it will regulate. As such, OFCOM may not be immune from constituent political concerns in deciding which cases to bring as compared to a truly independent enforcement agency. Finally, if the playing field is so skewed such that OFCOM has to bring an enforcement action against a particular company it normally regulates, will not this be an admission on the part of OFCOM that it is not doing its work properly. Consequently, a decision by the competition staff at OFCOM to prosecute a company may have to be weighed

[128] *Ibid.*, p. 163.
[129] *Ibid.*, p. 162
[130] *Ibid*, p. 166.
[131] *Ibid*, p. 169.

against other internal political pressures before a decision to bring an action can be reached.

In this section, we considered the proposed infrastructure regulations to be implemented by OFCOM that could have significant impact on the content that will be promulgated through such infrastructure. Notably, we examined in the Act the new definitions developed for electronic communications networks, the management of Radio Spectrum, aspects of media ownership and competition policies and saw that all these content-neutral sections that focus on infrastructure may have significant impact on the production of content to be transmitted through the digital networks. Furthermore, we also examined some of the key content regulating provisions that OFCOM will have to administer. Clearly, OFCOM will find itself enmeshed in content-determining activities merely through attempting to regulate content providers in a neutral and unbiased fashion. Thus, we may conclude that OFCOM will play a very significant role both directly through content regulation and indirectly through infrastructure regulation in the development of the content to be placed into our homes.

IV. OFCOM, Myths and Realities:

To a large extent no one can predict what impact OFCOM will have in regulating "converged-information" in a new and challenging digital environment. We have sought to apply concepts from law, science, philosophy and political theory to OFCOM and its role in the "converged-information" age. Stephen Carter, OFCOM's Chief Executive, however, said it best however in a 9 October 2003 speech entitled "The Communications Act: Myths and Realities":

> OFCOM is a creature of Statute. In many areas we have wide discretion. But where the Statute says something must be done and lays out the process, then that's what we have to do and how we have to do it. That may sound obvious. But we are at an inflection point: from one where public policy was plastic and could be moulded in debate and through lobbying, to one where – for good or ill – we have the Procrustean Bed that is the legislation. The debate has gone on so long, that some people cannot quite accept that it is over.[132]

[132] Stephen Carter, "The Communications Act: Myths and Realities", Address, 9th October 2003 available at http://www.ofcom.org.uk/media_office/speeches_presentations/carter_20031009

Mr. Carter then goes on to 'unpick' a couple of myths he believes are out there concerning the Act and how it is to be implemented. First, Mr. Carter disabuses us of the notion that the Act 'would be a light touch piece of legislation.'[133] While the Communications Bill wound its way through Parliament, an "unspoken bargain was struck which is now found in the Act: 'ownership and control will be liberalised; but as a counter-weighing safeguard, we, Parliament, will actually increase the detail and demands of regulation'".[134] Thus, according to Mr. Carter, television has a range of tough new quotas on originations, regional production and regional investment and radio has more proscriptive controls on changes to format and the new localness rules.[135]

One role that Mr. Carter does embrace is OFCOM's role as the regulatory midwife for the transition to digital:

> There is no doubt, however, that in time terms, OFCOM's regulatory role will be to oversee the transition from analogue to digital, from narrowband to broadband, and from an economy of provision to an economy of demand. The fact of these inevitable, largely desirable, changes will mean that the environment will demand a different culture and approach from the regulator.[136]

In describing the relation between OFCOM and its Content Board with respect to content-based decision making, Mr. Carter insists that content-based decisions are delegated to the Content Board "except where the decision: 1. would have a significant economic impact on the whole industry, or a significant section of it; or 2. have a direct effect on the value of an individual licence; or 3. relates to OFCOM's own business of governance."[137] Of course, this approach assumes that content-based decisions can be separated from infrastructure-based decisions and that the two are always clear. It is this author's humble opinion that Mr. Carter here may be a bit disingenuous here, as the distinction between what is content and what is infrastructure will blur in the future as suggested earlier on in this article.

Perhaps Mr. Carter sums up the challenge of OFCOM at the beginning of its existence best when he calls this moment rich in

[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*

'constructive disruption.'[138] McLuhan's hypothesis that a person's use of any communications medium has an impact that is of more relevance than the content of any medium, or what that medium may convey[139] speaks to the special role of OFCOM. OFCOM as the converged regulator bringing the digital age to the UK will play a significant role in reshaping the way information is processed and understood in this country. Through its policies and its actions, OFCOM is certain to be at the centre of the 'never-ending drizzle of electric rain' referred to so eloquently by Prof. von Baeyer. Let us hope, however, that OFCOM does not add undue distortion in the process of regulating electronic communications networks.

[138] *Ibid.*

[139] C Horrocks, "Marshall McLuhan and Virtuality" in *The End of Everything*, first edition, W. Self (Iconbooks, London, 2003), p. 238.