work can easily be considered to have been "recast, transformed or adapted" since by definition some expressive element of that work is now appearing in a different format or medium. This is so because an actual copy of the work is not in fact incorporated within that derivative work. It should not matter whether the change is itself "original."

On the other hand, where the derivative use does incorporate an actual copy of the underlying work into each copy of the derivative work, the concerns are different. In those cases, as long as that derivative use is a customary or reasonably expected use of such works, the copyright owner has had, at least in theory, an opportunity to calculate the potential value of his or her art's contribution to such derivative uses and could have priced that work accordingly to capture that value. Thus, the law should not allow the copyright owner to hold that derivative user liable, unless the copyright owner can prove that the derivative use was not customary or reasonably expected and that therefore there was no realistic opportunity for the copyright owner to receive compensation for that use of his or her work.

Returning finally to the tile art scenario at issue in *Mirage* and *Lee*, the use of the note cards is clearly not a public goods use since every piece of tile art incorporates an actual copy of the underlying art work. Thus, that use should not be considered infringing, unless the artist can prove by a preponderance of the evidence that that use was not customary or reasonably expected at the time the underlying work was created and distributed.

REGULATING MEDIA OWNERS IN DIGITAL TELEVISION: LESSONS FROM U.K. ANALOGUE POLICY FORMATION*

CHRISTOPHER T. MARSDEN, LL.M.**

"As ambitious a bunch of mercenaries as ever held up a gravy train."[1]

I. INTRODUCTION

A. *The International Political Economy of U.K. Analogue Pay-TV Regulation*

Media law and policy may be seen as a specialist element of the "Good Society" described by J.K. Galbraith,[2] in the post-war liberal capitalist consensus. A further element of that vision of socio-economic progress was corporatism,[3] which embraced a policy of government intervention in the economy. This intervention often took the form of "picking winners" in national champion firms in strategic, often high-technology sectors. More recently,[4] real-time digital telecommunications has empowered[5] transnational—or multinational—corporations to loosen the straitjacket of domestic governance and domestic capital formation. This flexibility, or "footloose" characteristic, has enabled an exponential growth in trade and foreign direct investment ("FDI"), concentrated in intra-OECD flows in the manufacturing industry. Since approximately

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1 Jeremy Isaacs, first CEO of Channel 4, *quoted in* G. Mulgan & Worple, *Saturday Night or Sunday Morning? From Arts to Industry—New Forms of Cultural Policy*, 44 COMEDIA MONOGRAPH 35, 35 (1986).

2 J. K. GALBRAITH, THE GOOD SOCIETY: THE HUMANE AGENDA (1996); *see* IBRD WORLD DEVELOPMENT REPORT (1998).

3 *See* WYN GRANT & SHIV NATH, THE POLITICS OF ECONOMIC POLICYMAKING (1984).

4 The dramatic increase in intra-Organization for Economic Cooperation and Development ("OECD") foreign direct investment ("FDI") is from circa 1980. *See* WORLD BANK, WORLD DEVELOPMENT INDICATORS (1998); *see also* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, RECENT TRENDS IN FDI (1998).

5 *See* ALFRED D. CHANDLER JR., ET AL., THE DYNAMIC FIRM: THE ROLE OF TECHNOLOGY, STRATEGY, ORGANIZATION AND REGIONS (1998).

the beginning of the Uruguay Round trade negotiations in 1986,[6] the established pattern of manufacturing trade and FDI flows between developed countries has been supplemented by trade and FDI flows from manufacturing to service sectors, more particularly in OECD economies.[7] Undoubtedly, satellite and cable data communications have partially enabled this growth. Governments are developing frameworks to regulate and sponsor their communications industries in light of this increasing internationalization of the communications services sector.

Why is this phenomenon important to media ownership? There are two broad policy explanations, one economic and the other cultural. First, the products and services described can, with the advent of digitalization, be delivered by a variety of electronic media to a variety of household reception devices via the "Information Superhighway." It encompasses computing, publishing, and communications, the most dynamic and important elements in the "Information Age" economy. Second, the political-cultural dimension of participatory indirect democracy properly continues to occupy the attention of policy-makers. The concerns of citizens that mass media channels continue to supply diverse sources of information, associated with the policy of ensuring plurality of ownership of those channels, have continuing resonance.

B. *U.K. Media Ownership Case Study: Why the U.K. Regulatory Policy Arena?*

The U.K. experience of privatization, market liberalization, and independent regulation is a model for European (and wider international) imitation in telecoms as well as in other utilities and strategic industries. This is particularly due to ideological drivers from Thatcherism,[8] and the lack of institutional limitations on policy reform, allowing policy formation on "a heroic scale." The United Kingdom has thereby become the archetype of socio-economic liberalization. Further, its advanced integration into the global economy[9] has produced an interdependence between multinational actors and governments in which trade and foreign investment are critical policy influences.

[6] The Uruguay Round trade negotiations culminated in the formation of the World Trade Organization in 1995.

[7] *See* WORLD BANK, *supra* note 4; *World Trade Organization Annual Report 1998*, FIN. TIMES (London), Dec. 5, 1998, at 5.

[8] *See* A. King, *Thatcherism and the Emergence of Sky Television*, 20 MEDIA, CULTURE AND SOC'Y 277, 277 (1998).

[9] This is evidenced by the United Kingdom's lead in Group of 7 foreign direct inward and outward investment. *See supra* note 4.

C. *Why Analogue Terrestrial Television?*

Corporatism: Analogue television is chosen as a mature industry from which incumbents wished to expand into emerging digital markets. It is therefore an arena dominated by vested interests, in which the spoils of a corporatist inheritance were reallocated by government licensing decision. For this reason, it is in policy towards analogue terrestrial in which neo-corporatist tendencies, if any, would be expected to arise, protecting former national champions: domestic "clients."

Embeddedness: Further, the ban on non-European ownership of terrestrial analogue television channels existing in the United Kingdom—as well as continental Europe and the United States—meant that this sector was reserved for domestic actors, protected from foreign market entry competition in this technology. Therefore, vested interests were "embedded" in the national political arena.[10] Consequently, domestic actors employed policy strategies which leveraged their erstwhile domestic monopoly, to the detriment of potential FDI. Evidence of "home state" capture by domestic multinational interests (rather than "host state" by FDI) will be supplied by studying this market. One can make an unarguable case for examining both analogue and digital policy formation; terrestrial and satellite/cable delivery markets; "home" and "host state" actors; and consequently "embeddedness" of domestic and "insiderization" of inward investors. However, the increased complexity of such a study is beyond the constraints of this Article. This Article explores policy formation in the liberalization of domestic actors' analogue terrestrial cross-media ownership.

Part II of this Article examines the development of policy in the United Kingdom analogue free-to-air television and newspaper sectors. These sectors were previously characterized by corporatist regulated pluralism and a specific, if increasingly disregarded, competition regime. Part III critically assesses the U.K. government response from 1994 through 1996 to the increasing globalization of the sector, resulting from the convergence of communications technologies. The assessment is both for policy realism in adopting the "globalization" paradigm of international competitiveness, and transparency and equality of treatment of the various stakeholders in the policy process. It will be concluded that the regulator and legislators were captured by "home state" multinational business interests in the newspaper and television sec-

[10] *See* R. SALLY, RIVAL STATES, RIVAL FIRMS: STATES AND FIRMS IN INSTITUTIONAL COMPETITION (1996).

tors. The policy process, examined in Part IV, resulted in reforms which were so wide-ranging that the actors themselves have thus far been unable to indulge in total gratification of the new opportunities. In "leaning on an open door," lobbyists opened it so wide that—unusually—their regulatory arbitrage was almost entirely satisfied for the foreseeable future, as shown in the concluding Part VI. Part V briefly considers how a policy solution might best be adapted in order to deregulate ownership, without abandoning the British tradition of broadcast impartiality. Legislative proposals and policy formation are examined holistically: as Griffith states: "The study of law and the study of politics are best considered as one."[11]

II. Principles of Media-Specific Regulation

Media regulation addresses stricter definitions of concentration than does generic competition law. The Broadcasting Acts[12] in the United Kingdom are concerned with maintenance of pluralism and diversity in licensing electronic media sources.[13] Diversity is maintained through standards of impartiality in content[14] imposed on compulsorily licensed broadcasting services. Pluralism of ownership in the public interest is protected beyond general competition law, at least in theory and statute. While excessive cross-media concentrations are proscribed in the Broadcasting Act of 1990, as amended by Schedule 2 of the Broadcasting Act of 1996,[15] newspaper concentrations are subject to a political economic test. Broadcasters wishing to merge with newspaper concerns must satisfy television regulator, the Independent Television Commission ("ITC"), or the Radio Authority, in a statutorily governed Public Interest Test ("PIT").[16] This PIT is stated in suitably opaque language in the wording of the Act:

> 13.—(1) The matters to which the relevant authority shall have regard in determining, whether the holding of a license connected with, the proprietor of a newspaper operates . . . against the public interest include-
> (a) the desirability of promoting—
> (i) plurality of ownership in the broadcasting and newspaper industries, and
> (ii) diversity in the sources of information available to the public and in the opinions expressed on television or radio or in newspaper
> (b) any economic benefits (such as, for example, technical development or an increase in employment or in the value of goods or services exported) that might be expected to result from the holding of the license by that body . . .
> (c) the effect of the holding of the license by that body on the proper operation of the market within the broadcasting and newspaper industries or any section of them.[17]

Under the PIT, the proposed merger must thus be shown to maintain: [i] diversity and pluralism, [ii] economic benefits in the competitiveness of the industry, [iii] and competition in the market.

In contrast to this potentially contradictory combination of factors upon which the independent regulator adjudicates, newspaper mergers are subjected to a more limited range of factors, upon which the Secretary of State for Trade and Industry adjudicates. There is both greater administrative simplicity and less transparency.[18] Under the Fair Trading Act of 1973,[19] reformed by the Competition Act of 1998,[20] newspaper mergers must be referred by the Secretary of State for Trade and Industry to the competition authorities, unless the target is "uneconomic as a going concern" and the case requires urgent approval in order to safeguard the newspapers' future.[21] Politicians are adept at locating distress and urgency when required.[22] Such an adjudication had been made by

11 J.A.G. Griffith, *Introduction*, J. of Legis. Stud., vol. 1, no. 1 (1995), at 3, 3-15.

12 Broadcasting Act, 1990, ch. 42, *amended by* Broadcasting Act, 1996, ch. 55 (Eng.); *see also* N. Reville, Broadcasting Law and Practice (1998).

13 *See* Thomas Gibbons, Regulating the Media (2d ed. 1998).

14 This approximates the Fairness Doctrine in the United States; *see* R. Giles, *What's Fair?*, Media Stud. J., Spring-Summer 1998, at 149; C. Marsden, *Looming Battles in Britain*, Media Stud. J., Spring-Summer 1998, at 80, 80-85.

15 *See* Department of National Heritage, A Guide to the Provisions of the Act and Main Changes Since Publication (Press Release No. 220 July 25, 1996) [hereinafter National Heritage Press Release].

16 *See* Radio Authority, *Guidance Notes: Part IV of Schedule 2 to the Broadcasting Act 1990 (as substituted by the Broadcasting Act 1996) as applied to radio* (revised Nov. 1997) [hereinafter Radio Authority, *Guidance Notes*].

17 Broadcasting Act of 1996, sched. 2, pt. IV, cl. 13(1).

18 It should be noted that newspaper markets have been largely unregulated since the 1850s, in content and control terms, and as a result have been vociferously independent throughout the twentieth century, whether in defending free speech or proselytizing on behalf of their commercial interests and those of their advertisers.

19 Fair Trading Act, 1973, ch. 41 §§ 57-58 (Eng.).

20 Competition Act, 1998, ch. 41 (Eng.).

21 Fair Trading Act, 1973, ch. 41 § 58 (3) (9) (Eng.).

22 *See* Roy Hattersley, Press Gang 61-66 (1983) (analyzing breach of Item 4(b)(i) of the published Terms of Consent to the Times Newspapers merger with News International. It is also supported by the parliamentary comments by the Rt. Hon. John Biffen MP, the Secretary of State at the time of Times Newspapers' purchase by News Corporation in 1981. A doctrine known as "Biffen's Law" holds that "a newspaper is uneconomic when Mr. Murdoch deems it to be so." This statement was made in the House of Commons on the occasion of Murdoch's acquisition of *Today*, his third daily national newspaper, in 1987).

Biffen imposed amendments of the Articles of Association of Times Newspapers. His assessment of the public interest required independent national directors to be appointed

the then-Secretary of State in the 1981 purchase of Times Newspapers by News International. Robertson and Nicol believe that the decision to refuse referral "was plainly unlawful dereliction."[23] Furthermore, Richard Whish has stated:

> Newspaper mergers . . . are subject to a stricter form of control [than are other mergers] requiring prior approval . . . . [C]ontrol of the media is a matter of particular political sensitivity and importance . . . . There would be much to be said for removing the element of political discretion in this area by [referring] all newspaper mergers subject to a *de minimis* exception.[24]

In a case of urgency, the Secretary of State makes an immediate decision in the public interest in pluralism. The potential exists for the Secretary of State to insist on editorial independence from the new owner. For the vast majority of the national press, editorial independence is anathema to proprietors.[25] Such a suggestion could expect to be resisted and, if implemented, subverted, as were the controls on News Corporation's acquisition of Times Newspapers. Both the closure of *Today* by News Corporation in 1995, and the1994 loss of independence of Newspaper Publishing, owners of *The Independent*, were held by the Secretary of State[26] to be "distressed." Editorial independence of *The Independent* in 1994 was seen by the Secretary of State as "defined contractually in the light of the publisher's appraisal of the market opportunity."[27] The public interest in diversity was judged unaffected by the company's absorption into Mirror Group Newspapers.

Even when the Secretary of State refers a merger to the competition authority, the Monopolies and Mergers Commission ("MMC"),[28] he is not obliged to follow its advice. In an infamous

to the board in order to support editorial independence and to ensure proprietorial propriety. Such directors have proven so sympathetic to the proprietor's interests, that they have vocally supported the management of Times Newspapers in the House of Lords as recently as February 9, 1998. *See* 585 PARL. DEB., H.L. (5th ser.) 920-30 (1998). *See also* HAROLD EVANS, GOOD TIMES, BAD TIMES (1984).

23 GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW: THE RIGHTS OF JOURNALISTS AND REPORTERS 504 (3d ed. 1992).

24 RICHARD WHISH, COMPETITION LAW 701 (2d ed. 1989).

25 Lord Rothermere, Chair of Daily Mail and General Trust, insisted in the wake of the August 1997 death of the Princess of Wales that he would refuse to purchase "paparazzi" photographs of public figures in private, thus instituting his judgement of the public interest above that of his editors.

26 Rt. Hon. Michael Heseltine MP, the Deputy Prime Minister.

27 Rachel Bridge, *Heseltine Nod for Indy Bid*, EVENING STANDARD (London), Mar. 18, 1994, at 44.

28 *See generally* MONOPOLIES AND MERGERS COMMITTEE, THE SUPPLY OF NATIONAL NEWSPAPERS, 1993, Cmnd. 2422 [hereinafter MMC REPORT].

case in 1994, as in earlier cases, the Secretary of State overruled the MMC.[29] Daily Mail and General Trust sought dominance in the East Midlands regional newspaper market through acquisition of the Nottingham Evening Post Group. On October 31, 1994, the MMC declared that the takeover tended against the public interest, but was overruled by the Secretary of State. In view of these examples, confidence in competition authority independence is misplaced. We return to the quasi-judicial powers of the Secretary of State, exercised in these critical freedom of speech decisions, in the Conclusion. Eric Barendt regards the duality of the system, with strict controls on broadcast/newspaper mergers, but limited control of newspaper/newspaper mergers, as "from the point of general media regulation . . . [making] no sense at all."[30] In his view, "the absence of any content control over newspapers makes the case for their structural regulation a particularly strong one," thus strengthening monomedia regulation rather than liberalizing cross-media controls. He views structural regulation as a substitute for content regulation, which is prone to political failure, as "the ITC will come under considerable pressure to give weight to arguments that a merger will result in economic benefits," in similar fashion to newspaper mergers. Structural regulation is so intertwined with content regulation in broadcasting that attempts to govern newspaper acquisitions of broadcast licenses must present "every good reason to extend [Public Interest Tests] to newspaper acquisitions [of other newspapers]."

A. *Competitiveness and Digital Media*

The "Information Superhighway" cliche which dominated digital media debate in 1993-94 led both television and newspaper interests to lobby for deregulation of ownership limits in both the United Kingdom and the United States. United States proposals resulted in legislative paralysis in the Communications Bills of the Senate and Congress in 1994.[31] United Kingdom government proposals, not limited in the unwritten U.K. constitution as is the case under the rigid U.S. separation of powers doctrine, were published

29 *See* Alice Rawthorn, *Daily Mail Group to Bid Again for Midlands Titles*, FIN. TIMES (London), Nov. 1, 1994, at 13; Raymond Snoddy, *Midland Independent Asks MMC to Block Bid by Rival*, FIN. TIMES (London), Nov. 23, 1994, at 29.

30 Eric Barendt, *Structural and Content Regulation of the Media: United Kingdom Law and Some American Comparisons*, Y.B. ENT. & MEDIA L. 91 (1997).

31 *See* Jonathan D. Blake & Lee J. Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 FED. COMM. L.J. 397 (1994).

in May 1995 and referred to as the Green Paper.[32] These proposals followed delegated legislation in late 1993,[33] under which television companies had been allowed to double in size. The proposals foreran the PIT[34] introduced in the Broadcasting Act of 1996. In similar language, the proposals concern three factors: diversity/pluralism, competition, and international economic competitiveness. Given the increasingly monopolistic position of both television and newspaper owners, and the market liberal approach to the public interest displayed above by Secretary Heseltine in 1994, it became clear that the 1995 Green Paper would approach digital possibilities with that final factor, competitiveness, very much the priority.

Two irreconcilable truths are evident in this debate: competitiveness is opposed to pluralism; pluralism invokes an equality between media which is economically absurd.

1. Competitiveness and Pluralism

First, diversity is opposed to concentration: the Green Paper at section 1.11 describes "the balance between the needs of consumers and the industry." Government decided that "critical mass" was desirable in the international competitiveness of TV program exports. Diversity for viewers thus suffers at the expense of consolidation for larger corporations. Lord Annan[35] questioned the government's "big is beautiful" argument in the House of Lords, at the Second Reading of the Broadcasting Bill:

> Not a shred of evidence is cited to substantiate this obsession with size. Indeed, these days large entrepreneurial projects are usually undertaken by consortia, joint ventures or alliances. . . . If Carlton, Granada and Meridien [now UN&M—the three "majors" which emerged in 1994] were really so keen to break into world markets, why has there been no sign of it? What is their international strategy?[36]

He tackled head-on the competitiveness rhetoric[37] of Secretary of

[32] *See* DEPARTMENT OF NATIONAL HERITAGE, MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS (1995) [hereinafter GREEN PAPER].

[33] *See* Broadcasting (Restrictions on the Holding of Licenses) (Amendment) Order - Article 2(1), S.I. 1993, No. 3199.

[34] *See* Hazel Fleming, *Media Ownership: In the Public Interest? The Broadcasting Act 1996*, 60 MOD. L. REV. 378, 384-87 (1997).

[35] Lord Annan was the Chair of the 1977 Committee on Broadcasting whose recommendation led to the founding of Channel 4.

[36] 568 PARL. DEB., H.L. (5th ser.) 497-98 (1996).

[37] See DEPARTMENT OF TRADE AND INDUSTRY, HELPING BUSINESS TO WIN (1994); DEPARTMENT OF TRADE AND INDUSTRY, FORGING AHEAD (May 24, 1995); DEPARTMENT OF TRADE AND INDUSTRY, HELPING BUSINESSES TO WIN (June 16, 1996); DEPARTMENT OF TRADE AND INDUSTRY & CABINET OFFICE, FIRST COMPETITIVENESS OCCASIONAL PAPER: "THE UK'S INTERNATIONAL PERFORMANCE: FACT AND FALLACY" (June 1996)

[38] 568 PARL. DEB., H.L. (5th ser.) 498 (1996).

[39] 276 PARL. DEB., H.C. (5th ser.) 832 (1996).

[40] *Id.* at 837.

[41] 568 PARL. DEB., H.L. (5th ser.) 473 (1996).

State Heseltine:

> If the government believe that past legislation has stifled expa sion, how does anyone explain the rise of Mr. Murdoch's sat lite empire in Britain? Did he not reach for the sky entir within the law? Such anomalies make me suspicious of t whole argument. Building larger media companies in order fight the world brings no guarantee of success, and may hamp the entry and growth of small innovative companies into th domestic market. It is an old-fashioned policy that is very u likely to work. Indeed, if you let the big get too big at hon why should they bother competing abroad at all?[38]

Austin Mitchell MP concurred: "The argument that bigge companies are needed to compete in the world market i cious."[39] He believed that newspaper groups "want to buy a s a monopoly to cushion themselves from the inevitable dec print and the rise of television." He advised that "they coulc buy a production house and put money into it"[40] to comp international markets, rather than extracting a rent from t mestic audience.

2. Pluralism and Economic Absurdity

The second truth is that democratic accountability th plurality invokes the myth of consumer equality. Thus, whil petition law will examine market power in revenue terms, ownership must examine numerical consumption, despi clearly absurd result that 300,000 *Sun* readers will equ 300,000 *Financial Times* readers. As Lord Inglewood stated f government during the debate on the 1996 Act:

> Audience share relates directly to the principle of plurali That makes it appropriate in this context. Revenue share flects the market power of a media enterprise, rather than ability to influence opinion and endanger debate—and marl power is primarily controlled through competition legislation

The arguments would therefore merge together economic re ments of concentration and market power, and cultural and tutional protectionist requirements of diversity and plu Perhaps unsurprisingly, this convergence of economic and p

factors produced a rich yield of contradictory and specious arguments, and a fertile breeding ground for special interests and incumbents.

3. Neo-Corporatism

Inglewood did not mention the disastrous cronyism that afflicts market-specific regulation: media ownership is perhaps the ultimate example of agency capture. As illustrated in Parliamentary debate on the Broadcasting Act of 1996, it simply does not work. Neo-corporatism is a trait recognized by Grant in the incoming New Labour government,[42] as much as in the outgoing Conservative administration. Liberal Democrat spokesman Bob MacLennan MP was concerned prior to the General Election of 1997 that New Labour, then in opposition, "does not put itself in hock to substantial newspaper interests if it is entrusted with government,"[43] as its policy by 1996 had become even more deregulatory than that of the Conservative administration. In the same debate, radical Labour MP Chris Mullin believed that no regulator "even if they were beefed up, is necessarily capable of facing up to the mighty and enormous vested interests we face"[44] in the media, further arguing that "those who brought us junk journalism will bring us junk television if we let them, and we should not."[45] While serving as Director General of Fair Trading,[46] Sir Bryan Carsberg was firmly of the view that media ownership limits were a matter for politicians.

4. Summary

The scene is thus set for the policy debate in which government and opposition were prepared to countenance far-reaching, and in all probability, irrevocable liberalization of the cross-media ownership regime, in the interests of an undefined international competitiveness on the "Information Superhighway." As a candid John Malone, President of TCI, stated in 1997 to industry analysts: "The Information Society was just hype."[47] Whatever the truth of that declaration, it is clear that over-exuberant rhetoric in the period of 1993 through 1996 produced a climate in which embedded domestic actors could capture the policy process, as examined in microscopic detail in Part III.

[42] *See* Wyn Grant, *Globalization, Comparative Political Economy and the Economic Policies of the Blair Government* (visited Apr. 20, 1999) <http://www.warwick.ac.uk/fac/soc/CSGR/wpapers.html>.

[43] 279 PARL. DEB., H.C. (5th ser.) 832 (1996).

[44] *Id.* at 833.

[45] *Id.* at 834.

[46] The position of Director General of Fair Trading is the equivalent of Deputy Assistant Attorney General for Antitrust.

[47] *Emap Media*, BROADCAST, Jan. 10, 1997, at 15.

III. MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS

The government's proposals of May 1995 were threefold: short-, medium-, and long-term. It only sought real debate and consultation on its long-term proposals. As will be seen, the medium-term ambitions of newspaper owners had already ensured that their cross-media ownership agenda would be enacted in the Broadcasting Act of 1996.[48] The immediate proposals for legislative action were enacted by secondary legislation in July 1995.[49] These proposals were in truth a *fait accompli.* Medium term proposals were announced as in a White Paper: any delay in enactment was merely to permit primary legislative timetabling (the Broadcasting Bill of 1995 was published in December). The medium term proposals can be seen as an example of pre-legislation, upon which corporations acted prior to the Broadcasting Bill debates.[50] The U.K. Parliament rarely disobeys government in any matter of policy. Given that the proposals were the subject of heated political debate at the highest levels of Cabinet prior to their publication, any intra or extra-parliamentary consultation could be little more than cursory formality. Longer term proposals for merging the vertical segments of the media markets, particularly national newspapers and television licensees, were the subject of invitations to consult. The longer term proposals could only be enacted with some form of Media Exchange Rate to equate newspaper readership with television viewing, for instance the *Financial Times* circulation with BSkyB soccer match audiences. This section of the discussion paper indicated a far more speculative and genuinely participatory discourse between government and interested parties.

A. *Introducing the Media Exchange Rate ("MER")*

The previously vertically separated regimes for newspaper and television gave rise to fundamental difficulties in the Green Paper.

[48] Broadcasting Act, 1996, ch. 55 (Eng.).

[49] Broadcasting (Restriction on the Holding of Licenses) Amendment Order, S.I. 1995, No. 1924; Broadcasting (Independent Productions) Amendment Order, 1995: No. 1925.

[50] This explains how the third largest television group (Meridien), and the fourth largest newspaper group (Express) merged to form United News and Media ("UN&M"), in reliance on this document. The merger was announced during the "quasi-consultation" of Broadcasting Bill debates in February 1996.

First, it sought to disaggregate the effects of content and ownership regulation: diversity and plurality. Given that the two are interdependent, there is a paradox in this approach. It was somewhat mitigated by the government's decision to produce primary legislation in the Broadcasting Act which encompassed both content and ownership.[51] The greater difficulty lay in measures of dominance: media plurality would measure either consumption (circulation in newspapers) or reach (readership). Competition law measures newspaper revenues from advertising, subscription, and sponsorship. The government decision to employ the "citizen usage" approach in the MER, as opposed to corporate revenue, was both controversial and methodologically inexact. The approximate nature of these "product" markets for a democratic pluralistic test is recognized in the proposals by excluding magazines and journals, ostensibly because they largely cater to apolitical minority interests. The apoliticization of *Angler's Weekly* is a consequence of audience preference. The apoliticization of broadcast journalism, the political fact underwriting the public law regulation of broadcasting, appears arbitrarily separated from such consideration. BBC is included in calculations which ostensibly measure commercial media concentration.

B. *The 1995 Green Paper*

The government's MER proposals are set out in six sections: "Introduction," "The Policy Framework," "The International Dimension," "The Results of Consultation," "Key Issues," and "The Government's Proposals." It first establishes, in section 1.2, that World Wide Web ("WWW") publishers and program producers are operating in emerging and competitive sectors (the latter "vibrant and growing"), and will therefore be excluded from analysis.[52] Diversity of voice "promotes the culture of dissent which any healthy democracy must have. . . . [It] contribute[s] to the cultural fabric of the nation and help[s] define our sense of identity and purpose."[53] It explains the growth of new media, and the varied investment opportunities available without legislative change. In section 2, the Green Paper heralds the success of the 1990 Act, claiming that it:

> [a]. enabled greater competition by the formation of the Channel 3 Network Centre;[54]
> [b] permitted growth in cable and satellite;
> [c] boosted independent production.[55]

51 *See* NATIONAL HERITAGE PRESS RELEASE, supra note 15.
52 *See* GREEN PAPER, *supra* note 32, § 1.2.
53 *Id.* § 1.4.

The first claim is dubious because the Act resulted in the institutionalization of the dominant Channel 3 companies in 1993 and 1994. The second is at least misleading, since cable growth was spurred by the 1991 telecom duopoly review,[56] which banned the national telecom operators, British Telecom and Cable & Wireless, from unveiling national cable networks. It is equally misleading in that deliberate misapplication of the European Directive "Television Without Frontiers" articles on quotas[57] and the place of establishment[58] produced a policy enclave for satellite broadcasters such as BSkyB and Turner. The third government claim for the 1990 Act emphasizes independent production in terrestrial broadcasting, but fails to acknowledge non-enforcement of local programming obligations in cable franchises, as well as the delay from 1992 to 1996 in licensing Channel 5. It explains that the 1994 doubling of Channel 3 television concentration "was designed to allow Channel 3 companies to compete more effectively in the international marketplace."[59]

Section 3.2 actually could be seen to dissemble, in announcing the U.K. review as part of wider international deregulation, naming the United States as its example, but failing to notify the reader that the other reviews mentioned in Australia, Sweden, Italy, and France proved reregulatory. For instance, the Swedish government established a Council on Media Pluralism in 1995. In Section 3.4, the Green Paper claims that "Australia, Canada and the USA make no attempt to limit ownership of the press, or to impose equity ceilings."[60] In truth, all three legislatures have allowed regulation to lapse as a result of political corruption of the regulatory process. Next, the Green Paper describes European legislative proposals. It does not acknowledge any competitive deregulation in the Single Market which a unilateral U.K. deregulation may cause: "The government [to] continue to play an active part in discussions in these

54 *See* MMC REPORT, supra note 28. The regime for governing the federal Channel 3 franchises had required antitrust investigation, such was the intent of the franchisees to overturn the impartial spirit of the 1990 Broadcasting Act regulations.
55 *See* GREEN PAPER, *supra* note 32, § 2.
56 DEPARTMENT OF TRADE AND INDUSTRY, CREATING THE SUPERHIGHWAYS OF THE FUTURE: DEVELOPING BROADBAND COMMUNICATIONS (1991).
57 *See* GREEN PAPER, *supra* note 32, art. 4.
58 *See id.* art. 2.
59 *Id.* § 2.9.
60 *Id.* § 3.4.

areas."[61] Section 4.2. details the undoubtedly wide consultation undertaken in January through May 1994. It details three basic responses:

> [i] abolish media-specific rules;
> [ii] liberalize gradually;
> [iii] continue to protect diversity.

Option [i] was favored by "the larger newspaper and media companies;" [ii] by "medium-sized and smaller companies [which] generally valued their independence;" [iii] by "consumer groups, advertisers, academics and trade unions," which counseled against "what they considered to be exaggeration in much of the current multimedia excitement."[62] Newspaper companies wished to acquire terrestrial commercial TV monopolies; those monopolies wished to enter satellite; and radio companies "wanted simplification" of the rules (which one assumes to be consolidation).[63]

Five arguments for change were laid out: digital convergence of telecoms, computing, and mass media; market entry in digital media; critical mass of domestic corporate actors; current under-investment in broadcasting and production; and inequity for newspaper proprietors barred from broadcast markets.[64] The first two arguments, convergence and entry, form the "digital paradigm." Critical mass and under-investment form the "competitiveness" argument. Inequity forms the self-serving national newspaper argument. In Section 4.8, exponents of generic competition law acknowledge the need for continuing broadcasting content requirements, rigorous enforcement, geographical market definition, and Conditional Access System ("CAS pay-TV") regulation.[65] The remainder of Section 4 details various elements of special pleading in specific media sectors. Section 5.8 explains the deficiencies of general competition law, which is "reactive, gives the authorities wide discretion and can involve lengthy procedures."[66] This statement appears ironic in view of the lobbying which preceded this Green Paper, the huge government discretion under the 1990 Act, and the delay of almost three years from announcement of the review in January 1994 to implementation of the 1996 Act in November 1996. It then counters its analysis of the deficiencies of competition law by explaining competition regulation of

61 *Id.* § 3.12.
62 *Id.* § 4.2.
63 *Id.*
64 *See id.* § 4.4.
65 *See id.* § 4.8.
66 *Id.* § 5.8.

pay-TV conditional access with great attention to the efficacy of general competition law. It is in section 5.20 that the entire document is summarized:

> Alliances between television and newspaper companies are a *logical and natural* product of the economic and technological dynamics of the industry and will allow a *healthy interchange of skills and creativity* for the benefit of the consumer.[67]

It then explains that this "natural," " healthy," "logical" synergy will provide international competitiveness and ends the debate. Section 6 details the government's dismantling of television and cross-media controls.

C. *Longer Term Proposals*

The longer term government proposals at section 6.4-6.22 were devised to limit cross-media ownership concentration at thresholds of:

> 20% of sectoral markets, or a regional market, and
> 10% of the overall market.[68]

Mergers which exceeded these limits[69] would trigger a PIT.[70] Furthermore, the Green Paper suggests appointing an "independent" regulator to oversee these PITs.[71] The existing competition authorities which we saw in Part II were charged with enforcing the tarnished newspaper provisions of the Fair Trading Act of 1973.[72] It invited comment on:

> [a] the threshold;
> [b] the Media Exchange Rate, especially measures of audience and revenue;
> [c] the regulator's accountability;
> [d] the regulator's identity.[73]

1. In Praise of the Green Paper?

Government enthusiasm for this proposal can be explained by several factors. First, the government ardently wished to avoid continuous delegated legislation with attendant lobbying. Secondly,

67 *Id.* § 5.20 (emphasis added).
68 *Id.* § 6.16.
69 It should be noted that 20% would apply to the sector termed "the press," which presumably amalgamated national and regional newspapers.
70 *See* GREEN PAPER, *supra* note 32, § 6.17.
71 *Id.* § 6.18-6.20.
72 *Id.*
73 *Id.* § 6.21.

there was a genuine desire to foster whatever benefits convergent multimedia corporations might produce. Thirdly, officials expressed an intellectual aversion to the political capture which had characterized policy formation in both newspapers and television ownership until 1994. Finally, there was the earnest hope that a workable plan would provide a model for regulatory action at the European level, thus producing "first mover" compliance benefits for British corporations, as well as much-needed kudos for the media policy team. They commissioned National Economic Research Associates ("NERA") to produce econometric models of concentration and MER,[74] on which its proposals were based. The deadline for responses to the Green Paper was set at August 31, inexplicably only a few days after the publication of the NERA report. The timing may have been simply unfortunate, or alternatively a ruse to bounce media owners into lending their support, given that the Bill would be drafted within weeks. The digital television proposals were also released at this time,[75] resulting in responses which addressed both ownership in analogue and digital licensing provisions at the expense of serious discussion of the MER.

D. *Methods of Media Market Measurement*

The NERA report's[76] appearance in late August 1995, a delay during which its proposals had become virtually irrelevant, was largely ignored. It lists various caveats regarding its brief, explaining that it is "background research,"[77] that "all the measures are of necessity rather crude,"[78] and that "a key element of our work has been the construction of a media market share spreadsheet model."[79] Clearly, this paper did not carry forward policy, nor could one expect econometric consultants to do so. It did however establish that time-use is the most accurate measure of electronic media consumption, and that reach is the best measure of newspaper influence.[80] NERA explains that its preferred measures produce results "seemingly underestimating the influence of the press,"[81] which accords with News Corporation commissioning Bill

74 *Id.* § 6.10-6.14.

75 *See* DEPARTMENT OF TRADE AND INDUSTRY & DEPARTMENT OF NATIONAL HERITAGE, DIGITAL TERRESTRIAL BROADCASTING: THE GOVERNMENT'S PROPOSALS, 1995, Cmnd. 2946.

76 NATIONAL ECONOMIC RESEARCH ASSOCIATES, METHODS OF MEDIA MARKET MEASUREMENT (1995) [hereinafter NERA REPORT].

77 *Id.* at iii.

78 *Id.*

79 *Id.* at iv.

80 *See id.* at v.

81 *Id.* at vi.

Shew to produce such a measure.[82] Therefore "we [NERA] suggest that [revenue weighting] based on advertising and consumer expenditure is preferable."[83] It further recommends that regulations apply on change of control (merger or franchise transfer), in order to avoid a further News Corporation criticism that organic growth in media may trigger share thresholds. The government did not brief NERA to consider new services, or to disregard BBC and other "public service" type media.[84] NERA considered a November 1994 European Institute for the Media report on media control,[85] which produced so many variables that NERA considered its significance to lie in proving "how complex a task it would be to define an exhaustive list of measures."[86] Throughout the NERA study, the continuous refrain is that government must impose a policy: ownership and control are political matters which require leadership in their implementation.

E. *Summary of Responses to the Consultation Exercise*

The government proposed using an objectively quantifiable MER, rather than an administratively and arbitrarily fixed weighting, as proposed by newspaper owners. What clearly emerged was that "broadcasters tended to be more cautious [about convergence] . . . to emphasise the differences between [media]," whereas newspapers were "more bullish."[87] Though consumption and reach would reflect media use, the paradox that impartiality and diversity were excluded from the equation forced most commentators to examine revenue weighting in order to "protect" television share from newspaper groups. The inanity of such an approach became apparent. In regard to the operation of a discretion-based test, instead of the 1990 Act's rigid rules, respondents objected to the enforcement of such discretion by a single authority, suggesting a balance of regulation between ITC, competition authorities, and the Secretary of State. The difference between broadcasters' confidence in ITC as content and control regulator, and newspaper hostility to any regulation other than competition

82 *See* W. SHEW, METHODS OF MEDIA MARKET MEASUREMENT, LONDON: ANDERSEN CONSULTING FOR NEWS CORPORATION (1994).

83 NERA REPORT, *supra* note 76, at vi.

84 *Id.* at 1.

85 EUROPEAN INSTITUTE FOR THE MEDIA, TRANSPARENCY OF MEDIA CONTROL 1 (1994) (commissioned by DG XV for the proposed Directive on Media Pluralism).

86 NERA REPORT, *supra* note 76, at 6.

87 DEPARTMENT OF NATIONAL HERITAGE, BROADCASTING BILL UNIT, SUMMARY OF RESPONSES TO THE CONSULTATION EXERCISE, ¶ 26 (1995) [hereinafter RESPONSES TO CONSULTATION].

law, was apparent.[88]

1. Sectoral Regulators' Responses

The commercial television regulator, ITC, published its response on August 29, broadly welcoming the shorter-term proposals. Its final nine paragraphs relate to the MER, in which ITC favored the unitary approach of measuring "reach" in electronic media and readership in newspapers, as a direct, simple, and established method. It commended European Commission adoption of this approach,[89] which may not have enamored it to the Euro-sceptic government. The Commission responded to BBC submissions in 1992 through 1994 by excluding public service broadcasters from its proposed directive, resulting in near-total monopoly reach measurements for regional ITV companies. The ITC view of the media regulator was that, even were this to be governed by a Commission,[90] "the concentration of regulatory power . . . would be very considerable."[91] It also indicated that diversity and pluralism should be regulated by the same body in a unitary manner, that is, by ITC. Its view that diversity and plurality be regulated by a single body is complemented by the view that plurality and competition law are ill-suited to unitary consideration, as it "would risk an undue concentration of regulatory power."[92] The objection is justified by the width of discretion required in judgement of pluralism, which requires "direct and continuing knowledge of broadcasting matters . . . beyond a purely arithmetical test of acceptability."[93] ITC's case was that public law and policy issues of diversity and pluralism require separate skills to economic law and policy issues of competition.

The Radio Authority view was more damning of the proposals.[94] It viewed the MER as reliant on "subjective judgement" which "will create inconsistencies and anomalies." It explained that: "it is difficult to have confidence in a theoretical model if the methodology is capable of such variable interpretation."[95] Therefore, "it questions . . . whether government should not give a firmer

88 *See id.* ¶ 53.
89 *See id.* ¶ 46.
90 Explaining that ITC's terms of appointment are more accountable than single regulators such as the Director General of Fair Trading. *See id.* ¶ 44.
91 *Id.*
92 *Id.*
93 *Id.* ¶ 51.
94 Radio Authority, *Guidance Notes*, *supra* note 16.
95 *Id.* at 19.

lead in support of" media pluralism.[96] It questioned the exclusion of magazines and newer electronic media, regarded revenue as "inappropriate" for pluralistic concerns, explained that "licensing and ownership are inextricably linked" and concluded: "The Authority doubts the need for a new regulator on ownership."[97] It is the strength of this verdict upon which the media reported.

F. *Political and Policy Failure*

1. Arbitrariness and Methodology

The merit-worthy attempt to define a cross-media market by instituting a Media Exchange Rate was doomed to failure by its ambition, statistical inaccuracy, and the flaws in monomedia markets, whether instituted by newspaper market failure or forty years of commercial television regulation. In addition to a separate methodology paper produced by Richard Hooper for the newspaper groups (considered below), economic advisors Andrew Graham and Bill Robinson published contributions to a collection of papers collated by the BBC Policy Directorate.[98] Further, publicly disseminated responses to the proposals were published by Shew for News Corporation; News Corporation itself; BSkyB (September 1995); BBC; and by the regulators ITC and Radio Authority.

The Guardian explained that the proposals were "savaged."[99] For the Radio Authority, CEO Tony Stoller commented that comparing radio with national newspapers, and television with regionals was "like comparing apples to oranges and pears."[100] The problem appears not to be the comparison per se, but the failure to establish a definitive methodology, as shown by Robinson and Shew. In its absence, any MER would appear arbitrary. The consultation exercise appears to have identified chalk and cheese, in the words of Andrew Graham.[101]

This arbitrariness in defining the MER compounded the immediate government problem in setting a barrier of twenty percent market share for national newspaper groups expanding into terrestrial TV. Those groups are the dominant partial political voices in

96 *Id.* at 17.
97 *Id.* at 2-3.
98 *See* Andrew Graham, *Exchange Rates and Gatekeepers*, *in* TIM CONGDON ET AL., THE CROSS-MEDIA REVOLUTION: OWNERSHIP AND CONTROL (1995); Bill Robinson, *Market Share as a Measure of Media Concentration*, *in* CONGDON, ET AL. *supra*.
99 Maggie Brown, *Nice Idea, Shame About the Reality*, THE GUARDIAN, Sept. 4, 1995, at 15.
100 *Id.* In view of his analogy, it is noteworthy that possibly the most influential decision in European competition law compared bananas with other fruit. *See* Case No. 27/76, United Brands v. EC Commission, 1978 E.C.R. 207, 1 C.M.L.R. 429 (1978).
101 *See* Graham, *supra* note 98, at 44.

mass media: News Corporation and Mirror Group. The NERA study had demonstrated that 20% national newspaper share would create dominance in regional ITV markets. In Broadcasting Bill debates, the Ministers appeared to ignore this specific econometric brief. The Labour opposition had set a radical and hugely controversial policy of abandoning all specific ownership limits and media pluralism controls, which would help both Mirror Group and News Corporation. Ian Sproat for the government asserted that twenty percent was an arbitrary figure, but as good as any other![102] "The French have set it at 20% . . . 20% seemed to be a decent level—there was a precedent for it."[103]

2. Policy Irrelevance of MER

If government had not previously realized, it now knew that the will to create a long-term MER-based test had dissipated. The proposals' methodological inadequacy was criticized so completely[104] in the period after the Green Paper was published, the NERA study was so delayed, and short-term political expediency—as demonstrated in Labour policy reform—so overwhelmed the policy process, that the MER was deemed an irredeemable mess. Government had set an October 31, 1995, deadline for responses to the NERA Report, which lobbyists appreciated would be after the drafting of the Broadcasting Bill. It admitted that "the outcome was disappointing as only 10 respondents chose to comment,"[105] in contrast to seventy replying in August to the Green Paper. The expectation was that the government would change, that the MER was a proposal which could not be legislated upon prior to the next General Election in 1997, and would then be low on the list of priorities for an incoming Secretary of State. The MER proposal was therefore unlikely to be discussed before 1998. Such a scenario has resulted.

In contrast to the failure of the ambitious long-term proposals, and the capture of political processes by vested interests in the period leading up to the 1997 General Election, media academics and political analysts may be better served in considering the genesis of the policy process prior to the Green Paper. Part IV will examine the policy proposals which foreran the flawed reforms.

102 In Commons Committee, as elsewhere, civil servants suggest that this is because government knew that it would win the vote, and hence responded arrogantly in debate.

103 House of Commons Standing Committee, D Apr. 20, 1996; 276 PARL. DEB., H.C. (5th Ser.) 841 (1996).

104 Shew suggested a consumption figure which would obviate the need for an MER at all; Bill Robinson's alternative revenue figure would do the same. *See* Graham, *supra* note 98.

105 NERA REPORT, *supra* note 76, at 11.

IV. A NEW APPROACH TO CROSS-MEDIA OWNERSHIP

To find a true defense of deregulation, it may be more satisfactory to examine the February 1995 British Media Industry Group ("BMIG") paper,[106] written by economic consultant and former Radio Authority board member Richard Hooper.[107] Respondents to the Green Paper had noted the government's similarities with the Hooper methodology.[108]

BMIG was the lobby of the national newspaper owners, with the exception of UN&M, News Corporation, and Mirror Group Newspapers.[109] Hooper's paper for BMIG is the father of the Green Paper, providing rather more intellectual coherence than the Green Paper itself, which appears to have been written in committee. In contrast to an earlier February 1994 BMIG paper,[110] Hooper's 1995 paper adopts an intellectually consistent methodology in an evolutionary approach to existing media. It explains: "Our first paper [February 1994] demonstrated *why* the current rules should be changed. This paper sets out *how* new rules might work."[111] It further asserts the export value of its approach: "We further believe that if this approach is adopted, the United Kingdom would be seen to be at the leading edge of regulatory innovation worldwide."[112] This would be appealing to media policymakers, in that their lack of prestige compared to telecoms regulators is explained by the U.K. position as "telecommunications deregulatory laboratory" for the world.

A. *Methodology*

Hooper characterized the system of monomedia regulation as "pigeonholing," in that it limits each company to one exclusive media sector.[113] He identified three critiques of "pigeonholing": con-

106 RICHARD HOOPER, BRITISH MEDIA INDUSTRY GROUP, THE FUTURE OF THE BRITISH MEDIA INDUSTRY (1995) [hereinafter BMIG REPORT].

107 *See* Richard Hooper, ch. 16, *in* MEDIA OWNERSHIP AND CONTROL IN THE AGE OF CONVERGENCE (Vicki Maclead ed., 1996) (explaining Richard Hooper's methodology in writing the 1995 BMIG Report, *see* note 106 *supra*, and its adoption by the government).

108 *See* BMIG REPORT, *supra* note 106, ¶ 29.

109 The dominance of the latter pair, and the legally dubious merger of the former, made all three unsuitable members of a lobby which represented the "respectable" side of the former Fleet Street. *See id.*

110 A polemical anti-regulation piece according to its author, a member of BMIG. *See id.*

111 *Id.* (emphasis added).

112 *Id.*

113 *See* Hooper, *supra* note 107, at 230.

vergence, critical mass, and arbitrariness, the same critiques that the Channel 3 companies used. Hooper therefore began by seeking the "least bad" solution, from the premise that media markets require regulation in addition to competition law, an approach which differentiated his earlier paper in February 1994 from the BMIG and News Corporation deregulatory submissions, both of which proposed integration of media into the competition law regime.[114]

Hooper envisaged a holistic media sector, based on national, regional, and local geographical markets, the smallest of which would be that which supported a local paid newspaper. A regional market would typically encompass the catchment area of a regional Channel 3 franchise. Hooper would measure newspaper, television, and radio *audience* share, rather than *revenue*. This difference between individual consumption and overall audience methods would require an explicit MER in order to convert the figures into tradeable commodities for regulatory purposes. Hooper's medium term proposals do acknowledge consumption rather than revenue as the basis for regulation. Employing existing measures, Hooper proposes to weight media, such that TV, national, and regional newspapers[115] would carry equal share, with radio somewhat arbitrarily allocated fifty percent of that weighting. Thus, TV carries two-sevenths of total share. Fifty percent of the TV market, an approximation of ITV audience share, would result in a fourteen percent (one-seventh) share of the total media market.[116] Hooper's product market is based on monomedia, the existing classification used in the 1990 Act: it is an evolutionary proposal. It carries the advantage of using recognized industry-regulated measures of share.

Product market definition is genuinely misleading here, as in the Green Paper. Plurality for individuals is not the same as competition in a market. Eliminating pre-recorded music and film products consumed individually (recorded music and video) does not answer this criticism. The United Kingdom and European Commission accept different product markets within sectors, while Hooper and the government attempt to institute what competition lawyers would consider a ludicrously wide market of almost all media. As the U.K. competition authority explained: "we take television/radio more as a complement to newspapers than a substitute

114 *See id.* at 233.
115 *See* RESPONSES TO CONSULTATION, *supra* note 87.
116 *See* BMIG REPORT, *supra* note 106, § 5.

product, at least for the majority of consumers."[117] The European Commission accepts separate markets for pay-TV and free-to-air TV.[118] Competition in a *product* market is not the same as a *business strategy* market, as Scholes and Woods explain.[119] Strategists analyze an industry sector for market entry opportunity and prospective market entrants from other sectors. The holistic Hooper view is cross-sectoral, encompassing several distinct markets. Scholes and Woods state: "Market share in the strategic market is not a meaningful concept in the context of competition policy nor in the context of the Policy Document . . . ."[120] They criticize the government for capture by cross-media interests:

> The Government appears as a result, no doubt, of heavy lobbying from the various businesses involved in the media, to have adopted the 'strategic market' idea of the media being a single product market . . . this does not accord with economic principle and is not the right way to tackle the issues of plurality and diversity with which the government is trying to deal.[121]

B. *Progress of Hooper Proposals*

Nevertheless, Hooper's long term measures were effectively swallowed whole by the government in the Green Paper. He stated six general criteria to be employed: flexibility; technological-neutrality; market entry; formal transparency; simplicity of operation and drafting; and quantitative measurement.[122] These criteria meet the primary concerns of regulators. In reading the Paper, one is reminded that Hooper is an "insider," as a Radio Authority member until 1994. The Paper is written with the regulators' concerns foremost, rather than corporate considerations, though his proposals carry convenient implications for BMIG. This Paper proved a remarkably accurate foretaste of both the Green Paper and the Broadcasting Bill. Its logic was seductive in 1995, and retains its credibility and bureaucratic logic in 1999. The incoming government shares the outgoing administration's concern for competitiveness; its pluralism credentials in the media were severely criticized by the House of Lords as recently as the February 9, 1998,

117 *See* MMC REPORT, supra note 28, § 3.5.
118 *See* Case No. IV/M.110, MERGER TASK FORCE, Sept. 10, 1991, O.J. C244/5 ABC/Generale des Eaux/Canal Plus/W.H. Smith TV.
119 *See* Jeremy Scholes & Lorna Woods, *Media Ownership: The UK Government's Proposals*, 1 ENT. L. REV. 11 (1996).
120 *Id.* at 13.
121 *Id.*
122 *See* BMIG REPORT, *supra* note 106, § 3 at 4.

debate.[123] The British tradition of conservatism will ensure that some elements of plurality and diversity protection remain on the statute book.

C. *Hybrid Approach: Robinson*

Hooper asserted a case for BBC and Channel 4 inclusion in media measurement, in that their role is to encourage diversity.[124] Why these strictly content-regulated public corporations sit well with for-profit corporations is not apparent, nor is it explained. BBC supporters Bill Robinson and Andrew Graham fundamentally disagreed. Bill Robinson identifies five elements which combine to form an explanation of pluralism. These are:

[1] restraining monopolists in individual markets;
[2] balancing politically influential product ownership;
[3] restricting monopolists in the cross-media market;
[4] providing universal access to media and;
[5] providing diversity of media products.[125]

He places the first two in a category of political influence, the third with commercial influence, the fourth access, and the fifth content diversity. He believes that the aim of the Green Paper is to regulate cross-media commercial influence as a supplement to monomedia ownership limits, as content regulation and the provision of public service broadcasting provide the other elements.

Robinson's approach is to investigate the specific plurality issue which the government seeks to address. His product market is defined through competition law analysis of substitutability, which provides interesting evidence of the "media differences" concept and the lack of substitutes for electronic media. While newspapers' political influences are relatively easily substitutable, in that their coverage can be replicated in other daily and weekly print and electronic media, electronic news is non-substitutable, since it produces news in near real-time direct to the viewer. That establishes a case for specific regulation of electronic media. Robinson extends his analysis to specific products: protection of political plurality in his view involves the analysis of markets for news, for current affairs and political analysis, and other far less important markets (game show, light entertainment, soap opera, and others). This is reflected in the specific provisions in the 1990 Act relating to ownership of ITN, the network news provider to ITV and Channel 4.

123 Bagehot, *Lordly Virtues*, THE ECONOMIST, Feb. 14, 1998, at 59.
124 *See* BMIG REPORT, *supra* note 106, § 1.6.
125 *See* Robinson, *supra* note 98, at 51-53.

Dominance of political analysis would be the market, whatever the means of distribution.

He also establishes the case for regulation of Internet delivery, representing the substitute for television and radio. In another essay in the same collection, Andrew Graham states that "the new media *must* be included" in order to ensure that the regulatory regime functions effectively, and in order to avoid the regulatory asymmetry of the domestic/non-domestic (BSB/Sky) satellite regimes of the 1990 Act, under which the protected alien will succeed.[126]

D. *Impartiality and Waiver From Ownership Rules*

As the public service broadcaster is designed to protect microdiversity and impartiality, it is logically and explicitly excluded from MER analysis. Impartiality is suggested by Robinson and Graham as an instrument of diversity which companies could voluntarily concede in order to attract a different regulatory regime.[127] If a company agrees to be monitored, presumably by ITC, for content-diversity and impartiality as a public service broadcaster would, it should be entitled to waiver or exclusion from cross-media ownership rules, in the same way as the BBC. BBC Radio 4 *Today* and BBC 2's *Newsnight* may be influential and highly valued, but the quantitative MER does not reveal a value. Excluding BBC from MER calculations removes close to fifty percent of broadcasting consumption from the figures.

Thus far, arguments have been dominated by analysis of external control of media corporations through ownership. Both this analysis, and the public debate, have been somewhat artificially separated from internal corporate governance and editorial independence issues. Collins, Murroni, and Purnell seek a radical solution to media ownership, suggesting that the minimum acceptable number of media players should be seven, thus creating a maximum cross-media market share of fifteen percent.[128] Within the four sectors regulated by the 1996 Act,[129] companies could control forty percent of one, thirty percent of two, twenty percent of three, or fifteen percent of the total.[130] Circulation and audience are the

126 *See* Graham, *supra* note 98, at 49.
127 *See* Robinson, *supra* note 98, at 49; *see also* Graham, *supra* note 98, at 55; John Kay, *News Liked Baked Beans Better for Choice*, DAILY TELEGRAPH, May 15, 1995.
128 *See* RICHARD COLLINS & CHRISTINA MURRONI, NEW MEDIA, NEW POLICIES: MEDIA AND COMMUNICATIONS STRATEGIES FOR THE FUTURE 74 (1996).
129 The four sectors are TV, radio, regional and national press.
130 *See* COLLINS & MURRONI, *supra* note 128, at 72.

measures chosen.[131] This approach is transparent since it states explicit goals: it is worrying for the reasons of political capture demonstrated throughout this paper. Political expediency could undermine the process, though the authors recognize this explicitly and suggest the formation of an "Ofcom" super-regulator with powers comparable to the F.C.C. in the United States. They suggest that this institution may be rather less malleable than current regulatory institutions.

Collins and Murroni set out editorial independence objectives in the internal management of media corporations, explaining that "[d]iversity is a matter for competition policy and content regulation" while concentration rules "are narrowly targeted at pluralism."[132] They express the opinion that "surprisingly little attention has been given to policies that further diversity and reliability of information."[133] Their proposition of 40%/30%/20%/15% is limited and is therefore *conditional* on "an entrenched independence for the editors and journalists concerned."[134] Without this latter condition, the thrust of the statistical proposal appears deregulatory. When one adds this condition, the difference between Collins and Murroni and public lawyers, such as Barendt, is less apparent. Barendt's argument that content and structural rules are inseparable, is thus shared by Collins and Murroni. The internal pluralism sought is not quixotic: it is the regulatory model pursued in smaller oligopolistic media markets, especially those in Scandinavia.[135] The difference between those commentators and this proposal that competition law perform the task of ensuring competitive markets, is the documentation of the failure of media-specific pluralism and diversity controls, together with acknowledgment of the fact that "editorial and management decisions are inseparable."[136]

Graham proposes pro-active competition regulation of both horizontal concentration in "pluralism," and vertical integration in "interconnection," within a regulator whose ambit extends to the consideration of "internal democracy" or diversity. This would address his three concerns: content-regulated broadcasting should be

131 *See id.* at 71.
132 *Id.* at 70.
133 *Id.* at 73.
134 *Id.* at 74.
135 *See, e.g.*, DANISH MEDIA COMMITTEE, MEDIA CONCENTRATION: TRANSPARENCY, PLURALISM AND ACCESS, THE REPORT OF THE DANISH MEDIA COMMITTEE'S INTERNATIONAL HEARING ON MEDIA CONCENTRATION 12-13 (1995). Such practices are employed in the Scott Trust governance of *The Guardian*.
136 COLLINS & MURRONI, *supra* note 128, at 74 (quoting the last, and perhaps final, ROYAL COMMISSION ON THE PRESS, 1977, Cmnd. 6810).

distinguished from solely commercial operations; media concentration should be effectively regulated; and control of gateways should be strictly regulated. He makes three proposals. First, he proposes that ownership control be based on monomedia concentration accumulating towards "a variety of trigger points,"[137] as suggested by Collins and Murroni.[138] Second, "internal democracy" should replace the public/private sector distinction, with rights and obligations of impartiality enabling organizations to seek exclusion from ownership controls.[139] Third, "there should be at least three bodies looking across the media as a whole." These would be: competition authorities; a decency and privacy commission; and a public interest regulator. However, the final regulator would be different from the government Green Paper plan and the Collins/Murroni "Ofcom." This would be due to its specialization, by a power to refer defined markets to the competition authorities for investigation, and by impartiality measures potentially excluding dominant players such as BBC and Channel 4. Market definition could be as limited as "*individual* consumers." He concludes that "the new media *must* be included" to avoid the BSB/Sky market asymmetry.[140]

E. *Summary of Cross-Media Reform Proposals*

Removal of impartial sources from an MER measurement identifies the crucial anomaly in existing ownership regulation, as earlier identified by Barendt. The most partisan media, national newspapers, are least regulated; television, legally bound to ensure impartiality and diversity, is most regulated. The justification for unregulated content and ownership in newspapers, but content and ownership regulation in television, appears increasingly untenable. Government's response is not to regulate newspapers, but to deregulate both content and ownership in television. This truly is a "race to the bottom," as the competitive devaluation of regulation is referred to in the literature on regulatory arbitrage.

An approach is outlined in Part V which retains this most valuable feature of British broadcasting diversity, impartiality, while at-

137 *See* Graham, *supra* note 98, at 48.
138 He refers to James Purnell and Collins, as Purnell was co-author of a proposed pamphlet by IPPR which was due for publication. Purnell became advisor to the BBC, then Deputy Director of the Prime Minister's Policy Unit.
139 *See* Graham, *supra* note 98, at 49.
140 The satellite TV market in 1988-90 was distorted by the presence of both domestic and non-domestic regimes, due to which the domestic content-regulated actor was forced to merge with the non-domestic deregulated.

tempting to remove the ownership pluralism adjudication from political control.

V. Competition Law Approach

Given the difficulties of weighting an MER, it is suggested that the commercial operators' own measure, revenue, be employed as the best market substitute. It has the added advantage of including new media, which would remain unaffected in that their revenue sources are currently negligible, and excluding the public service broadcaster whose "internal democracy" ensures its impartiality while measuring its commercial joint ventures.[141] The danger of asymmetrical regulation is thus avoided. Thus it is submitted that revenue, a measure of advertising/sponsorship plus sales/subscriptions, is the true measure of influence, combining direct influence over consumer choice with the imperfections of advertising value. This would, of course, affect the valuation of media products. Consumers express their preference via expenditure. Subscription revenues reveal those preferences. To provide a concrete example, BSkyB established a £10 billion business at mid-1996 valuations based on four percent of U.K. viewing. The advertising-driven media provide a consumer substitute, which the equity market values far less highly on an individual consumer basis than the reality of subscription. If News Corporation generates revenues in the billions, while radio companies produce tens of millions, that reflects the fact that consumers are perceived to value *The Sun* and *Sky Sports* as exponentially more important than Capital Radio. The central problem with established measures is that they assume advertisers, rather than viewer choice, to be the target.[142] Advertisers take account of this in their negotiations; any Media Exchange Rate should do the same.

This methodology produces strategic divestment choice for dominant commercial operators, and produces market entry possibility in its wake. Based on revenue rather than audience, the government's ten percent overall market share figure becomes a real ceiling on the ambitions of conglomerates, revealing media markets for the cartelised imperfections, with massive barriers to entry, which entrants and providers of capital understand them to be.[143]

141 *See* Collins & Murroni, *supra* note 128, at 76.

142 *The Daily Telegraph*, for instance, distributes 365,000 newspapers at marginal cost, in order to ensure sales figures above 1,000,000. It is unlikely to be read as closely as *The Guardian*, which is 50% more expensive and offers very few bulk sales.

143 The real value of BSkyB, News.International, Pearson, and The Telegraph Group, familiar to the investment community, is made stark reality to the public.

Government plans to allow twenty percent concentration in a region, fifteen percent in television and radio, and ten percent overall, become approximately forty percent, thirty percent, and twenty percent respectively in the absence of the BBC. Multinationals would be required to abandon plans to acquire similar mature advertising media in favor of development of new electronic media markets, which is ostensibly both theirs and the government's policy.

In this more competitive environment, the opportunity for a regulatory structure based on competition rather than market failure may present itself without jeopardizing the position of current market actors. Following this methodology could provide a medium-term solution within a competition law framework. This would carry the benefits that:

> [a] it would work with the dynamic competitive restructuring of the industry;
> [b] it would not require wholesale divestment by any market actor;
> [c] it would provide a framework which is compatible with European law and policy and;
> [d] it would remove the scope for political interference in the commercial environment.

For these reasons, it may be considered an incrementalist choice which pursues the Labour opposition strategy of opening markets to generic competition law, rather than pursuing a sectoral liberalization as chosen by the Green Paper and Broadcasting Act of 1996.

A. *Impartiality and Political Actors*

In view of government complicity in Times Newspapers (1981), Today (1987), BSB/Sky (1990), Independent Newspapers (1994), and other cases, the Secretary of State should relinquish his present quasi-judicial role in order to remove the temptation to interfere in media pluralism. This abdication of political control has been rejected in the Competition Act. Whether he would concede the loss of political control in the narrower field of media mergers is moot. Former Labour Deputy Leader Roy Hattersley continually threatened News Corporation with a full and politically supported investigation by the competition authorities. His radicalism was to support openly competitive media markets.[144] If the new New Labour government is to confront media ownership re-

144 *See* Roy Hattersley, Fifty Years On: A Prejudiced History of Britain Since the War (1997).

form, this is the direction that would be advised. This is consistent with New Labour policy:

> [a] to employ competition law analysis of media markets;
> [b] to reform UK competition law;
> [c] to reform UK regulation by adopting transparent, independent commissions;
> [d] to remove political discretion through the adoption of independent PIT's and;
> [e] to support public service broadcasting, in the Protocol to the Treaty of Amsterdam.[145]

Automatic investigation by competition authorities would not amount to automatic divestment. Simply defining a dominant position would fail to meet democratic objectives in the media market. More suitable would be a requirement that interest in excess of market share be limited by a duty of impartiality, and to avoid abuse of pluralism wherever a separate investigation of competitive conduct might so reveal. This is not without precedent: the 1996 Federal Broadcasting Law in Germany requires television companies exceeding ten percent of market share to provide access to independent broadcasters in peak-time.[146] The Canal+ broadcasting license in France requires minimal returns to the public interest, in terms of investing a share of turnover in French film production.[147]

A Media Panel of the proposed new Competition Commission would be expected to display greater consistency and independence than the existing authorities with veto by Secretary of State. The result would be the ring-fencing of public service broadcasting, in that impartial content-regulated services would be exempt from Media Panel enforcement of divestment. The concept of a multimedia market share of 10%, a spirited, if facile, attempt on the parts of NERA and the government in 1995, can be abandoned as irrelevant to competition law. There is no market for "news consumption," it is in any case recognized that news analysis is received through a multiplicity of ill-defined sources.[148]

145 *See also* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Protocol No. 32, on the system of public broadcasting in the Member States (June 1997) (providing limited exemption from the Article 92(4) illegal state aid provision of the Treaty of Rome), *available at* <http://www.poptel.org.uk/carole-tongue/pubs/protocol.html>.

146 *See* PETER HUMPHREYS, RECENT TRENDS IN THE GERMAN MEDIA: BROADCASTING PLURALISM IN THE BALANCE 25-27 (1997).

147 *See* CAROLE TONGUE, CULTURE OR MONOCULTURE: THE EUROPEAN AUDIOVISUAL CHALLENGE 23 (1997).

148 Including BBC television and radio, broadsheet newspapers, and opinion-forming weekly journals, such as *Private Eye, The Economist, The New Statesman*, and *The Spectator*, which are nowhere included in MER calculations.

VI. CONCLUSION

Failed media markets provide no basis for successful entrepreneurs; they are a breeding ground for special interests. Similarly, poor competition law enforcement is no basis for improving competition in markets; it is a breeding ground for abusive cartelisation. Jonathan Davis asked whether "the equivalent of what British Telecom has called a 'hostile and destructive' Oftel[is necessary] to give UK television the enema it may need if competition is to run smooth?"[149]

It may be that Oftel itself will be the government's chosen solution to convergent communications regulation, renamed and reconstituted as "Ofcom." It is clear that any future U.K. communications competition regulator must adopt an equally vigorous approach, in order successfully to create the conditions for market entry and competition. Despite this broadly pessimistic analysis of regulatory capture by multimedia multinationals, there has been only one successful merger of television and newspaper interests since the Broadcasting Act came into force.[150]

Media concentration has occurred in vertical sectoral markets, with competition reduced by massive barriers to entry caused by Channel 3 mergers and newspaper price wars.[151] Though deregulation by regulatory capture was described by lobbyists as "pushing at an open door," it served only to retrench producer vested interests. Monomedia monopolists appear content to remain, regardless of whatever opportunities compliant governments may offer. Regulatory reformist zeal has pre-empted any possible digital market convergence. The lesson for regulators and academics is that the media corporate predator's eyes may be bigger than his stomach. It appears apt to quote Lord Clive of India, the most successful CEO of the world's most successful monopolistic multinational—the British East India Company. When tried in the U.K. Parliament in 1773 for the excesses and personal rewards of his governance in Bengal, he concluded his defense: "I stand astonished at my own moderation."[152]

British media barons may conclude the same. The reforms of 1993-96 appear to have produced so little convergent cross-market

149 Jonathan Davis, *Is competition in TV a fair game?*, Broadcast, June 16, 1995, at 14.

150 This was the formation of Scottish Media Group from Scottish Television and Caledonian Press.

151 *See* Colin Sparks, *Concentration and Market Entry in the UK National Daily Press*, EUR. J. OF COMMS., vol 10, no. 2 (June 1995), at 179, 179-206.

152 CONCISE OXFORD DICTIONARY OF QUOTATIONS 102 (3d ed. 1994).

restructuring that one may conclude that the hype of which John Malone spoke about may be just that. This evidence of policy capture should be especially feared where vested interests resist market entrants, aided by party politicians seeking short term electoral gain. However tarnished the policy process may appear, it is important to conclude that these party games are in fact the early shots in the battle to control the Information Superhighway. It is an inauspicious start for those who would wish for either free market competition or a governmental assertion of the public interest. For the embedded domestic special pleaders, it will do just fine.

NEW LYRICS FOR AN OLD MELODY: THE IDEA/EXPRESSION DICHOTOMY IN THE COMPUTER AGE*

HONORABLE JON O. NEWMAN**

The computer era has presented new challenges to all segments of society, so it should come as no surprise that these challenges arise in the domain of law in general and copyright in particular. It should also not be surprising that our initial efforts to meet these challenges have not been entirely successful. After all, if the programmers could not anticipate that the year 2000 would not be just one year after 1999 but in another century[1] — one in which computers would be thinking that 2000 is 1900 — the legal community ought to be forgiven for not immediately adapting its doctrines to the demands of cyberspace.

Among the major challenges the computer age poses for copyright law is how to draw the line with respect to digital materials — mostly software[2] — between what is protectable by copyright and what is available to be copied. The instinct of many judges, lawyers, and commentators has been to start with the idea/expression dichotomy and then struggle to adapt this basic continental divide to digital materials. The effort has thus far led to two deficiencies in our approach — deficiencies that have been recognized insufficiently, if at all. Moreover, unless we begin to notice what has happened and seriously consider whether our approaches are sound, we risk not only a deficient approach to copyright issues concerning digital materials, but also an unwise corruption of previously sound approaches to copyright issues concerning non-digital materials.

These two deficiencies of decision-making in the copyright

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1 Purists would no doubt point out that the year 2000 is the last year of the twentieth century, not the first year of the twenty-first century, just as it is the last year of the second millennium, not the first year of the third millennium. But as others have observed, those who wait until midnight on December 31, 2000, to celebrate the start of the new century and the new millennium will have missed a lot of excitement on December 31, 1999.

2 I say "mostly software" because the 1s and 0s of object code that make source code readable by a computer can be embodied either in software on floppy disks or CD-ROMS, or in the hardware of a computer itself. *See* Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2319 (1994).