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'Reality Television' and Content Regulation – Perspectives and Challenges

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ABSTRACT

The introduction and popularity of new genres of 'reality television' have created significant challenges for regulation of broadcast content. The availability of a larger number of television channels, where particular

reality television shows might be broadcast live for many hours in the day, combined with the unpredictable activities of 'reality television' participants raises significant difficulties both for broadcasters and regulators. There is a significant need to consider the rationale for content regulation in this context, and the appropriate regulatory response where infringements take place, in both their theoretical and practical contexts.

This article examines the regulatory approach for offensive content in the United Kingdom and the United States of America. The study has adopted a comparative approach in order to determine whether regulators across the Atlantic are confronted with similar challenges and whether similar solutions are adopted in order to address these challenges. The examination of the regime in the United Kingdom assesses the effectiveness of the Broadcasting Code <<http://www.ofcom.org.uk/tv/ifi/codes/bcode/>> (the Code) adopted by the British communications regulator Ofcom on setting standards for broadcasting content. The discussion focuses on the application of the Code in practice, by analysing the official inquiry and ruling by Ofcom on Channel Four's response to the 2007 Celebrity Big Brother (CBB) incident. The analysis of the system in the United States of America examines the approach adopted by the American communications regulator, the Federal Communications Commission (FCC) in dealing with offensive content, focusing on the free speech provisions under the First Amendment of the American Constitution and on FCC's mandate to act in the pursuit of the public interest. The discussion will examine, inter alia, FCC's response to complaints regarding the broadcast of indecent material in the 'reality television' programme Married by America. A particular feature in both jurisdictions is the tension between regulatory intervention in broadcasting content and considerations for freedom of expression. Both systems are affected by the lack of adequate definitions of the limitations to freedom of expression. This study aims to determine what the current approach is in these jurisdictions for addressing this tension and what lessons might be learned for the future.

KEYWORDS

'Reality television' - Content - Regulation - Freedom of Expression – Citizenship - Values

THE REGULATION OF OFFENSIVE CONTENT AND FREEDOM OF EXPRESSION – A DIFFICULT BALANCE

The regulation of broadcasting content poses a dilemma between the need for intervention in order to protect the interests of the public on the one hand, and considerations for freedom of expression on the other hand (Freedman 2008, p. 124). Policymakers justify intervention in broadcasting content, due to the significant level of influence that the media has over our lives. Barendt (1995) perceives broadcasting as 'an activity of enormous political and social significance', while Feintuck and Varney (2006) consider that 'our view of the world is influenced more by media than our personal experience'. Furthermore, Varona (2004) points towards the 'unparalleled influence' of broadcasting in shaping our 'culture, identity and values'. According to Varona, television at its best plays the role of educator and equaliser (due to its power to act as a bridge between people), while at its worst, television is 'littered with exploitative programming that does more to pollute than enrich our democracy and culture'.

While some commentators see 'reality television' as a 'cultural phenomenon' (Gies 2008, p. 41)

capable of challenging stereotypes and acting as an equaliser between people (Ofcom 2007a, para. 4.14 – quoting Channel Four), others perceive this form of programming in less complementary terms (James 2007, p. 182). What is certain, however, is that ‘reality television’ is here to stay. ‘Reality television’ could be broadly defined to comprise programmes in which real people compete for a prize and have to perform tasks in order to have a chance to gain that prize (Podlas 2007, p. 144). For producers, part of the appeal of this form of programming rests with the low production costs and with the widespread public appeal. The big audience ratings generated by ‘reality television’ is owed, in part, to the ‘undeniable capacity’ of such programmes to ‘create buzz’ and to cause controversy (Brenner 2005, p. 898). Sometimes, however, boundaries are pushed too far in these programmes, leading to calls for regulatory intervention in broadcasting content. As Podlas (2007) suggests, ‘it seems that as reality television shows have proliferated, so have complaints about these shows’.

What constitutes ‘bad’ television content is often a matter of taste. However, if such content is perceived by policy makers as ‘politically or socially undesirable’, it can be subject to restrictions or prohibitions through negative content regulation (Freedman, 2008, p. 122). These measures aim to protect the public and to safeguard values such as human dignity (Harrison and Woods 2007, p. 218) and can take various forms, including, *inter alia*, measures protecting children from harmful content, the imposition of a watershed and measures restricting the broadcast of offensive content. This study focuses on this latter form of intervention (on the former see Lievens 2006).

Studies reveal that the public is generally supportive of regulatory intervention in broadcasting content, such as the imposition of content standards (Millwood Hargrave 2003). In fact, the public considers that standards are set too low and that the proliferation of ‘reality television’ programmes has contributed to an increase in the use of offensive language in broadcasting (Ofcom, 2005, p. 21). Given the influential role that the media plays in society, commentators such as Verhulst (2001) consider that content standards in broadcasting should be set higher and should be policed more actively by regulators. While these arguments are welcomed for the regulation of offensive content, Verhulst warns that this form of intervention should be the exception rather than the rule and that any forms of control or censorship of content must be avoided (Verhulst 2001, p. 22).

Measures designed to prohibit or restrict broadcasting content are in sharp contrast with calls for freedom of expression. According to Freedman (2008), the ability of the media to ‘freely ... circulate a range of ideas, no matter how marginal, unwelcome or uncomfortable’ constitutes ‘a basic feature’ of any democratic system. Furthermore, Harrison and Woods (2007) suggest that ‘even shocking or extreme speech may need protection’. Nevertheless, a careful balancing act is required between the protection of free speech and the need for intervention in order to prevent the harm that may be caused by such speech (Harrison and Woods 2007, p. 220). While freedom of expression is a fundamental principle in every democratic society, it is not an absolute principle (Freedman 2008, p. 63). According to Barendt (2007), the protection of free speech does not automatically mean that every single programme is ‘immune from legal restrictions’. Barendt (2007) acknowledges that the relation between free speech and values such as dignity can be problematic and argues that the best solution is to ‘balance freedom of speech and dignity, in the context of the particular facts’.

The definition of offensive content and the approach in balancing the need for intervention in broadcasting content with calls for freedom of expression can vary from country to country and from context to context. The case studies examined in the following two sections aim to explore how this balance is achieved in the United Kingdom and in the United States of America, in the context of ‘reality television’ programmes.

THE REGULATION OF OFFENSIVE CONTENT IN THE UNITED KINGDOM

In the United Kingdom, the competence to regulate offensive content in broadcasting has been entrusted with the communications regulator Ofcom. Under section 319(1) of the Communications Act 2003 <http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1> Ofcom has a duty to set and review standards for the content of television and radio services, in order to secure ‘the standards objectives’. As stated in s. 319(2) of the Act, these standards objectives are designed to ensure, *inter alia*, the protection of persons under the age of eighteen (s. 319(2)(a)) and that ‘generally accepted standards’ are applied to television and radio content, in order to ‘provide adequate protection to members of the public from the inclusion in such services of offensive and harmful material’ (s. 319(2)(f)). In order to comply with its duties under s. 319(1), the

communications regulator adopted the Ofcom Broadcasting Code. The Code, which came into force on the 25th of July 2005, applies to all licensed television and radio services. By virtue of s. 325(1)(a) of the Communications Act, a condition is included in the licence of these services regulated by Ofcom, in order to secure that standards set under s. 319(1) of the Act are observed in the provision of services (Note: In the case of the BBC, observance of 'relevant programme code standards' adopted under section 319 of the *Communications Act* is required under section 46 of the *Agreement between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*, Cm 6872, July 2006 <http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbcaqr_eement_july06.pdf>. BBC services funded by the licence fee or grant aid are not subject to ss. 5, 6, 9 and 10 of the Code).

By bringing together the six codes inherited from the legacy regulators (the Independent Television 8 Commission, the Radio Authority and the Broadcasting Standards Commission), the Code aims to 'unify and modernise' the standards set by Ofcom's predecessors (Foreword, *Ofcom Broadcasting Code*). The Code has been praised for its clear and concise nature, and for the fact that it streamlined broadcasting content regulation from a previously fragmented framework (Grant 2005, p. 184). The Code is structured into ten sections, including s. 1 (Protecting the Under-Eighteens) and s. 2 (Harm and Offence). Under s. 1, the Code maintains the 9 p.m. watershed (Rule 1.4), with the objective of protecting children from exposure to unsuitable material through appropriate scheduling (Rule 1.3). The provisions under s. 2 of the Code, dealing with the broadcast of harmful and offensive material, adopt a more lenient approach. The Code allows the broadcast of material that may be seen as harmful or offensive, as long as such broadcasts comply with 'generally accepted standards' (Rule 2.1). According to Rule 2.3 of the Code, these standards require broadcasters to ensure that material likely to cause offence is 'justified by context' and that 'appropriate information' is broadcast in order to avoid or minimize offence. This is a move away from the standard put forward in the Broadcasting Act 1990, ensuring that 'nothing is included in its programmes which offends against good taste or decency or is likely to be offensive to public feeling' (s. 6(1)(a)).

While the approach adopted under the Code is designed to allow television and radio services to 9 broadcast challenging material and to enjoy creative freedom (Foreword, *Ofcom Broadcasting Code*), some commentators have raised concern that the Code is 'a licence for broadcasters to broadcast harmful and offensive content, provided that they adequately inform viewers' (Grant 2005, p. 184). The remainder of this section, examining the 2007 CBB incident, aims to explore the effectiveness of the Code in dealing with the broadcast of offensive material, focusing on Ofcom's adjudication on whether Channel Four complied with the Code in handling the incidents in the CBB House. This adjudication provides a good illustration of the operation of the Code in practice and of the challenges of regulating offensive content in 'reality television'.

'Reality television' has been credited with the 'recognition of everyday as something that is worthy 10 of publicity' (Gies 2008 p. 41). Since its origins in 1999 in the Netherlands, the Big Brother 'reality television' programme has become a familiar format throughout the world (Griffen-Foley 2004, p. 543). For a set amount of time, participants in this programme are confined together in the 'Big Brother House', with their actions being recorded 24 hours per day. Contestants are nominated for eviction each week and the ultimate decision as to who is evicted rests with the public. The winner of the show is the last contestant to remain in the house at the end of the series (Ofcom 2007a, para. 1.3). While Big Brother is considered to be part of the 'reality television' genre, the programme does not necessarily mirror events in the real world. Instead, events are often engineered in order to increase ratings (Gies 2008, p. 40). As Gies suggests, Big Brother 'complements' rather than 'represents' the social reality.

In the United Kingdom, Big Brother is produced by Brighter Pictures (part of Endemol UK plc) and 11 broadcast by Channel Four Television Corporation on Channel 4, S4C in Wales and E4 (Ofcom 2007a, para. 1.2). The fifth series of CBB, which ran for 26 days beginning with the 3rd of January 2007, was surrounded by controversy. Ofcom received over 44,500 complaints about this programme, as viewers became concerned that Shilpa Shetty, one of the contestants, was being subjected to alleged racist bullying by some of her fellow housemates, in particular Jade Goody, Jo O'Meara and Danielle Lloyd (Ofcom 2007a, para. 1.4). In addition to the unprecedented number of complaints received by the communications regulator, the events in the CBB House led to wide-ranging public debate, extensive press coverage, as well as demonstrations in India (Ofcom 2007a, paras. 2.10-2.11). Following complaints from the public, Ofcom launched an investigation into Channel Four's handling of the events in the CBB House, which ultimately led to a ruling by the

communications regulator in May 2007.

As a licensed broadcaster under Ofcom's control, Channel Four is required under a condition of its 12 licence (Section 325(1), *Communications Act*) to ensure that the programmes it broadcasts comply with the standards set in the *Ofcom Broadcasting Code* (Ofcom, 2007a, para. 3.11; Communications Act 2005, s. 325(1)). In its adjudication regarding Channel Four's handling of the events in the fifth series of CBB, Ofcom considered the broadcasters' compliance with rules 1.3 and 2.3 of the Code. The Code provides a non-exhaustive list of materials which may cause offence, which includes, *inter alia*, 'offensive language ... humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on grounds of ... race)' (Rule 2.3). According to the non-binding Guidance Notes to s. 2 of the Code,

Racist terms and material should be avoided unless their inclusion can be justified by the editorial of the programme. Broadcasters should take particular care in their portrayal of culturally diverse matters and should avoid stereotyping unless editorially justified. When considering such matters, broadcasters should take into account the possible effects programmes may have on particular sections of the community (Ofcom 2007b, p. 2).

This approach highlights the importance placed on concepts such as equality and human dignity in 13 justifying regulatory intervention in offensive content. As Monaghan (2007) points out, the adoption of a human dignity threshold seeks to ensure that 'everyone is treated as having value or worth, whoever they are'.

On the issue of 'generally accepted standards', the Guidance Notes state that their meaning is 14 shaped by the context in which they are applied (Ofcom 2007b, p. 1). In previous adjudications regarding the Big Brother programme, Ofcom determined that an assessment of 'generally accepted standards' must take into account the nature of the programme in which controversial material is likely to arise and where 'emotional and offensive exchanges' between the participants are likely to take place, as characters are revealed (Ofcom 2007a, para. 5.10; Ofcom 2006, p. 11). Nevertheless, Ofcom highlighted that viewers have an expectation that behaviour which has the potential to cause offence will be challenged through the use of tools such as the Diary Room or Big Brother itself (Ofcom 2007a, paras. 5.10 and 5.15; Ofcom 2004a, pp. 5-6). Previous adjudications by Ofcom on the Big Brother series have also assessed the meaning of material 'justified by context', within the context of Big Brother. As stated in the Code (Rule 2.3), relevant factors in assessing the 'context' include, *inter alia*, the editorial content of the programme(s) or series, the service on which the material is broadcast and the likely size and composition, as well as the likely expectations and attitude of the potential audience (Ofcom, 2007a, para. 5.15).

The Code does not prohibit the broadcast of potentially offensive or harmful material, so long as 15 such material complies with 'generally accepted standards' and the broadcaster justifies the inclusion of such material by context (Rules 2.1 and 2.3). Consequently, Ofcom's adjudication in the 2007 CBB incident was concerned not with the broadcast as such of potentially offensive or harmful material, but with the manner in which such material was handled by Channel Four (Ofcom 2007a, para. 1.10). Ofcom (2007a) has found that Channel Four has been in breach of the Code in relation to the broadcast of three events. These concerned the broadcast of remarks by Jo O'Meara about cooking in India (broadcast on the 15th of January 2007 and found in breach of rule 2.3 of the Code), remarks by Danielle Lloyd that Shilpa Shetty should 'f**k off home' (broadcast on the 17th of January 2007 and found in breach of rule 2.3 of the Code) and remarks by Jade Goody calling Shilpa Shetty as 'Shilpa Poppadom' (broadcast on the 18th of January and found in breach of rule 2.3 of the Code and also broadcast pre-watershed on the 19th of January 2007 and found in breach of rules 1.3 and 2.3 of the Code) (Ofcom 2007a, para. 1.11). With regards to these three events, Channel Four was found to have failed to apply adequately 'generally accepted standards' by 'justifying the inclusion of the offensive material by its context' (para. 1.15). Channel Four should have taken further steps in addressing the potential offence or in challenging the offending behaviour in the CBB House (para. 1.16). In failing to do so, Channel Four did not provide the members of the public with adequate protection from offensive material (para. 1.11).

The regulator has also expressed dissatisfaction with Channel Four's procedures for ensuring 16 compliance with the Code. Following a breakdown in communications between Brighter Pictures (the independent producers of Big Brother) and Channel Four, the broadcaster was not informed immediately about the existence of untransmitted material of an offensive nature, which was logged as 'racist' by the producers (para. 8.40). Knowledge of this material would have led Channel Four to handle differently the situation in the CBB House and would have most likely prevented the

broadcasters from transmitting material which was not in compliance with the Code (para. 8.45). In Ofcom's view, Channel Four should have been more proactive in ensuring compliance with the Code.

In light of the serious nature of Channel Four's failure to comply with the Code, Ofcom imposed a 17 statutory sanction on the broadcaster (para. 1.1). Channel Four and S4C were directed to broadcast a statement of Ofcom's findings on three separate occasions: at the start of the first programme of the new Big Brother series, the following morning at the start of the re-versioned programme and at the start of the first eviction show (para. 1.25). The timing of these broadcasts was chosen in order to reach the highest possible number of viewers (para. 9.13). Statutory sanctions are generally imposed by Ofcom where a broadcaster 'deliberately, seriously and repeatedly breaches the Code' (Legislative Background, *Broadcasting Code*). Notable in Ofcom's adjudication in the 2007 CBB incident is the absence of a financial penalty imposed on Channel Four, despite the regulator's competence to impose such a penalty (Ofcom 2008a). This can be contrasted with later decisions adopted by the communications regulator, such as Ofcom's decision in June 2008 to impose an aggregate financial penalty of £255,000 on MTV Networks following the pre-watershed broadcast of 'extensive offensive language' (including the repeated use of the word f**k) in a number of programmes, including the 'reality television' programme *Totally Boyband* (Ofcom 2008b). The decision to impose this substantial financial penalty was attributed to 'the very serious nature' of the 'persistent failure' of MTV Networks to ensure compliance with the *Broadcasting Code* (Ofcom 2008b, para. 1.1). On the other hand, in the 2007 CBB adjudication, in reaching its decision not to impose a financial penalty, Ofcom considered that Channel Four's actions were the result of 'a serious error of judgement' regarding the handling of the material, rather than from 'deliberate, reckless or grossly negligent action' by the broadcaster (Ofcom 2007a, para. 1.24). The different penalties imposed by Ofcom on MTV Networks and on Channel Four could be explained by the fact that the swearing broadcast by MTV Networks was gratuitous, while the offensive language broadcast by Channel Four revealed the character of the participants and the overall occurrences in the CBB House. In the 2007 CBB adjudication, Ofcom has also taken into account Channel Four's prompt reaction to exercise control over events in the CBB House as soon as it became aware of the untransmitted material, as well as the fact that the broadcaster has led a full internal review of its compliance programme, which led to the adoption of improved procedures and guidelines (para. 1.23). The regulator has, nevertheless, stressed that any future breaches of the Code of a similar nature will be taken very seriously (para. 9.14).

The Ofcom adjudication in the 2007 CBB incident sends the message that, while freedom of 18 expression must be safeguarded (Foreword, *Broadcasting Code*) and viewers of 'reality television' programmes such as CBB are entitled to be informed about events taking place in the CBB 'House', the public is also entitled to expect appropriate intervention by the broadcaster in handling content likely to cause harm or offence (para. 5.22). This illustrates the challenging task entrusted to the regulator to balance concerns for freedom of expression with the need for appropriate intervention in regulating content. What is unclear, however, is whether the regulator's adjudication in the CBB incident was motivated by the public reaction during the broadcast of the series, or whether Ofcom's decision was influenced by wider considerations for citizenship interests, such as the protection of human dignity.

The balance between freedom of expression and the need for effective content regulation has been 19 a recurring theme during the consultation process for the adoption of the *Broadcasting Code* (Ofcom 2004b). A number of citizens responding to Ofcom's consultation <http://www.radioauthority.org.uk/consult/condocs/Broadcasting_code/responses/A-B/> expressed concern that the Code prioritises freedom of expression over the need for effective mechanisms for content regulation. Nevertheless, given the commitment of the United Kingdom under the Human Rights Act 1998, ss 1, 12 to safeguard freedom of expression, embodied in Article 10 of the European Convention of Human Rights (ECHR), as well as Ofcom's duty as a public authority under s. 6 of the Human Rights Act not to act in a manner which is incompatible with Convention rights, it is not surprising that the Foreword to the Code stresses that 'freedom of expression is at the heart of any democratic state' and that 'broadcasting and freedom of expression are intrinsically linked'.

At first sight, this would seem to suggest that in the tension between considerations for freedom of 20 expression and regulatory intervention in broadcasting content, freedom of expression has the predominant voice. As stressed by Ofcom, any limitations to freedom of expression are acceptable only if 'required by law' and if considered as 'necessary to achieve a legitimate aim' (Ofcom 2007a, para. 3.7). Nevertheless, is freedom of expression effectively protected in practice and are the

limitations to this freedom clearly defined within the current framework? Is the current framework sufficiently well equipped to deal with the difficult balance between freedom of expression and other citizenship values such as dignity? These issues will be explored in more depth in Part Four of this study. Before that, the discussion will focus on the manner in which the balance between the need for regulatory intervention in broadcasting content and wider considerations for freedom of expression is achieved in the United States of America.

THE REGULATION OF OFFENSIVE CONTENT IN THE UNITED STATES OF AMERICA

The American system of broadcasting regulation is all too familiar with the tension between 21 regulatory interventions in broadcasting content and considerations for freedom of expression. At first sight, this system is characterised by a strong commitment to free speech, embodied in the First Amendment of the American Constitution <<http://www.america.gov/media/pdf/books/constitution.pdf#popup>>, which states that 'Congress shall make no law ... abridging the freedom of speech, or of the press'. As stated in s. 326 of the Communications Act 1934 <<http://www.fcc.gov/Reports/1934new.pdf>> :

'Nothing in this Act shall be understood or construed to give the [FCC] the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the [FCC] which shall interfere with the right of free speech by means of radio communication' (47 U.S.C. 326).

On the other hand, the American communications regulator, the Federal Communications 22 Commission is entrusted with acting in pursuit of the public interest (Feintuck, 2003, 122). The FCC has the authority to license radio and television broadcasting stations and is entrusted with the enforcement of rules on the operation of these stations (FCC, 2004a, para 4). Broadcast licensees enjoy a 'uniquely privileged status' among the communication industries regulated by the FCC. In exchange for the right to broadcast over a channel of publicly owned radiofrequency spectrum, broadcasters agree to 'broadcast in furtherance of the 'public interest, convenience and necessity'' (Varona 2004, pp. 3-4) (*Communications Act* 1934, as amended, 47 U.S.C. 301 *et seq.*). This is envisaged as a 'social contract' between the broadcast licensees and the American people (Varona 2006, p. 149). What exactly constitutes 'public interest' programming was left to be defined by the regulators (p. 151). Unfortunately, as Varona (2006) suggests, the FCC has failed to put forward a coherent definition of the 'public interest' in the broadcasting context.

While the FCC's competence in overseeing broadcasting content is limited by the First Amendment 23 of the Constitution and by s. 326 of the Communications Act 1934 (47 U.S.C. 326) (FCC, 2004a, para. 4), the FCC's congressional mandate entitles the regulator to control the broadcast of offensive content, particularly obscene, indecent and profane material (Varona 2004, p. 39). According to s. 1464 of Title 18 (Crimes and Criminal Procedure) of the United States Code <<http://www.gpoaccess.gov/uscode/browse.html>>, 'whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both'. The FCC has been entrusted with enforcing this provision (Coates 2005, p. 787). 'Obscene' material is defined as 'material that 'appeals to the prurient interest' and depicts sexual conduct in an offensive way and has no artistic or literary merit' (Freedman 2008, p. 128) (Note: see *Miller v California* 413 U.S. 15 (1973)). The broadcast of obscene material is prohibited under s. 73.3999(a) of Title 47 (Telecommunication) of the Code of Federal Regulations <<http://law.justia.com/us/cfr/index.html>>. Such material is not entitled to the protection of free speech under the First Amendment of the American Constitution (Note: see *Miller v California* 413 U.S. 15 (1973)) and it is considered to be 'utterly without redeeming social importance' (Coates 2005, p. 790) (Note: see *Roth v United States*, 354 U.S. 476 (1957)). Unlike obscene material, offensive content such as indecent or profane programming can be entitled to the protection of free speech under the First Amendment (Mortlock 2006, p. 193) but such material can only be broadcast between 10 p.m. and 6 a.m. (47 C.F.R. § 73.3999(b)). Profane language has been defined to include 'words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a 'nuisance'' (FCC, 2007). Indecent material is defined as 'language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities' (Varona 2004, p. 39) (Note: see *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) at 657).

The assessment of the context in which indecent material is broadcast relies on a two-step 24 approach. The first assessment focuses on 'contemporary community standards' and on whether

the broadcast material will be considered as 'patently offensive' when measured against these standards. Second, the assessment focuses on the programme itself, looking at 'the degree of graphicness involved, the extent to which the offensive images and words are fleeting or repeated and whether the material aims deliberately to titillate or shock the audience'; such assessments are made on a case by case basis (Freedman 2008, p. 128). However, the FCC test for indecency has been criticised for being too vague and too wide (Coates 2005, p. 789). As Coates (2005) points out, the FCC test for indecency is much wider than the test for obscenity put forward by the Supreme Court in *Miller v California* 413 U.S. 15 (1973). This has led to a certain degree of confusion among broadcasters as to what is considered to be indecent by the FCC (Coates 2005, p. 779). Furthermore, commentators have pointed towards the inherently subjective assessment of 'contemporary community standards' by an FCC panel of five political appointees (p. 796).

The FCC has been criticised in the past for adopting a 'strikingly permissive enforcement attitude' 25 towards broadcasters, opting for regulatory intervention only when subjected to public scrutiny (Varona 2004, p. 40). However, in recent years, the communications regulator has imposed a number of heavy fines on broadcasters found in breach of its rules on indecency (Rosenblat 2006, p. 167). In 2004, the FCC imposed a fine of approximately \$1 million on Fox, following 159 complaints about the broadcast of indecent images before 10 p.m. during an episode of the 'reality television' programme *Married by America* (FCC, 2004a para. 2). The remainder of this section, examining FCC's adjudication in the broadcast of this controversial episode of *Married by America*, aims to provide an illustration of the practical operation of the FCC rules on offensive content.

'Reality television' programmes have 'flooded' the American airwaves (Podlas 2007, p. 143). 26 *Married by America* is a 'reality television' programme in which single adults who have never met previously, agree to become engaged and potentially get married (FCC 2004a, para. 2). The episode of this programme that was the subject of FCC's adjudication was broadcast before 10 p.m. on the 7th of April 2003 and featured the Las Vegas bachelor and bachelorette parties for the remaining two couples (para. 2). The broadcast featured sexually suggestive images of bachelors licking whipped cream from strippers' bodies (para. 8). Fox defended the broadcast, arguing that the programme 'did not contain descriptions or depictions of sexual or excretory organs or activities and even if it did, the material was not patently offensive' (para. 3). Fox also argued that the broadcast was 'an integral part of the storyline and the various participants' character development' (para. 12). The FCC concluded that the images broadcast by Fox did feature material that 'depicts or describes sexual or excretory organs or activities' (para. 8). The FCC assessment also determined that the broadcast was 'patently offensive as measured by contemporary community standards for the broadcast medium' (para. 10). In reaching its decision, the communications regulator considered the 'full context' in which the material was broadcast and concluded that the party scenes featured in the broadcast were of an 'overtly sexual and gratuitous nature' (para. 10). The FCC also considered that the material was intended to 'pander and to titillate the audience' due to the prolonged appearance of strippers, and that the material 'plainly dwell[ed] on matters of a sexual nature' (paras. 11 and 12). Consequently, Fox was fined \$1,183,000 for the broadcast of indecent material at a time when there was a 'reasonable risk' that children will be watching television (paras. 1 and 13).

The fine imposed by the communications regulator has been justified as a response to 'intense 27 public concern', illustrated by the number of complaints about the broadcast (Coates 2005, p. 777). Examples of intervention by the communications regulator in broadcasting content, following complaints from the public, are not limited to the realm of 'reality television'. Such examples include a fine imposed on NBC following the broadcast of indecent language in the transmission of the 2003 Golden Globe Awards (FCC 2004b). The incident concerned the acceptance speech of Bono, the lead singer of U2, who employed the words 'f***ing brilliant' (Varona 2004, p. 40). While initially the FCC did not consider these words to be indecent, it eventually gave in to public opinion and fined NBC (p. 40). Similarly, the FCC imposed a fine of \$550,000 on Viacom, after the communications regulator received 542,000 complaints from viewers of the televised Super Bowl 2003, following the live half-time performance of the singer Janet Jackson, where, due to an alleged 'wardrobe malfunction', one of the singer's breasts was bared (Varona 2004, p. 40).

In light of these fines, Freedman (2008) points towards a 'growing moral crusade' by the 28 communications regulator and a 'sustained assault' on the broadcast of 'bad language' and indecent images, coupled with narrow interpretations of the First Amendment. This was motivated, *inter alia*, by increased cross-party political concerns about broadcasting indecency (Freedman 2008, p. 131). The current campaign against indecency led by the FCC can be contrasted with former FCC chairman Newton Minow's approach put forward in his 1961 address to the National

Association of Broadcasters. Minow (1961) stressed that he was 'unalterably opposed to governmental censorship', promising that 'there will be no suppression of programming which does not meet with bureaucratic tastes'.

In 2006, following the adoption of the Broadcast Decency Enforcement Act, the FCC was given the 29 competence to impose increased fines on broadcasters that fail to comply with the rules of indecency. This has led to 'a climate of self-censorship' in which broadcasters adopt the precautionary approach to refrain from broadcasting any material that could potentially trigger a fine from the FCC (Freedman 2008, p. 127). According to Coates (2005), this campaign against indecency has led to 'an unconstitutional and impermissible chilling of free speech'. At the same time, Freedman (2008) argues that it is difficult to feel too sympathetic for the media corporations which, for many years, have capitalised from broadcasting 'a highly sensationalist and cost effective diet of violence, sex, gossip and scandal'.

The American broadcasting map seems to be dominated by an over-cautious approach by 30 broadcasters engaged in self-censorship, for fear of attracting fines from the communications regulator (Roeder 2005, p. 897). This poses significant concerns for the protection of free speech under the First Amendment. While some could question the merits of a discussion of the value of free speech in the context of 'reality television', such discussion raises important questions regarding the justifications and the extent of regulatory intervention in broadcasting content. Coates (2005) warns us against perceiving the concern for media self-censorship in entertainment programmes as misguided. As Coates suggests, the media is much more than just entertainment and there is a risk that the trend towards self-censorship could extend to informative programmes such as the news.

The FCC has been faced with the 'difficult and delicate task' of ensuring that broadcasters fulfil 31 their public interest obligations, while at the same time preserving the First Amendment values of free speech (47 U.S.C. 302(a) and 326 (2000)) (Varona 2006, p. 163). The Supreme Court has acknowledged that in balancing the need for regulatory intervention with calls for protecting free speech, the FCC must 'walk a tightrope' (Note: see *Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973)). Nevertheless, when faced with challenges based on the First Amendment, the Supreme Court has in the past upheld the FCC's power to intervene in the regulation of broadcasting content in the pursuit of the public interest (p. 163) (Note: see *National Broadcasting Co. v. United States*, 319 U.S. 190 (1934); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969)). Furthermore, in *FCC v. Pacifica Foundation* 438 U.S. 726 (1978), the Supreme Court has stated that due to the power of the broadcast medium, offensive materials could intrude into the privacy of people's homes and, in this context, 'the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder' (Freedman 2008, p. 128).

In any assessment about the balance between free speech and regulatory intervention in 32 broadcasting content, the focus must be on identifying the wider values that influence this assessment. Both Varona and Freedman's examinations of broadcasting policy in the United States of America identify a tension in conflicting interpretations of the First Amendment. One potential interpretation is framed in economic terms and is concerned with promoting a 'marketplace of ideas', which is free from state interference (Varona 2004, p. 99) (Note: The 'marketplace of ideas' metaphor has been attributed to Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919)). This is associated with 'an exercise in consumer sovereignty in which speech [is] treated as a kind of commodity' (Freedman 2008, p. 61, quoting Sunstein 1990). An alternative interpretation of the First Amendment focuses on wider democratic considerations such as equality of citizenship and perceives free speech as an important instrument for empowering citizens. This approach is much closer to the vision put forward by James Madison, one of the founding fathers of the American Constitution (Varona 2004, p. 53). Unfortunately, in the current framework, the former interpretation of free speech seems to have the predominant voice (Freedman 2008, p. 61). In the present context dominated by a commodified perception of free speech, in which the rationales for regulatory intervention are highly politicised (p. 146), it is legitimate to question how much weight is actually given to wider citizenship concerns. The need for a framework of principles (based on values such as equality of citizenship (Feintuck 2004)) in assessing the balance between regulatory intervention in broadcasting content and considerations for freedom of expression will be explored in more depth in Part Four of this study.

LESSONS TO BE LEARNED?

Content has been considered to be 'the most contentious' aspect of media policy (Freedman 2008, 33

p. 122). As it was seen in the previous sections, the regulation of content in 'reality television' programmes such as *Celebrity Big Brother* and *Married by America* has attracted its share of controversy. The cases studies of the regulatory systems in the United Kingdom and the United States of America illustrate that political interests and public opinion have played an important role in influencing the outcome of adjudications by the communications regulators (p. 222). It is, therefore, reasonable to question how much weight has been given to citizenship values in assessing the balance between calls for intervention in broadcasting content and freedom of expression. Nevertheless, before addressing this issue, it is important to stress that while the United States of America and the United Kingdom are confronted with a number of common difficulties in the regulation of offensive content and the protection of free speech, the approaches adopted in these two jurisdictions also reveal significant differences. These differences are rooted in the different legal cultures in the United Kingdom and the United States of America (Glendon, Carozza and Picker 2008). Barendt (2007) indicates that the American system tends to confer a stronger degree of protection to free speech from Government regulation and courts in the United States tend to 'distrust' the balancing of free speech against other rights. On the other hand, the British approach to free speech (which is influenced by the incorporation of the ECHR into domestic law by the HRA 1998) tends to allow a greater degree of balance between freedom of expression and other rights. This approach acknowledges that limitations to freedom of expression 'may be necessary in order to ensure that the media serve other public goals' (Hitchens 2006, 41). Craig (1990) suggests that the American and British systems have a lot to learn from each other:

Lawyers in the United Kingdom have much to gain by reflecting upon the experience in the United States. At the most fundamental level, this serves to remind us that the existence of a written constitution is not the end of constitutional controversy...[L]awyers in the United States will also...have something to learn from the experience in the United Kingdom...[UK] serves to demonstrate how...the meaning of constitutional obligations...can embrace a wider spectrum of issues than encapsulated by an exclusive concern with the courts.

While both the British and the American systems emphasise the importance of free speech, both systems allow limitations to free speech in certain circumstances. These limitations include the empowerment of the communications regulator to intervene in regulating offensive broadcasting content (Note: Section 319(1), *Communications Act 2003* (United Kingdom); 47 C.F.R. § 73.3999 (United States of America)). One of the key rationales for regulatory intervention refers to the power of broadcasting to intrude into people's lives and to influence their lives (*FCC v Pacifica Foundation* 438 U.S. 726 (1978)) (Feintuck and Varney 2006, p. 1). Yet, the limitations to freedom of expression for the regulation of offensive broadcasting content are not clearly defined in the United Kingdom and the United States of America. In Ofcom's adjudication in the 2007 CBB incident, the British communications regulator stressed that any limitations to freedom of expression are acceptable only if 'required by law' and if 'necessary to achieve a legitimate aim' (Ofcom 2007a, para. 3.7). Unfortunately, the communications regulator did not provide any guidance as to the practical application of these limitations. In the United States of America, the actions of the FCC are limited by the free speech provisions under the First Amendment of the Constitution and s. 326 of the Communications Act (47 U.S.C. 326). However, the American communications regulator has the competence to control the broadcast of offensive content, particularly obscene, indecent and profane material (18 U.S.C.S. 1468). Unfortunately, the FCC test on indecency has been criticised for being too vague (Coates 2005, p. 789). This is due, *inter alia*, to the subjective nature of any assessment of terms such as 'contemporary community standards' or 'patently offensive' material (Freedman 2008, p. 129). This has led to a certain degree of confusion among broadcasters as to what falls within the FCC rules on indecency (Coates 2005, p. 778) and in order to avoid attracting fines from the FCC, broadcasters have engaged in self-censorship (Freedman 2008, p. 127). It is interesting to note that the approach on offensive language adopted in the United States of America has been stricter than the approach adopted in the United Kingdom. This could be attributed to the dominance of conservative views in the American political arena (Freedman 2008).

Particular concerns are posed by any abstract interpretations of 'contemporary community standards'. Important lessons could be learned from the Australian system, which relies on consultations with the community in order to determine what constitutes offensive content. The concept of 'contemporary community standards' plays a central role in the regulation of broadcasting content under the Classification Act, the Broadcasting Services Act and the Commercial Television Industry Code of Practice (ACMA 2007, p. 9). Nevertheless, the concept of 'contemporary community standards' can pose a number of challenges, as 'such standards are not

able to be readily expressed or quantified' and 'a pluralistic society such as Australia will necessarily encompass multiple viewpoints' (p. 9). For these reasons, the Australian approach relies on the development and maintenance of a Code which takes into account and reflects community attitudes as to what constitutes offensive content in television broadcasting (p. 17). In a report prepared by the Australian Communications and Media Authority (ACMA) on the regulatory arrangements for 'reality television' programming on commercial free to air television, ACMA commissioned research in the form of national surveys and focus groups in order to determine whether the Commercial Television Industry Code of Practice reflects community standards (p. 1). This report revealed that the Code generally reflected community standards. The majority of people surveyed considered that they should have the freedom to watch what they want on television and parents / guardians should have control over what their children watched. At the same time, the people surveyed stressed that 'reality television programmes exploit the people who participate in them' and that such programmes 'encourage inappropriate attitudes towards women' (p. 45). In light of these findings, ACMA recommended, *inter alia*, the inclusion of a clause in the Code to prohibit 'the broadcast of material presenting participants in reality television programmes in a highly demeaning or exploitative manner' (p. 3). Rather than relying on inherently subjective assessments of 'contemporary community standards' by regulators (Coates 2005, 796), the Australian system illustrates the value of a process in which the community is given a say in what constitutes offensive content and how far should regulators intervene in responding to such content.

Whilst acknowledging that the balance between regulating offensive content and the protection of freedom of expression should not be conducted on abstract terms and that regulators should seek the view of the community as to what constitutes 'offensive content', it is important that the regulatory process rests on a legislative framework which upholds the importance of free speech, which provides clear guidance as to values safeguarded by the legislative framework and to the circumstances when limitations to free speech are legitimate (Cohen 2006, p. 143). Otherwise, broadcasters are left unsure as to what can be broadcast. A too permissive attitude could, for example, harm children, while a self-censorship attitude could have devastating consequences for free speech to an extent that goes beyond the entertainment genre (Coates 2005, p. 778). The ultimate loss in such circumstances would be placed on citizens. 36

The examination of the British and American approaches for regulating offensive content has also revealed the absence of a clearly defined framework of principles that would assist regulators in the difficult balance between intervention and the protection of freedom of expression (Heyman 2008, p. 1). The American system benefits from reference to regulation in 'the public interest': the FCC is entrusted with acting in the pursuit of the 'public interest' (Feintuck 2003, p. 122) and licensed broadcasters agree to 'broadcast in furtherance of the public interest' (47 U.S.C. 301 *et. seq.*) (Varona 2004, p. 4). According to Feintuck (2003), the 'public interest' can be seen as 'a founding principle' which could ultimately be enforced by the Supreme Court and could, therefore, act as 'a safety net for the democratic interest in the media'. Nevertheless, the 'public interest' notion is ill defined and ambiguous (Freedman 2008, p. 64). As Varona (2006) points out, the FCC has so far failed to put forward a coherent definition of the 'public interest' in the broadcasting context. Furthermore, Thierer argues that the 'public interest' standard is 'hopelessly arbitrary and open to undue special interest influence' and that, in practice, it is often used to limit the free speech of broadcasters (Thierer 2007, p. 441 and 451). In the British system, the absence of a 'coherent concept of the public interest' in the Communications Act 2003 has led to the criticism that this system lacks 'solid foundations' for regulatory intervention in the pursuit of citizenship values (Feintuck 2003, p. 107). According to Feintuck (2003), the current framework constitutes a 'missed opportunity' for providing the basis for regulatory intervention designed to defend citizenship concerns. 37

The term 'public interest' is elusive, being open to a number of interpretations. In spite of disagreement on the meaning of this term (determining some scholars to be quite sceptical of its actual merit) (Hantke-Domas 2003, p. 165), commentators seem to agree on the difficulty of associating this 'open-ended phrase' (Chen 2003, p. 307.) with an exact definition (Feintuck, 2004). An analogy has been made with 'an empty vessel to be filled at different time with different content' (Feintuck, 2004, p. 3). The ambiguity surrounding this concept makes it susceptible to be misused for private ends or to be associated with the short-term policy objectives of the parties at power (p. 28). Feintuck (2004) calls for a definition of the 'public interest' that comprises democratic values and responds to citizenship expectations, particularly equality of citizenship. This is hoped to reduce the risk for the misuse of this concept by political or market powers, in the pursuit of their own interests (p. 58). The value base for this interpretation of the 'public interest' 38

should comprise the 'democratic imperatives that underlie our society', including human dignity (p. 58).

The Communications Act 2003 does make reference to citizenship interests in the communications 39 sector. According to s. 3(1) of the Act, it is the 'principal duty' of Ofcom to 'further the interests of citizens in relation to communications matters' (s. 3(1)(a)) and to 'further the interests of consumers in relevant markets' (s. 3(1)(b)). In carrying out its functions under section 3(1) of the Act, Ofcom's duties include, *inter alia*, the application of standards for television and radio services, designed to 'provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services' (s. 3(2)(e)). The express reference to citizenship interests in the Act provides a positive step in the protection of democratic values. Nevertheless, the Act entrusts Ofcom with the dual task of protecting citizenship and consumer interests, overlooking the fact that these interests are not always synonymous. The concept of citizenship comprises wider democratic values such as equality between the members of society. When acting as citizens, people tend to take into account the interest of others, rather than being confined to the pursuit of self-interests (*Sunstein 1990, p. 58*). On the other hand, the notion of consumers reflects a narrow perception of the public, as people tend to act in the pursuit of individual goals. In the context of the application of standards for broadcasting content, the Act makes reference to regulatory intervention in order to protect the 'members of the public', without specifying whether it is referring to the public as citizens or as consumers. To avoid any ambiguity as to the range of values protected, the Act should have prioritised citizenship interests over the interests of consumers (Feintuck 2003).

Regulators can assess effectively the balance between intervention for regulating offensive content 40 and freedom of expression only if guided by a framework of principles based on citizenship interests. Addressing such a balance is never going to be an easy task for regulators, especially when faced with the choice between freedom of expression and the protection of dignity. In the American context, Heyman (2008) argues that the balance between free speech and dignity has been affected by the fact that 'the individual right of free speech' is contrasted with 'societal interests such as dignity and equality'. As Heyman (2008) suggests, 'there is no clear way to resolve clashes between individual rights and societal interests', as these involve '[a] collision between incommensurable values'. The solution rests with adopting a rights-based approach for free speech and dignity, 'rooted in respect for human beings and their capacity for self-determination' (Heyman 2008, p. 2).

Both freedom of expression and dignity constitute important citizenship values. Free speech can 41 have an important role in ensuring equality of citizenship, due to its ability to empower citizens (Varona 2004, p. 53). Similarly, dignity can play an important role in ensuring equality, due to its emphasis on safeguarding the autonomy of individuals (Fredman 2001, p. 155). This value is inherent in every human being and provisions that safeguard dignity aim to ensure that everybody 'is treated as having value or worth' (Fredman 2001, p. 155). It would be impossible to state that free speech should always prevail over dignity or *vice versa* (Barendt 2007, pp. 33-34). Regulators should not have to be faced with the 'tragic choice' of protecting either dignity or free speech at the expense of the other (Heyman 2008, p. 1). Instead, speech should be 'reconciled' with other citizenship values such as dignity (Heyman 2008, p. 1), in a framework of principles based on equality of citizenship, which would assist regulators in deciding the appropriate level of intervention in broadcasting content.

Some commentators question whether regulators should intervene at all in broadcasting content, 42 as such intervention impacts of free speech. Coates (2005), for example, argues that the public should be left to make their own decisions as to what they want to watch. Viewers who are dissatisfied with broadcasting content should simply change the channel or switch off the television set, and if enough viewers do so, broadcasters will get the message and alter the content accordingly. In this manner, content is determined not by regulators but by the marketplace. While it is inevitable this approach will open the door to 'tasteless and terrible' programming, it will also ensure a free flow of ideas, unhindered by regulatory intervention, which is essential in any democratic society (p. 804). This approach is similar to the dissenting opinion of Justice Brennan in *Pacifica*, who argued that the viewer and not the government should have the ultimate control over what is broadcast on radio and television (p. 816). Nevertheless, while the protection of freedom of expression is fundamental in every democratic society, it is important to acknowledge that a system which would leave content regulation exclusively to the marketplace would have its drawbacks. The marketplace is not best positioned to act as the exclusive regulator of broadcasting content, as the market perceives viewers as consumers rather than citizens. As discussed above,

the public tends to behave differently as consumers as they would as citizens (Roeder 2005, p. 902), and intervention to meet consumer interests could overlook wider citizenship concerns such as the need to safeguard human dignity.

In the context of 'reality television' programmes, Brenner (2005) points out that television is 'a 43 communicative medium that reaches all segments of society' and if 'reality television' programmes are left unregulated, this could lead to 'social costs that burden society'. While acknowledging the importance of freedom of expression and the fact that 'an idea, image or word (which) may offend someone is not and cannot be sufficient grounds for its suppression' (Coates 2005, p. 805), it would be impractical to leave all the responsibility of content regulation to the marketplace. Instead, a clearly defined framework of principles based on citizenship values, particularly equality of citizenship (Feintuck 2004), could assist regulators in the difficult balance between freedom of expression and regulatory intervention in broadcasting content.

CONCLUSION

Regulators are often faced with dilemmas between competing interests and values. This article has 44 attempted to explore the dilemmas faced by the communications regulators in the United Kingdom and the United States of America, when balancing the need for intervention in regulating offensive content with considerations for freedom of expression. The discussion focused on the regulation of offensive content in 'reality television', examining Ofcom's adjudication in Channel Four's broadcast of CBB in 2007 and FCC's adjudication in the broadcast of Married by America in 2003 by the Fox network. The discussion was aimed at raising wider questions about the appropriate regulatory response to the broadcast of offensive material.

The analysis of the British and American systems revealed common difficulties faced by the 45 communications regulators when balancing the rationale for intervention with considerations for freedom of expression. Both systems are affected by the lack of adequate definitions of the limitations to freedom of expression. In the United Kingdom, in the adjudication on the 2007 CBB incident, Ofcom (2007a) has stressed that any limitations to freedom of expression are acceptable only if 'required by law' and 'if necessary to achieve a legitimate aim'. Unfortunately, the British communications regulator did not provide any guidance on the practical application of these limitations. Similarly, in the United States of America, the limitations to free speech embodied on FCC's indecency test have been described as too vague (Coates 2005, p. 789). This has left broadcasters in a state of confusion as to what can be broadcast and the fear of attracting fines from the FCC has led them to engage into self-censorship (Freedman 2008, p. 127). There is a fear that this trend will extend beyond the entertainment genre, with devastating effects for free speech (Coates 2005, p. 789). Potential solutions in determining what constitutes 'contemporary community standards' necessary in assessing whether the communications regulators should intervene in regulating broadcasting content could be offered by the Australian system. Rather than adopting subjective assessments of such standards, the Australian approach relies on actual consultations with the community in order to determine what constitutes offensive content (ACMA 2007).

The examination of the British and American jurisdictions also revealed the absence of a clearly 46 defined framework of principles to assist regulators in the difficult balance between intervention in broadcasting content and freedom of expression. While the FCC is entrusted with acting in pursuit of the 'public interest' (47 U.S.C. 301 *et. seq.*), the communications regulator has failed to put forward a coherent definition of what constitutes the 'public interest' in the broadcasting content (Varona 2004, p. 151). Furthermore, the United Kingdom has been criticised for the absence of a 'coherent concept of the public interest' in the Communications Act 2003, which could provide the foundation for regulatory intervention in the pursuit of citizenship interests (Feintuck 2003, p. 107). The citizenship values inherent in the 'public interest' notion can play an important role when dealing with difficult questions about the regulation of broadcasting content.

In any assessment about the balance between free speech and regulatory intervention in 47 broadcasting content, the outcome should be influenced by a framework of principles based on citizenship values. Until such a framework is clearly defined in the regulatory framework, the decisions of the communications regulators will continue to be dominated by commercial and political pressures. It is, however, important to note that reliance on such a framework of principles is not likely to be a panacea for all the difficulties identified in this article. As Minow (1961; Minow and LaMay 1996) suggests, 'the public interest is made up by many interests' and while the 'public interest' can justify protecting the public from offensive content, the same concept could be used

as a justification for protecting free speech. Given these difficulties, it is legitimate to question whether it is ever possible to eliminate political choices from such matters. Nevertheless, as Feintuck (2004) points out, a definition of the 'public interest' based on democratic values has the potential to reduce the risk of misuse of this concept by political and market powers in the pursuit of self interest. Such a framework of principles can ensure that important citizenship values such as equality, the importance of free speech in empowering citizenship and the need to protect human dignity, are given sufficient weight when regulators are dealing with complaints from the public about offensive content.

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