



**INTERNATIONAL REGULATION OF ADVERTISING,
SPONSORSHIP AND COMMERCIAL DISCLOSURE
FOR COMMERCIAL RADIO BROADCASTING**

RESEARCH REPORT PREPARED FOR THE
AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

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TABLE OF ABBREVIATIONS

Australia	
ABA	Australian Broadcasting Authority
ABC	Australian Broadcasting Corporation
BSA (Aus)	Broadcasting Services Act 1992
Advertising Standard	Broadcasting Services (Commercial Radio Advertising) Standard 2000
Disclosure Standard	Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000
Compliance Program Standard	Broadcasting Services (Commercial Radio Compliance Program) Standard 2000
CRA Code	Commercial Radio Australia Codes of Practice and Guidelines
Canada	
ASC	Advertising Standards Canada
BA 1991 (Ca)	Broadcasting Act 1991 (Ca)
BDU	Broadcasting Distribution Undertaking
CBC	Canadian Broadcasting Corporation
CRTC	Canadian Radio-television and Telecommunications Commission
CAB	Canadian Association of Broadcasters
Code of Ethics	Canadian Association of Broadcasters Code of Ethics
CBSC	Canadian Broadcast Standards Council
Radio Regs (Ca)	Radio Regulations 1986
RTNDA	Radio-Television News Directors Association of Canada
RTNDA Code	Radio-Television News Directors Association of Canada Code of Ethics
European Union	
TWF Directive	Television without Frontiers Directive

AVMS Directive	Audiovisual Media Services Directive
Germany	
ALM	Association of State Media Authorities
Interstate Treaty	Interstate Treaty on Broadcasting and Telemedia
Joint Commission	Joint Commission on Programming, Advertising and Media Literacy
Joint Directive	Joint Directives of the State Media Authorities for Advertising, for the Implementation of the Separation of Advertising and Programming, and for Sponsorship in Radio
Ireland	
BA 2001 (Ie)	Broadcasting Act 2001
Bill	Broadcasting Bill
BAI	Broadcasting Authority of Ireland
BCI	Broadcasting Commission of Ireland
BCC	Broadcasting Complaints Commission
BCI Advertising Code	BCI General Advertising Code
BCI Guidance Notes	BCI General Advertising Code Guidance Notes
DAB	Digital Audio Broadcasting
RT Act 1988 (Ie)	Radio and Television Act 1988
RTÉ	Radio Telefís Éireann
United Kingdom	
ASA	Advertising Standards Authority
ASA(B)	Advertising Standards Authority (Broadcast) Ltd
BA 1990 (UK)	Broadcasting Act 1990 (UK)
BA 1996 (UK)	Broadcasting Act 1996 (UK)
Basbof	Broadcasting Advertising Standards Board of Finance Ltd
BBC	British Broadcasting Corporation
BCAP	Broadcast Committee of Advertising Practice

CAP	Committee on Advertising Practice
Comms Act (UK)	Communications Act 2003 (UK)
DAB	Digital Audio Broadcasting
Ofcom	Office of Communications
Ofcom Code	Ofcom Broadcasting Code
RAS Code	Radio Advertising Standards Code
United States	
CFR	Code of Federal Regulations
Comms Act (US)	Communications Act of 1934
FCC	Federal Communications Commission
IBOC	In-Band On-Channel
NAB	National Association of Broadcasters
USC	United States Code
VNRs	video news releases

INTRODUCTION

This report provides a comparative survey and analysis of policies and regulations relating to advertising on, and sponsorship of, commercial radio. The report focuses on those rules which are most relevant to news and current affairs programming. The jurisdictions comprehensively surveyed are the United Kingdom (UK), the United States (US), Canada, and Ireland. A brief review of Germany is also included.

The survey and presentation have been influenced by a view that the regulations can not be fully understood in isolation. How they operate within the regulatory framework of the relevant jurisdiction will also be significant. As such, the report has also included information on the regulatory framework, or on those aspects relevant to advertising regulation, of each jurisdiction. Although some examples (for certain jurisdictions) are included of adjudications on relevant rules, it has not been possible within the time frame of this project to undertake a comprehensive review. Accordingly, these examples should be seen as illustrative only.

In reporting on the regulation of advertising and sponsorship of commercial radio, we have reviewed rules which are specifically concerned with advertising and/or sponsorship. In addition, we have reviewed rules which may be triggered because of the influence of commercial interests on programming. In this category, relevant rules would be those dealing with disguised advertising, such as product placement.

So far as it is possible to have consistency across the four major jurisdictions: UK, US, Canada, and Ireland, the review of the advertising and sponsorship rules and other rules of relevance, is structured as follows:

- Definitions. This section considers all definitions which may be relevant. In some cases, it will be more appropriate to consider the definitions in the context of considering the substantive rules. This is made clear in the relevant sections of the report.
- Advertising, sponsorship, and related rules. This section reviews rules specifically about advertising, sponsorship, and other related commercial practices. It is structured as follows:
 - Amount of advertising. Rules on the amount of advertising are considered to be relevant to the general public-interest concern that

there should be a balance between advertising and content so that listeners have access to programming content, including news, information, and opinion.

- Political advertising. Political advertising rules will be relevant to access to broadcasting, and to the need for fair and accurate coverage of matters of public interest.
- General – this section will consider the advertising and sponsorship rules relevant to news and current affairs programming. In some cases, the rules will not be specifically directed at news and current affairs coverage, but they may be relevant to the need for fair and accurate coverage.
- Other rules which may be relevant – this section will consider any other rules, if any, which may not be specifically about advertising and sponsorship, but which may nevertheless be relevant to the influence of commercial interests on programming. An example of this would be a general rule which prohibits misleading content. An undisclosed commercial relationship might cause content to be misleading. We have not reported on laws of general application which relate to misleading or deceptive-type conduct.
- Application of the rules and/or current issues – if appropriate, this section will include reference to any useful examples showing the application of the rules or to any matters of particular current concern in relation to the rules.

The research method used in preparing this report has been to access and analyse primary materials and policy documents issued by the relevant government bodies or regulatory agencies. We have relied upon desk-based, Internet research, and have primarily accessed the materials from official websites, with some back up from commercial legal publisher databases. With very limited exceptions, this report does not use or refer to secondary literature.

As required the report is concerned with commercial radio only, and with rules relating to advertising and sponsorship specifically in relation to news and current affairs programming. The report does not make reference to any other advertising rules which might be imposed on radio. It should also be noted that in some jurisdictions the rules considered in this report will apply also to other categories of

radio licensing. We provide no information on this. However, we have included in the *Appendix* a brief review of other radio licensing categories in each of the jurisdictions with information about whether or not those other services are allowed to broadcast advertising. We note also that we have not found any differences in the application of the rules considered here to commercial radio services which might be delivered via digital transmission compared with analogue.

Each of the jurisdictions considered in this report has self-regulatory schemes in place for regulating advertising industry practices in advertising. Save where directly relevant to the regulatory framework or the advertising regulation issues being considered in this report, we have not discussed these schemes or their rules. Professional codes of ethics or statements of principles, adhered to by journalists and related personnel, can also be found in the jurisdictions considered in this report. These are usually administered by professional organizations. These codes or principles may include matters which are relevant to the concerns of this report. However, with the exception of Canada (where the journalists' code is a formal part of the self-regulatory framework), we have not examined these codes.

The Australian Context

As background to this report and to the analysis provided, we note briefly the regulation, so far as it is relevant, of advertising and sponsorship of commercial radio.

Commercial radio is permitted to advertise. There is no prohibition on sponsorship. The Broadcasting Services Act 1992 (BSA (Aus)) includes no definition of 'advertisement' or 'sponsorship'. We note the recent reference by the ACMA in *Community Broadcasting Sponsorship Guidelines*¹ to reliance upon common law definitions of advertising² and to dictionary definitions of advertisement.

The rules governing commercial radio advertising and sponsorship relevant to news and current affairs coverage are set out in the following codes and standards:

Commercial Radio Australia, *Codes of Practice and Guidelines (CRA Code)*³:

- This code contains no definition of 'advertisement' or 'sponsorship'

¹ ACMA, *Community Broadcasting Sponsorship Guidelines 2008* (20 June 2008), 4.

² See also ABA, *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority* (August 2000), 50.

³ September 2004; <http://www.acma.gov.au/webwr/aba/contentreg/codes/radio/documents/cra-codeofpractice.pdf>

- Code rule 3 governs advertising:

The purposes of this Code are to ensure that advertisements comply with others [sic] codes where applicable

3.1 Advertisements broadcast by a licensee must:

- (a) not be presented as news programs or other programs;
 - (b) comply with all other Codes of Practice so far as they are applicable.
- [...]

- No specific rules mention sponsorship
- Another rule might be relevant to commercial influence on programming. This rule is found in code rule 2 governing news and current affairs programs. The concern here is that material may be misleading because information, for example, about a commercial relationship, is not provided.⁴
 - Rule 2.2(d) requires in relation to current affairs programs that “viewpoints expressed to the licensee for broadcast are not misrepresented and material is not presented in a misleading manner by giving wrong or improper emphasis or by editing out of context.
- The CRA Code includes no specific requirement to ensure the identification or separation of commercial and program content, although this requirement may be implied from rule 3.1(a).

Broadcasting Services (Commercial Radio Advertising) Standard 2000 (*Advertising Standard*)⁵

This standard reinforces the need to ensure that advertising is able to be distinguished from other programming, by the reasonable listener. The standard defines an ‘advertisement’, and other relevant terms, and sets out the rule:

- Section 5 defines an ‘advertisement’:
 - (a) material broadcast a substantial purpose of which is to draw public attention to, or to promote, directly or indirectly, an organisation, a product, service, belief or course of action; and
 - (b) consideration has been provided by or on behalf of an organisation or a supplier of the product or service to a licensee, or to a presenter, or an associate of a presenter for the broadcast of that material.

It is noted that this definition is broadly drawn. In particular, it includes promotional material which may be directed at purposes outside the ordinary commercial activity

⁴ It is noted that this code rule in force at the time of the Australian Broadcasting Authority’s Commercial Radio Inquiry was drafted in different terms. That rule also included the words “...by withholding relevant available facts”.

⁵ http://www.acma.gov.au/WEB/STANDARD/pc=PC_91766#standards.

of promoting goods and services. The definition also clarifies that an advertisement can still fall within the definition even though someone other than the licensee has received consideration.

It is less clear whether this definition includes sponsorship in the sense of those sponsorship arrangements whereby the sponsor makes some contribution to the costs of production of the program. The definition could be regarded as broad enough to include sponsorship given that it refers to the purpose of drawing attention to or promoting, "...directly or indirectly ...". However, in the context of the purpose of this standard, it is not immediately obvious that the definition would be so read, since the rule is concerned with a situation which would not be readily applicable to a sponsorship arrangement.

Further, it is not clear that section 5(b) contemplates the usual sponsorship arrangement whereby the consideration paid is towards the costs of program production. Section 5(b) refers to consideration being paid for the broadcast of that 'promotional' material. It is noted that 'sponsorship' is dealt with under the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (noted below), although only in relation to current affairs programs. There would seem to be a lack of rules (to the extent that rules on advertisements don't cover the matter) about sponsorship in relation to commercial radio broadcasting more generally.

- Section 6 states: Advertisements broadcast by the licensee must be presented in such a manner that the reasonable listener is able to distinguish them from other program material.

It is noted that the standard provides no other rules or guidance to ensure that advertisements and other program content are able to be distinguished.

Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (Disclosure Standard)⁶

This standard is intended to ensure that the existence of commercial agreements which could impact on the coverage of current affairs⁷ is disclosed on-air. It imposes

⁶ http://www.acma.gov.au/WEB/STANDARD/pc=PC_91766#standards

⁷ It is noted that the standard includes a definition of 'current affairs'. This is not something which is generally found in other jurisdictions, although the UK code of program standards, referred to later in this report as the *Ofcom Code* (see section 1.2.2.1 and ff) includes a definition, although this is relevant to television regulation, not radio.

an obligation upon licensees to ensure that disclosure, in the terms set out in the standard, is made.

The standard chiefly aims to ensure that on-air disclosure is provided during current affairs programs of:

- Commercial agreements between sponsors and presenters that have the potential to affect the content of the relevant programs; and
- The payment of production costs by advertisers and sponsors (section 5).

It is noted that, pursuant to section 7(1) (and subject to the exceptions in rule 7(2)), that the circumstances in which an on-air disclosure announcement must be made, during a current affairs program, are:

- When the name, products, or services of a sponsor are mentioned during a broadcast of any material;
- When an agent, employee, or officer of a sponsor is interviewed in relation to any matter that concerns the sponsor, its products, services, or interests;
- When material is broadcast at the request of a sponsor or is based upon or similar to any material provided by a sponsor;
- When material is broadcast that directly promotes an issue which is directly favourable to a sponsor.

Section 7 only appears to contemplate circumstances in which the commercial arrangement is one between the sponsor and a presenter (or an associate of the presenter)⁸, and not the licensee, having regard to the type of announcements which must be made pursuant to section 7(3).⁹ These announcements all contemplate situations which relate directly to the interests of the presenter (including part-time presenter).

However, section 8 addresses those circumstances where a sponsor or advertiser has paid for or contributed to the costs of production of a current affairs program. This

⁸ The standard covers part-time presenters also (defined in section 6), although the register requirements differ as between presenters and part-time presenters: section 10(3).

⁹ It is noted that the definition of 'commercial agreement' under section 6 is not so limited.

contemplates situations in which the commercial arrangement will be with the licensee.¹⁰ In such cases, announcements must be made in accordance with section 8.

It is noted that with the exception of section 7(3) and the requirements as to placement and frequency of sponsorship announcements (sections 7(1) and 8), no other rules or guidance are provided regarding the nature of a sponsorship announcement and, for example, the extent to which it might take on advertising-like qualities.

This standard aims to ensure that the listener has information about the nature of the current affairs material which is being heard. It seeks to ensure that there is transparency through the disclosure of commercial interests. The standard imposes an obligation upon the licensee only. As such the effectiveness of the standard will be dependent upon a licensee's internal compliance program. It is noted that there is also in place a compliance standard, Broadcasting Services (Commercial Radio Compliance Program) Standard 2000.¹¹

It is further noted that the standard does not address editorial independence, in the sense of requiring that the sponsor should have no editorial influence. Indeed, the standard would seem to contemplate the converse possibility, given the reference in section 7(1)(c) to "any broadcast requested by a sponsor or which is based on or similar to any material which is provided by a sponsor...".

The Public-interest Concern

Advertising is an inexorable part of commercial free-to-air broadcasting; indeed, it is its lifeblood. As such, audiences will be only too well aware that to receive the program content, they must also receive the advertising. Regulation of advertising can be viewed as a consumer protection measure: for example, advertising regulation may be designed to ensure that advertising claims are truthful, not exaggerated or misleading; or, to protect particular groups within the community who may be vulnerable, children being an obvious example. Similarly, there may be limits on the amount of advertising which can be broadcast in order to ensure that the audience is

¹⁰ It is noted that the definition of a 'sponsor' is tied to the definition of a 'commercial agreement': section 6.

¹¹ <http://www.acma.gov.au/webwr/aba/radio/content/documents/compliance.rtf>. See also ACMA, *Radio 2UE Sydney Pty Ltd, The John Laws Morning Show*, Investigation Report No 1790 (25 September 2007) which indicates the difficulties of maintaining effective compliance, http://www.acma.gov.au/webwr/assets/main/lib101068/2ue_report_1790.pdf

not swamped with commercial content and their access to programming not unduly interrupted or limited.¹²

However, as the Australian Broadcasting Authority (ABA) made clear in its final report on the Commercial Radio Inquiry, the presentation of commercial content can have a much wider significance. The ABA referred to the importance of transparency of commercial content and arrangements:

Listeners are entitled to know who is seeking to persuade them. This principle is fundamental to full and open public disclosure on matters of current relevance to the community.¹³

As the ABA noted, this principle of transparency is one which is common to other jurisdictions, certainly those covered in this report. In the review of the jurisdictions in this report, and discussed in the *Summary Review of Findings* (see page xx), it will be seen that the principle of transparency encompasses two related categories of rules: disclosure and separation. In the former category, there will be rules which ensure that the public has information about commercial content and arrangements. In the latter category, the rules will be designed to ensure the separation of commercial content from program or editorial content.¹⁴ In each case the concern is to make the commercial content or arrangements transparent to the public.

In acknowledging the importance of this principle of transparency, and its role in ensuring that the listener has adequate information upon which to assess the views being put forward, the interest which is of concern here is something more than the interest of a consumer, it is the interest of a citizen. It is almost a truism to assert the media's role within the public space of opinion formation and debate, so necessary for the operation of the democratic process.¹⁵ Nevertheless, it is a fact that the media are able to provide a focus for citizens, to provide access to different voices, and to

¹² Code rule 3.2 of the *CRA Code* limits the amount of advertising which can be broadcast within an hour. However, this rule applies only where a commercial radio station is the only commercial station in a licence area, and any overlap does not exceed 30%. This rule has only limited practical application.

¹³ ABA, *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority* (August 2000), 88.

¹⁴ In some of the jurisdictions reviewed in this report another group of rules can be identified around a second principle; namely, editorial independence. This principle will be discussed in the *Summary Review of Findings*.

¹⁵ These claims can be made generally for the media, although, of course, it is radio broadcasting which is the subject of this report, and radio and television broadcasting which, unlike the print media, is subject to sector-specific regulation. The fact that different regulatory approaches have been adopted towards the print and broadcast media does not undermine the significance of the public interest in the role of the media, and the need to address how the regulatory framework promotes that public interest.

facilitate debate. Indeed, it is difficult to envisage today that public debate taking place without the active participation of the media. If one accepts that the media has an important role to play in providing the citizen, the public, with access to information and ideas, then it will be important that the media are structured and operate in a way which can fulfil this role.

The notion of the public's access to information and ideas illustrates well the importance of shaping the broadcasting environment to ensure that this access is a genuine form of access. In other words, the broadcasting environment in Australia, and in other jurisdictions considered here (although to a lesser extent, the US), is structured in a way which ensures that the public has access to a range of services, which because they are structured and financed in different ways may also help to provide diversity in content. Thus, for example, there is a mix of public and commercial broadcasting services, and the availability of free-to-air services. Rules about control of services will also be relevant. This structuring of the environment also ensures that access to this important source of information and ideas is not obstructed by the public's ability to pay. In this sense, we may see this access as a structural access.

But the access, if it is to ensure that the public is informed, able to play its part as informed and active citizens, needs also to be more than mere structural access. There is a qualitative aspect to access which needs also to be addressed. Qualitative access relates to the content which is broadcast by the services. It is rules such as those which are under consideration in this report, that contribute to that qualitative aspect of access. It is the qualitative aspect which elevates the interest from something more than mere access. Rules which address the relationship between commercial content, commercial interests, and program content are relevant to this sense of qualitative access, as are rules which address fairness and accuracy in news and current affairs coverage. Given the privileged position of broadcasting in this public space, it is important that the public's access to all broadcasting – public and commercial – provides this qualitative access. If commercial broadcasting does not provide these guarantees, then the public's access is compromised.

It may be thought that such regulation is diminishing in importance given the apparent abundance of alternative information sources available, especially through the Internet. In fact, this apparent abundance may actually make broadcasting more

important. In the chaos of the Internet with its unsifted content, what is needed are trusted providers. In a recent speech given by the UK Secretary of State for Media, Culture and Sport, Andy Burnham, he argued the case for the continued need for standards in broadcasting:

With so much of the online world untrusted, I feel we should preserve standards of accuracy, impartiality and trustworthiness, rather than dismantle them. ... Lower standards and you lose the trust and the public support that goes with it.”¹⁶

Thus, if the listeners are to have genuine access to information and ideas, there is a strong public-interest claim for rules which will enable qualitative access from a trusted provider. Qualitative access should be available across the whole of the broadcasting sector.

A Note on European Union Law

European Union Law has an impact on broadcasting on three of the countries considered in this report: the United Kingdom, Ireland, and Germany, in their capacity as member states. Under European Union Law, member state laws on television broadcasting must comply with the *Television without Frontiers Directive (TWF Directive)*¹⁷. This directive was enacted in 1989. Following lengthy negotiations, a new directive, the *Audiovisual Media Services Directive (AVMS Directive)*¹⁸ came into force on 19 December 2007. This directive will replace the *TWF Directive*. Member states have until 19 December 2009 to implement the new directive. As is obvious, neither of these directives affect radio, and the European Union has not enacted any laws of relevance to radio.¹⁹ However, indirectly, changes in European Law affecting television may also affect radio. This is because rules which may be drafted based on the EU directives may be applied both to television and radio. Since rules relating to advertising, sponsorship, and commercial influence are a particular concern of the directives, then this influence becomes particularly

¹⁶ Andy Burnham, Secretary of State Speech to the Convergence Think Tank, 11 June 2008, http://www.culture.gov.uk/reference_library/minister_speeches/5192.aspx.

¹⁷ OJ L 298, 17 October 1989, 23. The *TWF Directive* had also been amended in 1997.

¹⁸ OJ L 332, 18 December 2007, 27.

¹⁹ When the European Community first contemplated regulation of broadcasting in the eighties, the intention was to include radio as well as television. However, plans to regulate radio were dropped because radio, compared with television, was not seen as posing the same cross-border issues. Despite technological convergence, the definitions of audiovisual services in the *AVMS Directive* continue to have the effect of excluding radio services.

noticeable. This is particularly so in the case of Ireland and Germany, but to a lesser extent, the UK. Currently it will be the *TWF Directive* which influences the rules considered in this report, but as members states consider how to implement the new *AVMS Directive*, there are likely to be rule revisions and these may also affect radio. Each of the European jurisdictions considered in this report is currently considering legislative changes to incorporate the *AVMS Directive*. With regard to the matters of relevance to this report, it seems unlikely that these jurisdictions will introduce significant changes.

SUMMARY REVIEW OF FINDINGS

[This section provides an executive summary reviewing the findings across the jurisdictions. At the end of each jurisdictional report, a more detailed analysis of findings related to the relevant jurisdiction is provided.]

The jurisdictions considered in this report demonstrate some core common principles and practices, but also some fundamental differences in approach. It is clear however, that regulation of advertising and sponsorship is seen as an important component of the need to ensure that the listener has information which will enable him/her to assess the matter being broadcast. Thus, principles of transparency are apparent in each jurisdiction, so each jurisdiction has rules in place which ensure that advertisements and other commercial references are appropriately identified and distinguished from other program content.

Definitions

A range of approaches is observable. The UK and Ireland have the most comprehensive set of definitions, covering advertising, sponsorship, product placement, and, in the case of Ireland, surreptitious advertising. The comprehensiveness of these definitions is also a reflection of the detailed rules which apply in these two jurisdictions, and especially in the UK, covering all types of commercial practices such as advertising, sponsorship, and disguised advertising. In these jurisdictions, sponsorship arises when the costs of a program have been met by a sponsor, either in part or in full.

Canada does not have a highly developed set of definitions. Indeed in carrying out its regulatory functions, in relation to content and advertising regulation, the CBSC, the body dealing with program and advertising standards, would appear to rely on definitions which arise under statute and common understanding. The definitions under statute relate only to advertising, of the traditional kind of commercial activity. Canada does not have in place any definitions which cover sponsorship or other commercial practices. There does not seem to be a high awareness of these other type of practices, although as shown in the report, the CBSC has been able to respond flexibly to new situations using existing rules and principles.

The US does not include definitions in its regulation of advertising and sponsorship. In fact, the US sponsorship-identification rules make no mention of advertising and

sponsorship. Instead they focus on any situation where payment or consideration has been made for matter to be broadcast. In this way, too, the rules differ from the other jurisdictions because the US rules are not confined only to paid-for content which relates to commercial activity, but can cover also other situations such as political activity.

Australia: Advertising, in the form of the traditional type of spot advertisement, will usually mean that consideration is paid by the advertiser (or its agent) to the licensee for the broadcasting of that advertising material. The sponsorship arrangement differs from this because generally the sponsor is sponsoring the program or service by making a contribution to the costs of production of that program or service in return for some form of on-air acknowledgment of that contribution.

It is noted that the *CRA Code* does not contain any definitions of advertising, sponsorship, or like terms.

The *Advertising Standard* contains a definition of ‘advertisement’. It is submitted that this definition is broader than the examples to be found in the UK and in Ireland since it covers, in addition to commercial activity, beliefs and courses of action. This is appropriate given that Australia does not face similar obligations of impartiality, or restrictions on political and other issue-based advertising. In this respect, the approach is similar to the US. Unlike the typical description of ‘advertising’ noted above, the definition also contemplates that consideration may be paid to a presenter (or associate) for some promotional purpose. This broadens the scope of the definition to include other commercial arrangements.

This definition is relevant only to the operation of the *Advertising Standard*. The same definition, in effect, is included in the *Disclosure Standard*.

It is noted that there is no definition of sponsorship. It is submitted that the definition of ‘advertisement’ considered here may be drafted broadly enough to include other forms of commercial communication, such as sponsorship, however, the reservations expressed at page xi (the *Introduction*) should also be noted. It is noted also that section 8 of the *Disclosure Standard* conveys a sense of sponsorship which is similar to the definitions found in the UK and Ireland, namely the idea that a sponsor contributes to the production costs of a program.

Transparency

Although there are a range of approaches, the principle of transparency finds the most common ground between the jurisdictions. Transparency will involve information being provided to the audience which ensures that they understand the nature of the content being broadcast (disclosure) and a clear separation between advertising content and other programming content. These concepts of disclosure and separation are closely related. In effect, disclosure creates a degree of separation, but some jurisdictions will seek an enhanced form of transparency by imposing detailed rules to ensure the separation of advertising and programming content.

In the US, transparency is satisfied by announcing the source of any paid-for content under the sponsorship-identification rules. This disclosure will be regarded as sufficient to inform the audience and to ensure that there is a distinction between content which is paid-for and content which is not.

In the UK, Canada, and Ireland, general rules will apply imposing an obligation on licensees to ensure that advertising and other content is readily distinguishable. As noted below additional rules may apply to cover news programming. The UK and Ireland also provide more detailed rules on what might be required to ensure that advertising and other content are able to be distinguished. Thus, these jurisdictions require an enhanced form of transparency by imposing rules to ensure separation. Editorial independence as noted below will also be of relevance here: for the UK and Ireland in relation to programming of all types; for Canada, to news and public affairs programming.

Australia: Compared with provisions respecting transparency in other jurisdictions, the *CRA Code* is much undeveloped, with only code rule 3.1(a) being vaguely relevant. The *Advertising Standard* addresses the need for transparency with its requirement to ensure that advertisements are distinguishable from other program material, but does not include any more detailed requirements to ensure separation. The *Disclosure Standard* which imposes an obligation on licensees to ensure on-air disclosure of commercial arrangements during current affairs programs will also be relevant to the principle of transparency. This *Standard* does not impose an obligation on presenters directly, nor does there appear to be any similar obligations

on other persons who may be involved with the production of program content, but who are not on-air presenters.

Editorial Independence

Despite the commitment to transparency, there is an important difference between the jurisdictions, in policy and regulation in the relationship between commercial and other content. Whilst the rules noted above make clear the need to ensure that the audience is able to distinguish between advertising and other programming content, only the UK and Ireland insist on the editorial independence of programming, and prohibit advertisers and sponsors having any influence over programming. Editorial independence can also be seen as an example of separation, but it is clearly going beyond the mere requirement of transparency.

The US does not adhere to a principle of editorial independence. Thus, for example, practices such as product placement and integration would not be prohibited, provided there was compliance with the sponsorship-identification rules. In the UK these practices are prohibited because they are seen as compromising editorial independence.

In Canada, adherence to editorial independence under the *Code of Ethics* and the *RTNDA Code* is expressed only in relation to news and public affairs programming.

Australia: There would not appear to be any guarantees of editorial independence in the regulation of commercial radio. In this respect, Australia would be more in line with the US approach which relies on identification. In the absence of guarantees of editorial independence, the need for rigorous transparency rules is heightened.

It might be argued that guarantees of editorial independence are unnecessary when there are in place rules which ensure that the listener knows that what is being heard is paid-for content. In effect, it could be asserted that once this information is made available the listener knows that what is being heard is in all respects ‘commercial content’ even though it may appear to be a ‘program’. On the one hand, this raises a larger question about the use of broadcast media, and whether the public is entitled to expect that it should have access to program content which is not influenced by commercial, or other, interests. Another, more practical, issue, however, is whether the listener, having received the information about the paid-for content, does make the connection that the program is commercial content, and not necessarily editorially

independent. For example, if a listener is told that a program is sponsored by ‘X Company’, does the listener therefore recognise that the sponsor could also have had an influence over the program content? This connection may be easier to make in situations where a presenter is being paid personally (or through an associate). It is clear that the presumption upon which the *Disclosure Standard* operates is that a listener may view content differently, particularly a presenter’s opinion, if that presenter is being paid by the relevant commercial interest. But, in other situations, such as the ‘X Company’ example, the connection may not be so readily made. It is noted that the announcements required under section 7(3) of the *Disclosure Standard* do not provide any information about the extent to which content may have been influenced (even though section 7(1) clearly contemplates situations in which there will or may be editorial influence), nor does section 8.

News and Current Affairs

The US makes no distinction between news and current affairs programming and other content in the application of its sponsorship-identification rules. No special treatment is accorded news and current affairs content.

The other jurisdictions make special provision for news coverage:

- In the UK, news bulletins cannot be sponsored and restrictions are placed on news readers and presenters voicing advertising messages, although this is not prohibited.
- In Canada, news readers are prohibited from reading advertisements during a newscast.
- In Ireland, persons who regularly present news programs are prohibited from being featured in advertising and sponsorship communications. News bulletins can not be sponsored.

None of the jurisdictions makes special provision for current affairs programming.

Australia: The *CRA Code* prohibits advertisements being presented as news programs, but does not otherwise address the need for separation of advertising and news programming or those associated with news programming. The *Compliance Program Standard* deals with disclosure in the context of current affairs programming, but does not restrict current affairs presenters from having commercial

arrangements or airing content which may be relevant to those arrangements during a current affairs program.

Regulatory Obligations

With the exception of the US, no jurisdiction imposes liability on any persons other than the licensee in relation to commercial interests. It is thus left to a licensee to ensure that it has adequate internal compliance measures in place in order to ascertain whether any other persons may be associated with undisclosed commercial practices. The US sponsorship-identification rules impose obligations on employees and third parties, who are associated with the production or payment of program content, who receive consideration for broadcasting content; on persons who make such payment or consideration, and on other persons supplying program matter who may have information, to make disclosure of the fact of the payment or consideration. These rules are designed to ensure that the sponsorship-identification rule is not undermined by making commercial arrangements with persons other than the licensee. Breach of this requirement is a criminal offence.

Australia: The intent of the *Disclosure Standard* is similar to that of the sponsorship-identification rules. However, unlike the US, these obligations cannot be enforced against anyone other than the licensee.

Germany

Germany is noted here separately because the review of Germany is not a full review comparable to the other jurisdictions. Germany's regulation of advertising, sponsorship and other commercial influences bears a strong resemblance to UK and Ireland. Germany does not provide separate rules for radio and television, and, as such, the rules are heavily influenced by EU law, currently the *TWF Directive*, including the definitions of 'advertising', 'sponsorship', and 'surreptitious advertising'.

Germany still retains limits on the amount of advertising which can be broadcast. Like the UK and Ireland, German regulation of advertising and sponsorship reflects the principles of transparency and editorial independence. Hence, rules require:

- the separation of advertising from programming;
- clear signals to be given to ensure disclosure and separation of advertising;

- information about the fact of sponsorship to be provided;
- that in the case of sponsorship, no promotional activities occur; and
- that no influence is exerted by advertisers or sponsors on program content or scheduling.

Infomercials, that is, advertising presented as program content, are permitted, but, here too, the principle of transparency will be relevant. Infomercials must be clearly recognisable as advertising content.

Again, like the UK and Ireland, there is a prohibition on all forms of disguised or surreptitious advertising, such as product placement.

With regard to news and current affairs programming, there are no restrictions on advertising; nor are there restrictions on any person who might be associated with news and current affairs programming appearing in advertisements. However, sponsorship of news and current affairs is prohibited.

PART A: REPORTS OF JURISDICTIONS

1 UNITED KINGDOM

1.1 The United Kingdom broadcasting environment

1.1.1 Overview

Primary responsibility for regulation of broadcasting (and telecommunications) in the United Kingdom (UK) rests with the Office of Communications (Ofcom), a statutory regulatory authority established under the Office of Communications Act 2002 (UK).²⁰ Ofcom's powers were formally vested in December 2003. Ofcom's formation was part of a major reform of communications regulation in the UK, encompassed in the Communications Act 2003 (UK) (Comms Act (UK)). It replaced a large number of regulatory bodies which had responsibility for broadcasting, telecommunications, and spectrum regulation. Ofcom's responsibilities come under two government departments, the Department for Business, Enterprise and Regulatory Reform²¹ and the Department for Culture, Media and Sport. It is the latter body which is most relevant to broadcasting. The most relevant legislation for broadcasting is the Comms Act (UK), the Broadcasting Act 1990 (UK) (BA 1990 (UK)), and the Broadcasting Act 1996 (UK) (BA 1996 (UK)).²² Ofcom also has responsibility for some aspects of the British Broadcasting Corporation's (BBC) activities.

Broadcasting in the UK offers a typical mix of radio and television services both with regard to type of delivery and nature of service. Compared with the other jurisdictions reported here, there are two distinguishing features.

First, is the long and well-established tradition of public service broadcasting which has shaped not only the public broadcaster, the BBC (and, later, Channel 4), but also the free-to-air private commercial services. The maintenance of public service principles has led to close regulatory supervision of broadcasting in the UK, especially television. Also relevant is the dominant role played by the BBC throughout UK broadcasting history. Commercial television services only began in 1955. Local commercial radio began in 1972 and national radio services in 1992. Despite the 2003 reforms the influence of public service broadcasting principles can

²⁰ <http://www.ofcom.org.uk/>

²¹ The Department was formerly known as the Department of Trade and Industry.

²² References to the BA 1990 (UK) will be as amended by the BA 1996 (UK) and the Comms Act (UK); references to the BA 1996 (UK) will be as amended by the Comms Act (UK).

still be detected. Although radio is no longer identified as public service broadcaster²³, it retains format and, where relevant, local content obligations.

Secondly, the availability and adoption of digital broadcasting services in the UK are considerably more advanced. This is especially the case with television and the UK has already begun a process of switching off analogue transmission.²⁴ It is less clear yet whether the analogue signal for radio will be switched off, although the Government has suggested that it will develop strategies to enable digital to become the primary distribution network for radio.²⁵

Radio services in the UK are transmitted over the air on AM or FM, and by digital audio broadcasting (DAB). Radio services are also delivered via digital satellite and cable. As at July 2008, the number of radio stations broadcasting was as follows²⁶:

- Commercial
 - Local commercial:
 - 305 analogue services of which 245 were FM and 60 AM
 - 124 DAB services
 - UK-wide commercial:
 - 3 analogue services of which 1 is FM and 2 are AM
 - 4 DAB services
- Public (BBC)²⁷
 - Local and nations²⁸:
 - 46 analogue services
 - 32 DAB services
 - UK-wide networks:
 - 5 analogue services
 - 11 DAB²⁹

There are also approximately 80 stations broadcasting on digital satellite, and a further 27 on Freeview, and 34 on cable.³⁰ Community radio only began to be licensed in 2005. As at July 2008, 179 licences had been issued.³¹ In terms of market

²³ Comms Act (UK), section 264.

²⁴ See Digital UK, <http://www.digitaluk.co.uk/>.

²⁵ Department for Business, Enterprise and Regulatory Reform & Department for Culture, Media and Sport, *Digital Britain: the Interim Report* (Cm 7548, 2009), 35.

²⁶ Ofcom, *The Communications Market 2008* (2008), 243.

²⁷ Many BBC services are broadcast on AM and FM frequencies.

²⁸ 'Nations' refers to the English regions, Northern Ireland, Wales, and Scotland.

²⁹ The figures here for DAB services are slightly misleading as they are not all digital-only services. There are 38 digital-only stations. Of this list of radio stations, there are a total of 397 unique stations.

³⁰ Ofcom, *The Communications Market 2008* (2008), 243. Again some of these stations will be simulcasts. 'Freeview' refers to the digital terrestrial service free-to-air service.

³¹ Ofcom, *The Communications Market 2008* (2008), 245.

share, at end first quarter 2008, the BBC dominated with 57% of share of total radio listening, while commercial radio's share reached just over 41%.³²

1.1.2 Licensing of commercial radio

Within the radio sector, the main licensed services are commercial services. However, other services licensed are community radio and restricted service licences. Information about other radio services and digital service is provided in the *Appendix*.

1.1.2.1 Local commercial services

Local commercial licences are awarded on a merit process for a term not longer than 12 years.³³ Ofcom must have regard to the viability of the service; the potential of the service to cater for local interests; the extent to which it would broaden local diversity; and the demand for such a service.³⁴ Under the Comms Act (UK), Ofcom is required to carry out its regulatory functions in relation to local radio services in a way which is best calculated to ensure that:

- The service includes programs consisting of local material; and
- A suitable proportion of such programs are locally-made.³⁵

Formats proposed by licensees become conditions of a licence and can be changed only with the approval of Ofcom.³⁶ Ofcom monitors – by content sampling – stations to assess whether the station is adhering to its format.

Local services are not restricted with regard to the amount, frequency, or distribution of advertising on their services.

1.1.2.2 National commercial services

National commercial radio is also format-based to an extent. Under the BA 1990 (UK) one service is required to broadcast mainly spoken material.³⁷ This service, which is broadcast on the AM spectrum, is known as *talkSPORT*. Another service is required to provide a music service in a genre other than 'pop music'.³⁸ *Classic FM*, broadcast on the FM spectrum, is the licence which fulfils this requirement. A third

³² Ofcom, *The Communications Market 2008* (2008), 252.

³³ BA 1990 (UK), section 86(3).

³⁴ BA 1990 (UK), section 105.

³⁵ Comms Act (UK), section 314.

³⁶ BA 1990 (UK), sections 106(1A) &(1B).

³⁷ BA 1990 (UK), section 85(2)(i).

³⁸ BA 1990 (UK), section 85(2)(ii).

service, *Virgin Radio*, also broadcasting via AM, has no stipulations as to format. Licences were allocated by auction.

National services are not restricted with regard to the amount, frequency, or distribution of advertising on their services.

1.2 The Broadcasting Regulatory Environment

1.2.1 Broadcasting policy

As noted above, the traditions of public service broadcasting still influence the UK broadcasting environment. This can be discerned also in the general statutory obligations imposed upon Ofcom:

- (1) It shall be the principal duty of OFCOM, in carrying out their functions [...]
 - (a) to further the interests of citizens in relation to communications matters; and
 - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- (2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following [...]
 - (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
 - (d) the maintenance of a sufficient plurality of providers of different television and radio services;
 - (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
 - (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services³⁹

In carrying out its duties, Ofcom is to have regard to certain regulatory principles; namely:

The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

³⁹ Comms Act (UK), section 3.

any other principles appearing to Ofcom to represent the best regulatory practice.⁴⁰

Other aspects of this regulatory policy are contained in the legislation. For example, Ofcom must keep under review their functions in order to ensure that they don't impose or continue unnecessary regulatory burdens.⁴¹ In fulfilling these obligations, Ofcom must give consideration to whether effective self-regulation can be used.⁴² Despite the so-called 'bias against intervention' in the new UK regulatory environment, it is clear that, within the broadcasting context, Ofcom has adopted a very cautious approach to contracting out its powers to self-regulation, and to date only some aspects of advertising regulation have been contracted out, as discussed in sections 1.2.2.1 and 1.2.2.2 below.

In reviewing advertising and sponsorship regulation in the UK, it is important to note a fundamental principle in UK broadcasting, of relevance to public and commercial broadcasting, which will provide a backdrop to the specific rules on advertising and sponsorship, and to other rules which may be concerned with the impact of other commercial or paid-for interests. This principle is the requirement of due impartiality, in other words, a rule against editorialising.⁴³ There is a slight relaxation for local radio services. The principle of impartiality applies to matters of political or industrial controversy, and matters of current public policy. The effect of sections 319 and 320, so far as they related to commercial radio is as follows:

- All news must be presented with due impartiality;
- A licensee must exclude any expression of its own views and opinions;
- National commercial radio services must exercise due impartiality; and
- Local radio commercial radio services must avoid giving undue prominence to the views and opinions of particular persons or bodies.

It is Ofcom's responsibility to include draw up rules to secure these obligations. This is dealt with in section 5 of the *Ofcom Broadcasting Code (Ofcom Code)*.

⁴⁰ Comms Act (UK), section 3(3).

⁴¹ Comms Act (UK), section 6(1).

⁴² Comms Act (UK), section 6(2).

⁴³ The term 'due' is to obviate the need for giving equal time for every view or opinion.

1.2.2 The Regulatory Framework

As noted above, with the establishment of Ofcom there was a clear policy move towards a more light-touch regulatory approach,⁴⁴ although Ofcom has retained core responsibilities for many aspects of broadcasting regulation.⁴⁵ With respect to content regulation, Ofcom retains responsibility for much of this area, although some aspects of advertising regulation have been contracted out to the Advertising Standards Authority (ASA) as part of a co-regulatory scheme. This is explained further in section 1.2.2.2 below, but in essence, Ofcom retains responsibility for all program content matters. The ASA has responsibility for traditional spot advertising. Ofcom retains responsibility for sponsorship and product placement.

1.2.2.1 The Role of Ofcom

It is the responsibility of Ofcom to develop (and keep under review) codes setting out standards for program content (which includes advertising and sponsorship) rules,⁴⁶ although this is subject to its power to transfer some of its functions to a self-regulatory process, as will be discussed in the next section. Sections 319-322 of the Comms Act (UK) contain detailed provisions of the type of matters which must be addressed in the standards, but these provisions do not themselves create the broadcasters' obligations.⁴⁷ Compliance with standards will be a condition of licence.⁴⁸ The standards for which Ofcom retains responsibility, and which are relevant to commercial radio, are contained in the *Ofcom Code*.⁴⁹

Ofcom consideration of potential breaches of the *Ofcom Code* is mainly complaints-led. However, Ofcom will initiate investigations when it considers it appropriate. It does not appear that Ofcom undertakes an active monitoring program regarding adherence to standards. However, Ofcom does monitor local commercial radio's

⁴⁴ Department of Trade and Industry & Department for Culture, Media and Sport, *A New Future for Communications* (Cm 5010, 2000), para 8.11.

⁴⁵ In 2008 Ofcom consulted on its approach for promoting and adopting forms of self-regulation and co-regulation; see *Initial Assessments of when to adopt Self-regulation or Co-regulation* (27 March 2008), <http://www.ofcom.org.uk/consult/condocs/coregulation/>. Following the consultation, Ofcom issued a statement setting out the principles it will use: *Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation*, *Statement* (10 December 2008), <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/>.

⁴⁶ Comms Act (UK), section 319(1).

⁴⁷ Section 324 sets out the procedure for devising and consulting on the codes.

⁴⁸ Comms Act (UK), sections 325-326.

⁴⁹ October 2008, <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>. Ofcom also issues guidance notes which are designed to assist a licensee in interpreting and applying the *Ofcom Code*, but the guidance notes are non-binding. Ofcom regularly updates the guidance notes.

adherence to the licensee's format. In the course of these sampling reports, it is possible for potential breaches of the *Ofcom Code* to be detected and acted upon.⁵⁰

Reports in the media may also lead to an Ofcom investigation. This was case in a recent investigation into the ITV commercial television network concerning the abuse of premium rate services, which resulted in fines of over £5 million. In addition, ITV agreed to pay £7.8 million in compensation to viewers and to charity. This is the highest fine imposed by Ofcom or previous broadcasting regulators.⁵¹

There are several committees of the Ofcom Main Board which deal with matters related to the *Ofcom Code*:

- The Ofcom Content Board is established under section 12 of the Comms Act (UK) and its primary role is the regulation of broadcasting content.⁵²
- The Fairness Committee is a sub-committee of the main board. It deals with complaints about fairness and privacy.⁵³ This sub-committee is more concerned with dealing with complaints from individuals or organizations who consider that they may have been dealt with unfairly or whose privacy may have been infringed.
- The Content Sanctions Committee is a sub-committee of the main board and it deals with the question of whether a statutory sanction should be imposed for breach of the *Ofcom Code* and what that sanction should be.⁵⁴ Matters are referred to it by the Ofcom executive. This committee will also deal with

⁵⁰ See Ofcom, *Radio Sampling Report – Dream 107.7* (22 June 2007), <http://www.ofcom.org.uk/radio/ifi/contentsampling/dream107.pdf>, where possible breaches of sponsorship rules were detected.

⁵¹ The size of the fine reflected the seriousness of the matter and the repeated nature of the breaches. The fines included a fine of £3 million in relation to one program. The largest fine previously imposed by Ofcom was £2 million.

⁵² See also Comms Act (UK), section 13. Guidelines are in place for how complaints and Ofcom-initiated investigations are dealt with: Ofcom, *Guidelines for the handling of standards, complaints and cases (in programmes, advertising and sponsorship)* (March 2004). These guidelines pre-date the *Ofcom Code* but appear to still be applicable to the process.

⁵³ In the UK context, 'fairness' refers to the treatment of individuals or organizations in relation to a particular program. Australian regulation of fairness and accuracy would find its counterpart in the UK rules on impartiality and accuracy. However, there is a substantive difference in approach given the UK requirements of no-editorializing.

⁵⁴ Breaches of other codes may also come within the jurisdiction of the Sanctions Committee but these are not relevant to this report.

sanctions which might arise from matters dealt with by the ASA. Ofcom has a set of guidelines to be used in the process for dealing with sanctions.⁵⁵

1.2.2.2 The role of the Advertising Standards Authority

The ASA is a long-established advertising-industry-established self-regulatory body which, until recently had been responsible for regulation of non-broadcast advertising in the UK.⁵⁶ The ASA takes responsibility for adjudication of complaints, and, where a formal investigation is warranted, the ASA Council will make the final ruling on adjudications. The ASA Council is a mix of a majority of independent members and industry members. The Committee on Advertising Practice (CAP) drafts the rules, provides guidance, and monitors their operation. The ASA is primarily a complaints-based adjudication system, although it may act on its own initiative or where matters are brought to its attention by CAP.

In 2004, Ofcom contracted out to the ASA its responsibilities for regulation of standards relating to advertising and rules as to the amount and scheduling of advertisements (not applicable to radio).⁵⁷ Under the Comms Act (UK), Ofcom when determining whether self-regulation procedures will be effective, must have regard to the independence of the person administering the process from the persons to be administered; and whether adequate arrangements are in place to fund the activities of the person administering the process.⁵⁸

For commercial radio, the relevant code is the *Radio Advertising Standards Code (RAS Code)*. The *RAS Code* deals with advertising. Sponsorship, product placement and political advertising remain the responsibility of Ofcom. Ofcom considered that it was appropriate for it to retain responsibility for sponsorship regulation because of the strong link between sponsorship and editorial content.⁵⁹

Adherence to the *RAS Code* is a condition of a broadcaster's licence. Under the co-regulatory arrangements complaints about advertising, to the extent that they come

⁵⁵ Ofcom, *Outline procedures for statutory sanctions in content and content-related cases* (18 January 2008).

⁵⁶ www.asa.org.uk

⁵⁷ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004).

⁵⁸ Section 6(3).

⁵⁹ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), para 10(f).

within the jurisdiction of the ASA are determined by the ASA, but referred to Ofcom if it is considered that a statutory sanction is required.

Pursuant to the co-regulatory arrangements, several new entities were established within the auspices of the ASA to deal with the delegated functions⁶⁰:

- Advertising Standards Authority (Broadcast) Ltd (ASA(B)) is the entity responsible for handling and resolving complaints about advertising on broadcasting.⁶¹ The ASA(B) is required to produce and publish a guide to its procedures for dealing with complaints.⁶² Adjudications on complaints are made by the ASA Council. Under the co-regulatory arrangements, for broadcasting content, adjudications will be made by the ASA(B) Council.⁶³
- The Broadcast Committee of Advertising Practice (BCAP) is responsible for code setting and monitoring. The codes currently under the responsibility of BCAP have been inherited from Ofcom, but BCAP will have the power to revise those codes as necessary.⁶⁴ Code changes by BCAP must be agreed to by Ofcom. Ofcom retains the legal power to amend the codes if it considers it necessary to intervene. However, it is clear that Ofcom's intention is to respect the autonomy and independence of the ASA(B) and BCAP.⁶⁵
- The Broadcasting Advertising Standards Board of Finance Ltd (Basbof). Basbof is responsible for the collection of a levy imposed on broadcast advertising to fund the self-regulatory system.

⁶⁰ See Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), para 10.

⁶¹ In practice, the ASA tends to refer to the ASA(B) as the ASA to "reflect the fact that the ASA operates a 'one-stop shop'": see ASA, *Broadcast Complaints Handling Procedures* (25 January 2008).

⁶² See ASA, *Broadcast Complaint Handling Procedures* (January 2008), <http://www.asa.org.uk/NR/rdonlyres/1CC0407B-210C-488A-B5D1-71EB6A25AAC9/0/BroadcastComplaintHandlingProcedures25Jan08.pdf>

⁶³ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), para 17. In practice, the ASA Council now has two arms: one dealing with non-broadcast adjudications, and one dealing with broadcast adjudications.

⁶⁴ A review of the RAS Code commenced in May 2008. In March 2009, BCAP launched a consultation on a proposed new code, http://www.cap.org.uk/cap/Consultations/open/BCAP_Code_Review_consultation/BCAP+Code+Review+Consultation.htm. This is considered further in section 1.5 below.

⁶⁵ See, for example, Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), paras 8-9.

The co-regulatory arrangements also make provision for regular liaison and contact between ASA(B)/BCAP and Ofcom, including formal contact through the holding of meetings.⁶⁶ ASA(B)/BCAP are required to report regularly to Ofcom on agreed key performance indicators.⁶⁷ Other reporting arrangements are also put into place including provision in the ASA Annual Report covering the work of the three new entities established under the co-regulatory arrangements.⁶⁸

1.2.2.3 Enforcement and sanctions

Although the ASA⁶⁹ has responsibility for the regulation of most aspects of broadcast advertising, the co-regulatory arrangements ensure that Ofcom will also have a role to play in enforcement and sanctions of breaches under the *RAS Code*.

Ofcom

As noted above, compliance with the *Ofcom Code* and the *RAS Code* is a condition of licence. Ofcom has a range of statutory sanctions available to deal with licence condition breaches.⁷⁰ More than one type of statutory sanction can be imposed. Not all code breaches will result in the imposition of a statutory sanction. Less serious breaches may result in notification to the broadcaster and publication in the regularly produced *Ofcom Broadcast Bulletin*.⁷¹ However, statutory sanctions will be considered where "...a broadcaster has seriously, deliberately, repeatedly, or recklessly breached the terms of its licence conditions...".⁷²

⁶⁶ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), paras 51-54.

⁶⁷ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), paras 55-56.

⁶⁸ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), paras 73-74.

⁶⁹ Unless otherwise necessary, reference will be made to the ASA rather than to the ASA(B). The ASA usually refers to itself collectively.

⁷⁰ Whilst the range of sanctions generally applies to all licensees, information given here is specifically focused on commercial radio services – national and local. There may be variations, for example, in size of financial penalties and in the applicability of some of these sanctions to different licences.

⁷¹ Ofcom, *Guidelines for the handling of standards, complaints and cases (in programmes, advertising and sponsorship)* (March 2004), para 18. The *Bulletin* is available at http://www.ofcom.org.uk/tv/obb/prog_cb/

⁷² Ofcom, *Outline Procedures for statutory sanctions in content and content-related cases* (18 January 2008), para 1. Ofcom also has power to impose sanctions on the public broadcasters, including the BBC, but these powers are not considered in this report.

Pursuant to the BA 1990 (UK), the BA 1996 (UK), and the Comms Act (UK), Ofcom can:

- Issue a direction to broadcast a statement of Ofcom's findings or a correction.⁷³ Under this provision, Ofcom can also direct a licensee during a specified period, not exceeding 12 months, to provide Ofcom with scripts, details of programs, and recorded matter (where it exists) in advance of a broadcast. This requirement to produce only applies where there has been during the specified period further non-compliance with licence conditions or directions.
- Impose a financial penalty.⁷⁴
 - For a national radio licence, the maximum penalty is the greater of £250,000 or 5% of the qualifying revenue.⁷⁵
 - For a local radio licence, the maximum penalty is £250,000.

Ofcom is required to publish guidelines for the determination of financial penalties.⁷⁶ These guidelines deal with the criteria for determining the level of penalty, and the factors which would tend to increase or decrease the level.

- Shorten a licence term for a period not exceeding two years.⁷⁷
- Suspend a licence term for a period not exceeding six months.⁷⁸
- Revoke a licence.⁷⁹ If Ofcom considers that revocation is justified, it must first serve a notice on the licensee directing the licensee to take specified steps to remedy the non-compliance within a specified period. If at the end of the specified period the licensee has not taken the requisite steps, and Ofcom is satisfied it is necessary in the public interest to revoke the licence then it must do so.

⁷³ BA 1990 (UK), section 109.

⁷⁴ BA 1990 (UK), section 110.

⁷⁵ National radio licensees are required to pay a percentage per annum of their qualifying revenue (determined according to a statutory formula): see further BA 1990 (UK), section 102.

⁷⁶ Comms Act (UK), section 392. Ofcom has published *Penalty Guidelines, Section 392 of the Communications Act 2003*, <http://www.ofcom.org.uk/about/accoun/pg/>

⁷⁷ BA 1990 (UK), section 110(1)(b).

⁷⁸ BA 1990 (UK), section 110(1)(c).

⁷⁹ BA 1990 (UK), section 111.

A condition of a broadcaster's licence requires compliance with directions given by Ofcom to do or refrain from doing such things as may be related to the broadcasters' obligation under the licence or codes.⁸⁰ A direction under this power can be issued directly by an executive officer of the Ofcom Content Board. Failure to comply with a direction can lead to the imposition of statutory sanctions.

The ASA

Under their licence conditions, licensees must comply with directions issued by a body to whom Ofcom has contracted out its responsibilities. Although it will usually be an advertiser who is responsible for the production of the advertising content, it is licensees who will be accountable for advertising under the *RAS Code* pursuant to their licence obligations.⁸¹

Pursuant to the co-regulatory arrangements, if the ASA upholds a complaint, it has the power to:

- Require the advertisement to be changed prior to further broadcast
- Require the broadcaster to restrict transmission of the advertisement
- Require the broadcaster to cease to broadcast the advertisement.⁸²

Other sanctions, such as the imposition of financial penalties, remain with Ofcom. If the ASA considers that a breach (or ongoing non-cooperation or non-compliance) warrants it, the ASA can refer the matter to Ofcom. Ofcom will be able to impose sanctions as described above.⁸³

⁸⁰ The power to impose the condition on commercial radio services is found at BA 1990 (UK), section 87(2). See further Ofcom, *Outline procedures for statutory sanctions in content and content-related cases* (18 January 2008), paras 3 & 30-31.

⁸¹ In practice, clearing house arrangements ensure pre-vetting of most advertisements, although not necessarily those broadcast by local radio. In dealing with complaints, the ASA will also be in contact with the clearing houses and with advertisers and/or advertising agencies: see ASA, *Broadcast Complaint Handling Procedures* (25 January 2008), para 7.

⁸² Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), para 22. The ASA may also require broadcasting of an advertisement to be suspended during an investigation if it considers public harm may result: ASA, *Broadcast Complaint Handling Procedures* (25 January 2008), para 18. The Memorandum also permits further action to be taken, if the ASA considers it necessary, to ensure future compliance such as calling all parties in for meetings and ruling out eligibility for competitions: paras 25-26.

⁸³ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), para 27.

1.3 Regulation of advertising and sponsorship on commercial radio

The *Ofcom Code* applies to all radio and television services (and to public broadcasters) licensed by Ofcom, although there are variations as to how the rules apply to some services, and as between television and radio.⁸⁴ The *RAS Code* is relevant to all radio broadcasting licensees which carry advertising. However, for the purposes of this report, the two *Codes* will only be considered to the extent that they are relevant to commercial radio services.

1.3.1 Definitions

The legislation does not provide definitions of ‘advertising’ or ‘sponsorship’. This is left to the codes, as reported below.

1.3.2 Advertising, sponsorship, and related rules

1.3.2.1 Amount of advertising

Commercial radio is not subject to any restrictions on the amount of advertising which it can broadcast.

1.3.2.2 Political advertising

Political advertising is prohibited. Ofcom is required to ensure that no advertisement is broadcast by, or on behalf of, any body whose objects are wholly or mainly of a political nature, and no advertisement is directed towards any political end.⁸⁵ This is broader than simply prohibiting party political advertising. The rules dealing with this prohibition are found in the *RAS Code* but responsibility for them is retained by Ofcom.⁸⁶ A further prohibition is imposed on advertisements which show undue partiality in matters of political or industrial controversy or relating to current public policy; or which relate to any industrial dispute.⁸⁷ Ofcom retains responsibility for regulation of this prohibition also.

⁸⁴ The *Ofcom Code* is currently under review. This is considered in section 1.5 below.

⁸⁵ Comms Act (UK), sections 319(2)(g) and 321(2). See also section 321(3).

⁸⁶ Ofcom, *Memorandum of Understanding between Ofcom & The Advertising Standards Authority (Broadcast) Ltd & the Broadcast Committee of Advertising Practice Ltd & The Broadcast Advertising Standards Board of Finance* (May 2004), para 10(d). See *RAS Code*, section 2.15.

⁸⁷ *RAS Code*, section 2.15.

1.3.2.3 General

The RAS Code

In essence, the *RAS Code* is concerned with ensuring that radio advertising is “...legal, decent, honest, and truthful.” It applies the rules “...in spirit as well as in the letter.”⁸⁸

The definition of ‘advertising’ is one which focuses on commercial activity, that is, the selling of goods and services:

...refers to any items, including spot advertisements and promotions with advertisers, which are broadcast in return for payment or other valuable consideration to a licensee or which seek to sell to listeners any products or services.⁸⁹

It is noted that this definition refers to payments to licensees only. The definition is not especially detailed on the nature of an ‘advertisement’ and would seem to rely on commonly understood notions, by using terms such as “spot advertisements”.

Two provisions in the *RAS Code* are of particular relevance. Section 2.1 requires transparency and clear separation of advertising:

Advertising must be clearly distinguishable from programming.
Licensees must ensure that the distinction between advertising and programming is not blurred and that listeners are not confused between the two.

The guidance to this rule emphasises that particular care must be taken with any expressions or sound effects normally associated with news bulletins.

Section 2.24 deals with the relationship between station presenters and newsreaders in advertising:

Station presenters/newsreaders may voice advertising messages provided that a proper distinction is made between the programming material and the advertising material they deliver. However, they may not be used to advertise products which may be seen to compromise the impartiality of their programming role. They should not make references to any specific advertisement or product, except within the Rules of this Code, and may not personally endorse products or services.

No guidance is given on this rule. Related to the last part of this rule is a prohibition on presenters making personal testimonials within advertisements on stations on

⁸⁸ *RAS Code*, section 1.1.

⁸⁹ *RAS Code*, section 1.1. The *Code* also excludes promotion of the radio station’s own-branded activities, goods and events which are not designed to make a profit or promote commercial partnerships.

which they appear.⁹⁰ The *RAS Code* does not provide any definition of ‘station presenter’ or ‘newsreader’.

The obligation of compliance with these provisions will of course be on the licensee. It will be seen that there is no direct prohibition on newsreaders/presenters voicing advertising messages during a news program, although the qualification of not compromising impartiality may mean that this practice would not be feasible.

The Ofcom Code

The *Ofcom Code* deals with program standards generally, but as noted above also includes rules covering sponsorship and other commercial references. These provisions will be especially relevant to news and current affairs coverage, but some other provisions of the program standards will also be relevant to the relationship between news and current affairs coverage and commercial or paid-for interests.

Sponsorship

The sponsorship rules will be considered first. These are covered in section 9 of the *Ofcom Code*. Section 9 sets out the principle which informs the sponsorship rules:

To ensure that the unsuitable sponsorship of programmes on radio and television is prevented, with particular reference to:

- transparency – to ensure sponsorship arrangements are transparent;
- separation – to ensure that sponsorship messages are separate from programmes and to maintain a distinction between advertising and sponsorship; and
- editorial independence – to ensure that the broadcaster maintains editorial control over sponsored content and that programmes are not distorted for commercial purposes.⁹¹

Definitions are provided:

- ‘sponsored programme’ - A sponsored programme, which includes an advertiser-funded programme, is a programme that has had some or all of its costs met by a sponsor with a view to promoting its own or another's name, trademark, image, activities, services, products or any other direct or indirect interest.
- A channel is a television or radio service. A sponsored channel is a channel that has had some or all of its costs met by a sponsor with a view to promoting its own or another's name, trademark, image, activities, services, products or any other direct or indirect interest.

⁹⁰ *RAS Code*, section 2.18.

⁹¹ In this principle, ‘programmes’ includes ‘channels’ – see definitions above.

Costs include any part of the costs connected to the production or broadcast of the programme or channel.

- A sponsor is any public or private undertaking (other than the broadcaster or programme producer), who is sponsoring the programme, programming or channel in question with a view to promoting their or another's name, trademark, image, activities, services, products or any other direct or indirect interest. This meaning extends to those who are otherwise supplying or funding the programme or channel.

Although it is clear from these definitions that sponsorship is an accepted practice, the rules impose certain constraints consistent with the need to comply with the principles of transparency, separation, and editorial independence, noted above. The underlying requirements of impartiality must also be factored into any sponsorship arrangements.

So far as news and current affairs are concerned:

- Rule 9.1 prohibits the sponsoring of news bulletins and news desk presentations on radio. Ofcom's guidance in relation to this rule 9.1 reminds licensees that sponsorship arrangements should not compromise the requirement to present news with due impartiality and due accuracy. It suggests that news bulletins should not be broadcast during a sponsored program.
- Unlike television, radio is permitted to have current affairs programs sponsored.⁹² Ofcom publishes guidance on section 9.⁹³

Rules are in place to preserve the independence of sponsored content. Hence, rule 9.4:

A sponsor must not influence the content and/or scheduling of a channel or programme in such a way as to impair the responsibility and editorial independence of the broadcaster.

Other rules buttress this requirement of independence by providing more specific regulation. For example, rule 9.5 prohibits any promotional reference to the sponsor including trademark, image, services or products, or to any of its other direct or indirect interests (for example, associated companies). However, non-promotional

⁹² A current affairs program is defined as one "...that contains explanation and analysis of current events and issues, including material dealing with political or industrial controversy or with current public policy": *Ofcom Code*, section 9.

⁹³ Ofcom, *Guidance Notes, Section 9: Sponsorship* (Issue Six: 17 July 2008).

references are permitted provided they are editorially justified and incidental.⁹⁴ It is clear however, from Ofcom's guidance notes that great care must be taken with such references, since a reference to a sponsor "...may create a higher presumption of editorial influence by the sponsor."⁹⁵ It is not permissible, for example, to include in a sponsorship agreement a condition that reference will be made to a sponsor within a program.

To ensure that the listener is aware of the sponsorship arrangement, there are a number of rules which deal with identification and sponsorship credits:

- Rule 9.6 requires sponsorship to be "...clearly identified as such by reference to the name and/or logo of the sponsor. For programmes, credits must be broadcast at the beginning and/or end of the programme."
- Rule 9.7 requires the relationship between the sponsor and the sponsored channel or programmes to be transparent.

There are additional rules to cover radio:

- Rule 9.8 requires licensees to ensure that during longer sponsored output, credits are broadcast "...as appropriate to create the degree of transparency required".
- Rule 9.9 allows credits to contain legitimate advertising messages but the credits must nevertheless be "...short branding statements".⁹⁶

Ofcom's guidance regards rule 9.6 as representing the minimum requirement to help ensure transparency.

Although rule 9.9 allows an advertising message to be included in the sponsorship credit, Ofcom's guidance reminds licensees that a credit's primary purpose is to provide the listener with information about the fact of the sponsorship arrangement. Hence, the sponsorship credit should not sound like an advertisement.⁹⁷

As noted above, it is also permissible to sponsor channels. Ofcom provides quite lengthy guidance on what will be appropriate for sponsorship (further specific guidance can be sought from Ofcom), and how to deal with identification and

⁹⁴ Promotional reference is defined to include, but is not limited to, "...references that encourage, or are intended to encourage, the purchase or rental of a product or service", rule 9.5.

⁹⁵ Ofcom, *Guidance Notes, Section 9: Sponsorship* (Issue Six: 17 July 2008).

⁹⁶ Rule 9.10 requires credits to be cleared in the same way as advertisements.

⁹⁷ Ofcom, *Guidance Notes, Section 9: Sponsorship* (Issue Six: 17 July 2008).

credits.⁹⁸ The type of matters which Ofcom will take into account when assessing whether a channel can be sponsored are:

- The amount of program material on the service which is sponsorable, which should be around 75%.
- The positioning of the channel. Thus, even if it carried more than 75% of sponsorable material, if it positions itself as, for example, primarily a news service, then it is unlikely to be suitable.

Whether a channel (radio service) can be sponsored links back into the rules on the relationship between news and current affairs programming and sponsored channels. A radio service, which carries news, is not excluded from being sponsored because it carries some news, but it is unlikely that a radio service which broadcast almost all news could be sponsored. Sponsorship is of the channel (service) not individual programs. Nevertheless, Ofcom reminds broadcasters that they must be careful not to create an impression of programs being sponsored.

In sum, it can be seen that the rules are designed to ensure not just transparency, but editorial independence.

Commercial References

Of key importance to the concerns about commercial interests on news and current affairs programming, is section 10 of the *Ofcom Code* which deals with commercial references. These rules cover the potential influence of commercial interests over programming, whether it is in the form of recognizable advertising or some other arrangement or practice, such as disguised advertising. The relevance of the rules is clear from the statement of principles:

- To ensure that the independence of editorial control over programme content is maintained and that programmes are not distorted for commercial purposes.
- To ensure that the advertising and programme elements of a service are clearly separated.

Section 10 includes an extensive list of rules, some of which are relevant only to television. Rules 10.1 and 10.2 state the general requirements:

- Broadcasters must maintain the independence of editorial control over programme content (rule 10.1)

⁹⁸ Ofcom, *Guidance Notes, Section 9: Sponsorship* (Issue Six: 17 July 2008).

- Broadcasters must ensure that the advertising and programme elements of a service are kept separate (rule 10.2)⁹⁹

These rules are important in reminding licensees of their obligations with regard to all forms of commercial reference – advertising, sponsorship, and disguised forms of advertising. Although advertising is covered by the *RAS Code*, these rules mean that Ofcom will have direct regulatory responsibility for conduct which would fall within these rules.

There is also a series of rules which deal with more particular situations. One group of rules will be dealt with here. Although these rules do not address news and current affairs specifically, it will be apparent that they could certainly be relevant to the coverage of material in such programs. These rules relate to the use of products or services in programs.

- Rule 10.3 prohibits the promotion of products and services within a program.¹⁰⁰ This rule is also intended to maintain a distinction between advertising and programming. A promotion will occur “...where there is a clear ‘sell’”.¹⁰¹
- Rule 10.4 prohibits any undue prominence being given to a product or service in a program. Undue prominence is likely to occur when there is no editorial justification for a reference to a product or service (company names, brand names, logos) within a program or because of the manner in which the same appears within a program. The Ofcom guidance accepts that reference to branded products and so forth will be inevitable, but there must be no negotiation or agreement as to that appearance with the supplier.
- Rule 10.5 prohibits product placement. ‘Product placement’ is a practice which is likely to be of greater relevance to television, but it nevertheless can occur in radio. Prohibition of product placement has been a longstanding

⁹⁹ Rule 10.12 reiterates the separation requirements and prohibits advertisements appearing in program time unless editorially justified.

¹⁰⁰ This rule does not prohibit program-related material, which can be promoted provided it is editorially justified. Program-related material is products and services which are directly derived from a program and are intended to allow the audience to benefit from or interact with the program: rule 10.6.

¹⁰¹ Ofcom, *Guidance Notes, Section 10: Commercial References and other Matters* (Issue Ten: 11 April 2008).

policy, although it has been recently under review (see section 1.5 below).

‘Product placement’ is defined in the *Ofcom Code*:

Product placement is the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either). For the purposes of this rule, the following are not considered to be product placement:

References to products or services acquired at no, or less than full, cost, where their inclusion within the programme is justified editorially. [...]

These prohibitions indicate a strong commitment to the separation of program content from advertising, and the unacceptability of commercial interference with program content. As will be seen, these rules contrast with the US sponsorship-identification rules, which are concerned primarily with making the fact of sponsorship known rather than with any influence the sponsorship relationship may have over programming content. In this sense also there is a clear contrast with Australia, which also relies on identification, without guarantees of editorial independence.

1.3.3 Other rules of relevance

Under the *Ofcom Code*, one other program-related rule might be relevant. Section 2 is concerned with ‘Harm and Offence’. Thus, rule 2.2 prohibits factual programs or items materially misleading the audience. This rule does not cover news which is dealt with separately. Clearly, an undisclosed commercial relationship could mislead and thus cause harm and offence. In deciding whether a program materially misleads, the Guidance Statement suggests that it will depend upon a number of factors such as context, the editorial approach taken in the program, the nature of the misleading material, and the potential effect of the material.¹⁰²

1.3.4 Application of the rules and/or current issues

Two recent ASA adjudications highlight the subtlety of rules requiring separation of advertising and program content under *RAS Code* section 2.1. In *Royal Air Force t/a RAF*¹⁰³ the ASA considered two advertisements broadcast on radio promoting careers in the RAF. Although the advertisements were voiced by actors, they did contain lines such as “Kiss [the radio station] tries out for the Royal Air Force Careers.” This

¹⁰² Ofcom, *Guidance Notes, Section 2: Harm and Offence* (Issue 8: 27 May 2008).

¹⁰³ 25 February 2009, http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45838.htm

was because the advertisement was part of a combined promotion by the RAF and the broadcaster. The ASA did not find that a listener was likely to confuse the advertisement with program content. The advertisements were broadcast during a clear ‘ad-break’ and it was also made clear that the advertisements were being voiced by actors from a well-known television program. *Experian Ltd t/a Credit Expert*¹⁰⁴ concerned an advertisement about credit reports broadcast for this company on radio. The advertisement was broadcast as the first item during an ‘ad-break’ and was read by the radio program presenter, although it did come after a promotional trailer for another program, read by another presenter. There was also a station identity call and a jingle. It was the broadcaster’s view that there was sufficient separation from program material. As noted in section 1.3.2.3 above, a presenter is allowed to voice advertising messages under section 2.24. The ASA acknowledged the broadcaster’s attempts to separate the advertisement, but concluded that it was not sufficiently clear that the material was an advertisement. In this case, the ASA focused on the tone of the presenter’s voice and the nature of the product being promoted, concluding that they exacerbated the impression that the listener might have that this was program material. It is clear that the voicing of advertising material by a presenter, whilst permitted, will heighten the difficulty of ensuring clear separation of advertising and program content and that a broadcaster will need to focus on more than just physical separation of advertising and program content.

Ofcom¹⁰⁵ has also commented on the challenges posed by broadcasting presenter-voiced advertisements for compliance with the obligation to keep separate advertising and program content.¹⁰⁶ In this instance, there was a complete failure to separate, as required by the *Ofcom Code* rule 10.2 (see section 1.3.2.3 above), the paid-for advertising, about courses offered by a local college, from the program content which was about course options for school leavers.¹⁰⁷ Although Ofcom does not comment specifically on the subject matter of the broadcast, it may be that, as with the ASA *Experian* adjudication, the topic under discussion – educational options – increased the difficulty of separation. Since the promotion of this college occurred during program

¹⁰⁴ 25 February 2009, http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45826.htm

¹⁰⁵ In reviewing Ofcom decisions, we have focused on decisions which concern radio broadcasting and relate to news and current affairs or current affairs-like programming.

¹⁰⁶ *Matt Blunt, Atlantic FM (Cornwall), 4 July 2008, Ofcom Broadcast Bulletin* (Issue no. 116, 1 September 2008, 25).

¹⁰⁷ *Matt Blunt, Atlantic FM (Cornwall), broadcast 4 July 2008, Ofcom Broadcast Bulletin* (Issue no. 116, 1 September 2008), 25-26.

content, Ofcom also found breaches of rule 10.3 (promotion of products within a program) and rule 10.4 (undue prominence), because this was the only college to be mentioned during the program.

News Bulletin, 2-Ten FM highlights the care broadcasters should take with news sources.¹⁰⁸ In this decision, the broadcaster voiced an opinion, during a news bulletin, about the risks of inadequate flood protection in new homes. The opinion was provided by a representative of a company which sold flood protection equipment. A website link for the company was also broadcast. In considering whether there was a breach of rule 10.4, Ofcom held that it was irrelevant that there was no commercial relationship between the broadcaster and the company. Ofcom found a breach of rule 10.4 because of the manner in which the product was referred to. Here, the company's opinion was broadcast as fact and unchallenged. There was no editorial justification for the material to have been presented in this way. The complainant had also raised a breach of rule 10.5 (product placement) but this would have been inapplicable because there was no evidence of consideration being given as the definition of 'product placement' requires. However, as can be seen, this does not affect the operation of rule 10.4.

1.4 UK review of findings

Regulation of advertising and sponsorship is shared between the statutory regulator, Ofcom, and a self-regulatory body, the ASA. In general, regulation of advertising (in its traditional form) is the responsibility of the ASA, whilst Ofcom retains regulatory responsibility for sponsorship and other relevant commercial practices. In relation to those matters, Ofcom determines whether there has been a breach of relevant rules and has a range of sanctions to impose. Ofcom has shown itself willing to impose very substantial financial penalties when considered necessary. For matters under the jurisdiction of the ASA, the ASA will be responsible for adjudicating on complaints about alleged code breaches. If the ASA decides that a breach is sufficiently serious, it can refer it to Ofcom for consideration of further action. In general, the regulation of advertising and sponsorship relies on a complaints-based model.

¹⁰⁸ Broadcast 22 May 2008, *Ofcom Broadcast Bulletin* (Issue no. 116, 1 September 2008), 25-26.

The main sources of obligations relating to advertising and sponsorship for commercial radio licensees are located in the *RAS Code* (administered by the ASA) and the *Ofcom Code* (administered by Ofcom).

Regulation of advertising and sponsorship of commercial radio in the UK will be influenced also by the statutory obligation imposed on national commercial radio licensees to observe impartiality in news and current affairs coverage. The rule is modified slightly for local radio licensees: with respect to current affairs, licensees must refrain from giving undue prominence to the views and opinions of particular persons or bodies. Another influence on this area of regulation will be the prohibition on political advertising. This is not confined to party political advertising. The prohibition also extends to restrain certain forms of advertising which may relate to political or industrial controversy (or industrial dispute), or current public policy.

A key element of the approach towards regulation of advertising and sponsorship is the principle that, whilst advertising and sponsorship are recognised as acceptable revenue-raising activities, influence on, or interference with, the content of other programming is not tolerated. As such, there are extensive rules regulating advertising, sponsorship, and other forms of commercial influence.

Definitions

Definitions are located in the *RAS Code* or the *Ofcom Code* as relevant to the subject matter of the rules. The *RAS Code* contains a definition of advertising which is confined to commercial activity, namely the sale of goods and services. The definition applies only where payment/consideration is received by the licensee.

The *Ofcom Code* includes definitions relevant to the matters with which it deals; namely sponsorship and other commercial references. In the UK it is permissible to sponsor programs and channels (radio and/or television services), and definitions are provided to reflect this. A sponsored program or channel will be one in which some or all the costs of production of a program or the costs of operating a channel are met by the sponsor.

‘Product placement’ is also defined. This is a reflection of a broader set of rules governing commercial references in programs, as noted below, which may not be clearly recognizable as advertising or sponsorship, but may constitute a form of disguised advertising. Product placement in any form is prohibited.

Separation of commercial content from other programming

The key concern here is to ensure transparency and clear separation of advertising from other programming. The *RAS Code* with its primary responsibility for advertising reflects this in its rules:

- Rules of general application include requirements to ensure that advertising and programming are readily distinguishable, and that listeners are not confused.
- News is given particular attention, but there are no similar constraints on current affairs coverage:
 - Particular care is required to ensure that there is no confusion with news bulletins; and
 - Station presenters and newsreaders are permitted to voice advertising messages provided that they do not compromise their impartiality obligations, and a clear distinction is made between the programming material and the advertising material. They are not permitted to provide personal endorsements of products and services.

The *Ofcom Code* also reiterates the principle of transparency and requires all licensees to maintain the independence of editorial control over program content and to keep separate advertising and program matter.

Sponsorship

The same principles of transparency will apply to sponsorship. Hence, rules are in place to ensure that a sponsorship arrangement, and its nature, is transparent to the audience. Rules govern the type of sponsorship announcements which can be made and how often they need to be made, with some rules specific to radio to ensure transparency and listener awareness.

The fundamental principle of editorial independence, noted above as applying to all types of commercial content, is specifically applied to sponsorship. Hence a sponsor can not influence the content or scheduling of a program or channel if that would impair the editorial independence of a licensee.

Particular protection is given for news programming which can not be sponsored. A radio station which is primarily a news service would not be able to be sponsored as a

sponsored channel. The same protection is not given to current affairs on radio. Nevertheless, the prohibition on interference with editorial interference is relevant.

Commercial References

Product placement, promotion of products and services within programs, and any undue prominence is prohibited. These rules are concerned with ensuring that there is no disguised advertising and that any references are editorially justified. Once again they illustrate the emphasis on separation of commercial content and other programming, and the need to maintain editorial independence.

Regulatory obligations

The rules in place impose regulatory obligations on the licensee only. There are no rules in place which would impose obligations on other persons such as newsreaders or presenters. It will be a matter for licensees to institute internal compliance and due diligence measures.

1.5 Completed or planned reviews

Two current reviews of direct relevance to radio will be considered here. The first concerns a review of the *Ofcom Code*; the second, a review of the *RAS Code*. Two other recent reviews will also be considered in this section: *Participation TV*, and *Product Placement Relaxation*. These two reviews relate to television but they are useful in indicating current policy concerns which also have implications for the regulation of radio. Both of these reviews will also result in changes to the *Ofcom Code* and those changes will be outlined in the sections dealing with the reviews on *Participation TV* and *Product Placement Relaxation*. Neither of these reviews is concerned directly with news and current affairs reporting, but each is relevant to commercial influences on broadcasting.

Ofcom Code

Ofcom has launched a review of the *Ofcom Code* (the Code Review).¹⁰⁹ The main purpose of the Code Review is to consider whether the *Ofcom Code* continues to reflect the consumer, industry, and regulatory environments.¹¹⁰ However, proposed amendments to the *Ofcom Code* will also reflect recent compliance failings within the

¹⁰⁹ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009).

¹¹⁰ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 1.1.

industry (discussed under *Participation TV*) and the need to implement the *AVMS Directive* (discussed under *Product Placement Relaxation*).¹¹¹ It is intended that after a period of consultation the revised *Ofcom Code* will be published in December 2009.

In relation to radio, the most significant proposed change to the *Ofcom Code* will be the creation of separate rules in relation to sponsorship and commercial references for television and radio. As outlined in section 1.3.2.3 above, section 9 of the *Ofcom Code* deals with sponsorship and section 10, with commercial references in programming. The Code Review proposes that these sections will be replaced and there will be a new section 9 which will cover ‘Commercial References in Television Programming’ and a new section 10 which will cover ‘Commercial References in Radio Programming’. The restructuring of the Code in this way is being done to ensure a better alignment with statutory requirements.¹¹² Each of these sections will also cover sponsorship. Ofcom’s view is that incorporating sponsorship rules into the same section which deals with commercial references will minimise the risk that broadcasters focus on one or the other:

The integration of the sponsorship rules, for both television and radio, would emphasise that sponsorship is just one way in which references to commercial activities can be included in broadcasting, and that it is subject to the same broad principles and overarching rules as other commercial references.¹¹³

The restructuring of the *Code* will also result in some refinement of the drafting, although, with the exception of the matters noted below, it is not intended to make substantive changes or to relax the current regulatory approach. As part of the revision, Ofcom intends to introduce, or to clarify existing, definitions. Thus, the proposed new section 10 would provide the following definitions:

- Radio programming: “examples of radio programming include programmes, features, trails and sponsorship credits. ‘Programming’ does not include advertisements”.
- “‘Commercial references’ means any references to products or services”.

¹¹¹ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 1.2.

¹¹² Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 2.34.

¹¹³ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 2.35.

- “‘Products and services’ include logos, image, names and/or associated activities, and may include references to non-commercial organisations”.

The proposed substantive rule changes are of interest having regard to the matters canvassed in this report. In essence, they will provide some relaxation of the current rules on commercial references in programming. The motivation for the proposed changes to be outlined here has been, in part, the recognition that the radio industry may benefit from additional revenue sources.¹¹⁴ However, the principles of transparency, separation, and editorial independence remain applicable. Of most relevance are the changes which would allow for content-related promotions. However, as noted below, these promotions would not be permitted in relation to news bulletins or news-desk presentations. The other areas for proposed relaxation of the commercial reference rules related to venue-sponsored radio outside broadcasts and sponsored listener competitions.

Proposed rules 10.17 to 10.24 cover content-related promotions. A content-related promotion is described as “...a brief pre-recorded offer of further information, or of a product or service for sale, that is both directly associated with specific editorial content and dependent on a commercial arrangement with a third party”.¹¹⁵ The Code Review gives the example of an offer to download from a third party website a music track which has just been played. Basic information such as cost and website access could be provided.¹¹⁶ Under current *Ofcom Code* rules a spot advertisement placed next to directly related program content would be regarded as inadequately separated (under rule 10.2 (see section 1.3.2.3 above)). The proposed rules covering content-related promotions are designed to ensure that radio broadcasters

“...pay particular attention to editorial justification and the presentation of the promotions, so as to maintain editorial integrity ... transparency, consumer protection and distinction from advertising”.¹¹⁷

¹¹⁴ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.5.

¹¹⁵ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.30.

¹¹⁶ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.30.

¹¹⁷ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.31.

Research conducted by Ofcom into the views of listeners indicated that whilst listeners found traditional spot advertisements intrusive they were more positive about this type of promotion provided that the frequency was controlled and editorial integrity maintained.¹¹⁸

Accordingly the proposed rules prescribe that a content-related promotion:

- Can only be broadcast in or around the content with which it is directly associated (rule 10.17).
- Must not be unduly prominent or give undue prominence to the products, services, or a third party (rule 10.18).
- Must not include any advertising message. Only the most basic information can be given (rule 10.19).
- Must be pre-recorded and brief. A content-related promotion must be clearly identified as such and distinguishable from surrounding content and full advertisements (rule 10.20).
- A presenter of the program must not read (or appear to read) the promotion (rule 10.20).
- Must comply with advertising rules related to content and scheduling, and cannot include any parties who would otherwise be prohibited from advertising (rules 10.21-22).
- Must not be broadcast in or around news bulletins or news-desk presentation (rule 10.24).

Proposed rules 10.31-10.32 cover venue-sponsored radio outside broadcasts. A radio outside broadcast is understood to be a broadcast in which the lead presenter hosts a program from a location outside the studio, although some of the usual components of the program, such as news, advertisements, travel reports etc may be ‘driven’ from the studio.¹¹⁹ Under current *Ofcom Code* rules, sponsorship of outside broadcasts is effectively prohibited because references to the venue could not be regarded as

¹¹⁸ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.34. The research report, *Commercial References within Radio Programming* (June 2009) can be accessed at <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>.

¹¹⁹ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.52.

incidental (rule 9.5 (see section 1.3.2.3 above)). The rules would allow outside broadcasts to be sponsored by a venue or the owner of the venue. The proposed rules for a venue-sponsored radio outside broadcast prescribe that:

- Sponsor references may be included within the sponsored program, provided that references are editorially justified. Such references must not be overly promotional or unduly prominent (rule 10.31).
- Sponsor references must not directly encourage the purchase or rental of the sponsor's products or services (unless they are broadcast as content-related promotions and comply with the rules relevant to such broadcasts (proposed rules 10.17-24)) (rule 10.32).

Under current *Ofcom Code* rules, sponsored listener competitions would also be prohibited under the sponsorship rules (specifically, rule 9.5 (see section 1.3.2.3 above)). The proposed rules would permit sponsored listener competitions and allow the competition to be structured in such a way that questions could relate to the sponsor or the sponsor's product or services. Thus, a competition sponsored by a mobile phone provider could include questions relating to the particular mobile phones offered by that provider.¹²⁰ The proposed rules 10.33 and 10.34 would permit sponsorship references in a listener competition and would allow brief advertising messages to be included provided that they are distinguishable from full advertisements.

There is also a proposal, relevant to both television and radio, to permit 'public information programming' which would allow non-commercial, not-for-profit entities (such as public services) to fund programming which "...seeks to educate or inform the audience on matters in the public interest".¹²¹

RAS Code Review

The *RAS Code* is currently under review, as is the code for television. These codes have not been reviewed since 2000 (radio) and 2002 (television). The purpose of the

¹²⁰ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.70.

¹²¹ See further Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), paras 1.9 and 7.91-7.105.

reviews is to ensure that the codes are up to date and fit for their purpose.¹²² In March 2009, the BCAP commenced a consultation on a new draft code.¹²³ One of the main changes is to have one code to cover both radio and television although the rules will still take into account the different broadcasting contexts where necessary. The review will not result in substantive change to the current rules.

The current rule for separation of advertising, section 2.1 (see section 1.3.2.3 above) will be amended slightly:

Advertisements must be clearly distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.

This amendment would pick up some of the current guidance for section 2.1 although it is less prescriptive as to how the material should be separated because it excludes references to jingles and the like as separating devices.

The current section 2.24 which covers station presenters and newsreaders and advertising would be changed more substantially. The BCAP has suggested that the current restriction on presenters is not necessary and has proposed the following amendment¹²⁴:

A person who currently and regularly reads the news on radio or television may voice commercials but must not advertise products or services that could be seen to compromise the impartiality of their news-reading role.

Participation TV

This review concerns regulation of Participation TV. This is a review of the *Ofcom Code* rules which may have particular relevance to what is termed 'participation TV'. This term refers to television services (which can include programs and dedicated channels) that rely wholly or mainly on viewers paying for an opportunity to participate in the service. Almost invariably it means that viewers use premium rate

¹²² BCAP, *The BCAP Code Review: Consultation on the proposed BCAP Broadcast Advertising Standards Code* (26 March 2009).

¹²³ BCAP, *The BCAP Code Review: Consultation on the proposed BCAP Broadcast Advertising Standards Code* (26 March 2009). The consultation will close in late June 2009.

¹²⁴ BCAP, *The BCAP Code Review: Consultation on the proposed BCAP Broadcast Advertising Standards Code* (26 March 2009), 24-25. The rule would apply to radio only; a stricter rule will continue to apply to television.

services to participate, and the services themselves are characterised by constant on-screen ‘calls’ to viewers to call a premium rate number to participate. The type of content in this genre may include quizzes, dating, adult chat, and psychic readings.¹²⁵ Similar types of content can be seen on late night Australian commercial television services. These services have grown substantially in the UK with the growth of multi-channel television, and as a means of raising revenue for licensees who may be facing reduced revenue from traditional advertising.¹²⁶ One of Ofcom’s concerns has been whether these services, which currently operate as program content, are in reality advertising.¹²⁷

The review commenced in response to growing concerns about the conduct of these services. These concerns prompted an investigation by Ofcom, which culminated in May 2008 in sanctions being imposed on a number of commercial television licensees who were part of the major commercial free-to-air network, ITV. The sanctions included financial penalties which amounted to over five million pounds, the largest ever imposed by Ofcom or its predecessors.¹²⁸

The major concerns of the review, and borne out by the investigation, were the use of premium rate services and the type of information provided to viewers about charges; the separation of editorial content from advertising content; and the circumvention of advertising prohibitions.¹²⁹ Although the review was concerned with television services, Ofcom has proposed that any new rules should also apply radio. Indeed, in June 2008, thirty local radio commercial stations were fined over 1.1 million pounds for breaches of the *Ofcom Code* in connection with a competition which listeners paid to enter. The breaches concerned the fair conduct of competitions and the use of

¹²⁵ Ofcom, *Participation TV: how should it be regulated?; Pre-consultation Issues Paper* (December 2006), para 1.2.

¹²⁶ Ofcom, *Participation TV: how should it be regulated?; Pre-consultation Issues Paper* (December 2006), paras 1.11-1.13.

¹²⁷ A consultation on the implementation of the AVMS Directive is considering whether participation TV will be treated as ‘teleshopping’: Ofcom, *Review of television advertising and teleshopping regulation – stage 2* (7 October 2008).

¹²⁸ Ofcom, News Release, *Ofcom fines ITV plc for misconduct in viewer competitions and voting* (8 May 2008). Other issues were also involved in these investigations including a failure to conduct the competitions fairly in accordance with *Ofcom Code*, rule 2.11.

¹²⁹ Ofcom, *Participation TV: how should it be regulated?; Pre-consultation Issues Paper* (December 2006), paras 1.5-1.7. See also, *Participation TV, Part 2: keeping advertising separate from editorial*; (April 2008), para 1.2.

premium rate services.¹³⁰ Following the review, Ofcom proposed rules designed to ensure that there is clear separation of editorial and advertising content. It is likely that these rules would have a significant impact on the way these services are currently organised. In essence the proposed new rules would require that:

- A program which uses premium rate services for audience participation, must not give it undue prominence.
- The program must consist primarily of content other than the promotion of a premium rate service.
- The primary purpose of the program must be editorial, and any commercial activity associated with premium rate services, such as the raising of revenue, must be secondary to that purpose.

In the event that a program is not able to comply with these rules, then it would be classified as ‘teleshopping’. This would mean for television that it would count towards advertising minutage rules. However, the nature of some of the content may also be within a prohibited or restricted advertising content category, and thus unable to be broadcast. This situation does not directly apply to radio since, for example, radio is not limited in the amount of advertising which it can broadcast. However, Ofcom’s position is that such material will either have to be structured in a way which enables it be treated as a program or treated as advertising. In the latter case, the fundamental principle of ensuring separation of advertising and editorial content would apply. Further, the content would have to comply with the *RAS Code* and this may mean that some of the subject matter of this content could be prohibited or restricted under the *RAS Code*.

These new rule proposals would constitute amendments to the *Ofcom Code* which deals with commercial references in programming. Having regard to the Code Review, considered above, this would mean changes to sections 9 (Commercial References in Television Programming) and 10 (Commercial References in Radio Programming) of a revised *Ofcom Code*. These proposals regarding premium rate

¹³⁰ Ofcom, News Release, *Ofcom fines radio broadcasters for unfair conduct in a listener competition* (26 June 2008). Ofcom Content Sanctions Committee, Re 30 of GCap Media plc’s ‘One Network’ radio stations, 27 June 2008, http://www1.bsc.org.uk/tv/obb/ocsc_adjud/30GCapRadioStations.pdf.

services do not form part of the current Code Review and will be the subject of a separate consultation in Autumn 2009.¹³¹

However, the compliance failings exposed by television and radio competitions using premium rate services have led Ofcom to propose new rules which are the subject of the Code Review consultation. Ofcom considers that there is a need for increased regulation to ensure that audiences are not misled or subject to unfair conduct in relation to broadcast competitions or voting.¹³² These new rules would apply to television and radio. It is proposed that:

- Section 2 of the *Ofcom Code* which deals with ‘Harm and Offence’ will have a new section dealing with ‘competitions and voting’ which will prescribe that:
 - Competitions and voting are fairly promoted and conducted (rule 2.11).
 - Broadcasters must not materially mislead audiences (rule 2.11).
 - Competition rules are clear and appropriately made know (rule 2.12).
 - Prizes are described accurately (rule 2.13).
- Sections 9 and 10 of the *Ofcom Code* which deal with commercial references in programming in television and radio, respectively, will also include provisions designed to protect audiences from financial harm when paying to enter broadcast competitions and voting.¹³³ Hence section 10 will include rules which prescribe that:
 - Competitions and voting must be fairly promoted and conducted and broadcasters must not materially mislead listeners so as to cause financial harm (rule 10.11).
 - Terms and conditions must be appropriately brought to the attention of listeners, and significant conditions which might affect a decision to participate must be made clear at the time of the invitation to participate (rule 10.12).

¹³¹ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), paras 6.17 and 7.20.

¹³² Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), paras 2.27-2.30.

¹³³ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 2.30.

Product Placement Relaxation

The *AVMS Directive*, came into force in December 2007, and must now be implemented by member states. One of the major changes is that the new directive allows for television programs to use product placement if a member state permits it (article 3g). The *AVMS Directive* does not permit unrestricted use of product placement, because only certain types of programs will be allowed to use the technique and there will be rules in place to ensure identification of the production placement and editorial independence. News and current affairs programming is not the type of programming which is permitted to use product placement.

In 2008 the UK Government issued a consultation paper which set out its preliminary view on whether or not to permit product placement.¹³⁴ Subject to the consultation, the Government's preferred position was to retain the prohibition on product placement in all types of programming.¹³⁵ The Government suggested that a prohibition is the best way to ensure reasonable separation of editorial and commercial content. It also put forward the importance of maintaining public trust and confidence in television programming and argued that a prohibition would be the best way to maintain that confidence.¹³⁶ The position adopted by the Government in the consultation paper is consistent with an earlier statement made in a speech by the Secretary of State for Culture, Media and Sport, Andy Burnham, in which he cast doubt on the wisdom of allowing product placement. His concern was also with the extent to which product placement practices could exacerbate a "... decline in trust and contaminate [...] our programmes. There is a risk that, at the very moment when television needs to do all it can to show it can be trusted, that we elide the distinction between programmes and adverts".¹³⁷

¹³⁴ Department for Culture, Media and Sport, *The Audiovisual Media Services Directive, Consultation on Proposals for Implementation in the United Kingdom* (July 2008), http://www.culture.gov.uk/reference_library/consultations/5309.aspx. The consultation is open until October 2008.

¹³⁵ Department for Culture, Media and Sport, *The Audiovisual Media Services Directive, Consultation on Proposals for Implementation in the United Kingdom* (July 2008), http://www.culture.gov.uk/reference_library/consultations/5309.aspx, para 37.

¹³⁶ Department for Culture, Media and Sport, *The Audiovisual Media Services Directive, Consultation on Proposals for Implementation in the United Kingdom* (July 2008), http://www.culture.gov.uk/reference_library/consultations/5309.aspx, paras 38-39.

¹³⁷ Andy Burnham, Secretary of State Speech to the Convergence Think Tank, 11 June 2008, http://www.culture.gov.uk/reference_library/minister_speeches/5192.aspx

Following the consultation, the Government issued a statement setting out its intentions regarding product placement.¹³⁸ Despite advocacy from the industry for a relaxation of the rules, the Government has decided to retain the current prohibition on product placement. In reaching this decision, it considered that

...no conclusive evidence has been put forward that the economic benefit of introducing product placement is sufficient to outweigh the detrimental impact it would have on the quality and standards of British television and viewers' trust in it.

Because the *AVMS Directive* is concerned with television, it has no direct legal consequence for radio, but it does indicate current policy attitudes. The recent scandals affecting public participation in television and radio programs, noted above, may also contribute to the UK Government's maintenance of a strict line on product placement for the time being.

The Code Review maintains the prohibition on product placement for radio subject to any limited variations such as specific sponsorship arrangements (as regulated by the *Ofcom Code*) and the proposed rules relating to content-related promotions, described above. Given the restructuring of the *Ofcom Code*, the prohibition on product placement will now be found in section 10 (rule 10.7). Ofcom has proposed that the definition of 'product placement' used by the *AVMS Directive* should be adopted for radio also to ensure consistency.¹³⁹ It is not considered that this will result in a substantive change to the definition of 'product placement'.¹⁴⁰

¹³⁸ Andy Burnham, *Written Ministerial Statement on the implementation of the Audiovisual Media Services Directive*, 11 March 2009,

http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx

¹³⁹ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.131.

¹⁴⁰ Ofcom, *Broadcasting Code Review: Proposals on revising the Broadcasting Code* (15 June 2009), para 7.131.

2 UNITED STATES

2.1 The United States broadcasting environment

2.1.1 Overview

The Federal Communications Commission (FCC)¹⁴¹ is responsible for regulation of broadcasting (and telecommunications) in the United States (US). The FCC is an independent regulatory authority constituted under the Communications Act of 1934 (Comms Act (US)).¹⁴² As with the other jurisdictions, the US operates a mixed environment of commercial and public television and radio broadcasting. However, one marked difference between the US and the other jurisdictions is the dominance of the commercial sector. The US does not have a publicly funded broadcaster in the tradition of the BBC, although a public broadcasting sector exists providing non-profit, non-commercial radio and television services. It receives very limited public funding, and stations must rely primarily on listener support and sponsorship. Public funding is provided through the Corporation for Public Broadcasting, non-profit corporation, established by Congress to provide funding for programming.¹⁴³ US public broadcasting is more akin to the community broadcasting sector as it exists in Australia.

As at December 2008, 4786 AM and 6427 FM commercial over-the-air radio stations were licensed and 3040 non-commercial stations.¹⁴⁴ Some indication of the reach of the non-commercial radio sector is indicated by the fact that public radio is listened to by only 11.2% of Americans at least once per week.¹⁴⁵

Radio stations can also be carried by cable system. There is one satellite radio service (formally known as ‘satellite digital audio radio services’), *SiriusXM*, which, as at December 2007, had over 15 million subscribers.¹⁴⁶

¹⁴¹ www.fcc.gov

¹⁴² References in the footnotes will be to the United States Code (USC). References to regulations will be to the Code of Federal Regulations (CFR).

¹⁴³ <http://www.cpb.org/>

¹⁴⁴ FCC, *News Release: Broadcast Station Totals as of December 31, 2008* (27 February 2009)

¹⁴⁵ Arbitron, *Public Radio Today* (2007 Edition), 46. ‘Americans’ are persons over 12 years old. <http://www.arbitron.com/study/publicrt.asp>

¹⁴⁶ FCC, *Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking* (FCC 07-215, 18 December 2007), n 4. *Sirius* and *XM* merged in 2008. As at January 2009, *Sirius XM* remains the only satellite radio service: Arbitron, *The Infinite Dial 2009: Radio’s Digital Platforms*.

2.1.2 Licensing of commercial radio

The FCC licences radio stations.¹⁴⁷ Commercial radio can be licensed for either AM or FM transmission. The definition of both an ‘AM broadcast station’ and a ‘FM broadcast station’ make reference to communications intended to be received by the public.¹⁴⁸ Licences are for a term of eight years and can be renewed for the same period although it is open to the FCC to renew a licence for a shorter period should the public interest require it.¹⁴⁹

Consistent with First Amendment jurisprudence, the FCC does not, as part of the licensing process, make any evaluation or impose requirements regarding programming or formats. However, in fulfilment of the public interest a licensee is required to broadcast programming that is responsive to the needs of its local community.¹⁵⁰ The FCC does not require details of how a licensee proposes to meet this requirement, only an acknowledgement that the licensee is aware of the requirement.¹⁵¹ Licensees must also maintain a public access file, and this must include details of how the licensee has met this requirement.¹⁵² In general, licensing processes, including renewals, are carried out almost automatically, with an auction-type process used where there are competing applications. The acting chairman of the FCC, Michael J Copps recently commented that the licence renewal process needed to be reinvigorated and the “post card renewal” process ended.¹⁵³

Information about other radio services and digital service can be found in the *Appendix*.

2.2 The broadcasting regulatory environment

2.2.1 Broadcasting policy

The Comms Act (US) does not include an extensive statement of broadcasting policy. The only relevant statement, which is found in section 303, charges the FCC to carry out its duties and exercise its powers as “...public convenience, interest, or necessity

¹⁴⁷ 47 USC §307.

¹⁴⁸ 47 CFR §73.14 (AM) and 47 CFR §73.310 (FM).

¹⁴⁹ 47 USC §307 (c)(1).

¹⁵⁰ FCC, *Information in Broadcast Applications*, 3 FCC Rcd 5467(1988).

¹⁵¹ FCC, *Application for Construction Permit for a Commercial Broadcast Station* (Form 301, May 2009).

¹⁵² 47 CFR §73.3526(e)(12).

¹⁵³ Michael J Copps, *Remarks of Acting FCC Chairman Michael J Copps* (Speech delivered at the Free Press Summit: Changing Media, Washington DC, 14 May 2009, <http://www.fcc.gov/commissioners/copps/speeches2009.html>), 4.

requires”. It is this statement which provides the FCC with the mandate to regulate in the public interest. The FCC is also charged with making any necessary regulations to carry out the provisions of the Act.¹⁵⁴

Beyond this, it is mainly for the FCC, with its extensive policy and rule-making powers, to determine how this public-interest requirement is applied in practice. During the history of US communications regulation, this public-interest standard has led the FCC to do more than just monitor spectrum allocation. However, US broadcasting regulation has never been comparable with that found in the UK or in Canada. Such regulation as there has been has been justified largely on the ground of spectrum scarcity. A major reason for this is the First Amendment free speech guarantee, which, unlike European freedom of expression guarantees, is treated as more akin to a guarantee of non-interference (and is hence resistant to government interference) – in contrast to the European tradition which might be said to regard freedom-of-expression guarantees as promoting a multiplicity of voices. The FCC is also specifically denied any power of censorship, and is prohibited from making any regulations which interfere with rights of free speech.¹⁵⁵ Consequently, many of the FCC’s rules and regulatory decisions have been challenged on First Amendment principles. The First Amendment and the specific censorship prohibition on the FCC has meant that the regulatory authority has seen itself as having only a very limited mandate to regulate program content.¹⁵⁶ FCC policy and regulatory behaviour can also be said to reflect a general preference for market and industry-based solutions. The membership of the FCC is also more obviously party-political, and as such may reflect more closely than the other regulatory agencies considered in this report prevailing political philosophy.¹⁵⁷ With the election of Democrat President Barak Obama it is likely that there will be a shift in FCC approach and policy. Whilst commissioners’ terms of office do not terminate upon the election of a new president, the Chairman does resign. President Obama has appointed Democrat commissioner

¹⁵⁴ 47 USC §303(f).

¹⁵⁵ 47 USC §326

¹⁵⁶ FCC, *The Public and Broadcasting; How to get the most Service from your Local Station* (Revised, July 2008), 8.

¹⁵⁷ Commissioners are chosen by the President (and confirmed by the Senate), and it will usually be apparent that they reflect either Democrat or Republican preferences. There are limits on the number of Commissioners who can be from the same political party: 47 USC §154(b)(5).

Michael J Copps to be acting Chairman.¹⁵⁸ Two Republican-appointed commissioners resigned in January 2009 which means that there will now be a Democrat majority on the Commission.

2.2.2 The regulatory framework

2.2.2.1 The role of the FCC

Despite the extensive policy and rule-making powers of the FCC, consistent with the First Amendment position noted above, its regulatory focus, with some limited exceptions, has been on areas which are seen as more content-neutral such as licensing, competition, and regulation of media ownership and control. However, even the exercise of licensing powers will be influenced by the view that the FCC's role in content regulation is limited. Thus, despite the public-interest mandate, when licensing, or considering renewals, or transfers, the FCC does not engage in determining or reviewing formats.¹⁵⁹

As noted in section 2.2.2.3 below, the FCC has a range of sanctions available to it. The FCC will rely on matters being reported to it, and will consider a complaint if it is within its jurisdiction. Jurisdiction to deal with a complaint will depend upon there being in place specific rules, licence conditions and so forth affecting the matter complained of. However, the public-interest requirement does give rise to the scope for the FCC intervening in an appropriate case, for example, through licence renewal processes. However, the utility of this may be in doubt given the reliance on a largely automatic renewal process, combined with its reliance upon public complaint or intervention.¹⁶⁰

2.2.2.2 The role of self-regulation

There are no formal self-regulatory frameworks with regard to broadcasting licensees. The National Association of Broadcasters is an industry body which represents radio

¹⁵⁸ The President nominated Julius Genachowski to the position of Chairman on 23 March 2009: http://www.whitehouse.gov/briefing_room/nominations_and_appointments/.

¹⁵⁹ Where there is a competition for commercial broadcasting licences, FCC practice now is to hold an auction: See FCC, *Re-examination of the Policy Statement on Comparative Broadcast Hearings, Report and Order*, 14 FCC Rcd 8724 (1999), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-99-74A1.pdf

¹⁶⁰ The FCC noted recently the concerns about the renewal process, and the lack of public awareness of such processes and the public's scope for involvement: FCC, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, FCC 07-218 (24 January 2008), para 123 and generally.

and television commercial broadcasting licensees.¹⁶¹ However, it appears to operate no formal mechanisms for review of licensees' services or practices. Radio and television advertising guidelines established by the NAB were abandoned in the 1980s.¹⁶² Informal guidelines may be in place by individual licensees or networks, but no information has been able to be ascertained.

A self-regulatory scheme has been established by the advertising agency which covers advertising in print and broadcast media. This scheme affects truth and accuracy in advertising and applies to the advertising industry only. It is administered by the National Advertising Division of the Council of Better Business Bureaus, on behalf of a number of advertising industry organizations.¹⁶³ It will not be considered further in this report.

2.2.2.3 Enforcement and sanctions

The FCC has a range of formal sanctions available to it:

- Cease and desist orders can be issued where a licensee has failed to operate in accordance with a licence; breached a relevant provision in the Comms Act (US); or, breached an FCC rule.¹⁶⁴
- Fines (known as forfeitures) can be issued for breaches of licences; or, breaches of relevant provisions of the Comms Act (US) or FCC rules or orders. Such breaches must be wilful or repeated.¹⁶⁵ For licensees, the amount can be \$US 25,000, up to a maximum of \$US 250,000.¹⁶⁶
- The FCC can revoke a licence for, *inter alia*, wilful or repeated failure to operate in accordance with the licence or wilful or repeated breach of the Comms Act (US) or an FCC rule.¹⁶⁷
- The FCC also has the power to refuse to renew a licence, or to shorten the term of the licence, if the licensee fails to meet the renewal criteria:

¹⁶¹ <http://www.nab.org/AM/Template.cfm?Section=Home>

¹⁶² This followed proceedings brought by the Department of Justice alleging that the codes were a restraint on trade: W Overbeck, *Major Principles of Media Law* (15th ed, 2004), 575.

¹⁶³ <http://www.nadreview.org/> See National Advertising Review Council, *The Advertising Industry's Process of Voluntary Self-Regulation* (2007), http://www.nadreview.org/07_Procedures.pdf

¹⁶⁴ 47 USC §312(b). It should be noted that this provision covers 'any person'. A person is defined to include an individual: §153(32).

¹⁶⁵ 47 USC §503(b). This section also covers 'any person' and so will have a wider reach than licensees. There are other general monetary penalty provisions.

¹⁶⁶ 47 USC §503(b)(2).

¹⁶⁷ 47 USC §312(a).

- (a) the station has served the public interest, convenience, and necessity;
- (b) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and
- (c) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.¹⁶⁸

Although this report has not been able to review the FCC's enforcement practices, there is evidence that it uses the sanctions. However, it is worth noting again that the FCC is unlikely to act with regard to content unless there are specific rules in place.

2.3 Regulation of advertising and sponsorship on commercial radio

Given the policy context already noted, it is not surprising to find very limited regulation of advertising. Save for some specific situations, such as advertising directed to children, traditional spot advertising is largely unregulated by the FCC. There are, however, some key rules which will be of relevance to news and current affairs programming and to fairness and accuracy generally. The rules which will be considered here relate to political advertising, sponsorship identification, and payment disclosure (or 'payola'). It is worth noting that the Comms Act (US) is the source of these obligations, although the FCC has developed rules regarding their implementation.

2.3.1 Definitions

The Comms Act (US) contains some definitions of relevance to advertising and sponsorship but these are applicable to the non-commercial broadcasting sector only. There are no definitions of advertisement or sponsorship so far as they affect commercial broadcasting, although the sponsorship-identification rules (discussed below) describe what is covered by the rules. In their effect, the sponsorship-identification rules cover advertising and sponsorship, although this is not made explicit by the use of terms such as 'advertisement' and 'sponsorship'. The rules drafted by the FCC do use these terms. This is explained below.

¹⁶⁸ 47 USC §309(k)(2).

2.3.2 Advertising, sponsorship, and related rules

2.3.2.1 Amount of advertising

There are no limits on the amount of advertising which can be broadcast on commercial radio.

2.3.2.2 Political advertising

Paid political advertising is allowed to be broadcast in the US. However, rules are in place to provide access opportunities for those seeking to advertise. This is a complex area of advertising regulation. Although the rules are designed to provide access opportunities for candidates for public office, the rules also seek to balance this with the need to ensure that licensees are not deterred from providing regular news and current affairs coverage about political campaigns and elections.¹⁶⁹ The rules and FCC policy also seek to ensure that candidates are treated in like manner. Licensees must comply with rules designed to ensure that political candidates have reasonable opportunities to access the broadcast media. There are three key elements of these rules: reasonable access; equal opportunities; and ‘lowest unit charge’. In addition, the sponsorship-identification rules, considered in section 2.3.2.3, will be relevant.¹⁷⁰

Reasonable Access

A licensee risks revocation of its licence for:

wilful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, ... by a legally qualified candidate for Federal elective office on behalf of his candidacy.¹⁷¹

The reasonable-access rule applies only to candidates for federal office, although, at their discretion, licensees may offer reasonable access to state and local office candidates.¹⁷² The FCC has not determined formal rules for what is ‘reasonable access’, preferring instead to rely on:

the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates. Reasonable access does not lend itself to a specific number of hours based on complex formulas. Rather, what constitutes

¹⁶⁹ FCC, *Radio and Television Broadcast Services, Cable Television Services; Codification of the Commission’s Political Programming Policies*, 57 FR 189 (1992), para 25.

¹⁷⁰ 47 USC §317(a)(2) and 47 CFR §73.1212(d).

¹⁷¹ 47 USC §312(a)(7), and see 47 CFR §73.1944.

¹⁷² What constitutes a legally qualified candidate is defined under FCC rules: 47 CFR §73.1940. This definition applies both to 47 USC §312(7) and to 47 USC §315(a), the equal opportunities doctrine.

‘reasonable access’ depends on the circumstances surrounding a particular candidate’s request for time and the station’s response to that request.¹⁷³

The FCC has in place guidelines which it will use to evaluate whether, in a particular case, a licensee has complied with the reasonable-access requirement. These include:

- Reasonable access must be provided to legally qualified federal candidates through the gift or sale of time;
- Reasonable access must be provided at least during the 45 day period before a primary and the 60 day period before a general or special election;
- ... Stations must make program time available during prime time and other time periods unless unusual circumstances exist that render it reasonable to deny access;
- Commercial stations must make spot announcements available to federal candidates in prime time;
- Stations may not use a denial of reasonable access as a means to censor or otherwise exercise control over the content of political material;
- Licensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers; and
- In providing reasonable access, stations may take into consideration their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that will be caused by political advertising and the amount of time already sold to a candidate in a particular race.¹⁷⁴

The FCC guidelines are designed to enable access for candidates, whilst also retaining some discretion for the licensee over scheduling and programming. Of interest is the FCC policy on news programming. In its 1992 codification of political broadcasting policies, the FCC reaffirmed a longstanding policy to allow licensees to ban the sale

¹⁷³ FCC, *Radio and Television Broadcast Services, Cable Television Services; Codification of the Commission’s Political Programming Policies*, 57 FR 189 (1992), para 8.

¹⁷⁴ FCC, *Radio and Television Broadcast Services, Cable Television Services; Codification of the Commission’s Political Programming Policies*, 57 FR 189 (1992), para 9.

of political advertising time during news programming.¹⁷⁵ The policy is grounded in a strong public-interest principle: “[allowing such a ban serves ...] the public interest by preserving the journalistic integrity of the licensee in this vital area of programming”.¹⁷⁶ Advertisements can be placed adjacent to news programs. The policy appears to be extant.

Equal Opportunities

Under section 315(a) of the Comms Act (US), a licensee who has given access to a legally qualified candidate for any public office, must provide equal opportunities of access to all other candidates for that office.¹⁷⁷ This rule applies to federal, state, and local office. This ‘equal opportunities’ requirement contrasts with the Australian ‘reasonable opportunities’ requirement during election periods.¹⁷⁸

The equal opportunities rule does not compel a broadcaster to offer broadcasting time generally: the obligation only arises when a candidate has used air time during a political campaign, and other candidates demand equal access. Equal opportunities will include equal time, with comparable time slots and charges.¹⁷⁹ Whether this rule applies will depend upon whether there has been a ‘use’ of a broadcasting station by a political candidate. Certain broadcast appearances are exempt. Thus, appearances on bona fide news programs or news interviews, incidental appearances in news documentaries, and on-the-spot coverage of bona fide news events will not be classed as a ‘use’.¹⁸⁰ This exemption was created in order to encourage increased news coverage of political campaigns.¹⁸¹

The FCC now gives a fairly liberal interpretation to what constitutes a “bona fide news interview”, so that programs, which might be more readily classified as entertainment talk programs, such as *The Howard Stern Show* and *Jerry Springer*, can be an exempted use, even though the programs might include other segments which

¹⁷⁵ FCC, *Radio and Television Broadcast Services, Cable Television Services; Codification of the Commission’s Political Programming Policies*, 57 FR 189 (1992), para 15.

¹⁷⁶ FCC, *Radio and Television Broadcast Services, Cable Television Services; Codification of the Commission’s Political Programming Policies*, 57 FR 189 (1992), para 16.

¹⁷⁷ 47 USC §315(a).

¹⁷⁸ BSA (Aus), schedule 2, clause 3(2).

¹⁷⁹ There must be no discrimination by the licensee between candidates in relation to services, facilities and practices, and so forth: 47 CFR §73.1941(e).

¹⁸⁰ 47 USC §315(a)(1)-(4). A television journalist’s appearances as a presenter or reporter on regular news broadcasts will constitute a use if that person is also a candidate for office. In this situation, the exemption will not be relevant: *Branch v FCC* 824 F 2d 37 (1987).

¹⁸¹ FCC, *Radio and Television Broadcast Services, Cable Television Services; Codification of the Commission’s Political Programming Policies*, 57 FR 189 (1992), para 25

do not relate to news or current affairs. The FCC will look for factors such as whether the program is regularly scheduled, the licensee has editorial control, and whether the inclusion of the candidate is based on newsworthiness.¹⁸²

Determining whether there has been a ‘use’ may not be straightforward. An appearance by a candidate who is also a professional entertainer will constitute a ‘use’, even though the appearance is strictly for entertainment, and made in the person’s capacity as an entertainer.¹⁸³ Under an FCC policy, known as the ‘Zapple Doctrine’, the equal opportunities rule applies also to supporters of a candidate in order to prevent evasion of the rule.¹⁸⁴

Lowest Unit Charge

A licensee is not required to provide access free of charge, although where a candidate has been given access without charge, the same will have to apply to another candidate.

There is some attempt to control the cost of political broadcasting. Section 315(b) provides that within certain time periods leading up to the election, candidates can only be charged what is known as the ‘lowest unit charge’ for advertisements of the same kind and frequency.¹⁸⁵ Thus, if discounts are given to commercial advertisers – for example, for high volume advertising – the same rate would have to be offered to a candidate. Outside these particular periods only comparable rates have to be offered.¹⁸⁶ However, the lowest-unit-charge rule does not always work effectively because licensees may offer advertising rates in two categories: a higher rate category which ensures that the airtime slot is fixed, and a lower rate category which means that the airtime slot is pre-emptible, if someone offers to pay more for that slot. Candidates will generally have to pay the higher rate because they cannot be as flexible with the timing of their advertisement.

¹⁸² FCC, *Declaratory Ruling, In re Request of Infinity Broadcasting Operations Inc.* (DA 03-2865, 9 September 2003).

¹⁸³ *Paulsen v FCC* 491 F 2d 887 (1974).

¹⁸⁴ *In re request by Nicholas Zapple*, 23 FCC 2d 707 (1970). During the 2004 presidential campaign, Democrat candidate John Kerry attempted to invoke the Zapple Doctrine. His campaign asserted that a planned broadcast of a documentary, about Kerry’s war record, entitled Kerry’s supporters to equal time. It was argued that the program was not a genuine documentary, but had been produced by supporters of President Bush’s campaign as an attack on Kerry. The matter was not pursued as the documentary was not aired.

¹⁸⁵ 47 USC §315(b)(1)(A).

¹⁸⁶ 47 USC §315(b)(1)(B).

Reforms in 2002 (the Bipartisan Campaign Reform Act) to address concerns about campaign funding also affect broadcasting. The public file which licensees must maintain to record requests from candidates to purchase broadcast time must now include all requests about communications relating to political matters of national importance.¹⁸⁷ Corporations and labour unions are prohibited from funding broadcast ‘electioneering communications’ during a specified period prior to the relevant election.¹⁸⁸

2.3.2.3 General

The sponsorship identification rules

These rules are intended to ensure that audiences are aware that the programming they hear has been paid for, and to know by whom: the public is “...entitled to know who seeks to persuade them with the programming offered over broadcast stations and cable systems”.¹⁸⁹

The Comms Act (US) sets out the main rule:

317(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That “service or other valuable consideration” shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.....¹⁹⁰

As the legislative provision makes clear, the announcement must be made at the time of the broadcast of the relevant content.

¹⁸⁷ 47 USC §315(e)(B). The Act has also tightened the information that must be given to identify who is associated with, and has sponsored, the election advertisement: 2 USC §441d(d).

¹⁸⁸ 2 USC §441(b). An ‘electioneering communication’ is one which refers to a clearly identifiable candidate for Federal office, is made within a certain specified period prior to the election, and is targeted to a relevant electorate: 2 USC §434(f)(3)(A).

¹⁸⁹ FCC, *Public Notice, Commission reminds Broadcast Licensees, Cable Operators and others of Requirements applicable to Video News Releases and Seeks Comment on the use of video news releases by broadcast licensees and Cable Operators*, FCC 05-84 (13 April 2005), 1-2. This is a well-established principle: see, for example, FCC, *Public Notice, In re Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963).

¹⁹⁰ 47 USC §317(a)(1). In relation to the proviso see section 2.3.4 below. The FCC has issued rules: 47 CFR §73.1212 (for commercial broadcasting).

Section 317(a) is an all-encompassing rule. In fact, the description of these rules as the ‘sponsorship-identification rules’ is misleading, because it is clear from the statement of the rule that it will also apply to the typical spot-type advertisement. The rule would also cover practices such as product placement. It is important to note also that the rule is not confined to commercial contexts. It will cover situations in which the matter sought to be broadcast may be a viewpoint, opinion, a proposal, a belief, and it will apply not only to commercial activities, persons or organizations. This is considered further in section 2.4 below.

It is the FCC which refers to these rules as the ‘sponsorship-identification rules’; the Comms Act (US) refers to section 317 as the “Announcement of payment for broadcast” rule.

In any event, for matter “advertising commercial products or services” the one-off mention of the corporate or trade name, or the name of the product (if that is sufficient to make clear the sponsor), will constitute compliance with the rule.¹⁹¹ Since the purpose of an advertisement is to make known the goods or services and the ‘producer’ of them, this rule is not problematic for ordinary advertising.

The rules drafted by the FCC require:

- a licensee to broadcast, at the time of airing:
 - that the matter is sponsored, paid for or furnished, either in whole or in part; and
 - by whom or on whose behalf such consideration was supplied.
- The announcement must fully disclose the true identity of the person or persons by whom or on whose behalf such payment or other valuable consideration is provided.
- Where an agent or other person contracts or otherwise makes arrangements with the licensee on behalf of another, and this is known or, by the exercise of reasonable diligence could be known to the licensee, the announcement should disclose the identity of the person or persons or entity on whose behalf the agent is acting, rather than the agent.¹⁹²

¹⁹¹ 47 CFR §73.1212(f). This is referred to as the ‘obviousness’ exception.

¹⁹² 47 CFR §73.1212(a) and (e).

A licensee is also required to have systems in place to ensure that it receives relevant information so that it can comply with these rules. Thus a licensee must

...exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.¹⁹³

As can be seen, this rule encompasses a much wider class of persons than just the employees of the licensee, and could therefore cover also radio presenters, who may have contractual arrangements with the licensee, or even persons who contract on behalf of the presenter. The obligation here is on the licensee and section 317(a) is focused on consideration received, directly or indirectly, by the licensee, but payments to other persons will be picked up through the payment-disclosure rule as explained below.

As mentioned in the previous section, the sponsorship-identification rule will also apply to political advertising. In fact, it has a relevance to political matter generally whether it is a paid-for broadcast or not. Thus, a licensee is required to make disclosure if material has been provided, with or without charge, as an inducement to broadcast a program which relates to political matter or involves the discussion of controversial material.¹⁹⁴ In fact, the FCC regards this disclosure requirement as being of an even higher order than the commercial-sponsorship requirements. The FCC has recently reiterated this view:

The sponsorship identification rules impose upon broadcast licensees and cable operators a greater obligation of disclosure in connection with political material and program matter dealing with controversial issues. The Commission has noted that, particularly in the case of such programming, audience members are “entitled to know when the program ends and the advertisement begins.” Congress has acknowledged the danger that groups advocating ideas or promoting candidates, rather than consumer goods, might be particularly inclined to attempt to mask their sponsorship in order to increase the apparent credibility of their messages. Thus, deviating from the general rule contained in Section 317(a)(1) that no sponsorship identification announcement is necessary if material is provided to a station free or at a nominal charge ...¹⁹⁵

¹⁹³ 47 USC §317(c) and 47 CFR §73.1212(b).

¹⁹⁴ 47 USC §317(a)(2) and 47 CFR §73.1212(d).

¹⁹⁵ FCC, *Public Notice, Commission reminds Broadcast Licensees, Cable Operators and others of Requirements applicable to Video News Releases and Seeks Comment on the use of video news releases by broadcast licensees and Cable Operators*, FCC 05-84 (13 April 2005), 4.

The importance of this disclosure is emphasised by a difference in the number of disclosures which must be given. In the case of political matter being broadcast, the disclosure must be given at the commencement and end of the broadcast, unless the broadcast is five minutes or less in duration.¹⁹⁶ In other sponsorship situations, only one announcement is required.

The payment-disclosure rule

The payment-disclosure rule is an important rule which links to, but broadens the scope of the sponsorship-identification rule. The rule is a requirement that any employee, or person, involved with the production or preparation of program content, who receives consideration for the provision of content to be broadcast, or any person who provides such consideration, shall make disclosure:

(a) ... any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) ... any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast

(c) ... any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.¹⁹⁷

This rule imposes obligations of disclosure directly on a number of different persons: an employee receiving payment; the person making such payment; a person involved with the production or preparation of a program or program matter who receives payment; and a person who supplies a program or program matter who has relevant

¹⁹⁶ 47 CFR §73.1212(d).

¹⁹⁷ 47 USC §508. Under the Comms Act (US), this rule is found in §507. Breach of this requirement can lead to a fine of \$US10,000 and/or 12 months imprisonment.

information. Incorporating these different situations into the rule is intended to ensure that "...the information must ultimately be provided up the chain of production and distribution, before the time of broadcast, to the licensee so that it can timely air the required disclosure".¹⁹⁸

A licensee, having received such a disclosure, will then have an obligation to comply with the sponsorship-identification rules as if the licensee had received the consideration.¹⁹⁹

This provision will be wide enough to cover other persons associated with the broadcaster or its program content, such as a presenter (who may not be an employee), and who may have private commercial relationships associated with the program content, provided that they can be said to have a connection with the production or preparation of the program. This provision also imposes an obligation on the person providing the consideration. It marks a clear contrast with the operation of the Australian disclosure rules, as found in the *Disclosure Standard*, by being able to impose obligations directly on persons other than the licensee. Thus, whilst a licensee has statutory obligations to comply with the sponsorship-identification rules and to put compliance measures in place; other persons will have a direct statutory obligation to disclose information about such payments.

2.3.3 Other rules of relevance

We have not identified any other rules of relevance to this report.

2.3.4 Application of the rules and/or current issues

In this section, some recent concerns about the application of the sponsorship-identification rule and the payment-disclosure rule to news and current affairs programming will be considered.

The failure to disclose such payment or other consideration as required by the sponsorship-identification and the payment-disclosure rules is referred to as the practice of 'payola', which the FCC defines as "the unreported payment to, or

¹⁹⁸ FCC, *Public Notice, Commission reminds Broadcast Licensees, Cable Operators and others of Requirements applicable to Video News Releases and Seeks Comment on the use of video news releases by broadcast licensees and Cable Operators*, FCC 05-84 (13 April 2005), 3.

¹⁹⁹ 47 USC §317(b). However, if a licensee receives no information, having exercised requisite diligence, and no consideration is provided for the material, or only or nominal consideration is made, no identification is necessary: §317(a)(1). See further section 2.3.4 below.

acceptance by, employees of broadcast stations, program producers and program suppliers of any money, services or valuable consideration to achieve airplay for any programming”.²⁰⁰ A related practice is ‘plugola’ which “...describes a situation in which a station fails to identify an outside business interest of the licensee, its parent, its affiliates, or an employee in the broadcast of particular materials”.²⁰¹

These rules have a long history, but covert advertising and payola practices are a matter of continuing concern. By way of background, payola has often arisen with regard to the promotion of music, and, in 2005, a major investigation into payola practices was carried out.²⁰² The practice existed on a wide scale, and ranged from blatant bribes to payments disguised through a variety of mechanisms, for example, mock contest winners.²⁰³ The FCC’s own investigations led to four of the largest radio groups in the US consenting to make payments to the US Treasury totalling \$US12,500,000. The companies were also required to institute detailed compliance measures.²⁰⁴ In fact, allegations of payola practices in the radio industry had been long-standing but were not investigated by the FCC. The 2005 investigations were instigated by the New York Attorney-General. It was only after these investigations that the FCC moved to investigate the allegations.²⁰⁵ Even one of the FCC’s Commissioners, Commissioner Adelstein, has admitted that the FCC may have become lax in enforcing the sponsorship and payola rules.²⁰⁶

However, the payola rules are not concerned with music broadcasting alone, and some recent practices are particularly relevant to news and current affairs coverage. Of

²⁰⁰ FCC, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, FCC 07-218 (24 January 2008), para 98 citing *Commission Warns Licensees about Payola and Undisclosed Promotion, Public Notice*, 4 FCC Rcd 7708 (1988).

²⁰¹ FCC, *In the Matter of Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service, Second Report and Order*, FCC 07-33 (2007).

²⁰² The investigation involved a number of record companies. Sony BMG Music Entertainment, for example, agreed to pay ten million US dollars, after the investigation revealed that payments and gifts were being made to radio stations and employees in order to secure air play for various artists: Office of New York State Attorney General, ‘Sony Settles Payola Investigation’ (Press Release, 25 July 2005) http://www.oag.state.ny.us/media_center/2005/jul/jul25a_05.html

²⁰³ Office of New York State Attorney General, *Assurance of Discontinuance pursuant to Executive Law § 63(15)* (22 July 2005) http://www.oag.state.ny.us/media_center/2005/jul/payola.pdf, para 27 & generally.

²⁰⁴ In return for the consent orders, the FCC agreed to waive its rights to pursue the companies under §§ 317 and 507: see FCC, *CBS Radio, Inc, Order*, FCC 07-27 (13 April 2007); *Citadel Broadcasting Corporation, Order*, FCC 07-28 (13 April 2007); *Clear Channel Communications, Inc Order*, FCC 07-29 (13 April 2007); *Re: Entercom Communications Corp., Order*, FCC 07-42 (13 April 2007)

²⁰⁵ FCC, *Citadel Broadcasting Corporation, Order*, FCC 07-28 (13 April 2007), Statement of Commissioner Adelstein, 16.

²⁰⁶ J S Adelstein, “‘Fresh is not as Fresh as Frozen:’ A Response to the Commercialization of American Media’ (Speech delivered at The Media Institute, Washington, DC, 25 May 2005), 2

concern in the last few years has been the role of the US Government in this type of promotional activity. Two different practices have been involved. These have concerned television, but their significance is such that it is worth noting them here.

The first concerned a government department paying a presenter to promote a specified Government policy. Several instances of this came to light.²⁰⁷ In one, a political commentator was paid \$US 240,000 by the US Department of Education to promote, on national television, a key policy of the Government's education program. There was no disclosure of this payment, which specifically required him to "...regularly comment on NCLB [No Child Left Behind] during the course of his broadcasts...", and to interview the Education Secretary.²⁰⁸ In October 2007, the FCC issued a notice of apparent liability for forfeiture against a television station licensee (Sonshine Family Television) and Sinclair Broadcast Group, the parent company of a number of other television station licensees for breach of the sponsorship-identification rules in relation to these broadcasts.²⁰⁹ Sonshine argued that the consideration it received (\$US100 per broadcast) was nominal and therefore disclosure was not required under section 317(a)(1) (see section 2.3.2.3 above). However, the FCC rejected this argument on the basis that the proviso did not apply to money consideration, only to service or other valuable consideration.²¹⁰ Sinclair received no consideration for the broadcasts, and argued that it had no knowledge or reason to believe that anyone had received consideration and therefore was not liable. However, the FCC considered that this was irrelevant because the material which had been supplied to be broadcast amounted to political broadcast matter.²¹¹ Under section 317(a)(2) and section 72.1212(d), the identification obligation will apply whether or not consideration has been provided in the case of political matter.²¹²

²⁰⁷ ABC Radio National, 'American Cash for Comment', *The Media Report* (3 February 2005) <http://www.abc.net.au/rn/talks/8.30/mediarpt/stories/s1294962.htm>

²⁰⁸ Freepress, 'Free Press calls for an Investigation into Bush Administration's 'Payola Pundits'' (13 January 2005) <http://www.freepress.net/press/release.php?id=40>

²⁰⁹ FCC, *In the Matter of Sonshine Family Television, Inc and Sinclair Broadcast Group, Inc* 22 FCCR 18686 (18 October 2007). A notice of apparent liability is issued by the FCC when it finds a broadcaster liable for a fine: 47 CFR § 1.80(f). The broadcaster will have a period of time in which to pay the fine or respond. It would appear that these fines are being contested.

²¹⁰ FCC, *In the Matter of Sonshine Family Television, Inc and Sinclair Broadcast Group, Inc* 22 FCCR 18686 (18 October 2007), para 13.

²¹¹ FCC, *In the Matter of Sonshine Family Television, Inc and Sinclair Broadcast Group, Inc* 22 FCCR 18686 (18 October 2007), para 17.

²¹² See section 2.3.2.3 above.

The second practice, which appears to have been well-established and widespread, involved the supply to broadcasters of ‘video news releases’ (VNRs). VNRs are pre-packaged news stories, designed to be used in news programs, without alteration, and generally, supplied with a script to be used as the introduction to the video. Some VNRs use actors playing reporters. VNRs may be used by commercial or lobbying groups, but it has been the use by the US Government which has caused most concern. It would appear that hundreds of VNRs were prepared and supplied to broadcasters by government departments and agencies.²¹³ These were generally supplied to the broadcaster without any consideration, but, as noted above, the sponsorship-identification rules apply to programming which is political or discussing controversial issues, regardless of whether consideration has been provided.

In early 2005, the FCC issued a reminder to licensees of their obligations under the sponsorship identification and payment-disclosure rules, and called for information about VNR practice.²¹⁴ Investigations into the use by licensees of undisclosed VNRs are ongoing.²¹⁵ However, the FCC has made orders in relation to one cable network’s use of VNRs.²¹⁶ These decisions concerned VNRs for five different products; each was broadcast during a consumer issues program. No identification was provided under the sponsorship-identification rule. No consideration was received for the VNRs which should have triggered the exception under section 317(a)(1) where no consideration is provided. However, in each case, the FCC ruled that the exception did not apply because the references were not fleeting as is required by the exception.²¹⁷ In each of the broadcasts, the products promoted through the VNRs were the only products featured. Further, in the case of four of the VNR usages, the FCC ruled that the provision of the VNR was itself valuable consideration.²¹⁸ The FCC’s decision illustrates how the rule bears similarity with the UK rule which

²¹³ Letter from Senator John Kerry to [then] FCC Chairman, Michael Powell (15 March 2005).

²¹⁴ FCC, *Public Notice, Commission reminds Broadcast Licensees, Cable Operators and others of Requirements applicable to Video News Releases and Seeks Comment on the use of video news releases by broadcast licensees and Cable Operators*, FCC 05-84 (13 April 2005).

²¹⁵ FCC, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, FCC 07-218 (24 January 2008), paras 109-110.

²¹⁶ FCC, *In the Matter of Comcast Corporation*, 22 FCCR 17030 (21 September 2007) and *In the Matter of Comcast Corporation*, 22 FCCR 17474 (26 September 2007). These orders were notices of apparent liability to impose a forfeiture and are being contested by Comcast.

²¹⁷ 47 USC 317(a)(1), see section 2.3.2.3 above. Because this concerned a cable network the relevant FCC rules are found at 47 CFR § 76.1615(a).

²¹⁸ FCC, *In the Matter of Comcast Corporation*, 22 FCCR 17474 (26 September 2007).

prohibits undue prominence.²¹⁹ However, there is also a crucial difference. Under the US rules, the prominence given to these products would have been acceptable if identification had been provided.

The FCC had indicated that it saw no case for revision of the sponsorship-identification rules, but would review current trends in advertising, such as embedded advertising, and the efficacy of the rules (see section 2.5 below).²²⁰

2.4 US review of findings

The US regulation of advertising and sponsorship presents some marked contrasts to the other jurisdictions reported on. Regulation of advertising and sponsorship is the responsibility of the FCC. The source of the rules relevant to this report is the Comms Act (US), although the FCC has made rules to implement the statutory provisions.

In one sense, compared with other jurisdictions reviewed here, the US advertising and sponsorship rules will seem minimal. This is consistent with the US First Amendment bias against content regulation. However, it is significant that of the limited range of content-related public-interest obligations imposed upon licensees, the rules known as the ‘sponsorship identification’ rules are seen as a key element.

There is in the US a much greater tolerance of advertising and sponsorship and commercial influence generally on broadcasting. As reported, paid political advertising is also permitted, and indeed through the principles of ‘reasonable access’ and ‘equal opportunities’ access to airspace is encouraged and facilitated.

However, in the commercial context, the tolerance of advertising and sponsorship is qualified by a fundamental principle, which is the entitlement of audiences to know what is being broadcast and by whom. The essential obligation of the sponsorship-identification rule is that the identity of any person who has paid for matter to be broadcast must be aired at the same time.²²¹

The sponsorship-identification rule and related payment-disclosure rule (referred to generally as the payola rules) share a similar purpose to the rules considered

²¹⁹ *Ofcom Code*, rule 10.4; see section 1.3.2.3 above.

²²⁰ FCC, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, FCC 07-218 (24 January 2008), para 110.

²²¹ This fundamental principle was also emphasised by the ABA in the Commercial Radio Inquiry: see section on ‘The public-interest concern’ in the *Introduction* to this report.

elsewhere in this report which focus on the need for transparency of commercial content, but they are structured with some key differences:

- Unlike other jurisdictions reviewed in this report, the rules draw no distinction between advertising and sponsorship. There are no definitions provided, and, in fact, section 317 and section 507 of the Comms Act (US) do not refer to ‘advertising’ or ‘sponsorship’. As such they have a broad reach which covers any situation where payment has been made for matter to be broadcast. This means that the rules can cover:
 - Commercial references such as advertising and sponsorship (as they might be commonly understood), product placement and integration. However, the rules may not be well suited to practices such as product placement or integration. This is currently under review by the FCC (see section 2.5 below).
 - Other paid-for content. In other words, the content does not need to be confined to commercial activity. It may cover content seeking to put forward viewpoints, opinions, beliefs, and so forth. This is consistent with a regulatory environment which does not prohibit political or issue-based advertising. In fact, even where there has been no consideration, disclosure must be given in the case of material which is political or involves the discussion of controversial material.
- Under FCC rules, ordinary spot advertisements will comply with the sponsorship-identification rules, if, as will usually be the case, the advertisement itself makes clear the identity by mention of the corporate or trade name.

Commercial References

Whilst the rules emphasise the importance of identifying who has paid for the content, they operate in a way which is fundamentally different from the other jurisdictions reported on. Whilst the UK and Ireland (and Canada with respect to news and current affairs programming) regulate to preserve the editorial independence of programming content from commercial influence, the US rules take no stance on this. Thus, programming content may be influenced by a commercial interest. This will be

permissible provided that the sources are identified. In other words, no guarantees of editorial independence are provided.

Regulatory obligations

Another fundamental difference between the US rules and other jurisdictions is that the rules (section 507, Comms Act (US)) impose obligations on persons additional to the licensee. Under the sponsorship-identification rules, a licensee has an obligation to make disclosure of paid-for content. However, employees of the licensee, and third parties who are associated with the production or payment of program content, who receive consideration for the provision of content to be broadcast, must disclose that information to the licensee, so that the necessary announcements can be made. Further, the obligation is imposed on the person providing the consideration, and on any other person supplying program matter who may have information about such payments to make disclosure. Breach of this rule is a criminal offence.

2.5 Completed or planned reviews

On 26th June 2008, the FCC announced an Inquiry and Notice of Proposed Rule Making into the sponsorship-identification rules.²²² The main purpose of this inquiry is to investigate whether the current sponsorship-identification rules are adequate to deal with, what is perceived to be, the increasing practice of embedded advertising techniques. The increased use of these techniques is attributed to the development of technologies which enable audiences to bypass traditional forms of commercial communications.

The FCC identifies two main forms of embedded advertising: ‘product placement’ and ‘product integration’. ‘Product placement’ is understood to refer to the practice of inserting branded products into programming in exchange for consideration. In general, this will occur through the use of props in the programming.²²³ Whilst product placement is more obviously a visual technique, it is not precluded from being used in radio programming. ‘Product integration’ is understood to be the actual

²²² FCC, *In the matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, FCC 08-155 (26 June 2008). The period for submissions has closed but no further announcements have been made regarding the inquiry.

²²³ FCC, *In the matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, FCC 08-155 (26 June 2008), n 2.

integration of the product into the dialogue or plot of the program.²²⁴ This practice lends itself more readily to radio, compared with product placement.

The Inquiry covers both radio and television, and it is not specifically related to news and current affairs programming. Although it refers to these practices mostly in relation to entertainment programming, it is nevertheless clear that the Inquiry and the consideration of the rules will encompass all types of programming. The *Notice of Inquiry* document is relatively brief, and the process leading up to a decision, if any, to revise these rules will be lengthy. Nevertheless, some indication of the FCC's concerns and focus can be garnered from the document.

In part, the Inquiry will be an information gathering exercise to ascertain the extent and nature of embedded advertising practices, and the extent to which the public is being made aware of these practices. Also under consideration is whether the embedded advertising practices fall within the 'obviousness' exception, and so are exempted from having to make an identification announcement.²²⁵ The FCC is also concerned to investigate what changes might be necessary to the rules to ensure that audiences are aware of the presence of sponsored messages, integrated into programming. The FCC seeks comment on whether rules, which currently apply to political and issue-based advertising, regarding the size or duration of the identification announcement should be applied generally.

Radio is singled out in relation to one matter. The FCC raises for comment the personal, on-air endorsement by radio presenters of products and services which may have been supplied to them for little or no cost.²²⁶ Several issues are raised by the FCC for consideration here, although not elaborated upon:

- Should there be a presumption that consideration has been received for these on-air mentions, thus triggering the announcement requirement?

²²⁴ FCC, *In the matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, FCC 08-155 (26 June 2008), n2.

²²⁵ This refers to the position that ordinary spot-type advertisements are so obvious in terms of the commercial nature and identity of the sponsor that an announcement is not necessary. See section 2.3.2.3 above. The relevant rule is 47 CFR §73.1212(f).

²²⁶ FCC, *In the matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, FCC 08-155 (26 June 2008), para 18

- Is the obviousness exception applicable to those types of mentions which are integrated into broadcast programming, that is “... made to sound like they are part of a radio host’s on-air banter rather than an advertisement”?²²⁷

²²⁷ FCC, *In the matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, FCC 08-155 (26 June 2008), n2

3 CANADA

3.1 The Canadian broadcasting environment

3.1.1 Overview

Responsibility for regulation of broadcasting (and telecommunications) in Canada rests with the Canadian Radio-television and Telecommunications Commission (CRTC), an independent regulatory authority, which is constituted under the Canadian Radio-television and Telecommunications Commission Act 1985. The CRTC reports to the Department of Canadian Heritage, which has responsibility for broadcasting.²²⁸ Another government department, Industry Canada, has responsibility for spectrum and telecommunications.²²⁹

Canadian broadcasting offers a recognisable mixed environment both in terms of type of service and means of delivery, although cable delivery is more prevalent and well-established than in Australia.

The Canadian commercial radio sector operates within a mixed environment of commercial, public, and community television and radio broadcasting, which is consistent with legislative broadcasting policy. Canadian broadcasting policy as set out in the Broadcasting Act 1991 (BA 1991 (Ca)) states that:

The Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty (section 3(1)(b))

Canadian broadcasting caters for the English-language and French-language communities; English and French both being official languages of Canada.²³⁰ Free-to-air radio and television services are delivered over the air. Subscription services are delivered via cable, satellite or multipoint delivery, with cable being the dominant form of delivery, particularly in the case of television.²³¹ Most radio services are

²²⁸ http://www.pch.gc.ca/index_e.cfm

²²⁹ <http://www.ic.gc.ca/epic/site/ic1.nsf/en/home>

²³⁰ Canadian Charter of Rights and Freedoms, section 16.

²³¹ CRTC, *Communications Monitoring Report 2008* (July 2008), 89, 153. For radio, only a very few services are delivered by means other than over the air. The carriage systems are referred to as Broadcasting Distribution Undertakings (BDUs).

delivered over the air, whilst television services tend to be split more evenly between over-the-air and subscription services.²³²

As at 31 December 2007, 1,222 radio and audio services were licensed; 1,210 of these services were delivered over the air.²³³ The public broadcaster, the Canadian Broadcasting Corporation (CBC), provides four national radio networks, as well as some services to particular northern communities broadcasting in several languages, including Aboriginal languages. It should be noted that whilst the television stations operated by CBC are permitted to carry advertising, the radio services do not and therefore rely almost entirely on public funding.

The private commercial sector offers, approximately, 730 services – being a mix of AM, FM, and some digital.²³⁴ In terms of share of radio-tuning hours, the private commercial radio sector dominates:

Private Commercial Sector – 80.5% of hours tuned in an average week

CBC – 12.4%

Community and Campus – 1.4%

Other services – 5.7%²³⁵

3.1.2 Licensing of commercial radio

Within the radio sector, the dominant service is commercial radio. However, there are a range of other services licensed by the CRTC, although these occupy a minority within the overall radio sector. Information about these radio services and digital service is provided in the *Appendix*.

A commercial station is defined in the Radio Regulations 1986 (Radio Regs (Ca)) as “an AM station, FM station or digital radio station, other than one that (a) is owned and operated by the Corporation or a not-for-profit corporation; or

(b) is a campus station, community station, native station or ethnic station” (section 2). The CRTC has taken the view that, despite competitive pressures from new technologies, the commercial radio industry, especially FM stations, remains

²³² CRTC, *Communications Monitoring Report 2008* (July 2008), 89 (radio) and 117 (television).

²³³ CRTC, *Communications Monitoring Report 2008* (July 2008), 89.

²³⁴ CRTC, *Communications Monitoring Report 2008* (July 2008), 89.

²³⁵ CRTC, *Communications Monitoring Report 2008* (July 2008), 93. The results are based on an average week from 5am to 1am in Fall 2007.

financially healthy.²³⁶ Commercial radio remains a key element in the CRTC's implementation of Canadian broadcasting policy pursuant to the BA 1991 (Ca) which:

- Recognises that English and French language broadcasting will have different requirements (section 3(1)(c));
- Requires the broadcasting system to encourage the development of Canadian expression (section 3(1)(d)); and
- Requires maximum, or at least predominant, use by each broadcasting undertaking of Canadian creative resources.²³⁷

Thus, commercial radio stations are licensed to deliver French or English language programming and will have obligations imposed which relate to the broadcasting of Canadian content. Local programming obligations are also imposed on FM stations (as will be discussed in this report; see section 3.3.3 below) consistent with broadcasting policy which requires programming to be drawn from, *inter alia*, local sources (section 3(1)(i)(ii)).²³⁸ Licences are allocated on a merit basis, for a term of not more than seven years.²³⁹ Licences will be subject to conditions. Licence conditions applicable to all commercial radio licences are set out on the common licence form.²⁴⁰ A licensing or renewal decision contains only those conditions which alter or are in addition to the standard licence conditions.

3.2 The broadcasting regulatory environment

3.2.1 Broadcasting policy

The BA 1991 (Ca) governs the broadcasting regulatory responsibilities of the CRTC. An important element of the legislation is the policy statement in section 3. Much of the statement of broadcasting policy is concerned with a key objective: the promotion and availability of Canadian content and Canadian creative resources. Commercial radio is seen as having "...an important role to play in showcasing the work and

²³⁶ CRTC, *Commercial Radio Policy 2006*, Public Notice CRTC 2006-158 (15 December 2006), para 7. This appears to be confirmed by the CRTC, *Communications Monitoring Report 2008* (July 2008), 86.

²³⁷ BA 1991 (Ca), section 3(1)(f).

²³⁸ CRTC, *Commercial Radio Policy 2006*, Public Notice CRTC 2006-158 (15 December 2006), para 202.

²³⁹ BA 1991 (Ca), section 9(1)(b).

²⁴⁰ CRTC, *New Licence Form for Commercial Radio Stations*, Public Notice 1999-137 (24 August 1999). See also CRTC, *Conditions of Licence for Commercial AM and FM radio stations*, Broadcasting Regulatory Policy CRTC 2009-62 (11 February 2009) for amended licence conditions.

contributing to the development and promotion of Canadian artists”.²⁴¹ It is apparent that, across the broadcasting sector, licensing, renewal and related regulatory processes, and ongoing CRTC policy development, are very much driven by this key policy.

Whilst the section 3 statement of policy is not concerned directly with advertising, some of the policy objectives will have a relevance to advertising and its relationship to other broadcasting content, as can be seen from the following:

Section 3(1)(g): The programming originated by broadcasting undertakings should be of high standard

Section 3(1)(h) All persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast

Section 3(1)(i) The programming provided by the Canadian broadcasting system should

- (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
- (ii) be drawn from local, regional, national and international sources,
- (iii) [...]
- (iv) Provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and [...]

The reference to “high standard” in section 3(1)(g) encompasses compliance with program and advertising standards, as noted in the CRTC’s 1998 statement of policy for commercial radio.²⁴² This was reiterated in the 2006 statement of commercial radio policy, and specifically tied to the self-regulatory codes, in the CRTC’s examination of regulation of infomercials.²⁴³

It is also relevant to note the statement of broadcasting regulatory policy in section 5(2):

The Canadian broadcasting system should be regulated and supervised in a flexible manner that

- (a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under

²⁴¹ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158, 15 December 2006, para 32.

²⁴² CRTC, *Commercial Radio Policy 1998*, Public Notice 1998-41 (30 April 1998).

²⁴³ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158, 15 December 2006, para 216, and see section 3.3.2.1 below.

- which broadcasting undertakings that provide English or French language programming operate;
- (b) takes into account regional needs and concerns;
 - (c) is readily adaptable to scientific and technological change;
 - (d) facilitates the provision of broadcasting to Canadians;
 - (e) facilitates the provision of Canadian programs to Canadians;
 - (f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and
 - (g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

Section 5(3) states that in a conflict between the objectives of broadcasting policy and the objectives of regulatory policy, the CRTC should give priority to the broadcasting policy objectives.

3.2.2 The regulatory framework

The regulatory framework comprises a mix of statutory regulation and self-regulation. Thus, for example, licensing processes, Canadian content policies, and regulation of ownership and control of broadcasting undertakings are the responsibility of the CRTC. Other aspects of broadcasting content, including advertising, are covered by self-regulation. In relation to the commercial radio sector, the Canadian Broadcast Standards Council (CBSC) is of particular relevance.

3.2.2.1 The role of the CRTC

A striking feature of the BA 1991 (Ca) is its minimalist nature. Compared with comparable legislation in the UK and Australia, the Canadian legislation is very generalist in approach. As an example, it prescribes no types of licences, nor any rules about ownership and control.²⁴⁴ As a corollary of this, the CRTC is given particularly broad powers to develop policy and make regulations. Section 5(1) states:

Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set

²⁴⁴ The CRTC powers include establishing classes of licences, determining conditions and related functions (section 9).

out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

In fulfilment of its role under section 5(1), the CRTC is given the power:

- to develop policy by issuing guidelines and statements with respect to any matter under the BA 1991 (Ca), although such guidelines and statements are not binding on the CRTC (section 6). Policy determinations will be implemented through regulations or licence conditions. Even if policy determinations are not translated into legal instruments, the statement of policy creates an expectation, a “moral imperative”, of compliance;²⁴⁵
- to make regulations (section 10). Regulations can be applicable to all persons holding licences or to all persons holding licences of one or more classes. A list of non-exhaustive matters on which it can make regulations are set out. These include:
 - (d) ...the character of advertising and the amount of broadcasting time that may be devoted to advertising
 - (e) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates; and
- through its licensing powers, which include establishing classes of licences, issue, renewals, amendments and revocation, the CRTC is able to determine and impose licence conditions (section 9(1)).

3.2.2.2 The role of self-regulation

In some areas of broadcasting policy, the CRTC has allowed self-regulatory schemes to operate. Of relevance to the commercial radio sector are the CBSC and Advertising Standards Canada (ASC). These bodies have developed codes which relate to program and advertising standards. The CRTC’s approach to ensuring adherence to these codes varies. In some cases, the CRTC will rely on the licensees’ membership of the relevant body. In other situations, the CRTC will impose adherence by a licence condition or regulation.

²⁴⁵ Email communication from CRTC, 26 June 2008, and see section 3.3.2.1 below.

The CBSC

The CBSC²⁴⁶ was established by the Canadian Association of Broadcasters (CAB) in 1990. CAB represents the private commercial radio and television broadcasters and now also specialty services and satellite radio providers, and by virtue of their membership of CAB they agree to adhere to the codes administered by the CBSC. Of the codes currently administered by the CBSC, three are relevant to the radio sector:

- *CAB Code of Ethics (Code of Ethics);*
- *Radio and Television News Directors Association of Canada Code of Ethics (RTNDA Code);*
- *CAB Equitable Portrayal Code.*

It is a measure of the flexibility of the CRTC's powers that it can determine whether and what aspects of broadcasting regulation should be transferred to industry-based regulatory schemes. CRTC policy recognises the self-regulatory scheme operated by the CBSC, but retains an ongoing monitoring role over the operation of the scheme. For example, it requires the CBSC to report to it on a regular basis and to provide an annual report on its membership, activities, and disposition of complaints.²⁴⁷ All new codes and code amendments have to be approved by the CRTC.²⁴⁸

The CBSC operates through two national panels (one, dealing with speciality services, the other with television) and a series of regional panels (which can deal with both radio and television). The Chair of the CBSC must be independent of the broadcasting industry.²⁴⁹ Before a panel deals with a complaint, an attempt is made first to resolve the matter between the complainant and the licensee, but if the complainant is not satisfied with the outcome, s/he can seek a ruling from the CBSC which may be determined by the CBSC Secretariat or referred onto a panel.

²⁴⁶ <http://www.ccnr.ca/english/index.php>

²⁴⁷ CRTC, *Canadian Broadcast Standards Council*, Public Notice 1991-90 (30 August 1991).

²⁴⁸ CRTC, *Canadian Broadcast Standards Council*, Public Notice 1991-90 (30 August 1991).

Although not of direct relevance to the concerns of this report, an interesting example of the extent of self-regulation can be seen with the CBSC *Journalistic Independence Code*. This code was approved by the CRTC in October 2008: Broadcasting Public Notice CRTC 2008-95 (20 October 2008). The code is concerned with separation of broadcaster news management structures (but not news gathering) from their affiliated newspapers. The code is closely linked with the CRTC's policy on cross-media ownership: CRTC, *Regulatory Policy: Diversity of Voices*, Public Notice 2008-5 (15 January 2008).

²⁴⁹ CRTC, *Canadian Broadcast Standards Council*, Public Notice 1991-90 (30 August 1991) and <http://www.ccnr.ca/english/about/structure.php>

The CRTC will refer complaints it receives to the CBSC if they appear to relate to a code matter. However, it continues to recognise the right of “any interested party ...to approach the Commission directly.”²⁵⁰ However, there appears to be no formal mechanism for this.

Where the licensee is not a member of the CBSC, the CRTC will deal with complaints about program and advertising matters.²⁵¹

The *RTNDA Code* is primarily a code governing the behaviour of the professional journalists in the electronic media who are members of the Radio and Television News Directors Association of Canada. Unusually (compared with professional journalists’ associations in other jurisdictions) the Association has transferred responsibility for the administration of the *RTNDA Code* to the CBSC.²⁵² When adjudicating complaints about licensees, the CBSC will consider also whether there has been a breach by the licensee of the *RTNDA Code*.

The ASC

The ASC²⁵³ is a self-regulatory body for the advertising industry covering advertising in all media, including print. The ASC is chiefly concerned with advertising content and deals with breaches of the *Canadian Code of Advertising Standards*²⁵⁴ by advertisers. Where code breaches are found, advertisers are requested to deal with breach by amendment or withdrawal of the advertisement.²⁵⁵

The ASC code will not be considered further in this report, but one code provision should be noted as being of relevance. Clause 2 prohibits an advertisement being presented “...in a format or style that conceals its commercial intent”.

3.2.2.3 Enforcement and sanctions

As will be seen below, regulation of commercial radio advertising arises through a combination of regulations, licence conditions, and the self-regulatory codes.

²⁵⁰ CRTC, Public Notice 1988-159 (22 September 1988), reiterated in CRTC, *Canadian Broadcast Standards Council*, Public Notice 1991-90 (30 August 1991).

²⁵¹ CRTC, *Communications Monitoring Report 2008* (July 2008), 18.

²⁵² However, adherence to the *RTNDA Code* is a requirement of membership of the RTNDA, and so presumably it would be open to the RTNDA to act where it was clear that a member was responsible for a breach of the *RTNDA Code* as determined by the CBSC.

²⁵³ <http://www.adstandards.com/en/>

²⁵⁴ <http://www.adstandards.com/en/Standards/theCode.aspx>

²⁵⁵ ASC, *Canadian Code of Advertising Standards* (November 2007), 8.

The CRTC

On the face of it, the BA 1991 (Ca) provides the CRTC with only limited enforcement powers:

- The CRTC may make a mandatory order to ensure compliance with the legislation, a regulation, licence, decision or order (section 12(2)). A mandatory order can also be made an order of the Federal Court or provincial superior court and, thus, enforced, through contempt proceedings (section 13).
- Breach of a regulation or order, made under the BA 1991 (Ca), constitutes an offence, punishable by fine (section 32(2)). This includes also a breach of a mandatory order.
- Breach of a licence condition also constitutes an offence, punishable by fine (section 33).

Given the limited range of enforcement mechanisms and the reliance on criminal sanctions, it would seem that the CRTC lacks flexibility in licensee behaviour. However, this needs to be seen in the context of the wide licensing powers available to the CRTC, and the requirement to exercise those powers so as to implement broadcasting policy. For example, the CRTC has power to amend, suspend, or revoke licences in furtherance of its regulatory role.²⁵⁶ Further, licence renewals are not automatic, although they can be dealt with by public notice and without a public hearing.²⁵⁷ Licensing decisions provide the CRTC with an opportunity to review licensee behaviour and to take that into account in its decision. The prospect of having to account for behaviour on a licence renewal or possible revocation may help to shape behaviour.²⁵⁸

The CBSC

Where the CBSC finds a code breach, the sanction is to require the broadcaster to announce on-air the outcome of the complaint. There are requirements regarding the

²⁵⁶ BA 1991 (Ca), section 9(1)(c),--(e).

²⁵⁷ BA 1991 (Ca), section 18(2). The public notice route still allows for public consultation: CRTC, *A Guide to the CRTC Processes for Broadcasting Applications and Policy Reviews*, Broadcasting Circular 2007-4 (7 June 2007).

²⁵⁸ For an illustration of this, see CRTC, *CJMS Saint Constant – Licence Renewal*, Broadcasting Decision CRTC 2006-352 (10 August 2006), noted in section 3.3.4 below.

timing and frequency of the announcement. There is also an expectation that the broadcaster will take action to ensure that the breach does not recur.²⁵⁹

Although it could not be said that there is a formal co-regulation model in operation, there is scope for the CRTC to act:

- As noted earlier, the CRTC has stated its willingness to act where a member of the public is dissatisfied with the outcome of the complaints process.²⁶⁰
- If a licensee fails to comply with the CBSC codes on a repeated basis, the CRTC could deal with this by imposing licence conditions or, more generally, through its enforcement mechanisms.

3.3 Regulation of advertising and sponsorship on commercial radio

Although regulation of advertising on commercial radio is primarily governed by a self-regulatory system, as noted earlier, regulation of commercial radio, including advertising, is multi-layered with the rules originating from several sources and using different regulatory approaches.

3.3.1 Definitions

The BA 1991 (Ca) does not contain any relevant definitions. The Radio Regs (Ca) contains a definition of “commercial message”:

“an advertisement intended to sell or promote goods, services, natural resources or activities and includes an advertisement that mentions or displays in a list of prizes the name of the person selling or promoting those goods, services, natural resources or activities” (section 2)

This definition accords with a traditional sense of commercial advertising, namely that it is about the selling or promotion of goods and services, and like matter, but the following can be noted:

- It does not mention consideration being given for the broadcasting of the advertisement.

²⁵⁹ <http://www.ccnr.ca/english/faqs/decisions.php#4>

²⁶⁰ See CRTC, *Canadian Broadcast Standards Council*, Public Notice 1991-90 (30 August 1991) and CRTC, *Communications Monitoring Report 2008* (July 2008), 19.

- With the exception of the reference to the prize list, it does not cover other circumstances in which the provider of the goods, etc may seek to promote or publicise its name, or certain opinions or ideas, without the intention of selling or promoting goods etc.
- The definition is a narrow one in that it is focused on a commercial context and the sale or promotion of goods or services and like matter. It does not cover the possibility that other persons might seek, for non-commercial purposes, through payment, to promote or have aired particular viewpoints, proposals, beliefs or so forth.

As such the definition of ‘commercial message’ stands in contrast to the breadth of the US sponsorship-identification rule (see section 2.3.2.3 above) and to the more inclusive definition of ‘advertisement’ provided in the *Advertising Standard* (see Introduction to this report, above) which now applies to the obligation on commercial radio licensees to ensure that programme matter and advertising are clearly distinguishable.

There is no definition of ‘advertisement’ or ‘sponsorship’ in the Radio Regs (Ca).

The self-regulatory codes considered below do not contain any definitions of ‘advertising’ or like terms. It would seem that the codes tend to rely upon how the term might be generally understood in the industry or refer to definitions which may be contained in regulations made by the CRTC.²⁶¹

It should also be noted that the CRTC uses a scheme of content categories. These content categories are used by the CRTC in determining licence conditions when it intends to impose requirements on licensees to broadcast certain types of content in fulfilment of Canadian broadcasting policy. Hence categories might refer to types of ‘spoken word’ or types of music such as ‘popular’ or ‘special interest’.²⁶² Thus, for example, an AM or FM commercial licensee might be required to devote “10% or

²⁶¹ See CBSC, *CITY-TV re Ed the Sock* (CBSC Decision 9495-0100, August 23, 1995), <http://www.ccnr.ca/english/decisions/1995/950116.php>. In that decision the CBSC looked to the definition of ‘advertising material’ contained in the Television Broadcasting Regulations 1987(Ca). See also <http://www.ccnr.ca/english/codes/cabethics/clause13.php>

²⁶² CRTC, *Revised Content Categories and Subcategories for Radio*, Public Notice CRTC 2000-14 (28 January 2000). Under the Radio Regs (Ca), the content categories are as they are set out in this notice: section 2.

more of its musical selections from content category 3 to Canadian selections”.²⁶³ The content categories also include a category for advertising. Thus, if a condition of a licence limits the amount of advertising it will be referred to as follows: “It is a condition of licence that the licensee broadcast, during each broadcast week, no more than 504 minutes of advertising (content category 5)...”.²⁶⁴

Content category 5 is the only ‘definition’ of advertising which appears expressly to include sponsorship. Content category 5 is also confined to promotion within a commercial context.

“Broadcast matter intended to promote services or products offered to the public by persons normally advertising in the course of their business. For greater particularity, this category includes the following three subcategories:

Subcategory 51: Commercial announcement

A commercial announcement for a business, product or service, presented in return for consideration.

Subcategory 52: Sponsor identification

Identification of the sponsor of a program or program segment other than under subcategories 51 and 53

Subcategory 53: Promotion with sponsor mention

Verbal or musical material promoting increased listening to the station or to specific announcers, programs or programming elements, when accompanied by the identification of a sponsor”²⁶⁵

It is useful to note also that the Canadian Code of Advertising Standards administered by Advertising Standards Canada (see section 3.2.2.2 above) contains a definition of ‘advertising’ which is reasonably broad:

... any message (the content of which is controlled directly or indirectly by the advertiser) expressed in any language and communicated in any medium ... to Canadians with the intent to influence their choice, opinion or behaviour

That this definition is meant to encompass something broader than commercial activity is clear from the further definitions:

“Advertising” also includes “advocacy advertising,” “government advertising,” “political advertising” and “election advertising”

²⁶³ Radio Regs (Ca), section 2.2(3). Content category 3 is a reference to ‘Special Interest Music’. “Canadian selection” is defined in section 2.2(2). The provision is designed to promote Canadian music.

²⁶⁴ CRTC, *New Licence Form for Campus Radio Stations*, Public Notice 2000-156 (16 November 2000), licence condition 6.

²⁶⁵ CRTC, *Revised Content Categories and Subcategories for Radio*, Public Notice CRTC 2000-14 (28 January 2000).

“Advocacy advertising” is defined as “advertising” which presents information or a point-of-view bearing on a publicly recognised controversial issue

We have been unable to find any examples of the CBSC using these definitions in its adjudications.

3.3.2 Advertising, sponsorship, and related rules

3.3.2.1 Amount of advertising

There are no limits on the amount of advertising which can be broadcast on commercial radio.

However, the CRTC has developed a new policy on infomercials. In 2006, the CRTC issued a revised policy for commercial radio.²⁶⁶ Generally, the policy is more concerned with matters relating to the promotion of Canadian content and cultural diversity. However, the issue of infomercials was raised. The broadcasting of infomercials on television has been regulated, but not on commercial radio. The CRTC defines infomercials as programming “exceeding 12 minutes in length that combines entertainment or information with the sale or promotion of goods or services into a virtually indistinguishable whole ...”²⁶⁷.

It is clear that the policy governing the regulation of infomercials on television is designed to ensure that viewers are not confused by the nature of the programming being received and as such infomercials have to be clearly identified as constituting paid commercial programming. Once again, the focus appears to be on paid messages arising only within a commercial context.

The CRTC has taken the view that radio listeners should also be similarly informed and, in its review, referred to complaints received from listeners relating to the failure to identify such content as paid advertising.²⁶⁸ It has introduced a new requirement for commercial radio stations:

...advertising segments exceeding three minutes in duration must be identified as follows:

²⁶⁶ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158 (15 December 2006). The previous commercial radio policy had been issued in 1998: Public Notice 1998-41 (30 April 1998)

²⁶⁷ CRTC, *Amendment to the Television Broadcasting Regulations, 1987 to permit, by condition of licence, the airing of "infomercials" during the broadcast day*, Public Notice 1994-139 (7 November 1994). The reference to 12 minutes relates to the limitation on television stations not to broadcast more than 12 minutes of advertising per hour.

²⁶⁸ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158 (15 December 2006), para 217.

- a each production broadcast must be preceded by and concluded with a clear and prominent announcement that the programming constitutes a paid commercial segment; and
- b such an announcement must be repeated prior to the resumption of the production following each break in the program.²⁶⁹

It is useful to note the regulatory context in which the CRTC saw this new requirement:

The Act requires that the programming originating by broadcasting undertakings should be of high standard and notes that both the *CAB Code of Ethics* and that of the Radio-Television News Directors Association of Canada contain provisions respecting the accuracy of information provided by broadcasters. In this spirit, the Commission considers that radio listeners should be informed when the airtime for longer advertising segments is, in fact, paid by an advertiser.²⁷⁰

At this stage, the status of the ‘rule’ is unclear. The Radio Regs (Ca) have not been amended. It would be open to the CRTC to impose this as a licence condition, but the common form of licence conditions has not been amended in this respect. No evidence has been found of the imposition of this requirement on individual licensees. It would seem that the statement of the ‘rule’ in the policy is intended in the meanwhile to act as a “moral imperative” for licensees (see section 3.2.2.1 above).²⁷¹

3.3.2.2 Political advertising

Political advertising is permitted. During an election period, licensees are required to allocate time for advertisements of a “partisan political character” on an “equitable basis to all accredited political parties and rival candidates represented in the election or referendum”.²⁷²

3.3.2.3 General

As noted earlier, with some limited exceptions, advertising is primarily a matter for self-regulation. The main codes of relevance to licensees are the *CAB Code of Ethics (Code of Ethics)*²⁷³ and *Radio-Television News Directors Association of Canada Code of Ethics (RTNDA Code)*²⁷⁴. This will mean, in effect, that regulation of advertising

²⁶⁹ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158 (15 December 2006), para 218.

²⁷⁰ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158 (15 December 2006), para 216.

²⁷¹ Email communication from CRTC, 26 June 2008.

²⁷² Radio Regs (Ca), section 6.

²⁷³ Revised June 2002, see <http://www.ccnr.ca/english/codes/cabethics.php>

²⁷⁴ Revised June 2000, see <http://www.ccnr.ca/english/codes/rtnnda.php>

and sponsorship, so far as it relates to news and current affairs programming, will be largely complaint-driven.

The preamble (termed 'Background') to the *Code of Ethics* includes the following statement and is indicative of the need for licensees to exercise responsibility, especially in relation to the influence of advertising:

Revenues from advertising make possible non-government broadcasting and make all types of programmes available to the Canadian people including news, information, education, and entertainment. Each broadcaster is responsible for the programming of the licensed station, network or service. This responsibility can only be met by bringing influence to bear upon all who have a hand in the production of programs including sponsors, producers of live and recorded programs, advertising agencies and talent agencies.

Two clauses in the *Code of Ethics* deal expressly with advertising. As noted earlier, the *Code of Ethics* provides no definition of advertising. Clause 13 is a statement of general principles and as such is a familiar statement of the need to advertise responsibly and to ensure truthfulness in advertising. Clause 14 provides more detailed rules, and clauses 14(b) and 14(c), as set out below, are of direct relevance to the need to ensure that listeners are not misled as to the nature of the matter being broadcast. The CBSC provides a commentary on each clause referencing previous decisions. However, the commentary for clause 14 contains no relevant discussion, although a recent decision is relevant and is considered in section 3.3.4 below.

Clause 14 – Advertising (Details)

(b) Broadcasters shall ensure that advertising material within a newscast is clearly distinguishable from the news information adjacent to it. To this end, any commercial message broadcast within a newscast should not be read by the newsreader.

(c) Broadcasters shall ensure that there is no influence by advertisers, or the perception of such influence, on the reporting of news or public affairs, which must be accurate, balanced, and objective, with fairness and integrity being the paramount considerations governing its reporting.

The following can be noted in relation to clause 14:

- Whilst it contains no restrictions on the presence of advertising during a news broadcast, the prohibition on the newsreader reading an advertisement during this news broadcast serves as a safeguard against a confusion of news content and advertising content.

- Whilst the clause refers to advertising, it also refers to ‘commercial message’. As such it may be expected that the definition in the Radio Regs (Ca) could be relevant. Given this, and the discussion above, which seems to indicate that advertising is viewed only as promotion within a commercial context, clause 14 would seem to have a narrow reach.

The *RTNDA Code* does not contain any provisions which relate directly to advertising.

3.3.3 Other rules of relevance

News and current affairs

The rules considered here are not advertising rules, but they are rules which could be relevant to the impact of advertising on programming. Importantly, because they are not directed specifically at advertising, as it is understood within this regulatory regime, other paid-for influences could be covered.

Section 3(d), Radio Regs (Ca), prohibits a licensee broadcasting “any false or misleading news”. Clearly, news could be presented in a false or misleading way if it is a form of disguised advertising or, in some other way, there are undisclosed commercial influences on the content.

As can be seen from clause 14, discussed above, (and indeed, clause 13), the *Code of Ethics* does not provide detailed consideration of advertising as it may relate to news and current affairs programming, nor has an attempt really been made to emphasise different forms of commercial influence, such as sponsorship. However, it will be seen that clauses 14(b) and (c) are of direct relevance to news content and 14(c) in relation to current affairs content.

There are other provisions in the *Code of Ethics* which could be of relevance to the impact of commercial influence on news and current affairs in so far as they go to the process of presenting the news and ensuring that there is no confusion between news content and commercial content. Clauses 5 and 6 are set out in full.

Clause 5 – News

It shall be the responsibility of broadcasters to ensure that news shall be represented with accuracy and without bias. Broadcasters shall satisfy themselves that the arrangements made for obtaining news ensure this result. They shall also ensure that news broadcasts are not editorial.

News shall not be selected for the purpose of furthering or hindering either side of any controversial public issue, nor shall it be formulated on the basis of the beliefs, opinions or desires of management, the editor or others engaged in its preparation or delivery. The fundamental purpose of news dissemination in a democracy is to enable people to know what is happening, and to understand events so that they may form their own conclusions.

Nothing in the foregoing shall be understood as preventing broadcasters from analyzing and elucidating news so long as such analysis or comment is clearly labeled as such and kept distinct from regular news presentations. Broadcasters are also entitled to provide editorial opinion, which shall be clearly labeled as such and kept entirely distinct from regular broadcasts of news or analysis.

Broadcasters shall refer to the Code of Ethics of the Radio and Television News Directors of Canada (“RTNDA”) for more detailed provisions regarding broadcast journalism in general and to the CAB Violence Code for guidance with respect to the depiction of violence, graphic reporting of delicate subject matter or the use of explicit language in news and public affairs programming on television.

Clause 6 emphasises the ultimate responsibility of broadcasting licensees for all content broadcast, regardless of by whom.

Clause 6 – Full, Fair and Proper Presentation

It is recognized that the full, fair and proper presentation of news, opinion, comment and editorial is the prime and fundamental responsibility of each broadcaster. This principle shall apply to all radio and television programming, whether it relates to news, public affairs, magazine, talk, call-in, interview or other broadcasting formats in which news, opinion, comment or editorial may be expressed by broadcaster employees, their invited guests or callers.

The *RTNDA Code* includes clauses which are in the same spirit as clause 5 of the Code of Ethics:

Article Three - Authenticity

Broadcast journalists will present news and public affairs without distortion. Interviews may be edited provided that the meaning is not changed or misrepresented. Broadcast journalists will not present news that is rehearsed or re-enacted without informing the audience. Newsrooms should take steps to ensure the authenticity of amateur video and audio tape before broadcasting it. Editorials and commentary will be identified as such.

Article Five – Independence

Independence is a fundamental value and we will resist any attempts at censorship that would erode it. Broadcast journalists will resist pressures to change or alter the news. Intrusion into content, real or apparent, should be resisted.

Two further clauses are especially relevant to dealing with the potential impact of other commercial interests. There is no relevant commentary provided with respect to these clauses.

Article Five A – Integrity

Producers of news broadcasts will not pay subjects or sources that have a vested interest in a story. Commentators or contracted experts are exempted. Broadcast journalists will not accept financial compensation from those who seek to influence news coverage thereby compromising journalistic integrity and independence.

Article Six – Conflict of Interest

Broadcast journalists will govern themselves on and off the job in such a way as to avoid conflict of interest, real or apparent.

It is clear from Article Five A that there is an unequivocal prohibition on broadcast journalists accepting financial compensation. Breach of this clause could presumably lead to sanctions being imposed on a licensee. The rule operates differently to the US sponsorship-identification rules which are less concerned with the fact of payment; there the concern is to ensure disclosure of such information. However, in contrast to the US rules, these rules seem to impose no direct liability for the journalist, except to the extent that it might impact on the journalist's membership of the RTNDA. Further, it is clear that neither the *Code of Ethics* nor the *RTNDA Code* imposes any specific obligation on licensees to have systems in place for ensuring compliance.

Local content

This rule is not directly relevant, but it provides an interesting example of the way in which a licensee's reliance on advertising revenue can be used to achieve certain policy outcomes. FM stations are subject to a local programming requirement which requires that they must not solicit or accept local advertising for broadcast during any broadcast week when less than one-third of programming broadcast is local.²⁷⁵ This condition does not apply to single-station markets.

The condition is, in effect, a means of imposing a requirement that FM stations broadcast one-third local programming.²⁷⁶ AM stations are not subject to such a condition, but on a case-by-case basis AM stations may have requirements for

²⁷⁵ CRTC, *Conditions of Licence for Commercial AM and FM Radio Stations*, Broadcasting Regulatory Policy CRTC 2009-62 (11 February 2009), licence condition 8.

²⁷⁶ CRTC, *Commercial Radio Policy 1998*, Public Notice 1998-41 (30 April 1998), para 189.

minimum levels of local programming imposed.²⁷⁷ The current definition of “local programming” seeks to ensure that is genuine local content:

Local programming includes programming that originates with the station or is produced separately and exclusively for the station. It does not include programming received from another station and rebroadcast simultaneously or at a later time; nor does it include network or syndicated programming that is five minutes or longer unless it is produced either by the station or in the local community by arrangement with the station.

In their local programming, licensees must incorporate spoken word material of direct and particular relevance to the community served. This must include local news, weather, sports coverage, and the promotion of local events and activities.²⁷⁸

3.3.4 Application of the rules and/or current issues

A recent decision illustrates that the CBSC has had relatively little experience in dealing with programming that has been sponsored or paid for. The decision, however, is useful in showing how the CBSC can respond to new situations, and can use its adjudication role to set new standards which must be observed by future licensees. Here, also, the CRTC’s role in licensing processes will be relevant.

*Sunday Showcase with Murray Segal*²⁷⁹ concerned a radio program which consisted of music and talk segments, including invited guests, running for a two-hour period. A recurring guest was the owner of a local home-renovation company. During his appearances he would discuss a variety of home-renovation matters. In the course of the interviews, the company name, phone, and website details of the guest were regularly supplied. A complaint was made that the radio station did not disclose the fact that the home-renovation company had paid for the appearance.²⁸⁰ Interestingly, the radio station did not deny that the appearance was paid for, taking the view that it was purely advertising and the duration was irrelevant. The radio station noted further:

“...at this time there are no regulations or voluntary standards that require a radio station to identify normal advertising as having been a paid commercial announcement. On the practical side, from our perspective, to do so would be

²⁷⁷ CRTC, *Commercial Radio Policy 1998*, Public Notice 1998-41 (30 April 1998), para 191.

²⁷⁸ CRTC, *Commercial Radio Policy 2006*, Public Notice 2006-158 (15 December 2006), para 207. The definition was revised by the 2006 review of commercial radio to clarify that local programming must include news, weather and so forth: para 207.

²⁷⁹ CBSC, *CHWO-AM re Sunday Showcase with Murray Segal* (CBSC Decision 06/07-0999, April 14, 2008); <http://www.ccnr.ca/english/decisions/2008/080604.php>

²⁸⁰ It is perhaps notable that the complainant was someone who had worked in the radio industry.

stating the obvious and the additional commercial clutter it would cause would be very poor programming, indeed.”

The CBSC Panel adjudicating the complaint considered that there had been a breach of clauses 6 and 14 of the *Code of Ethics*. Whilst it noted that the complainant and the radio station were in agreement that the content was advertising, the CBSC was concerned as to whether the ordinary radio listener would identify it as such:

“While the apparent experience of the complainant in commercial radio enabled her to be aware of that fact, it is the reaction of the ordinary uninformed (in commercial radio practices) listener that counts. In the view of the Panel, such audience members could be expected to recognize 15-or 30-second commercial spots, but they would not know, without advice, that the challenged *Sunday Showcase* was nothing more or less than paid flattery. The failure to inform them is misleading and unfair.”

The Panel was also concerned by the radio station’s statement that there were no regulations in place requiring it to identify the advertising as a paid commercial announcement. Although no code provision was in place, the Panel referred to a standard defined by the CBSC in an earlier decision concerning the *Health Show*.²⁸¹

The Panel noted that this 2005 decision had been the first time the CBSC had dealt with the issue of paid or sponsored programming. The *Health Show* was a talk program which included invited guests to discuss health-related issues. In some cases, the guests were representatives of companies which had paid to appear. The CBSC was concerned with the failure to disclose that some guests had paid for their appearances. To the extent that there was disclosure, by the announcement that the program was “brought to you by Retirement Residences Group”, the issue was whether the disclaimer was adequate.²⁸² In that decision, the CBSC decided that the disclosure was inadequate and ruled that “...broadcasters must provide “*clear, transparent and unequivocal disclosure* [emphasis added] of the sponsorship” of a program.²⁸³ It went on:

“It is not the intention of the Panel to attempt to write a set of specific rules that must apply to the broadcast of sponsored programming. The Panel

²⁸¹ CBSC, *CFRB-AM re an episode of the Health Show* (CBSC Decision 04/05-1171, December 15, 2005); <http://www.ccnr.ca/english/decisions/2006/060309.php>

²⁸² CBSC, *CHWO-AM re Sunday Showcase with Murray Segal* (CBSC Decision 06/07-0999, April 14, 2008); <http://www.ccnr.ca/english/decisions/2008/080604.php>

²⁸³ CBSC, *CHWO-AM re Sunday Showcase with Murray Segal* (CBSC Decision 06/07-0999, April 14, 2008); <http://www.ccnr.ca/english/decisions/2008/080604.php>

considers that it is sufficient to lay down the principle that the broadcaster airing sponsored or paid programming must advise its audience of that sponsorship clearly, transparently and unequivocally. The disclosure must also be made at the beginning and end of the program and sufficiently frequently during it that persons tuning in after the start of the program will be able to listen to the broadcast on an informed basis, in terms of the relationship between the sponsor and the program content.”²⁸⁴

Although not a code provision, members of the CAB are expected to respect CBSC decisions regardless of whether they were the subject of the decision.²⁸⁵

In the *Sunday Showcase* decision, the Panel decided that the failure to disclose the sponsorship as required by the earlier decision amounted to a breach of clauses 6 and 14 of the *Code of Ethics*.

That decisions of the Panel can feed back into the CRTC’s licensing process, as suggested in section 3.2.2.3 above, is illustrated by the CRTC’s reference to the *Health Show* decision in a renewal of licence decision. In the licence renewal decision, the CRTC renewed the licence for a short term because of concerns about the failure of the licensee to meet a range of obligations. It also imposed additional licence conditions relating to program standards, and specifically referred the licensee to the *Health Show* decision:

“At the hearing, the Commission advised the licensee of a recent decision by the Canadian Standards Broadcast Council (CSBC) [sic] regarding sponsored programs, i.e., CBSC decision 04/05-1171. The Commission recommended that the licensee read the decision to ensure it fulfills its obligations when broadcasting sponsored programs. The Commission reminds the licensee of its responsibility to comply with the CSBC [sic] decision when broadcasting sponsored programs.”²⁸⁶

3.4 Canada review of findings

Regulation of content, including advertising and sponsorship, is primarily a matter for self-regulation in Canada. With the approval of the statutory regulatory body, the CRTC, the CSBC is responsible for administering various codes and adjudicating on

²⁸⁴ CBSC, *CFRB-AM re an episode of the Health Show* (CBSC Decision 04/05-1171, December 15, 2005); <http://www.ccnr.ca/english/decisions/2006/060309.php>

²⁸⁵ CBSC, *CHWO-AM re Sunday Showcase with Murray Segal* (CBSC Decision 06/07-0999, April 14, 2008); <http://www.ccnr.ca/english/decisions/2008/080604.php> The expectation is set out in the *CBSC Manual*.

²⁸⁶ CRTC, *CJMS Saint Constant – Licence Renewal*, Broadcasting Decision CRTC 2006-352 (10 August 2006), para 32.

complaints. The CRTC, which maintains an active regulatory role in licensing and licence renewals will take note of decisions of the CSBC in considering licensees' behaviour.

There are no limits on the amount of advertising which can be broadcast although the CRTC has introduced a new policy which would regulate infomercials of a certain length.

Political advertising is permitted with some restrictions on allocation of time during election periods.

Definitions

The codes administered by the CBSC of relevance to this report are the *Code of Ethics* and the *RTNDA Code*. Neither of these codes contains definitions of advertising or sponsorship. The BA 1991 (Ca) includes a definition of 'commercial message' and a definition of a content category which accords with general understandings of advertising. Both of these definitions accord with advertising which is concerned with ordinary commercial activity. It would seem that the CBSC in its decisions relies on these definitions and the term as it might be commonly understood in the industry.

There are no definitions of other commercial practices such as 'sponsorship' and in general the codes are relatively unsophisticated in their consideration of the scope for commercial influences on programming. However, as discussed in the report, the CBSC is able to respond to these types of practices, and develop policy which it and the CRTC will expect licensees to observe.

Separation of commercial content from other programming

As with other jurisdictions, a key concern identified in the rules is the need to ensure that there is transparency so that audiences know the nature of the material being broadcast. The *Code of Ethics* deals specifically with news, and in contrast to the other jurisdictions considered in this report, also with 'public affairs' (current affairs) reporting. These rules address:

- The need to ensure that advertising is distinguishable from news. As a further assurance, the rules prohibit a newsreader reading a commercial message during a newscast.

- The need to ensure that there is no influence by advertisers on the reporting of news and public affairs.

Sponsorship and other forms of commercial reference

As noted, the rules are relatively minimalist in their coverage. Aside from the rules dealing expressly with advertising, there are no rules which regulate sponsorship or other commercial practices. There are provisions in the codes which cover programming generally, and which may be relevant to commercial practices, such as rules which ensure that news and public affairs programs are fully and fairly presented. The CBSC has drawn on such rules when considering programming which has been paid for or sponsored, although it is apparent that the CBSC has not often had to deal with these types of practices.

It is notable that most of the obligations in the two codes which are relevant to concerns about editorial independence relate not to programming generally, but to news and current affairs. This suggests that Canada adopts a position somewhere between the UK (and Ireland) and the US.

Regulatory Obligations

The regulatory obligations are imposed on licensees. The *RTNDA Code* although applied to licensees, is also a code for journalists in the electronic media. However, the CBSC appears to apply this code only in relation to licensee obligations.

The *RTNDA Code* prohibits journalists accepting financial compensation for anyone seeking to influence news coverage. However, it would seem that this imposes no direct obligation on the journalist so far as the CBSC is concerned.

3.5 Completed or planned reviews

We have not identified any review, either planned or recently completed, which is relevant to the rules reviewed in this report. Although it is not directly relevant to the advertising and sponsorship rules, under consideration in this report, it is worth noting a current review of the CRTC Regulatory Framework. The review was commissioned by the CRTC,²⁸⁷ and it was required to assess current CRTC regulations and policies with regard to:

²⁸⁷ CRTC, *Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report* (August 2007), <http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm>.

- Their original purpose;
- Their relevance and effectiveness having regard to existing and future needs; and
- Whether they should be “...retained, improved, streamlined or eliminated in order to serve the purposes of the *Broadcasting Act* most efficiently and economically.

The approach taken by the review was to consider whether the regulation was consistent with policy objectives, achievable, and enforceable. The costs of regulation were also relevant. The review was completed in August 2007. However, we have been unable to find any follow-up or outcomes to this review.

With regard to commercial radio regulation, the review’s recommendations were limited, since it took the view that since the early eighties, the regulatory burden on radio had tended to reduce, taking account of financial and technological developments.²⁸⁸

More generally, it is to be noted that the review did not make any recommendations which might amount to a radical change in the current regulatory framework. Whilst it noted the successful use of industry self-regulation, citing the CBSC, and its value “...when properly implemented and administered, can result in achievement of policy objectives with less regulatory burden for both the regulator and the regulated undertakings...”, the review did not make any specific recommendations for greater use.²⁸⁹ It observed also that, whilst a useful regulatory mechanism, there was a risk that it could “...result in the substitution of private interests for public interests if it is not properly structured”.²⁹⁰ It also observed that the successful examples could be related to where the CRTC had taken an active role in the establishment of schemes, as well as the use of licensing conditions to ensure adherence to codes and standards.²⁹¹

²⁸⁸ CRTC, *Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report* (August 2007), <http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm>, 158.

²⁸⁹ CRTC, *Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report* (August 2007), <http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm>, 28.

²⁹⁰ CRTC, *Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report* (August 2007), <http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm>, 28.

²⁹¹ CRTC, *Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report* (August 2007), <http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm>, 28.

The review also considered the licensing processes of the CRTC, but here also there were few recommendations which might be considered to lead to a radical change in the regulatory framework, and especially in the use made by the CRTC of its licensing powers. As such, there were no recommendations to dispense with, or limit the use of, public hearings, although there was a recommendation that the CRTC should revise its rules and procedures to ensure better control over intervenors in public hearings; the review considered that the latter often took up an undue amount of time given the value of their intervention.²⁹²

²⁹² CRTC, *Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report* (August 2007), <http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm>, 206.

4 IRELAND

4.1 The Irish broadcasting environment

4.1.1 Overview

Responsibility for regulation of broadcasting in Ireland rests with two bodies: the Broadcasting Commission Ireland (BCI) and the Broadcasting Complaints Commission (BCC). The BCI is responsible for overall regulation of broadcasting including licensing; development of codes and rules governing content regulation, monitoring compliance and enforcement.²⁹³ The BCC is responsible for dealing with complaints about radio and television content.²⁹⁴ A broadcasting bill, currently under consideration, would replace the BCI and the BCC with one new regulatory authority, to be named the Broadcasting Authority of Ireland.²⁹⁵ A third regulatory authority, the Commission for Communications Regulation, is responsible for regulation of telecommunications, spectrum, and the postal sector.

The BCI and the BCC are both independent regulatory authorities. The BCI was established by the Radio and Television Act 1988 (RT Act 1988 (Ie)) and renamed by the Broadcasting Act 2001 (BA 2001 (Ie)). The work of the BCI is also guided by the Broadcasting (Funding) Act 2003 and the Broadcasting (Amendment) Act 2007. The BCC was established by the Broadcasting Authority (Amendment) Act 1976.²⁹⁶ Broadcasting is the responsibility of the Department of Communications, Energy and Natural Resources.²⁹⁷

Broadcasting in Ireland offers a recognisable mixed environment in terms of type of service, albeit within a small market. Cable and satellite delivery appears less well developed. The commercial radio sector operates within a mixed environment of commercial, public, and community television and radio broadcasting. Currently, 57 radio services are licensed by the BCI:

- 1 national commercial radio station, *Today FM*;
- 1 quasi-national commercial radio station, *Newstalk*;
- 5 regional commercial stations; and

²⁹³ <http://www.bci.ie/index.html>

²⁹⁴ <http://www.bcc.ie/>

²⁹⁵ See further section 4.5 below.

²⁹⁶ Amending the Broadcasting Authority Act 1960, section 18A.

²⁹⁷ <http://www.dcmnr.gov.ie/>

- 50 local, community and institutional stations.

The public broadcaster, the Radio Telefis Éireann (RTÉ), provides four national radio stations. Public broadcasting is funded by a mix of licence-fee and advertising revenue. Listening figures indicate that regional or local radio represents about 55% of the audience, whilst the RTÉ services have a slightly larger share of the national audience compared with national commercial radio.²⁹⁸

4.1.2 Licensing of commercial radio

Licences for radio services (sound broadcasting services) are licensed under section 5 of the RT Act 1988 (Ie), and the licences are referred to as contracts.²⁹⁹ Licences are allocated through a merit-based process relying on criteria set out in section 6.³⁰⁰ The criteria include the “quality, range and type of the programmes proposed”.³⁰¹ In fact, the licensing provisions for ‘sound broadcasting services’ do not specify what type of service it is meant to be. Thus, the section 5 licensing process will apply to commercial services and community services. It is for the BCI to determine the character of the radio services to be provided – commercial or community – and it is empowered to place greater emphasis on one or more of the criteria set out in section 6(2).³⁰² Section 10 permits the broadcasting of advertisements in a sound broadcasting service. The term ‘advertisements’ is not defined, but section 10(5) provides that references to advertisements will cover references to advertising matter in sponsored programs. Licences are for a term of ten years.

Information about other radio services and digital service can be found in the *Appendix*.

4.2 The broadcasting regulatory environment

4.2.1 Broadcasting policy

The current legislation governing broadcasting in Ireland is not especially detailed and there are few explicit statements of policy. The criteria to be used in awarding

²⁹⁸ Joint National Listenership Research, *Report for April 2008-March 2009*, http://www.bci.ie/documents/jnlr_%20april08_march09.pdf.

²⁹⁹ Licensees are referred to as ‘contractors’. In this report, references will be to ‘licence’ and ‘licensee’.

³⁰⁰ The Broadcasting Bill would allow radio licences to be auctioned.

³⁰¹ RT Act 1988 (Ie), section 6(2)(c).

³⁰² See also, BCI, *Licensing Policy, Commercial Radio Services* (2005), http://www.bci.ie/documents/radio_licensing_policy.pdf

sound broadcasting services provide some indication of the policy influences. As such, the policy concerns are similar to those which might be found in other jurisdictions: a concern to secure a range of programming which offers quality and diversity. However, there is also a specific concern to promote programming which relates to Irish culture or is available in the Irish language.³⁰³ This is reinforced by one of the additional functions imposed on the BCI by the BA 2001 (Ie) which requires the BCI, in carrying out its functions, to ensure:

...that the number and categories of broadcasting services made available in the State by virtue of this Act or the Act of 1988 best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity (section 11(2))

In the BCI's own statement of (commercial radio) licensing policy, it identifies four policy objectives to be derived from the relevant legislation: diversity; viability; efficient use of spectrum; and plurality.³⁰⁴

Matters of editorial standards and integrity do not receive express policy consideration, although some of the legislative requirements reflect the importance of news and information. Like the UK, Ireland imposes requirements of impartiality on news and current affairs programming. The obligation applies for commercial radio to both news and current affairs. An unusual requirement is

- a minimum of not less than 20% of the broadcasting time; and
- if the service, is provided for more than 12 hours per day, two hours, between 7.00 am and 7pm,

to be devoted to news and current affairs.³⁰⁵

However, the BCI can grant derogations, in whole or in part, from this rule provided that the BCI is satisfied that "...a derogation would be beneficial to the listeners of sound broadcasting services in that area".³⁰⁶ The BCI's policy in granting derogations is to look at the impact the derogation would have on the licensee's program

³⁰³ See RT Act 1988 (Ie), section 6(2)(d).

³⁰⁴ BCI, *Licensing Policy, Commercial Radio Services* (2005), 6-8.

³⁰⁵ RT Act 1988 (Ie), section 9(1)(c).

³⁰⁶ RT Act 1988 (Ie), as amended by the BA 2001 (Ie), section 15.

commitments, and the contribution the derogation would make to the diversity and quality of news and current affairs in the relevant area.³⁰⁷

4.2.2 The regulatory framework

The regulatory framework differs from that which is now more commonly found by relying entirely on statutory regulatory authorities. Within the broadcasting sector, there is no reliance on industry regulation. The advertising industry operates a self-regulatory system for advertising across the print and broadcasting sectors, but this is primarily the responsibility of advertisers.³⁰⁸ The use of multiple regulatory authorities is also no longer common, although, as noted, this is to change, at least for broadcasting. See section 4.1.1 above and section 4.5 below.

4.2.2.1 The role of the BCI

As noted earlier, the BCI has broad powers of licensing, code development, and monitoring. It is required to ensure that each sound broadcasting licensee complies with the provisions of the relevant legislation.³⁰⁹ The BA 2001 (Ie) imposed new responsibilities on the BCI to draw up codes of standards governing matters of taste and decency in programming, and advertising, sponsorship, and other commercial practices.³¹⁰ The BCI has drawn up three codes of relevance to radio:

- *BCI Code of Programme Standards* (effective 10 April 2007) – this code relates only to matters of ‘taste and decency’ and hence is primarily concerned with portrayal of violence, sexual conduct, different individuals or groups in society, and coarse and abusive language. This code will not be considered further;
- *The BCI General Advertising Code (BCI Advertising Code)* (effective 10 April 2007);³¹¹
- *Children’s Advertising Code* (effective 1 January 2005). This code will not be considered further.³¹²

³⁰⁷ See BCI, *BCI Policy on Derogations from the Statutory News and Current Affairs Requirement* (15 September 2005), http://www.bci.ie/documents/n_&_ca_policy.pdf

³⁰⁸ Advertising Standards Authority of Ireland, <http://www.asai.ie/about.asp>

³⁰⁹ RT Act 1988 (Ie), section 4(7).

³¹⁰ BA 2001 (Ie), section 19(1).

³¹¹ The BCI also publishes guidance notes: *BCI General Advertising Code, Guidance Notes* (10 April 2007) (*BCI Guidance Notes*); the Guidance Notes are non-binding.

The BCI is also required to enforce the codes, but it is the BCC which deals with complaints concerning these codes, and other licensee obligations, as explained in the next section: see 4.2.2.2 below.³¹³

There are some content obligations which are not covered by the codes. In some cases, the BCC will have responsibility for complaints about these matters, but for other matters, the BCI will retain direct responsibility. Rules dealing with impartial treatment of news and current affairs coverage (section 9(1)(a)-(b)); minimum levels of news and current affairs content (section 9(1)(c)); and infringement of individual privacy are statutory obligations not covered in the BCI codes.³¹⁴ Of these rules, the BCC deals with impartial treatment of news and current affairs and infringements of privacy. Rules on the amount of advertising which can be broadcast are covered by the RT Act 1988 (Ie) and are not covered in the codes. The BCI retains direct responsibility for these rules.

As noted above, the BCI was required to develop new codes. Prior to these codes being developed, broadcasters operated under a set of Ministerial Codes, dating from 1995. In drafting the *BCI Advertising Code*, the Ministerial Guides were drawn upon (as well as European Union law). However, it was also intended that the revision should ensure that the new code would be more user-friendly, and representative of a light-touch and proportionate regulation approach.³¹⁵ Whilst there were some suggestions in the submissions that greater use of self-regulation could be made, with specific reference to the example of Ofcom and the ASA (see section 1.2.2 above), this seems not to have been pursued at all by the BCI.³¹⁶

One area which was considered to be problematic was the regulation of sponsorship. In part, this was because the Ministerial code provisions covering sponsorship were difficult to interpret, but it was also because there was insufficient distinction made

³¹² It is worth noting that clause 11 of this code requires clear separation of children's advertising (that is, advertising which is likely to be of interest to children or broadcast during and between children's programs) and program content.

³¹³ BA 2001 (Ie), section 21.

³¹⁴ RT Act 1988 (Ie).

³¹⁵ BCI, *Review of Submissions Received, Consultation: The General Advertising Code: Phase 1* (June 2006), http://www.bci.ie/documents/Gen_ad_%20subs%20report_june_06.doc, 94. See also, BCI, *Review of Submissions Received, Consultation: The General Advertising Code: Phase 2* (October 2006), http://www.bci.ie/documents/GAC_subs_report_phase%202.doc, viii-ix

³¹⁶ BCI, *Review of Submissions Received, Consultation: The General Advertising Code: Phase 1* (June 2006), http://www.bci.ie/documents/Gen_ad_%20subs%20report_june_06.doc, para 7.6.

between the concepts of advertising and sponsorship.³¹⁷ However, it was acknowledged that these rules had been written at a time when the income potential of sponsorship had not been realised.³¹⁸ Chiefly, the debate centred on the need to clarify the distinction between advertising as being more of a “...direct call to action to buy a particular good/service” compared with sponsorship which might be about promotion of a product or service but not the actual sale or supply.³¹⁹ The definition of sponsorship in the *BCI Advertising Code* (see section 4.3.1 below) uses the *TWF Directive* definition. Further, rules limit sponsorship announcements becoming promotional announcements (see section 4.3.2.3 below).

4.2.2.2 The role of the BCC

The BA 2001 (Ie) sets out the role and responsibilities of the BCC in relation to the matters which they can determine and the process for dealing with complaints.³²⁰ Section 24(2) sets out the matters over which the BCC has responsibility:

- Impartiality of news and current affairs, under RT Act 1988 (Ie), section 9(1)(a)-(b);
- Content which offends against good taste and decency, is likely to incite crime, or undermine the authority of the state, under RT Act 1988 (Ie), section 9(1)(d);
- Encroachment on individual privacy, under RT Act 1988 (Ie), section 9(1)(e);
- Failure to comply with a provision of a code dealing with taste and decency of program material, under BA 2001 (Ie), section 19(1)(a);
- Failure to comply with a provision of a code dealing with advertising, teleshopping material, sponsorship, or other forms of commercial promotion either generally or in relation to children, under BA 2001 (Ie), section 19(1)(b)-(c); and

³¹⁷ BCI, *General Advertising Codes, a review of national and international practice* (June 2005), http://www.bci.ie/documents/gen_ad_%20report.pdf, para 9.8.

³¹⁸ BCI, *General Advertising Codes, a review of national and international practice* (June 2005), http://www.bci.ie/documents/gen_ad_%20report.pdf, para 9.8.

³¹⁹ BCI, *Review of Submissions Received, Consultation: The General Advertising Code: Phase 1* (June 2006), http://www.bci.ie/documents/Gen_ad_%20subs%20report_june_06.doc, para 4.4.3.

³²⁰ The BCC also deals with complaints about the public broadcaster’s services.

- inaccurate facts or information in relation to a person which constituted an attack on that person's honour or reputation, under BA 2001 (Ie), section 19(1)(f).

Section 24(3)-(14), BA 2001 (Ie), sets out the process for dealing with complaints, save those which are frivolous or vexatious:

- Complaints must be made in writing to the BCC not more than 30 days after the date of the broadcast;
- The broadcaster shall be given an opportunity to reply;
- The BCC may give to an employee of the broadcaster or the person commissioned to make the program, on request, an opportunity to respond, provided that the BCC is satisfied that the person's employment or the prospect of obtaining further commissions may be adversely affected because of the complaint;
- In the case of a complaint about breach of the advertising codes, the advertiser will also be given an opportunity to respond;
- Complaints shall be considered in private;
- Decisions on complaints must be sent to those concerned and published, unless otherwise inappropriate;
- The decision of the BCC on complaints which are upheld must be broadcast by the broadcaster concerned, unless otherwise inappropriate.

4.2.2.3 Enforcement and sanctions

As explained above, it is the BCC which deals with complaints, but it is for the BCI to ensure compliance by licensees of their obligations. There appears to be no formal mechanism by which the BCC refers matters to the BCI. However, the BCI undertakes a pro-active monitoring role as part of its responsibility to ensure licensee compliance. This monitoring process includes examining BCC's findings.

An interesting aspect of the BCI's role is the degree of monitoring which it undertakes. It has developed a formal compliance policy.³²¹ The main aspects of its compliance-monitoring policy of relevance to this report include:

- Annual performance review of each broadcaster;
- Review of program content – licensees are required to submit recordings and program schedules. In the 2006 review period, the BCI monitored 1800 hours of radio and television programming;³²²
- Decisions of the BCC.³²³

Although these monitoring activities might mean that potential breaches of a code are detected, the mechanism for responding is not clear. The BCC works on a complaints-based model. Whilst this obviously contemplates a member of the public making a complaint, it would presumably be open to the BCI to refer a matter to the BCC. However, a different arrangement appeared to be in place under the Ministerial Codes (see section 4.2.2.1 above). If the BCI, in the course of monitoring, became aware of a possible breach, it would not refer it to the BCC but notify the licensee in question of the breach. However, should the BCC later adjudicate on a complaint on the same matter, and reach a different decision, the BCI will revise its decision and withdraw the notification of breach. If the BCC then upholds the complaint, the BCI will notify the licensee of a breach of licence.³²⁴ However, given the planned changes to the regulatory authority structure, this would not be an issue under the proposed regulatory model.

The BCI

The sanctions available to the BCI are relatively limited. Pursuant to section 14 of the RT Act 1988 (Ie), the BCI can suspend or terminate a licence for serious or repeated breaches by a licensee of the terms of its licence or of its obligations under the legislation. Given the extreme nature of these sanctions, the BCI also operates a system of notifying a licensee of breaches and retaining these notifications on file.³²⁵

³²¹ BCI, *BCI Compliance Policy (2006)* (March 2006).

³²² BCI, *Annual Review 2006* http://www.bci.ie/documents/bci_annual_review_eng_06.pdf

³²³ BCI, *BCI Compliance Policy (2006)* (March 2006), 13.

³²⁴ BCI, *General Advertising Codes, a review of national and international practice* (June 2005), http://www.bci.ie/documents/gen_ad_%20report.pdf, para 8.3.

³²⁵ BCI, *BCI Compliance Policy (2006)* (March 2006), 15.

The BCC

If the BCC upholds a complaint its sanctions are limited to publishing the decision and requiring the licensee to broadcast the BCC's decision.³²⁶ Its website provides monthly reports of its adjudications and an annual report is also published.³²⁷

4.3 Regulation of advertising and sponsorship on commercial radio

As with the UK, the impartiality obligations will form a backdrop to the rules on advertising and sponsorship.

4.3.1 Definitions

Neither the RT Act 1988 (Ie) nor the BA 2001 (Ie) contains any relevant definitions.

The *BCI Advertising Code* contains a number of relevant definitions, which draw heavily on the *TWF Directive* definitions:³²⁸

- Commercial Communication: Any form of announcement on radio and television coming within the recognised character of advertising, sponsorship and teleshopping or any other form of commercial promotion.
- Advertising: Any form of announcement broadcast in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of products or services, including immovable property, activities, rights and obligations, in return for payment.

The term 'commercial communication' is a catch-all term and is used generally throughout the *BCI Advertising Code* when the rule is applicable to all forms of commercial promotion defined above. The definition of 'advertising' appears to be confined to the promotion of ordinary commercial activity; it does not cover broader uses of advertising which might be designed to promote viewpoints, policies, beliefs, or courses of actions. However, this is likely to be consistent with the impartiality obligations and the prohibition on political and religious advertising, and advertising in relation to industrial disputes. It should also be noted that the definition does not make clear to whom the payment or consideration is provided. It might be assumed that it is meant to refer to the licensee. If that is so, then a payment to someone else would mean that it is not an advertisement. The *Guidance Notes* do not comment on

³²⁶ BA 2001 (Ie), section 24(3)(11).

³²⁷ See <http://www.bcc.ie/decisions/index.html> and <http://www.bcc.ie/publications/index.html>

³²⁸ *BCI Advertising Code*, section 2.

this. It is noted that the definition of ‘advertisement’ in the *Advertising Standard* is specifically drafted to include payments made to presenters or associates of presenters.

- Sponsorship: Any contribution made by a public or private undertaking not engaged in television and/or radio broadcasting activities or in the production of audio visual works, to the financing of television and/or radio programmes with a view to promoting its name, its trademark, its image, its activities, its products or its services.
- Surreptitious advertising: The representation in words or pictures of products, services, the name, the trade mark or the activities of a producer of products or a provider of services in programmes when such representation is intended to serve advertising and might mislead the public as to its nature. Such representation is deemed to be intentional if it is done in return for payment or similar consideration.
- Product placement: The inclusion of, or a reference to, a product or service within a programme in return for payment or similar consideration to the programme maker or broadcaster for the specific purpose of promoting that product or service.

The definitions of ‘surreptitious’ advertising and ‘product placement’, a particular form of surreptitious advertising, are intended to cover disguised forms of advertising. These types of advertising will not take the form of traditional advertising, and so may not be readily apparent to the listener (or viewer). The definitions of ‘commercial communication’ and ‘advertising’ in the *BCI Advertising Code* would not seem to cover these forms of disguised advertising since they require “any form of announcement” to be a commercial communication or advertising. It is unlikely that product placement could be viewed as constituting an “announcement”. By contrast, the definition of an “advertisement” in the *Advertising Standard* might be broad enough to include the practice of product placement, given the wording: “...to promote, directly or indirectly...”.

4.3.2 Advertising, sponsorship, and related rules

4.3.2.1 Amount of advertising

There is a limit on the amount of advertising a commercial radio licensee can broadcast. Pursuant to RTA 1988 (Ie), section 10, a licensee must not broadcast advertisements exceeding 15% of the total daily broadcasting time, and within any hour a maximum of ten minutes must not be exceeded.

4.3.2.2 Political advertising

There is a prohibition on advertising which is directed towards a political end. The prohibition also applies to advertising for a religious end or in relation to an industrial dispute (RTA 1988 (Ie), section 10). A political end is understood to be broader than ‘party political’.³²⁹ These rules are also set out in the *BCI Advertising Code*, section 9.

4.3.2.3 General

Aside from the specific statutory obligations noted above, it will be the *BCI Advertising Code* which has most relevance to the regulation of advertising and sponsorship, and other commercial interests, in connection with news and current affairs coverage. The relevance is borne out in the section 1 objectives of the *Code* which, aside from the standard requirement that advertising be legal, honest, truthful, and decent, include:

- To ensure that commercial communications do not impinge on the editorial integrity of broadcasts.

Section 3, which sets out the general principles, also includes a recognition that one of the purposes of the *Code* is that the preparation of commercial communications should be with “...a sense of responsibility both to the individual and society and shall not prejudice the interests of either”.

The *BCI Advertising Code* includes rules which cover specific concerns and specific practices. The following will or may have a relevance to news and current affairs programming:

One set of rules covers the principle of transparency. These rules address the need for identification of content and separation of commercial and editorial content. The rules associated with the *Code* principles, of which transparency is one, apply generally to the practices covered by the *Code*, whilst later provisions deal with specific practices such as advertising or sponsorship. Relevant rules associated with the principle of transparency include:

- Rule 3.3 requires any commercial arrangement within programming to be transparent and the listener made aware of such arrangement. No definition is provided of ‘commercial arrangement’, but since this rule refers to the need

³²⁹ BCI, *BCI Statement regarding Trócaire Advertisement* (22 March 2007), http://www.bci.ie/news_information/press121.html

for commercial communications to operate on a principle of transparency, it can be assumed that a commercial arrangement will be an arrangement connected with a commercial communication.

- Rule 3.3.1 prohibits “...presenters and other on-air personnel...” advertising or endorsing products or services during editorial content. ‘Presenters’ etc are not defined, but the *BCI Guidance Notes* describe ‘on-air personnel’ to include “...reporters and regular guests or contributors”. The *Notes* also state that the prohibition applies to products or services with which the presenter or on-air personnel have “...a vested interest”. The *Notes* also emphasise the licensees’ responsibility to ensure that guests do not promote their products and services on-air.
- Rule 3.3.2 prohibits advertisers or sponsors exercising any editorial influence over the content of programs.
- Rule 3.3.6 prohibits commercial communications featuring persons who regularly present news programs. There is an exception for charity appeals and public service campaigns for health etc. The *BCI Guidance Notes* advise that this rule does not apply to persons who present current affairs programs. The responsibility for compliance rests with the licensee.

A set of rules deal specifically with advertising, and the following are relevant:

- Rule 4.1 reiterates the principle of transparency by requiring commercial content in advertising breaks to be separate from program content.
- Rule 4.2 also reiterates the transparency principle by requiring that advertising must not affect the editorial integrity and value of programming. Advertising is also required to be inserted in natural breaks. This rule addresses not just the need to ensure separation of commercial and programming content, but also the importance of programming content not being distorted by the inappropriate insertion of advertising. As noted, there are restrictions on the amount of advertising which is permitted, but this rule operates as an additional protection to ensure an appropriate balance between advertising and program content.³³⁰

³³⁰ See also *BCI Guidance Notes*, 18.

- Rule 4.8 also addresses the need to make clear the separation of advertising and other content by requiring advertising breaks to be signalled by visual or audio means. The signal itself should not contain a commercial communication.

Specific rules also govern sponsorship:

- Rule 7.2 prohibits sponsorship announcements making promotional references to the sponsor's product or services, although "generic branding slogans" are permitted.
- Rule 7.6 prohibits the sponsoring of radio news programs.

Rules also address other commercial practices or influences. These rules are relatively straightforward prohibitions.

- Rule 3.3.7 prohibits product placement, although it does not apply to incidental references to products or services where they are editorially justified. Such inclusion must not amount to undue prominence. This latter qualification is to avoid creating the impression that a product placement arrangement is in place.
- Rule 4.9 prohibits surreptitious advertising.

4.3.3 Other rules of relevance

Apart from the statutory rules noted above, there are no other rules of relevance. As noted above, the *BCI Code of Programme Standards* does not deal with any matters of relevance to this report.

4.3.4 Application of the rules and/or related issues

There are almost no examples of BCI or BCC decisions relating to the rules reviewed here. A recent decision, concerning the public broadcaster, RTÉ, concerned the requirement under rule 4.8 of the *BCI Advertising Code* to ensure that advertising is clearly separated from other content by visual or audio means.³³¹ This decision concerned two radio programs.³³² In relation to the first, the broadcaster had not used an audio means but had made clear that the program had come to an end by an

³³¹ See section 4.3.2.3 above.

³³² BCC, 'Complaint made by Mr Peter Douglas re RTÉ Radio 1: Ref No 198/08', *BCC Complaint Decisions* (July 2008).

announcement. The BCC considered that the announcement of the conclusion of the program constituted a sufficient audio communication. In the second program, no audio cue was given. RTÉ argued that it was unlikely to cause any confusion and therefore no audio cue was needed. However, the BCC concluded that the issue of confusion was irrelevant: the only issue was whether the advertising break was signalled. In the case of this program, there was no signal to indicate the advertising break.

4.4 Ireland review of findings

Regulation of advertising and sponsorship is the responsibility of two statutory regulatory authorities: the BCI drafts relevant codes; monitors compliance; and imposes sanctions. The BCC adjudicates on complaints about alleged breaches of the codes. Code-compliance operates on primarily a complaints-based model, but unlike the other jurisdictions reviewed in this report, the BCI undertakes ongoing monitoring to ensure licensee compliance. This monitoring role may also reveal possible code breaches.

Obligations related to advertising and sponsorship for commercial radio licensees arise under the RT Act 1988 (Ie) and the BA 2001 (Ie) and under the *BCI Advertising Code*. It is the *BCI Advertising Code* which contains the most detailed regulation of advertising and sponsorship.

Regulation of advertising and sponsorship of commercial radio in Ireland has certain distinguishing features. In these, there is a similarity with the UK.

- The approach to advertising and sponsorship regulation is influenced by the statutory obligation to observe impartiality in all news and current affairs coverage. Relevant also is a prohibition on political advertising, as well as advertising for religious purposes or in relation to industrial disputes.
- Whilst advertising and sponsorship are recognised as legitimate revenue-raising activities, influence on, or interference with, the content of other programming is not tolerated. Hence, there are also specific rules to prevent disguised forms of advertising.

It is also striking that Ireland continues to impose limits on the amount of advertising which can be transmitted by commercial radio licensees.

Definitions

Regulation of advertising and sponsorship and other commercial practices is based on a comprehensive set of definitions located in the *BCI Advertising Code*. These definitions include ‘advertising’, ‘sponsorship’, ‘surreptitious advertising’ and ‘product placement’. There is also a definition of ‘commercial communication’ which is a catch-all definition to cover advertising, sponsorship, and other forms of commercial promotion, and which is used for all general rules found in the *BCI Advertising Code*.

The definition of ‘advertising’ is primarily confined to commercial activity, namely, the sale or promotion of goods and services. This would be consistent with the obligations of impartiality and prohibitions on political, and so forth, advertising.

The definition of ‘sponsorship’ contemplates the sponsorship of programs, but, unlike the UK, not channels (or stations). This may be more a reflection of a still relatively small market, as well as an undeveloped digital environment. A sponsored program will be one in which some or all the costs of production are met by the sponsor.

The definitions of ‘surreptitious advertising’ and ‘product placement’ reflect the scope for other commercial practices which may not fit into the recognised categories of advertising and sponsorship. These disguised advertising practices are prohibited.

Separation of commercial content from other programming

There is a fundamental principle of transparency in advertising and the rules reflect this principle. The principle of transparency requires:

- A clear identification of any commercial arrangements so that the listener has this information.
- The separation of commercial content from other content.

A prohibition on any advertiser or sponsor exercising any editorial influence over other programming content confirms that editorial independence is also protected.

These rules are reinforced by a further layer of more detailed rules:

- A prohibition on presenters and other on-air personnel advertising or endorsing any products or services during their program.

- A prohibition on persons who regularly present news featuring in any commercial communications (this applies to advertising and sponsorship). It is notable that this prohibition does not extend to those presenting current affairs programming. However, the first rule would prevent presenters of all types of programming engaging in any advertising or endorsement of products and services.

Sponsorship

Sponsorship is also subject to the principles of transparency and editorial independence. Hence sponsorship will also be governed by rules requiring clear identification and separation, and a prohibition on the exercise of any editorial influence. In addition:

- Sponsorship announcements cannot become a form of advertising. They are primarily a form of identification.
- Sponsorship of news, but not current affairs, is prohibited.

Regulatory obligations

Although the rules, in some instances, impose restrictions on persons other than the licensee, such as news readers and presenters, the regulatory obligations are imposed solely on the licensee. It will be a matter for the licensee to ensure compliance. The rules do not impose any specific obligations on a licensee with regard to internal compliance and due diligence measures.

4.5 Completed or planned reviews

The Irish Parliament is currently considering a new Broadcasting Bill (the Bill) which will have a major impact on the regulatory arrangements described in this report. What follows is a brief review of those aspects of the Bill which are relevant to the matters discussed in this report.³³³ The Bill is expected to be passed in June or July 2009. We refer to the Bill as amended in the Select Committee on Communications, Energy and Natural Resources.³³⁴

³³³ The Bill also makes other changes such as the statutory recognition of community broadcasting services, but these are not reviewed here.

³³⁴ Broadcasting Bill 2008, No 29c of 2008.

One major purpose of the Bill is to combine in one act, the several acts which currently deal with broadcasting, dating back to 1960. The other major aspect of the Bill, as noted earlier, is to replace the BCI and the BCC with a new regulatory authority, the Broadcasting Authority of Ireland (BAI). This will mean that BAI will now combine the functions currently split between the BCI and the BCC, so that the BAI will also become the body to deal with complaints. The Bill also establishes two committees of the BAI: a Contract Awards Committee and a Compliance Committee. Notably, the members of these committees are not necessarily members of the BAI. Each committee will have eight members, four of whom will be appointed by the Minister for Communications, Energy and Natural Resources, and four of whom will be appointed by the BAI. The latter four will be two BAI members and two BAI staff members.³³⁵ Similar to the UK approach, the BAI is required to keep under review its performance (and the performance of these two statutory committees) to ensure that regulation does not impose unnecessary administrative burdens, or continue administrative burdens which are no longer necessary.³³⁶ It is interesting to note that the amended Bill now contains explicit mention of self-regulation and the possibility that the BAI could assist the establishment of a self-regulatory system for the drafting of codes and the establishment and administration of a self-regulatory system.³³⁷ However this provision does not seem to be intended for the regulation of traditional broadcasting. It has been included to fulfil obligations under the *AVMS Directive* and seems to be intended for use for non-traditional media or for content which may be transmitted from outside Ireland.³³⁸ Whilst it will be the BAI's role to draft broadcasting codes and rules,³³⁹ the Compliance Committee will be responsible for monitoring and enforcing compliance by the licensee with the terms and conditions of its licence³⁴⁰; with statutory obligations; and with broadcasting codes and rules.³⁴¹ It is interesting to note the reference in the Bill to the Compliance Committee's role of 'monitoring'. The Compliance Committee is also required to investigate and decide upon complaints made.

³³⁵ The Bill, clause 8(3) and (5).

³³⁶ The Bill, clause 32.

³³⁷ The Bill, clause 46.

³³⁸ The Minister, 26 November 2008,

<http://debates.oireachtas.ie/DDebate.aspx?F=MAS20081126.xml&Node=H2&Page=3>.

³³⁹ The Bill, clause 26(d).

³⁴⁰ The Bill continues the language of 'contract' and 'contractor', but the terms licence and licensee will continue to be used, consistent with this report.

³⁴¹ The Bill, clause 28.

The Bill continues the statutory obligations currently applicable to radio broadcasting. Thus:

- The obligations referred to in sections 4.2.2.1 and 4.2.2.2 above continue;³⁴²
- The obligation to include a minimum level of news and current affairs reporting on radio continues (see section 4.2.1 above);³⁴³
- The limits on the amount of advertising which can be broadcast on a radio service continue (see section 4.3.2.1 above);³⁴⁴
- The prohibition on political and religious advertising, and advertising which relates to an industrial dispute remains (see section 4.3.2.2 above);³⁴⁵

Clause 42 of the Bill requires the BAI to draw up codes covering these matters and others. The Bill declares that the current codes (see section 4.2.2.1 above) will continue in force.³⁴⁶ One matter, to which the BAI must have regard, when drawing up a code, is “the desirability of maintaining the independence of editorial control over programme content”.³⁴⁷

Part Four of the Bill establishes a complaints process.³⁴⁸ Under the statutory process, complaints may be made under clause 48(1) about clause 39 matters; namely, impartiality of news and current affairs; harm and offence (previously identified as ‘taste and decency’); encroachment upon an individual’s privacy. A licensee is required to give “due and adequate consideration” to such written complaints provided they are made in good faith, are not frivolous and so forth. A licensee must also prepare a code of practice, to be publicly available, including on the Internet, dealing with the process for handling complaints. Records of complaints and replies must be maintained.³⁴⁹ It is observed here that it is the broadcaster itself, not an independent body, which is dealing with complaints. Under the current regulatory arrangements, complaints are made to the BCC directly, there is no legislative

³⁴² The Bill, clause 39; currently RT Act 1988 (Ie), section 9.

³⁴³ The Bill, clause 39; currently RT Act 1988 (Ie), section 9(1)(c).

³⁴⁴ The Bill, clause 41; currently RT Act 1988 (Ie), section 10.

³⁴⁵ The Bill, clause 41; currently RT Act 1988 (Ie), section 10. The provision dealing with a prohibition on advertisement directed towards religious ends has been changed in the Bill. Rather than religious ends, the prohibition is on advertising which “...addresses the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation”.

³⁴⁶ The Bill, clause 42(9).

³⁴⁷ The Bill, clause 42(3)(f).

³⁴⁸ Part Four also establishes a statutory right of reply process: clause 49.

³⁴⁹ The Bill, clause 47.

provision or expectation that complaints must first be made to the broadcaster. In fact, the Bill sets up a two-track process. Whilst clause 47 provides for a complaints process to the broadcaster, clause 48 clarifies that complaints can still be made directly to the BAI – in fact, to the Complaints Committee. However, the Complaints Committee has discretion to refer a complainant back to the broadcaster, to be dealt with according to the broadcaster's clause 47 code of practice.³⁵⁰ Otherwise, the process for dealing with complaints by the Complaints Committee follows the process currently required of the BCC (see section 4.2.2.2 above). In the case of multiple complaints, clause 48 also empowers the Compliance Committee to review the matter and to make such reports, including to the Minister, as it considers appropriate.

The Bill introduces a new sanction: a monetary penalty. It is intended that this will provide more flexibility for the regulator given the limited sanctions currently available (see section 4.2.2.3 above). The penalty will apply to breaches of the statutory programming and advertising obligations outlined above (clauses 39 and 41) as well as breaches of codes or rules. Clauses 53-54 deal with the instigation by the Compliance Committee of an investigation and the process for investigating the matter. The Committee may recommend to the BAI a financial sanction of not more than 250,000 Euros. It is a matter for the BAI to apply to court for the imposition of the sanction.³⁵¹ Clause 56 sets out matters to be taken into account by the BAI or the court in determining the amount of the sanction.

³⁵⁰ The Bill, clause 48(3).

³⁵¹ The Bill, clause 55.

PART B: REPORT ON GERMANY; AN OVERVIEW

5 GERMANY

5.1 The German broadcasting environment

5.1.1 Overview³⁵²

The broadcasting environment of the Federal Republic of Germany is a dual broadcasting system with both private and public broadcasters operating under a single framework. Germany's Federal Constitutional Court exerts a strong influence on broadcasting policy. A series of landmark rulings established the basic features of the 'dual' broadcasting system, which are now contained in the Interstate Treaty on Broadcasting and Telemedia (*Rundfunkstaatsvertrag*) (Interstate Treaty).³⁵³

Unlike the other jurisdictions considered in this report, responsibility for regulation of broadcasting is a matter for the states, the *Länder*, not the Federal government. The regulatory framework of Germany is made up of a patchwork body of inter-state treaties and laws. Responsibility for regulation does not rest with a single body; rather each *Land* (state) has its own independent regulatory authority. However, the *Länder* broadcasting laws will generally reflect the provisions of the Interstate Treaty. To ensure a harmonised regulatory framework, the individual regulatory authorities (of the *Länder*) also operate collectively through an association, representing all regulatory authorities.

Germany's radio broadcasting environment comprises a mix of public, commercial, and citizen broadcasting. For commercial radio, advertising constitutes approximately 90% of revenue. In 2005, commercial radio received approximately 0.5 billion Euros in advertising.³⁵⁴ At year end 2007, a total of 229 private radio broadcasting stations had been licensed.³⁵⁵ The private commercial sector is further divided into three types, determined by reach and geography: national; state-wide; and local/regional. Over the years, the proportion of commercial radio stations pertaining to each type has remained largely consistent:

³⁵² The material on which this overview of German regulation is based has been compiled by Christoph van Opstal, who has worked with the materials in the original language, and provided translations (unless otherwise indicated) where appropriate. Where material is available in English, we have indicated this in the footnotes.

³⁵³ Version dated March 2007.

³⁵⁴ State Media Authority of the *Land* of Bavaria

<http://www.blm.de/inter/de/pub/programmaufsicht/werbung.cfm>

³⁵⁵ Association of State Media Authorities (ALM), *Yearbook 2007*, 178.

- A total of 20 radio broadcasting stations with national reach
- A total of 54 radio broadcasting stations with a state-wide reach
- A total of 155 radio broadcasting stations with a local/regional reach³⁵⁶

There are also 54 Digital Audio Broadcasting (DAB) radio stations.

5.1.2 The constitutional framework

Although the States are responsible for broadcasting regulation, their regulatory arrangements and policies have been influenced by general guidelines laid down by Germany's Federal Constitutional Court (*Bundesverfassungsgericht*).

5.1.2.1 Division of powers

As noted above, regulation of broadcasting in Germany is organised along state lines – although through the Interstate Treaty and the co-operative arrangements, a federal system results. This arrangement has its roots in the unique history of Germany. It is designed to ensure an independent broadcasting system, preventing party-political control or influence over broadcasting. In particular, it is seen as a safeguard against the Nazi regime's abuse of the former centralised broadcasting system. Article 30 of the Constitution reserves legislative competence for broadcasting to the States.

Article 73 of the Constitution grants the Federal Government competence over matters concerning 'postal and telecommunication services', but this has been understood to cover the technical transmission of broadcasts only, and not production, distribution or content.

5.1.2.2 Constitutional freedom of broadcasting

The Constitutional Court has been influential in the shaping of Germany's dual broadcasting system. Article 5(1) of the Constitution provides for the freedom of expression:

Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and

³⁵⁶ ALM, *Yearbook 2007*, 179.

freedom of reporting by means of broadcasts and film shall be guaranteed. There shall be no censorship.³⁵⁷

Whilst the Constitutional Court has interpreted article (5)(1) to guarantee broadcasting freedom from government interference, it has also held that government (state) involvement is necessary to ensure that the broadcasting system as a whole promotes diversity. Consistent with European jurisprudence, broadcasting freedom is seen as an instrumental freedom, so that ‘serving freedom’ will give rise to ‘substantive, organisational and procedural rules... that are oriented to the mandate of freedom of broadcasting’.³⁵⁸

5.1.2.3 The dual broadcasting system

The constitutional framework has ensured the maintenance of a dual system of public and private broadcasting, with the public broadcasting sector designed to compensate for the deficiencies of a commercially-driven private sector. The public sector is subject to rigorous requirements to ensure a basic service (*Grundversorgung*) which provides a comprehensive range of programs and airing of major political and social viewpoints, whilst the private sector is subject to less onerous obligations. According to the Constitutional Court, however, the lower standards of private broadcasting are only permitted because the public broadcasting sector provides the basic service.³⁵⁹ Nevertheless, the private sector will have obligations to contribute to diversity across the system, and it must also meet a minimum standard of fairness and diversity. This is reflected in the programming standards for commercial broadcasters contained in the Interstate Treaty and the individual State media laws.

5.2 The regulatory framework of German broadcasting

As noted above, the German broadcasting regulatory framework is essentially based upon a system of co-operative federalism. The system relies on statutory, rather than

³⁵⁷

http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf (available in English).

³⁵⁸ See 57 BVerfGE 295 (1981) (‘Third Television Case’). “Free individual and public formation of opinion by broadcasting initially requires that broadcasting be free of State dominance and influence...[But mere] freedom from the State does not mean that free, comprehensive formation of opinion by broadcasting is made possible; this mandate cannot be fulfilled by a mere negative duty...a positive order is necessary, which ensures that the variety of existing opinion is expressed in broadcasting...In order to achieve this, substantive, organisational and procedural rules are necessary that are oriented to the mandate of freedom of broadcasting.”

³⁵⁹ 73 BVerfGE 118, 157 (1986) (‘Fourth Broadcasting Case’).

industry-based, regulation. However, a complex network of laws and regulations, operating at State and national level, is required to ensure its operation.

5.2.1 Regulatory instruments

As noted earlier, regulation of broadcasting is the responsibility of the 16 *Länder* (states). Each state will enact its own set of broadcasting laws which provide the framework for the organisation, supervision, and in the case of commercial broadcasting, licensing, of broadcasting in the relevant *Land* (state).³⁶⁰ The individual broadcasting laws of the *Land* are complemented by the Interstate Treaty which controls the basic regulatory framework for licensing and regulation of public and private broadcasting on a national level. The Interstate Treaty ensures a degree of harmonisation of the individual state laws and avoids a fragmentation of the broadcasting market.³⁶¹ The Interstate Treaty makes clear its intent with the Preamble calling on the *Länder* to "... cooperate more closely with one another with a view to equal treatment of commercial broadcasters, and a better implementation of decisions." The Interstate Treaty imposes obligations which are given effect in the state broadcasting laws. With the exception of a few provisions which apply to television, the Interstate Treaty does not distinguish between radio and television.

There are variations in the application of the Interstate Treaty. In some cases, the state broadcasting laws will reflect exactly the provisions of the Interstate Treaty, sometimes, even referring directly to the provisions of the Treaty.³⁶² The rules on advertising and sponsorship are mostly uniform across the *Länder*.³⁶³ On other matters, however, the broadcasting laws are not uniform. The Interstate Treaty permits the *Länder* to make laws in so far as the matter is not covered in the Treaty.³⁶⁴

³⁶⁰ Interstate Treaty, article 1(2); An outdated English version of the Treaty (as of March 2007) is available: www.alm.de/fileadmin/Englisch/9_RAESTV_Englisch.pdf. For the latest amended version of the Treaty as of June 2009 (available only in German), see: http://www.alm.de/fileadmin/Download/Gesetze/RStV_aktuell.pdf.

³⁶¹ Interstate Treaty, article 1. References in this report will primarily be to provisions of the Interstate Treaty (as of June 2009), rather than to the laws of individual states.

³⁶² See, for example, article 8 and article 9 of the Bavarian Media Law on Advertising and Sponsorship, respectively.

³⁶³ See, for example, article 8 and article 9 of the Bavarian Media Law on Advertising and Sponsorship, respectively.

³⁶⁴ Interstate Treaty, article 1(2).

5.2.1.1 Programming principles

The individual broadcasting laws of the *Länder* contain comprehensive rules for the regulation of broadcast advertising and sponsorship, as derived from the Interstate Treaty (see section 5.3 below). However, the more general programming standards may also affect the relationship between broadcasting and commercial influence. In particular, article 10 of the Interstate Treaty deals with standards of reporting and is seen to reflect standards of journalistic ethics:

Reporting and information programs must conform to accepted principles of journalism even when virtual components are used. They must be independent and objective. News must be verified before their dissemination regarding truth and origin with the attention to accuracy and source that is required by the circumstances. Comments must be clearly separated from the reporting and indicated as such with the name of the author.³⁶⁵

The journalistic principles referred to in the provision have been enforced by state media authorities, although this has not been common. In June 2007, the Media Authority for the *Land* of Hamburg and Schleswig-Holstein ruled that a commercial radio channel was guilty of breaching the journalistic code of ethics.³⁶⁶ The Hamburg radio station, *Oldie 95.0*, broadcast a three-minute interview that was later found to have been fabricated by the use of a mix of excerpts of earlier interviews. The Media Authority found this to constitute “manipulation and a grave breach against the journalistic ethics of care and truth”.³⁶⁷ Although there is no clear statement of what constitutes the journalistic principles, as referred to in article 10, in practice, the Journalistic Code of Ethics developed by the German Press Council (*Deutscher Presserat*) has been said to apply.³⁶⁸ Although the Code is not legally binding, the principles embodied in the Code are acknowledged as fundamental to journalistic practices across all media sectors.³⁶⁹ In this respect, it is noted that the Code contains a relevant provision on commercial influences:

The responsibility of the press to the public mandates that editorial publication not be influenced by the private or commercial interests of third-parties or personal economic interests of journalists. Publishers and editors shall negate

³⁶⁵ Interstate Treaty, article 10(1).

³⁶⁶ Medien Anstalt Hamburg/ Schleswig-Holstein, Press Release (June 2007).

³⁶⁷ Medien Anstalt Hamburg/ Schleswig-Holstein, Press Release (June 2007).

³⁶⁸ The German Press Council is a self-regulatory body. For more information in English see <http://www.presserat.de/Keyfacts-in-English.232.0.html>. This is further evidenced by the numerous incidents of informal partnerships formed between the German Press Council and the individual state media authorities in the guidance of journalistic ethics.

³⁶⁹ State Media Authority of Mecklenburg-Vorpommern, www.lmk-online.de/fileadmin/webdateien/PDF/Presse/080608_Mueller_LMK_Gutachten_Komplett_Quoten.pdf

such practices and enforce a clear separation between editorial content and publication for advertising purposes. Publication, which is affected by the self-interest of the publisher, must be clearly identifiable as such.³⁷⁰

It is interesting to note that this provision addresses also the commercial interests of journalists, and, one assumes, that, in the case of radio broadcasting, this could cover also presenters. However, the Code itself and the broadcasting regulatory framework do not directly impose any legal obligations on the journalist/presenter.

5.2.2 The framework of regulatory bodies

Fourteen state media authorities cover the 16 *Länder*,³⁷¹ and are responsible for licensing and monitoring, as well as the development of private radio and television. To coordinate their activities, the state media authorities work together through the Association for State Media Authorities (ALM).

5.2.2.1 The role of state media authorities

The state media authorities are generally composed of two organs – an assembly or commission for broadcasting and a director/chairman.³⁷² The assembly or commission assumes the tasks of the relevant state media authority insofar as they have not been bestowed on the director/chairman.³⁷³ This includes the election of the director/chairman and the release of policy directives.³⁷⁴ It is the responsibility of the director/chairman to take measures to monitor compliance with the provisions of the relevant broadcasting law, and to prepare and implement decisions of the assembly/commission for broadcasting.³⁷⁵

³⁷⁰ German Press Council, Journalistic Code of Ethics, **Error! Hyperlink reference not valid.** <http://www.presserat.info/227.0.html> (available in English).

³⁷¹ The same Media Authority covers the states Berlin and Brandenburg, and another the states of Hamburg and Schleswig-Holstein.

³⁷² See, for example, article 51(2) *Broadcasting Law for the State of Mecklenburg-Vorpommern*; article 48(3) *Private Broadcasting Law for the State of Hessen*. Bavaria has an additional Administrative Council. There are some other exceptions specifically provided for in the Interstate Treaty.

³⁷³ The commissions can be very large in size, for example in Rhineland-Palatinate, the commission comprises 41 members. The commission has to be broadly representative of the community; particular religious groups, for example, must be catered for.

³⁷⁴ See, for example, article 61, *North-Rhine Westfalia Media Law*.

³⁷⁵ See, for example, article 60 *North-Rhine Westfalia Media Law*.

5.2.2.2 The role of the ALM

To coordinate and harmonise policies and laws amongst the individual *Länder* all state media authorities work collectively as members of the ALM.³⁷⁶ The obligations under the Interstate Treaty are given effect by the ALM, whose responsibilities are set out in the Statute for the Cooperation of the Association of State Media Authorities in the Federal Republic of Germany.³⁷⁷ The ‘basic responsibilities’ of the ALM comprise:

- Consideration of the interests of the state media authorities in the area of broadcasting on a national and international level.³⁷⁸
- Exchange of information with the broadcast service providers.³⁷⁹
- Consideration of areas of common concern, in particular: programming; legal matters; technology; research; media competence; and financial support.³⁸⁰
- Generating assessments to questions that are of significant importance to the state media authorities.³⁸¹
- Observation and analysis of program developments.³⁸²
- Co-operation in preparatory technical developments.³⁸³

Special responsibilities of the ALM include, for example, reaching agreement over the regulatory framework as it affects advertising and sponsorship in broadcasting.³⁸⁴

To coordinate the work of the ALM, four main bodies are constituted within the ALM framework:

- the Commission for Licensing and Supervision.³⁸⁵ The Commission was established on 9 September 2008 to replace and assume the functions of the now defunct Joint Commission on Programming, Advertising and Media Literacy and the Joint Commission on Digital Access. Members of the Commission comprise the representatives of the fourteen state media

³⁷⁶ See ALM website, <http://www.alm.de/4.html>.

³⁷⁷ *ALM Statut*, http://www.alm.de/fileadmin/Download/Gesetze/ALM-Statut_09.10.2008.pdf (Only available in German).

³⁷⁸ *ALM Statut*, article 2(1)(1).

³⁷⁹ *ALM Statut*, article 2(1)(2).

³⁸⁰ *ALM Statut*, article 2(1)(3).

³⁸¹ *ALM Statut*, article 2(1)(4).

³⁸² *ALM Statut*, article 2(1)(5).

³⁸³ *ALM Statut*, article 2(1)(6).

³⁸⁴ *ALM Statut*, article 2(2)(2).

³⁸⁵ Interstate Treaty, article 35(2).

authorities.³⁸⁶ The Commission has federal jurisdiction over matters concerning licensing and regulatory oversight of broadcasters, platform regulation, transmittal capacities, as well as the development of the digital broadcasting.³⁸⁷

- the Directors' Conference of the State Media Authorities.³⁸⁸ The Director's Conference comprises legal representatives of the fourteen state media authorities. The Conference is mainly concerned with policy issues governing licensing and monitoring of broadcasting services nationally, as well as the development of digital broadcasting.³⁸⁹
- the Committee Chairperson's Conference;³⁹⁰ and,
- the General Conference.³⁹¹

Two positions assist the work of the Commission for Licensing and Supervision: the Commissioner for Programs and Advertising, and the Commissioner for Platform Regulation and Digital Access.³⁹² The former will have oversight of the operation of the rules by the state media authorities, but no direct enforcement powers.³⁹³ A particular responsibility of the Commissioner for Programs and Advertising is to determine interpretation and construction of the Treaty regulations and to generate nationwide agreement as to regulatory practice of advertising and sponsorship in broadcasting. In contrast to its predecessor, the Joint Commission on Programming, Advertising and Media Literacy, the new role of Commissioner for Programs and Advertising allows for legally-binding decisions in relation to the regulatory framework governing broadcast advertising and sponsorship.³⁹⁴

5.2.2.3 The Federal Commissions

Two Federal Commissions, established under the Interstate Treaty, are also in place:

³⁸⁶ Interstate Treaty, article 35(3).

³⁸⁷ Interstate Treaty, article 36(2).

³⁸⁸ Interstate Treaty, article 35(2)(2).

³⁸⁹ Interstate Treaty, article 36(3).

³⁹⁰ Interstate Treaty, article 35(2)(3).

³⁹¹ Interstate Treaty, article 35(2)(4).

³⁹² See ALM website <http://www.alm.de/435.html> (Only available in German).

³⁹³ See ALM website <http://www.alm.de/88.html> (Only available in German).

³⁹⁴ Press Release, Association of State Media Authorities (October 2008)

http://www.alm.de/fileadmin/forschungsprojekte/GSPWM/GSWPM-Tagungsbericht_mit_Fotos.pdf.

- The Commission on Concentration in the Media;³⁹⁵ and
- The Commission for the Protection of Minors of Harmful Content.³⁹⁶ This Commission also deals with Internet content.

5.2.2.4 The role of the German Advertising Council

An industry-based body, the German Advertising Standards Council, is responsible for voluntary self-regulation of advertising in Germany.³⁹⁷ Its concerns are with the advertisers.

5.2.3 Enforcement and sanctions

It will be a matter for the state media authorities to enforce breaches by the broadcasters and to impose sanctions. Pursuant to the Administrative Offences Act, the relevant media authority of the state is usually designated as a competent administrative authority to deal with administrative offences arising under the Interstate Treaty.³⁹⁸ The authorities have available a range of sanctions ranging from fines to suspension or revocation of licence. In practice, however, the state media authorities tend to rely on informal measures designed to encourage broadcasters to comply.³⁹⁹

Article 49 of the Interstate Treaty applies to commercial broadcasters broadcasting nationwide. The article lists a number of provisions of the Interstate Treaty, breach of which can result in a state media authority imposing a fine. The provisions include breaches of the advertising and sponsorship rules as detailed below, and can result in a sanction of up to 500,000 Euros.⁴⁰⁰

³⁹⁵ KEK Mission Statement and Constitutional Principles (English version) <http://www.kek-online.de/cgi-bin/esc/mission.html>. For English information on German media concentration in the broadcasting sector, see the KEK reports: 'Cross Media Relations: A Challenge for Media Concentration Control (2007) <http://www.kek-online.de/Inhalte/summary2007.pdf>'; 'Ensuring Plurality of Opinion in Times of Major Change (2003) <http://www.kek-online.de/kek/download/mk-bericht/summary2003.pdf>'; 'Securing Diversity of Opinion Against Media Concentration' (2000) <http://www.kek-online.de/kek/download/mk-bericht/summary.pdf>

³⁹⁶ See KEK website <http://www.kjm-online.de>

³⁹⁷ See German Advertising Council website <http://www.werberat.de/>

³⁹⁸ See, for example, article 1(1) of the Media Law for the State of Sachsen-Anhalt (only available in German): <http://www.lra.de/download/Richtlinie.pdf>.

³⁹⁹ Hans-Bredow Institut, *Regulation of Broadcasting and Internet Services in Germany* (2nd ed., March 2008), 18. With the exception of the material which follows, on sanctions under the Interstate Treaty, we have had to rely on this very general overview of sanctions.

⁴⁰⁰ Interstate Treaty, article 49(2).

5.3 Regulation of advertising and sponsorship on commercial radio

The legal source for advertising and sponsorship rules on commercial radio is the Interstate Treaty, implemented through the state broadcasting laws. The ALM issues guidelines to help create a uniform framework for the implementation and treatment of the rules by all the state media authorities.⁴⁰¹ Another influence on the regulation will be the European Union directives. It is clear that the Treaty picks up directly many of the definitions and provisions which are found in the *TWF Directive*. Since the Interstate Treaty makes no distinction between radio and television (save for a few provisions), many of the provisions originating from the *TWF Directive* have become applicable to radio also. This is similar to Ireland, and, to a lesser extent, the UK.

5.3.1 Definitions

Relevant definitions are found in article 2 of the Interstate Treaty. Indeed, more than half of the definitions relate to advertising and sponsorship, although some of these will be relevant to television only.⁴⁰²

- Advertising: any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes in connection with a trade, business, craft or profession in order to promote the sale of goods or services, including immovable property, rights and obligations, in return for payment. (article 2(2)(7))
- Sponsorship: any contribution made by a natural or legal person or an association of persons not engaged in broadcasting activities or in the production of audiovisual works to the direct or indirect financing of a programme with a view to promoting the name, the trademark, the image of the person or association, their activities or their products. (article 2(2)(9))
- Surreptitious advertising: is the allusion to or representation of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising purposes and might mislead the public as to its nature. Such allusion or representation is considered to be intended for advertising purposes, in particular, if it is done in return for payment or for similar consideration. (article 2(2)(8))

⁴⁰¹ Of relevance to this report is the *Joint Directives of the State Media Authorities for Advertising, for the Implementation of the Separation of Advertising and Programming, and for Sponsorship in Radio* (10 February 2000) (Joint Directive). (This is available only in German, but the equivalent directive for television is available in English, http://www.alm.de/fileadmin/Download/Gesetze/WerbeRiL_Eng.pdf, and is in almost identical terms.)

⁴⁰² The Interstate Treaty includes a definition of ‘teleshopping’: being “...direct offers broadcast to the public with a view to selling goods or services, including immovable property, rights and obligations, in return for payment” (article 2(2)(10)). We have been informed that ‘teleshopping’ also encompasses ‘radioshopping’, but we have been unable to confirm this.

A form of ‘surreptitious advertising’ will be product placement. Surreptitious advertising is the equivalent of the US concept of ‘embedded advertising’. Surreptitious advertising is prohibited.⁴⁰³ As noted in the report on the UK, the new *AVMS Directive* permits a limited form of product placement. Any relaxation of the current prohibition would be likely to flow into regulation of radio. However, at this stage, it would appear unlikely that Germany will take advantage of the new rules. The Directors’ Conference of the State Media Authorities rejected a proposal in 2007 for the introduction of new relaxed rules, citing concerns over the difficulty of determining influence over programming: “...the independence of program production is not served by this proposal”.⁴⁰⁴

5.3.2 Advertising, sponsorship, and related rules

5.3.2.1 Amount of advertising

Whilst both public and private broadcasters are allowed to broadcast advertisements, there is a very significant difference in the permitted amounts. For commercial broadcasters, the following limits apply:⁴⁰⁵

- The proportion of broadcasting time devoted to teleshopping spots, advertising spots and other forms of advertising shall not exceed 20 per cent of the daily transmission time;⁴⁰⁶
- The proportion of broadcasting time for advertising spots shall not exceed 15 per cent of the daily transmission time;⁴⁰⁷ and
- The proportion of broadcasting time devoted to advertising spots and teleshopping spots within a given clock hour shall not exceed 20 per cent.⁴⁰⁸

5.3.2.2 Political advertising

Advertising of a political, ideological, or religious nature is prohibited.⁴⁰⁹ Furthermore, political, ideological, or religious associations may not sponsor broadcasts.⁴¹⁰ However, limited exceptions apply to nationwide broadcasting:⁴¹¹

⁴⁰³ Interstate Treaty, article 7(6).

⁴⁰⁴ Press Release, Directors’ Conference of the State Media Authorities www.alm.de/fileadmin/Englisch/dlm-pm09-07-englisch.pdf

⁴⁰⁵ Although these rules refer to ‘teleshopping’ the rules apply to radio and television services. Quære, also, whether the reference to ‘teleshopping’ includes ‘radioshopping’ as noted above.

⁴⁰⁶ Interstate Treaty, article 45(1)

⁴⁰⁷ Interstate Treaty, article 45(1)

⁴⁰⁸ Interstate Treaty, article 45(2)

⁴⁰⁹ Interstate Treaty, article 7(8).

⁴¹⁰ Joint Directive, article 10(7).

- During an election period, for elections to the German Federal Parliament, political parties contesting the election shall be allocated time, subject to reimbursement of costs.⁴¹²
- The Protestant Churches, the Catholic Church and the Jewish Communities shall, if they so request, be granted appropriate time for broadcasting religious programs, subject to reimbursement of costs.⁴¹³

5.3.2.3 General

The most important rule relating to the regulation of advertising is the separation of advertising from programming, also known as the ‘distinction rule’. Article 7(1) requires advertising to be clearly recognisable, and on radio it must be distinctly separated by means of an acoustic signal.⁴¹⁴ Editorial independence is guaranteed by a prohibition on advertising or advertisers influencing programming either “...content-wise or editorially...”.⁴¹⁵ The Joint Directive interprets this to mean also that the advertiser cannot exert any influence on the scheduling and placement of programs around advertising.⁴¹⁶

Infomercials are also regulated to ensure that they are clearly identified as advertisements and not confused with editorial content. Infomercials, which are advertising presented as editorial content,⁴¹⁷ are permitted provided that their advertising character is clearly recognisable, up front, and advertising constitutes a substantial component of the infomercial ‘program’.⁴¹⁸ Infomercials must be announced as such at the commencement of the broadcast and identified during the broadcast.⁴¹⁹

The rules on sponsorship are also aimed at ensuring that the audience is aware of the commercial relationship and that there is no editorial influence. In programs which are partially or totally sponsored, the fact of the sponsorship must be briefly announced at the beginning or at the end of the program.⁴²⁰ The content or scheduling

⁴¹¹ Interstate Treaty, article 42(3).

⁴¹² Interstate Treaty, article 42(2). There are also provisions covering European Parliament elections.

⁴¹³ Interstate Treaty, article 42(1).

⁴¹⁴ Interstate Treaty. Further indicia of how to signal separation are provided in the Joint Directive, article 6(1).

⁴¹⁵ Interstate Treaty, article 7(2).

⁴¹⁶ Joint Directive, article 5.

⁴¹⁷ Joint Directive, article 7(1).

⁴¹⁸ Interstate Treaty, article 7(5).

⁴¹⁹ Interstate Treaty, article 7(5).

⁴²⁰ Interstate Treaty, article 8(1).

of a sponsored program must not be influenced by the sponsor in such a way that the broadcaster's responsibility and editorial independence are impaired.⁴²¹

Sponsored programs are also prohibited from exhorting the sale or supply of the products or services of the sponsor or a third party or making any explicit reference.⁴²²

The Joint Directive advises that if, during the broadcast, the products or services are generally recommended, or in some other way emphasised as advantageous, this will constitute an exhortation.⁴²³

There are no restrictions on advertising during radio news and current affairs programming, nor are any persons who might be associated with news and current affairs prevented from appearing in advertisements. However, sponsorship of news and current affairs programming is prohibited.⁴²⁴

5.4 Concluding comments

As will be apparent from the review of the UK and Ireland, the German rules also reflect a tradition, in part influenced by European Union law, of strong regulation of advertising and sponsorship designed to ensure clear separation of programming and advertising and protection of editorial independence. With few exceptions, the rules apply to television and radio equally, and there is no indication of any strong move to treat commercial radio differently. Also consistent is the maintenance of central regulation of content. In relation to the design of the regulatory framework, it is important to highlight that the creation of a new position of Commissioner for Programs and Advertising is intended to provide 'more bite' in the enforcement of rules although there is little detailed information at this stage as to how this will operate.

With the exception of the rule on sponsorship, we have not found any other rules which relate specifically to regulation of advertising, sponsorship, or other commercial influences in connection with news and current affairs programming. We have found no rules which impose obligations on other persons, such as presenters, to disclose any commercial arrangements.⁴²⁵

⁴²¹ Interstate Treaty, article 8(2).

⁴²² Interstate Treaty, article 8(3).

⁴²³ Joint Directive, article 10.

⁴²⁴ Interstate Treaty, article 8(6).

⁴²⁵ See, however, the discussion in section 5.2.1.1 above on the Journalistic Code of Ethics.

However, despite the clear rules, there are evidently ongoing concerns. Recent debate has concerned the degree of surreptitious advertising which may be occurring on commercial radio. This has been recognised as the phenomenon of ‘Radio-Broadcasting PR’. In 2007, the State Media Authority for the *Land* of North-Rhine Westphalia released a study it had commissioned regarding the ‘infiltration process’ of public relations, and its blurring of lines with independent journalism in radio broadcasting.⁴²⁶ However, the director of the State Media Authority suggested that it was for the broadcasters to issue self-regulatory guidelines as to the proper management of public relations.⁴²⁷

In late 2008, the Commissioner for Programs and Advertising raised strong concerns over the separation between advertising and programming, noting that convergence and some aspects of the *AVMS Directive* permitting product placement allowed the issue of surreptitious advertising to be sidestepped.⁴²⁸ The Interstate Treaty is currently being reviewed in order to incorporate the *AVMS Directive* into German law by end of 2009 as required, although there is no consensus as yet as to the form this will take. The Directors’ Conference of the State Media Authorities has highlighted product placement as one of the main issues for debate and resolution.⁴²⁹ In 2007, virtually all of the fourteen state media authorities voted against any ‘legalisation of product placement’.⁴³⁰

⁴²⁶ State Media Authority Research Line, ‘Public Relations and Advertising Forms in Radio: Persuasive Radio Offering in Radio Broadcasting’ <http://www.vistas.de/vistas/Schriftenreihe/20.html>

⁴²⁷ Press Release, State Media Authority for North Rhine-Westphalia (March 2007) <http://www.lfm-nrw.de/presse/index.php3?id=523>

⁴²⁸ Press Release, Association of State Media Authorities (October 2008) http://www.alm.de/fileadmin/forschungsprojekte/GSPWM/GSWPM-Tagungsbericht_mit_Fotos.pdf

⁴²⁹ DLM Report (April 2009), http://www.alm.de/fileadmin/DLM%20Report/DLM-Report_April_2009-englisch.pdf.

⁴³⁰ ALM, *Yearbook 2007*, 47.

APPENDIX

6 NOTE ON OTHER RADIO BROADCASTING SERVICES AND DIGITAL RADIO

6.1 *United Kingdom*

6.1.1 Other radio broadcasting services

6.1.1.1 Community radio

Community radio was established under the Comms Act (UK) and the first licences were awarded in 2005. A community radio service is a non-profit service which must be a local service provided primarily for:

- (a) for the good of members of the public, or of particular communities,
and
- (b) in order to deliver social gain,

rather than primarily for commercial reasons or for the financial or other material gain of the individuals involved in providing the service.⁴³¹

Community radio licences are awarded for a term of five years on a merit basis. A key policy requirement is that in awarding community licences, Ofcom have regard to the viability of any other local service.⁴³² Therefore:

- Licences will not be awarded in coverage areas where there would be 50% or more overlap with coverage area of an existing local commercial station, if the area contains 50,000 or less adults.⁴³³
- In areas where there would be 50% or more overlap with a local commercial radio station, and the area contains between 50,000 and 150,000 adults, licensees will be prohibited from taking advertising or sponsorship.⁴³⁴

In other cases, licensees will be prohibited from generating more than 50% of their annual income from advertising and sponsorship.⁴³⁵ Licensees must comply with the advertising rules administered by Ofcom and the ASA.

⁴³¹ Community Radio Order 2004, SI 2004, No 1944, article 3.

⁴³² BA 1990 (UK), section 105(3).

⁴³³ BA 1990 (UK), section 105(4)(a).

⁴³⁴ BA 1990 (UK), section 105(4)(b).

⁴³⁵ BA 1990 (UK), section 105(4)(c) and section 105(5). The restrictions on sponsorship relate to program sponsorship. As such the rules do not prevent the sponsorship of station-related activities.

6.1.1.2 Restricted service licences

These licences are awarded for specific events or locations.⁴³⁶ Short-term licences are mainly events-based grants, such as for music festivals, religious or sports events, or as trials for community stations.⁴³⁷ These licences are usually for a term of up to 28 days.⁴³⁸ Long-term restricted service licences are granted for a five year term and are more likely to be awarded for location-based services such as a hospital or educational campus.⁴³⁹ Restricted service licences are granted on-demand.

Restricted service licences are allowed to carry advertising and station or program sponsorship. Licensees must comply with the advertising rules administered by Ofcom and the ASA.

6.1.1.3 Subscription sector

Services which consist of sound programs made available for reception to the general public, and are delivered via cable or satellite (whether in analogue or digital form), are licensed as radio licensable content services.⁴⁴⁰ Such services could be subscription-based or free-to-air. These licences are essentially granted on demand, and are awarded for an indefinite period.⁴⁴¹

6.1.2 Digital radio

Digital radio uses Digital Audio Broadcasting (DAB) technology. Digital radio services are delivered via digital radio multiplexes, both national and local.⁴⁴² Local multiplexes are the more common. Services to be delivered via the multiplex are licensed as digital sound program services.⁴⁴³ Digital sound program service licences are required for digital-only services as well as services which may be delivered analogue or via other platforms. They are awarded on an application basis for an indefinite period.⁴⁴⁴

⁴³⁶ Comms Act (UK), section 245(4)(c).

⁴³⁷ Ofcom, *The Communications Market 2008* (2008), 274.

⁴³⁸ Ofcom, *Restricted Service Licences: Notes for Applicants* (July 2008), 2.

⁴³⁹ Ofcom, *Restricted Service Licences: Notes for Applicants* (July 2008), 2. These services generally use AM spectrum. It is also possible to obtain a restricted services licences for broadcasting on other than AM/FM spectrum.

⁴⁴⁰ Comms Act (UK), section 247.

⁴⁴¹ Broadcasting Act 1990 (UK), section 86(1).

⁴⁴² BA 1996 (UK), sections 46 and 50.

⁴⁴³ BA 1996 (UK), section 60.

⁴⁴⁴ BA 1996 (UK), section 61.

When awarding multiplex licences, Ofcom must be satisfied, in the case of a national multiplex, of the capacity of the digital sound program services to provide a variety of tastes and interests.⁴⁴⁵ In the case of a local multiplex, the determination will be the capacity to provide for local tastes and interests.⁴⁴⁶ Multiplex licences are awarded for a period of 12 years.⁴⁴⁷

6.2 United States

6.2.1 Other radio broadcasting services

Noncommercial educational stations

Licences are granted for ‘noncommercial educational stations’; the stations which form the public broadcasting sector. Non-commercial radio stations can only be granted for FM transmission. To be licensed:

- the licensee must be a non-profit educational organization; and
- the station must be used for the “advancement of an educational program”.⁴⁴⁸ However, a station is permitted to broadcast “educational, cultural, and entertainment programs to the public”.⁴⁴⁹

Competing public broadcasting licences are allocated generally on a points-based system.⁴⁵⁰ The service provided must be non-profit and non-commercial.⁴⁵¹ A definition of ‘advertisement’, applicable only to this prohibition, is provided in the Comms Act (US):

For purposes of this section, the term “advertisement” means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended

- (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
- (2) to express the views of any person with respect to any matter of public importance or interest; or
- (3) to support or oppose any candidate for political office.⁴⁵²

⁴⁴⁵ BA 1996 (UK), section 47.

⁴⁴⁶ BA 1996 (UK), section 61.

⁴⁴⁷ BA 1996 (UK), section 58.

⁴⁴⁸ 47 CFR §73.503(a).

⁴⁴⁹ 47 CFR §73.503(b).

⁴⁵⁰ See FCC, *In the Matter of MM Docket No. 95-31 Re-examination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order*, FCC 00-120 (2000).

⁴⁵¹ 47 USC §399b(b)(2) and 47 CFR §73.503(d).

⁴⁵² 47 USC §399b(a).

Licensees are allowed to broadcast acknowledgements of contributions made, but they must not interrupt programming.⁴⁵³

6.2.1.1 Subscription sector

The FCC has also authorised digital satellite radio services. These services are not under any obligations regarding programming requirements, but in authorising the two services, *Sirius* and *XM*, the FCC noted that it expected them to “...provide audio programming to audiences that may be unserved or underserved by currently available audio programming”.⁴⁵⁴

6.2.2 Digital radio

Digital radio services in the US are using In-Band On-Channel (IBOC) technology to provide hybrid analogue/digital services enabling existing analogue and new digital receivers to receive the service. Licensees of AM or FM stations who have converted to IBOC must simulcast their service.⁴⁵⁵ In 2007, the FCC permitted these licensees to provide additional services (multicasting) using the spectrum. Separate approval is not required for these multicasting services.⁴⁵⁶ Digital radio must comply with the same ‘public interest’ rules as apply to analogue radio.⁴⁵⁷ As at June 2009, 1,724 stations (286, AM⁴⁵⁸ and 1,438, FM⁴⁵⁹) have been authorised to deliver IBOC digital radio. There is no time-frame for the conversion to digital. There is currently no regulatory structure to permit the delivery of all-digital terrestrial radio services.⁴⁶⁰

⁴⁵³ 47 CFR §73.503(d). Non-commercial licensees are allowed sponsorship. Sponsorship rules apply to commercial and non-commercial licensees.

⁴⁵⁴ FCC, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754 (1997), para 90. Sirius and XM merged in 2008.

⁴⁵⁵ 47 CFR §73.403.

⁴⁵⁶ FCC, *In the Matter of Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service, Second Report and Order*, FCC 07-33 (2007), para 37.

⁴⁵⁷ FCC, *In the Matter of Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service, Second Report and Order*, FCC 07-33 (2007), para 65.

⁴⁵⁸ See <http://www.fcc.gov/mb/audio/digital/index.html>

⁴⁵⁹ See <http://www.fcc.gov/mb/audio/digital/index.html>

⁴⁶⁰ However, licensees are allowed to experiment with all digital services provided appropriate authorisation is obtained from the FCC: para 22.

6.3 Canada

The non-profit sector consists of community, campus, and native radio.⁴⁶¹ Each of these services must be operated by non-profit undertakings, although each of these services is allowed to broadcast advertising.

6.3.1 Other radio broadcasting services

6.3.1.1 Non-profit sector

Community radio

Community radio is similar to the community radio sector in Australia. Its primary role is “...to provide a local programming service that differs in style and substance...” from services which are provided by the commercial sector and the CBC.⁴⁶² The intention is that these services will be relevant to local communities, provide programming for official language minorities within relevant communities, and provide a wide diversity of music and spoken word.⁴⁶³ Community stations providing third-language programming are also encouraged.⁴⁶⁴ Community radio undertakings should provide for participation drawn primarily from members of the community.⁴⁶⁵

Community radio licences are divided into Type A and Type B licences:

- A radio station will be a Type A station if, at the time of licensing, no other radio station is operating in the same market, in the same language, apart from a CBC station; and
- A radio station will be a Type B station if, at the time of licensing, at least one other radio station is operating in the same market, in the same language, apart from a CBC station.

⁴⁶¹ Ethnic radio licensees have also been licensed but these can be licensed as commercial, community, or campus services: CRTC, *Ethnic Broadcasting Policy*, Public Notice 1999-117 (16 July 1999).

⁴⁶² CRTC, *Community Radio Policy*, Public Notice CRTC 2000-13 (28 January 2000), para 12.

⁴⁶³ CRTC, *Community Radio Policy*, Public Notice CRTC 2000-13 (28 January 2000), para 12.

⁴⁶⁴ CRTC, *Community Radio Policy*, Public Notice CRTC 2000-13 (28 January 2000), paras 17-18.

This relates back to the CRTC's ethnic broadcasting policy.

⁴⁶⁵ CRTC, *Community Radio Policy*, Public Notice CRTC 2000-13 (28 January 2000), para 21.

Licensing conditions will differ between Type A and Type B stations with regard to programming requirements. Community radio stations, of either type, are no longer subject to any restrictions on the amount of advertising.⁴⁶⁶

There is also a third type of community radio station known as ‘low-power developmental stations’. These are established primarily for training purposes.

Campus radio

Campus radio stations are “...owned or controlled by a not-for-profit organization associated with a post-secondary educational institution”.⁴⁶⁷ There are two types of campus stations:

- Community-based campus is a station with programming produced primarily by volunteers who may be students or members of the community-at-large; and
- Instructional stations are designed for the training of professional licensees.⁴⁶⁸

The main purpose of a community-based campus station is to provide alternative content such as music (particularly that which is not generally broadcast by commercial stations), in-depth spoken-word programming, and programming directed to specific groups within the community.⁴⁶⁹

Campus stations are allowed to advertise but there are restrictions on the amount. A condition of a campus station licence prohibits a licensee, within each broadcast week, broadcasting more than 504 minutes of advertising, with a maximum limit of four minutes in any hour.⁴⁷⁰

Native radio

Native radio is designed to promote and provide access to Aboriginal cultures and languages. A native undertaking will be a non-profit organization which provides for

⁴⁶⁶ CRTC, *Community Radio Policy*, Public Notice CRTC 2000-13 (28 January 2000), para 50.

⁴⁶⁷ CRTC, *Campus Radio Policy*, Public Notice 2000-12 (28 January 2000), para 20.

⁴⁶⁸ CRTC, *Campus Radio Policy*, Public Notice 2000-12 (28 January 2000), para 20.

⁴⁶⁹ CRTC, *Campus Radio Policy*, Public Notice 2000-12 (28 January 2000), para 21

⁴⁷⁰ CRTC, *Campus Radio Policy*, Public Notice 2000-12 (28 January 2000), para 58 and CRTC, *Conditions of Licence for Campus Radio Stations*, Broadcasting Regulatory Policy CRTC 2009-63, condition 6. A ‘broadcast week’ means 7 consecutive broadcast days, beginning on a Sunday: Radio Regulations 1986 (SOR/86-982), reg 2.

board membership by the native population serviced by the station. It should specifically target the needs and interests of the native community it serves.⁴⁷¹

There are two types of native radio stations:

- Type A stations are those stations which, at the time the licence is issued or renewed, operate in a market in which no commercial AM or FM radio licence is operating. Type A stations are exempt from requiring a CRTC licence, although they must register with the CRTC.⁴⁷²
- Type B stations operate in a market where there is at least one commercial AM or FM radio licence and must be licensed.

Native radio stations are permitted to broadcast advertising. All restrictions on the amount of advertising have been removed.⁴⁷³

6.3.1.2 Subscription sector

Although this sector has been dominated by television services, licences can be obtained for subscription radio services. This sector remains small in terms of number of providers. Subscription radio may be offered as part of a package provided by a Broadcasting Distribution Undertaking (BDU) or provided as a satellite-subscription service for which the listener subscribes directly. As at 31 December 2007, nine audio services for distribution by a BDU had been licensed: seven specialty services and two pay audio services. Three multi-channel subscription radio services were authorised.⁴⁷⁴

Audio services delivered by Broadcasting Distribution Undertakings

There are two types of services operating in this sector:

- Specialty audio programming services are radio undertakings which are specialised in relation to their content and/or target audience. They are primarily for digital distribution. Subscription fees can be charged for the service by arrangement with the BDU, but the service is also free to carry

⁴⁷¹ CRTC, *Native Broadcasting Policy*, Public Notice 1990-89 (20 September 1990), para 2.1.

⁴⁷² CRTC, *Exemption Order respecting Certain Native Radio Undertakings*, Public Notice 1998-62 (9 July 1998). Licences to transmit are still required from Industry Canada.

⁴⁷³ CRTC, *Native Broadcasting Policy*, Public Notice 1990-89 (20 September 1990), para 5 and CRTC, *Changes to Conditions of licence for certain native radio undertakings*, Public Notice 2001-70, para 11

⁴⁷⁴ CRTC, *Communications Monitoring Report 2008* (July 2008), 89.

advertising. There are no limits on the amount of advertising which can be broadcast;⁴⁷⁵ and

- Pay audio programming services provide national multi-channel services carried by a BDU on discretionary tiers. The regulatory framework for these services is imposed via individual licence conditions. They are provided on a subscription basis and it is a condition of their licences that they do not carry advertising.⁴⁷⁶

Multi-channel radio services

These services also provide a multi-channel package on a subscription basis. Here also the regulatory framework is imposed via individual licences. There are two types of service:

- Subscription radio via digital terrestrial transmitters. These services are not permitted to broadcast advertising;⁴⁷⁷ and
- Subscription radio via satellite radio services. These services are not permitted to broadcast local advertising, but are allowed restricted amounts of national advertising.⁴⁷⁸

6.3.2 Digital radio

Digital radio broadcasting has been slow to develop in Canada. In 2006, the CRTC revised its policy on digital radio policy in light of the slow development of digital radio.⁴⁷⁹ When the CRTC's digital radio policy was first developed in 1995, it had intended that digital radio would replace AM and FM radio services. A new frequency band (L-band) was established and transitional licences issued. Transitional licences were for a period of three years to allow the CRTC time to

⁴⁷⁵ CRTC, *New Licensing Framework for Specialty Audio Programming Services*, Public Notice 2002-53 (12 September 2002), Appendix 1.

⁴⁷⁶ See CRTC, Broadcasting Decision 2002-391 (29 November 2002) and CRTC, Broadcasting Decision 2002-392 (29 November 2002). This approach to licensing has been recently reiterated, see CRTC, Broadcasting Decision CRTC 2008-368 (23 December 2008).

⁴⁷⁷ CRTC, *Terrestrial Subscription Radio Undertaking*, Broadcasting Decision 2005-248 (16 June 2005), Appendix, condition 8. As at December 2006, this service had not commenced.

⁴⁷⁸ CRTC, *Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings*, Public Notice 2005-61 (16 June 2005), paras 88-9. 'National' here refers to advertising purchased at a national rate and receiving national distribution.

⁴⁷⁹ CRTC, *Digital Radio Policy*, Public Notice 2006-160 (15 December 2006).

develop a longer-term policy.⁴⁸⁰ As at 31 December 2007, 41 licences had been issued to existing commercial radio undertakings and 18 to existing CBC stations.⁴⁸¹ Under the CRTC's revised policy, the transitional licence policy has been abandoned and it has been accepted that it is unlikely that the L-band will be a replacement for the AM and FM bands in the near future. It will now be possible for a digital radio service to offer whatever broadcast service they wish and limits on non-duplicated material will be removed.⁴⁸² The effect of this is that digital radio services will essentially operate under the same conditions, including advertising rules, as the existing analogue private commercial radio sector.⁴⁸³

6.4 Ireland

6.4.1 Other radio broadcasting services

Community radio services are licensed, like commercial radio, as sound broadcasting services, under the RT Act 1988 (Ie), section 5. It is a matter for the BCI to determine the licence categories and character of the service.⁴⁸⁴ Community services are non-profit services which serve a local community or community of interest. Community licences are granted for a term of five years. Community radio will be funded from a variety of sources, and although it is allowed to broadcast advertising and sponsorship, BCI policy requires that no more than 50% of income is derived from commercial activity.⁴⁸⁵

The BCI also licences institutional (licensed for a particular location) and temporary licences pursuant to RT Act 1988 (Ie), section 8.

6.4.2 Digital radio

Digital radio services in Ireland are still at a trial stage. There were two trial digital radio multiplexes, one operated by RTÉ, the other operated for commercial radio.

⁴⁸⁰ CRTC, *A Policy to Govern the Introduction of Digital Radio*, Public Notice 1996-184 (29 October 1995).

⁴⁸¹ CRTC, *Communications Monitoring Report 2008* (July 2008), 87. These licences which were renewed in 2008 will expire on 31 August 2009. An earlier stand-alone service licence appears not to have been renewed.

⁴⁸² CRTC, *Digital Radio Policy*, Public Notice 2006-160 (15 December 2006), paras 37-38. However, licensees will have to conform to the licensing and regulatory framework applying to FM analogue services but with some flexibility for relaxation on a case-by-case basis: para 41. The CRTC is also open to considering licensing services using IBOC technology: CRTC, *Digital Radio Policy*, Public Notice 2006-160 (15 December 2006), paras 55-56.

⁴⁸³ The Radio Regulations 1986 (SOR/86-982) have now been amended to reflect this.

⁴⁸⁴ See also BCI, *BCI Policy on Community Radio Broadcasting*.

⁴⁸⁵ See also BCI, *BCI Policy on Community Radio Broadcasting*, 7.

However, in November 2008, the commercial sector ended its involvement with the trial.⁴⁸⁶ Economic factors appear to have influenced the decision.⁴⁸⁷ The RTÉ digital services operate only in limited areas, although they are available nationally online.. Ireland has adopted DAB (digital audio technology).⁴⁸⁸

⁴⁸⁶ Digital Radio Ireland, <http://www.digitalradio.ie/>

⁴⁸⁷ Media Network, *Uncertain Times for Digital Radio in Ireland* (9 November 2008), <http://blogs.rnw.nl/medianetwork/uncertain-times-for-digital-radio-in-ireland>

⁴⁸⁸ Digital Radio Ireland, www.digitalradio.ie