

# ASPIRING TO PLURALISM: THE CONSTRAINTS OF PUBLIC BROADCASTING VALUES ON THE DE-REGULATION OF BRITISH MEDIA OWNERSHIP

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## INTRODUCTION

During the past seven years, there has been a remarkable change in the shape of the British<sup>1</sup> media market. The growth of opportunities in electronic media has encouraged existing interests in the press and broadcasting to seek new alliances, both domestically and internationally. Both government and regulators have responded with measures which have effected an incremental deregulation of the industry. This has resulted in a more liberal approach to changes in media ownership, which has produced increased concentration and cross-ownership between different media sectors. Nevertheless, the process has been accompanied by a continued commitment to retaining media pluralism as a public policy, a policy which is reflected in merger regulation of the press but which has manifested itself most strongly in the development of public service broadcasting. Although public service has a reduced role in the new multi-channel markets, it continues to act as a constraint on the exposure of British audiences to convergence of power in the media.

Before proceeding to discuss issues of ownership regulation, it may be helpful to sketch the current media arrangements in the United Kingdom. The press is characterized by a dominance of nationally distributed titles. There are eleven daily newspapers (five broadsheets or "quality," two mid-market, and four tabloids or "popular") and eight Sunday newspapers (four broadsheets, two mid-market and four tabloids). There is also a regional press which produces local papers but uses much syndicated material. In

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<sup>1</sup> Although it is not technically correct, the word "British" when referring to the United Kingdom is in accord with common usage.

addition, there is a growing circulation for "free-sheet" advertising, with varying degrees of editorial content and association with local newspapers.

At present, public sector television is confined to terrestrial broadcasting. There are two such terrestrial channels provided by the still publicly owned British Broadcasting Corporation. One is called "BBC 1" and it caters to the general audience, offering a range of popular programming. The second channel is called "BBC 2," and it tends to provide programs which appeal to minority interests in the audience, often dealing with cultural themes in the arts, drama, and film, or with current affairs. In the independent (that is, the private or commercial) sector, there is also a terrestrial public service channel, broadly comparable to "BBC 2," called "Channel 4," which does not make its own programs but is a commissioning and editing channel funded by advertising and sponsorship.

Since 1991, the other terrestrial channel in the independent sector has had a reduced commitment to public service. Legally described as "Channel 3," but commonly known as Independent Television ("ITV"), it used to have a full public service remit, albeit more popular and aimed at the mass audience, but that has now been relaxed. Channel 3 consists of fifteen companies, mainly regionally based but with a national breakfast service, which sell advertising and sponsorship in their localities, but operate as members of a network which buys and schedules their programs for national transmission. The 1990 Broadcasting Act<sup>2</sup> introduced a partial restructuring of the sector based on competitive tendering for licenses and a "lighter touch" to regulation. The statute also made provisions for the development of a new channel, "Channel 5," by re-allocating frequencies previously used for home video-recording and enabling the service to achieve a terrestrial coverage which is currently approaching 80% of the United Kingdom.<sup>3</sup> Beyond terrestrial broadcasting, there is a growing market for cable television and an established market for medium-powered (legally described as "non-domestic") satellite television, such as "BSkyB" on one of the Astra satellites.<sup>4</sup> In common with such services throughout Europe, the latter offer a wide variety of specialist

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<sup>2</sup> Broadcasting Act, 1990, ch. 42 (Eng.).

<sup>3</sup> "Channel 5" is also distributed on cable and satellite.

<sup>4</sup> There are regulatory provisions for direct broadcasting by satellite ("DBS"), using the international satellite frequencies allocated to the United Kingdom, and they are legally described as "domestic satellite" services. But, following the failure of British Satellite Broadcasting and its take-over by Sky in 1990, such DBS services have not been established in the United Kingdom.

channels providing, for example, sport, film, or news. These parts of the private sector are under no positive obligation to provide public service, although they must comply with some basic standards relating to taste, decency, accuracy, and impartiality. More generally, the opportunities to exploit the medium's potential to provide information services, such as teletext and business data, have been greatly increased.

With respect to radio in the public sector, there are five national services provided by the BBC and a host of local stations. Broadcasts are more commonly provided on FM frequencies, but AM and long wave services are still widely used. The independent sector was initially developed as a network of local stations, again using a combination of FM and AM frequencies. Since 1990, three national independent services have been introduced, two using FM and one AM, and there has been considerable growth in local services, often targeted at small but specialized sections of the audience.

Under the 1996 Broadcasting Act, a new regulatory regime for digital terrestrial television has been introduced. Broadly, terrestrial frequencies have been allocated to six "multiplexes," which will be responsible for the packaging and distribution of digital programming. One such multiplex will be operated by the BBC and another by a company owned by Channels 3 and 4. In each case, the multiplex was assigned on condition that they also provide their existing analogue programming simultaneously in digital form. But they have also been given a preferential position to develop their own digital programming (presently, two new BBC services and a second Channel 3 are anticipated) and to distribute other, independent programming, on a commercial basis. A third multiplex will be commercially operated but with capacity reserved to Channel 5 and the Welsh language public service provider. The remaining three multiplexes will be commercial and operated by one company, British Digital Broadcasting. Apart from the existing analogue services which are broadcast simultaneously, programming on the non-BBC multiplexes must be licensed separately by the Independent Television Commission ("ITC") or the Radio Authority ("RA"). The new services are still being developed and are not expected to start transmission before 1999. In due course, should digital broadcasting become sufficiently well established, analogue frequencies will be withdrawn from broadcasters.<sup>5</sup>

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<sup>5</sup> See generally, DEPARTMENT OF NATIONAL HERITAGE, DIGITAL TERRESTRIAL BROADCASTING: THE GOVERNMENT'S PROPOSALS, 1995, Cm. 2946; BROADCASTING ACT 1996 Current Law

BBC services are not subject to external regulation because the BBC is a public corporation, established by Royal Charter.<sup>6</sup> In consideration for receiving a transmission license from the government, it has agreed to provide a range of public broadcasting services and to comply with requirements as to quality for service and funding.<sup>7</sup> All other services are required to be licensed by one of the two media regulators, the "ITC" and the "RA."<sup>8</sup> There is no clear line marking the differences between public and independent broadcasting in the United Kingdom, however. All public television is terrestrial, but it is not all publicly owned. As with radio, where television is publicly owned, it adheres to public service values, but where it is privately financed, it covers a spectrum of services, ranging from full public service, through partial public service, to the fully commercial.

#### REGULATION OF COMPETITION IN THE PRESS

Although there is no regulation of press content in the United Kingdom, the economic activities of newspaper companies are governed by general competition law and its aim to reduce monopolistic concentrations of ownership. However, special provision is made for newspaper mergers, in recognition of the medium's contribution to freedom of speech. Newspaper transfers and mergers are governed by the 1973 Fair Trading Act.<sup>9</sup> Under section 58, a newspaper may not be transferred to a proprietor whose newspapers would have an average circulation of 500,000 copies per day (including the paper to be acquired) unless the relevant minister,

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Statutes Annotated (Thomas Gibbons ed. 1996). The Government has launched a consultation exercise on the precise arrangements for withdrawing analogue frequencies, following publication of a report by independent consultants on the available options. For the report, see NATIONAL ECONOMIC RESEARCH ASSOCIATES (NERA)/SMIT SYSTEM ENGINEERING, A STUDY TO ESTIMATE THE ECONOMIC IMPACT OF GOVERNMENT POLICIES TOWARDS DIGITAL TELEVISION (1998) (visited Mar. 23, 1998) <<http://www.culture.gov.uk/NERA1.HTM>>. For the consultation document, see DEPARTMENT FOR CULTURE, MEDIA AND SPORT / RADIO COMMUNICATIONS AGENCY, TELEVISION: THE DIGITAL FUTURE- A CONSULTATION DOCUMENT (1998) (visited Mar. 23, 1998) <<http://www.culture.gov.uk/CONS.HTM>>.

<sup>6</sup> DEPARTMENT OF NATIONAL HERITAGE, ROYAL CHARTER FOR THE CONTINUANCE OF THE BRITISH BROADCASTING CORPORATION, 1996, Cm. 3248.

<sup>7</sup> DEPARTMENT OF NATIONAL HERITAGE, COPY OF THE AGREEMENT DATED THE 25TH DAY OF JANUARY 1997 BETWEEN HER MAJESTY'S SECRETARY OF STATE FOR NATIONAL HERITAGE AND THE BRITISH BROADCASTING CORPORATION, 1996, Cm. 3152 [hereinafter AGREEMENT].

<sup>8</sup> See Broadcasting Act, 1990, ch. 42 (Eng.); Broadcasting Act, 1996; ch. 55 (Eng.). A minor exception is the Welsh language fourth channel, Sian Pedwar Cymru ("S4C") which is, like the BBC, a public corporation, albeit established by statute. It should also be noted that, where telecommunications services are used in delivering programming (for example, with cable television), the Office of Telecommunications ("OFTEL") has a parallel role in licensing the telecommunications aspects of the service under the Telecommunications Act, 1984, ch. 12 (Eng.).

<sup>9</sup> Fair Trading Act, 1973, ch. 41 (Eng.).

the Secretary of State for Trade and Industry, gives his consent. Unless a large-circulation paper is not intended to be continued as a going concern, or a decision is required urgently, that consent can only be given after a report from the Monopolies and Mergers Commission. However, where the paper to be merged has a circulation of 50,000 or less, consent may be given without such a report. This latter provision represents a relaxation of the former threshold of 25,000 and allows companies to undertake more acquisitions in the regional markets without regulatory intervention.<sup>10</sup> Under section 59 of the Fair Trading Act, the Monopolies and Mergers Commission has to consider whether the transfer may be expected to operate against the public interest, taking into account all relevant interests and, "in particular, the need for accurate presentation of news and free expression of opinion."<sup>11</sup>

The main difficulty with this procedure is that it has not proved capable of resisting commercial responses to loss-making ventures such as quality newspapers. *The Times* was not financially viable when it was bought by the Thomson Organization in 1966, and the incumbent Monopolies Commission had little choice but to accept assurances that editorial autonomy would be respected. When the same paper was bought by News International, the matter was not referred to the Commission by the minister, presumably on the basis that the paper's survival was at stake, despite the fact that *The Sunday Times* was included in the deal and remained a going concern, and that News International owned two major tabloids, *The Sun* and *The News of the World*. When *The Observer* was bought by Lonhro, it was also in financial straits and the Monopolies Commission approved the change of ownership. In all these cases, the appointment of independent directors was thought to provide some protection against any proprietorial interference that the concentration of ownership might bring.

The United Kingdom's competition law is currently being revised to bring it into line with the European Community's approach to such regulation. The 1997 Competition Bill does not alter the merger provisions relating to newspapers, however. The reason given by the Government is that a special regime for such mergers continues to be required because of their impact on freedom and variety in expression of opinion.<sup>12</sup> This is true of the Mo-

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<sup>10</sup> See Fair Trading Act, S.R. & O. 1995, No. 1351; DEPARTMENT OF NATIONAL HERITAGE, MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS, 1995, Cm. 2872, ¶ 6.42.

<sup>11</sup> Ch. 41 (Eng.).

<sup>12</sup> DEPARTMENT OF TRADE AND INDUSTRY, A PROHIBITION APPROACH TO ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION (1997).

nopolies and Mergers Commission's role (which will operate as part of a broader Competition Commission when the Bill becomes law), but the explanation ignores the effect of the wide discretion given to ministers and the fact that, in the past, such discretion has not noticeably been used to further media pluralism.

#### THE PUBLIC SERVICE TRADITION

Other media ownership rules have been subjected to considerable relaxation in recent years. To understand this relaxation, it is helpful to trace the development of the public service tradition in British broadcasting. The idea of public service broadcasting evolved partly as a response to the perceived scarcity of broadcasting frequencies.<sup>13</sup> But there was also a wider tradition of "responsible" administration which was reflected in an official committee's description of the BBC as "trustee" for the national interest in broadcasting<sup>14</sup> and in the ideals of John Reith, the first Director-General of the BBC.<sup>15</sup> Indeed, the early history of public service broadcasting and the early history of the BBC largely coincide. The Corporation had been established in 1926 as a *de facto* monopoly. Its vision and general ethos was to influence generations of broadcasters, including those who developed the new commercial services in the 1950s.<sup>16</sup>

Although encompassed in the requirement to provide a service for "disseminating information, education and entertainment,"<sup>17</sup> two features of public service broadcasting remain distinctive.<sup>18</sup> One is the idea of universality, in the geographical sense that the material which is produced should be available throughout the country, and in the consumer sense that it should cater to all tastes and interests. The other feature is the idea of cultural responsibility, that material should have the object of informing and educating the public to a high standard of quality as well as entertaining them. Connected with both ideas is a sense of

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<sup>13</sup> It is widely recognized that the scarcity was largely created by government's wish to control the airwaves and to reserve many frequencies for military and other state purposes. See R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); HOME OFFICE, REPORT OF THE COMMITTEE ON FINANCING THE BBC, 1986, Cmnd. 9824, (Peacock Committee). But the scarcity was real enough from the broadcasters' and the audience's perspectives.

<sup>14</sup> BROADCASTING COMMITTEE, REPORT, 1925, Cmd. 2599, ¶ 5 (Crawford Committee).

<sup>15</sup> See P. SCANNELL & D. CARDIFF, *A SOCIAL HISTORY OF BRITISH BROADCASTING: VOLUME ONE 1922-1939 - SERVING THE NATION*, ch. 1 (1991).

<sup>16</sup> See generally, T. BURNS, *THE BBC: PUBLIC INSTITUTION AND PRIVATE WORLD* (1977).

<sup>17</sup> See AGREEMENT, *supra* note 5, at cl. 3.2(a); Broadcasting Act 1990, ch. 42, §25(2)(a) (Eng.).

<sup>18</sup> See also BROADCASTING RESEARCH UNIT, *THE PUBLIC SERVICE IDEA IN BRITISH BROADCASTING - MAIN PRINCIPLES* (1985).

cultural consensus, that the nation shares a common fund of values and preferences which give it an identity as a community, notwithstanding the existence of differences of opinion between various sections of the population, including minority groups. Other issues, such as political independence or public finance, are analytically separate, although they are often discussed together with public service. The practical result of the public service tradition for regulation was that broadcasters were obliged, initially by convention and political understanding, but later by charter and statute,<sup>19</sup> to comply with a set of standards which were intended to further the audience's interests. There were prohibitions on the inclusion of material which offended good taste and decency, or which encouraged crime or disorder, or was generally offensive to public feeling. Importantly, there were also duties which reflected a general belief in pluralism, relating to impartial treatment of controversial issues and to positive obligations to cater to a variety of tastes and interests in the audience as a whole.

The BBC had been established as a public corporation with a system of public accountability for the public service programming which it broadcast. When competition in the form of commercial television was introduced to the United Kingdom in 1954, a similar model of public accountability was retained for organizing the new industry. A new regulator, the Independent Television Authority ("ITA"), was created by statute. It was also a public corporation, resembling the BBC in its institutional design, and the alternative service which it was responsible for delivering ("independent television" or "ITV") had to meet the same public service standards. The ITA was not allowed to make any programs itself, however, but was required to enter contracts for their supply with a number of regionally based companies. It was responsible for choosing the program contractors and awarding them franchises, for generally supervising their work, and for approving a schedule of programs which they produced and which it transmitted. When commercial sound broadcasting was introduced as late as 1972, the regulator's name was changed to the Independent Broadcasting Authority ("IBA") and its remit was duly broadened, but the basic relationship between broadcaster and program supplier was unaltered.

The legal and political responsibility of the IBA, as broadcaster, had an important influence on the control of television and radio ownership. Its regulatory duties were conceived as the fulfilment of that responsibility—to ensure that public service broad-

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<sup>19</sup> See *supra* note 6; Broadcasting Act 1990, ch. 42, §§ 6, 7, 90, 91 (Eng.).

casting was provided in the commercial sector. As broadcaster, the IBA had a role analogous to that of an editor. It could not treat programming companies as independent entities, but subjected their work to considerable scrutiny, including the previewing of programs and schedules, to insure that they provided the kind of material with which it was prepared to be associated. Indeed, the likelihood that the program contractors would meet its requirements was an important element in the IBA's decisions to award them franchises. Although companies were required to submit bids which demonstrated a business plan and sufficient financial backing, a major task in the franchising exercise was to convince the IBA that the company's personnel shared the same public service values and approach as the regulator. The process lacked transparency and was too subjective, and it was justifiably criticized as such.<sup>20</sup> But it also had the effect of placing a considerable premium on the identity of the company's owners. Once it had chosen a contractor whom it trusted to supply public service programming, the IBA proved extremely resistant to allowing changes in the company's ownership.

The impact of public service values in creating a tight ownership regime can be illustrated in many ways. The IBA maintained strict control of cross-holdings between the ITV companies, with an internal rule which prevented any person with a voting interest exceeding 5% in one company from holding more than 1% in another company without its consent.<sup>21</sup> This was partly an interpretation of its statutory obligation to secure adequate competition between program contractors as to finance and control,<sup>22</sup> but it also reflected its policy on regionalism and the public service concern with pluralism. With respect to regionalism, the IBA's franchise selections were strongly influenced by what it conceived to be the separate needs of different regions in the United Kingdom,<sup>23</sup> and it would have been inconsistent to allow an element of common control to undermine the distinctiveness of each of the contractors it had chosen. With respect to pluralism, the desire to provide a balanced range of opinions about matters of public interest created a suspicion about concentrations of power being used to influence the audience's opinions. In relation to cross-media holdings between broadcasting and the press, these concerns

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<sup>20</sup> See N. Lewis, *The IBA Contract Awards*, 1975 PUB. L. 317-40.

<sup>21</sup> IBA, OWNERSHIP, BACKGROUND PAPER NO. 3 TO COMMONS REPORT STAGE, BROADCASTING BILL (1990).

<sup>22</sup> Under the now repealed Broadcasting Act, 1981, ch. 68, § 20(2)(b) (Eng.).

<sup>23</sup> See A. BRIGGS & J. SPICER, *THE FRANCHISE AFFAIR* 56-61 (1986).



about regionalism and pluralism were supplemented by resistance to commercial influences on public service broadcasting. This theme was a major anxiety of the Pilkington Committee in its assessment of the new television service in 1962,<sup>24</sup> and in addition to restrictions on the sharing of interests across radio and television, a power was given to the IBA to prohibit newspaper share holdings in program contractor companies where that would be contrary to the public interest.<sup>25</sup>

It would be wrong to give the impression that the regulator was always successful in preventing media concentration, however. One affair, in the early 1970s, can be interpreted as well-meaning support for a program contractor but, ironically, it almost enabled the public service values, which the company was presumed to represent, to be compromised. When London Weekend Television was experiencing managerial and financial problems, the regulator allowed Rupert Murdoch, the newspaper proprietor, to hold a substantial part of the company's equity in order to assist it during its crisis and to become one of its directors for a time. At the same time, he had acquired a large holding in an independent radio company which covered part of the franchise area. Eventually, the IBA intervened to force him to divest, but not before much public concern. This was voiced by the Annan Committee which observed that "clearly, there is an editorial danger if the same men own both the main media for news and political expression."<sup>26</sup> Interestingly, the Annan Committee regarded the maximum acceptable holding of voting shares by a newspaper in a program company to be 10% and the total press interest in such a company not to exceed 25%. But it is worth noting that Murdoch had been able to control London Weekend Television with only 7.5% of the voting shares.<sup>27</sup>

This episode serves to illustrate the difficulties experienced by a broadcaster-regulator who has an obligation to provide a service, but who needs to find the financial backing to do so. In the early years of British independent television, there was actually a considerable amount of press investment in the service. Much of it was provincial, allowing the ambition of newspaper proprietors to coincide with the regulator's encouragement of regionalism. But the relationship between the provincial press and the national press

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<sup>24</sup> HOME OFFICE, REPORT OF THE COMMITTEE ON BROADCASTING 1960, 1962, Cmnd. 1753, ¶ 6.48 (Pilkington Committee).

<sup>25</sup> Latterly, under the repealed Broadcasting Act, 1981, ch. 61, §§ 20(3); 23 (Eng.).

<sup>26</sup> REPORT OF THE COMMITTEE ON THE FUTURE OF BROADCASTING, 1977, Cmnd. 9824, ¶ 13.32 (Annan Committee).

<sup>27</sup> See C. SEYMOUR-URE, THE BRITISH PRESS AND BROADCASTING SINCE 1945, at 109 (1991).

created fears of concentration. Furthermore, since the press has traditionally been politically partisan, there were anxieties that, despite the ITA's attempts to "balance" the political allegiances of press participation, this might compromise the political impartiality of television.<sup>28</sup> As a result, the regulator encouraged the gradual reduction of press holdings in independent broadcasting as it consolidated its strict policy against ownership changes.

#### EARLY DEREGULATION: THE 1990 REGIME

The 1990 Broadcasting Act marked a radical change of policy in the regulation of the electronic media in the United Kingdom,<sup>29</sup> and its approach to ownership naturally reflected the shift. The Government's policy had been set out in the *White Paper* published in 1988:

With the greater choice and variety that lies ahead, the Government is determined that ownership in the independent [television and radio] sector should be, and remain, widely spread. The existing controls on takeovers will be removed. The underlying thrust will be that . . . regulation should bite on performance rather than through an extensive and rigid set of disqualifications . . . . But clear rules will also be needed which impose limits on concentration of ownership and on excessive cross-media ownership, in order to keep the market open for newcomers and to prevent any tendency towards editorial uniformity or domination by a few groups.<sup>30</sup>

The new rules were introduced as part of a wide-ranging legislation which removed the obligation on commercial terrestrial television (except for Channel 4) and radio to provide a full public service. The broadcasting role of the regulator ceased and its function became that of an external supervisor and enforcer, with the program companies becoming responsible for their own productions. In addition, there was a major attempt to articulate what had not been thought necessary until then—the commitments which the companies would undertake in providing programs and services. The latter was closely connected with the introduction of competitive tendering as the preferred method of awarding franchises (the companies would need to know the specifications of a service to be able to put an economic value on it). But it also reflected a reac-

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<sup>28</sup> *Id.* at 90-92.

<sup>29</sup> *See generally*, THOMAS GIBBONS, REGULATING THE MEDIA (1991) (a second edition will be forthcoming in 1998).

<sup>30</sup> HOME OFFICE, BROADCASTING IN THE '90S: COMPETITION, CHOICE AND QUALITY, 1988, Cm. 517, ¶ 6.48.

tion to the lack of transparency and broad discretion which had characterized the IBA's decision-making. As a result, the ownership provisions of the 1990 Act were very complex in an attempt to be all-inclusive and to trace corporate ownership to the controlling interest as far as possible. Predictability was obtained, but at the expense of excessive rigidity and the need to anticipate all difficulties in advance in order to avoid loopholes.<sup>31</sup> The new regulators who replaced the IBA, the ITC, and the RA retained limited discretion, but their main duty was to apply the set of rules which had been devised for the media by Government.

Those rules were set out in sections 5 and 83 and schedule 2 of the 1990 Broadcasting Act and they fall into three main categories: first, there are prohibitions on disqualified persons from holding licenses; second, there are limitations on accumulations of interests in licensed services; and, third, there are limitations on cross-holdings between the press and licensed services. Although the introduction of these rules had a liberalizing effect on the previous regime, it is notable that they retained fairly tight control over the terrestrial broadcasting sector. At the same time, they relinquished much control over the cable and satellite sectors.

1. *Disqualifications.* Under section 5(1) and section 83(1) of the 1990 Act, the regulators must do all that they can to insure that a "disqualified person" does not become or remain the holder of a license. The list of such disqualified persons reflects a variety of policy issues and may be summarized as follows. First, there are individuals who do not have an appropriate connection with the United Kingdom because they are neither European Community ("EC") nationals who are ordinarily resident within the Community, nor persons ordinarily resident in the United Kingdom. Similarly, corporate bodies are disqualified unless they are formed under the law of a member state and have their registered office or principal place of business there.<sup>32</sup> Second, and consistent with the traditional principle of political impartiality in broadcasting, bodies with political connections are disqualified: a local authority or its officers; a body whose objects are wholly or mainly of a political nature or its officers or affiliates; companies that are associates of local authorities or political bodies; and companies in which lo-

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<sup>31</sup> See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); IBA, OWNERSHIP IN THE BROADCASTING BILL, BACKGROUND PAPER No.5 (1990).

<sup>32</sup> Ordinary residence or incorporation in the Isle of Man or the Channel Islands counts for this purpose.

cal authorities, political bodies, their affiliates, or associated companies have more than a 5% interest, or any bodies that they control. Reaching further back, the list continues with any body which is controlled by a non-EC person, together with any body that is controlled by one of the foregoing politically connected bodies, and any company in which it has more than a 5% interest.

The requirement of an EC or United Kingdom connection is partly required by virtue of the Community's single market obligations, but it is also protectionist, in resisting the potential for mainly North American domination of the British media industry. The restriction is not entirely logical, however, because there is no limit on non-British but European domination; however unlikely in practice, such companies could control all the Channel 3 and Channel 5 services. Furthermore, the requirement of an EC or British connection does not apply to local delivery services (such as cable services) nor to the new digital services. The assumption here is that overseas, especially North American, investment needs to be encouraged to establish the services. Controversially, the same provision is made for non-domestic satellite services, those using medium-power such as the Astra satellites. At the time the legislation was passed, and indeed currently, the principal provider of such services was Sky Television, now BSkyB, which is owned by News International plc. That company, in turn, owns the daily newspapers, *The Times* and *The Sun* (with a combined national circulation of 33%) and the Sunday newspapers, *The Sunday Times* and *The News of the World* (with a combined national circulation of 38%),<sup>33</sup> and is itself a subsidiary of News Corporation, chaired by Rupert Murdoch.

One objection is related to cross-media ownership, and will be mentioned below. But the exemption for non-domestic satellite services was also regarded by some as a concession to the Murdoch media companies whose newspapers supported the Conservative Government. It was claimed that Sky programming would be able to establish a *de facto* monopoly over satellite broadcasts to the United Kingdom and would gain an unfair advantage compared to British-based initiatives. Against that, the Government suggested that if there was a case for protectionism, it depended on the scarcity of United Kingdom frequencies, but the Astra satellites operated from Luxembourg and would be unaffected by United Kingdom regulation. Furthermore, the Government argued, in-

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<sup>33</sup> See generally AUDIT BUREAU OF CIRCULATION, CIRCULATION STATISTICS FOR DECEMBER 1997 (visited Mar. 23, 1998) < <http://www.abc.org.uk> >.

vestment in Astra was already established and was unlikely to be affected by United Kingdom policy; the effect of denying licenses to non-EC Astra operators would be to remove finance and employment from the United Kingdom, and with no obvious advantage.<sup>34</sup> Those arguments had much force, in recognizing that British investment in cable and satellite had been slow, with the farsighted exception of Sky. However, they avoided the reason why the issue was raised at all, that the ownership rules had not dealt with the extent to which dominant interests in satellite services should be allowed to coincide with dominant interests in the British national press. If there is no concentration of editorial policy, and it is difficult to demonstrate that one way or the other, the commercial pressure to adopt cross-advertising of the two media was a real issue which needed to be resisted.<sup>35</sup>

Another area of controversy concerned the amount of influence that religious bodies should have over radio and television. One might think that religious beliefs are likely to be as strongly held and as influential as political beliefs, so that religious bodies should also be disqualified persons. Contrary to the position under the earlier legislation, however, a strong religious lobby secured a provision for religious organizations to own radio stations. While they cannot own television services, the ITC has been given discretion to exempt non-domestic satellite services and program services specially made for cable. Any dangers which may arise from exploitation of the audience in relation to fund-raising, the manipulation of religious feeling or evangelism are expected to be contained by the regulation of program content. Since these dangers are related to the exclusivity of the audience, one anomaly under this regime is the perhaps remote possibility that a national radio service could be controlled by a religious organization.<sup>36</sup>

Other disqualifications may be mentioned more briefly. Anybody that receives more than half its finance from public funds<sup>37</sup> is not allowed to own or control a radio service. Disqualification can also arise where a local authority or a body already disqualified because of their political connections is, in the opinion of the ITC or RA, exerting an influence over a licensee in a manner adverse to the public interest. In addition, the BBC and the Welsh Authority

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<sup>34</sup> See HANSARD, STANDING COMMITTEE F., BROADCASTING BILL, Jan. 25-30, 1990, at cols. 294-392.

<sup>35</sup> DEPARTMENT OF TRADE AND INDUSTRY, ENQUIRY INTO STANDARDS OF CROSS-MEDIA PROMOTION, 1991, Cm. 1436, (Sadler Committee).

<sup>36</sup> See HANSARD, HOUSE OF COMMONS DEBATES, vol.172, cols.154-68 (May 8, 1990).

<sup>37</sup> Other than a local authority, the BBC or the Welsh Authority.

are disqualified, as are advertising agencies and their associates. However, unlike the previous position, but a reflection of the pressures of finance in the radio sector, companies connected with the music industry are not precluded from ownership or control of radio stations, despite their already strong associations with them.

2. *Accumulations.* The next set of ownership restrictions which were introduced by the 1990 Act were those preventing accumulations of interests within and between licensed services. Schedule 2 established a complicated method for establishing concentrations of ownership through "cascading" layers of corporate control, and further detail was provided in secondary legislation.<sup>38</sup> These provisions were replaced by the 1996 Broadcasting Act in brief, to give a flavor of the approach, any one person could hold only the following licenses: one in the case of services provided on national Channel 3, Channel 5, and national radio; two in the case of regional Channel 3; and thirty-five in the case of local radio services. Special provision was made for regional Channel 3, national Channel 3, and Channel 5, so that a licensee for one of those services could not hold or have an interest of more than 20% in one of the others. Nor could holders of any of those licenses, taken as a whole, and holders of domestic satellite or national radio licenses have more than a 20% interest in one of the others. In regional Channel 3, it had only been possible, originally, for a license for a "large" region to be held together with a license for one of the six smaller regions, but that restriction was removed in 1993 (following political lobbying by the British media industry, discussed below). However, the two London licenses (weekday and weekend) could not be held by the same person. Furthermore, where two such regional Channel 3 licenses were held by one person, any interest in a third license was limited to 20%, and any further interest was limited to 5%. The 20% rule also applied to cross-holdings between Channels 3 and 5, national radio services, and broadly, different types of satellite service. It also applied where the areas served by regional Channel 3, local radio, and local delivery services coincided to a significant extent. Furthermore, all these restrictions applied to companies which controlled licensees. For the radio sector, the basic method was applied through a "points" system which was introduced through delegated legislation.<sup>39</sup>

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<sup>38</sup> Broadcasting (Restrictions on the Holding of Licenses), S.R. & O. 1991, No. 1176, as amended by S.R. & O. 1993, No. 3199 & S.R. & O. 1995, No. 1924.

<sup>39</sup> *Id.*

3. *Cross-Ownership.* One aspect of the policy underlying the 1990 Broadcasting Act was an acceptance that companies have been eager to develop interests in different sectors of the media and that large consolidations of corporate power, especially at the international level, have become regarded as a precondition to competitive success. The new rules responded to this trend by protecting the position of the quasi-public service channels, but liberalizing cross-holdings more generally. Proprietors of national newspapers could not have more than a 20% interest in a Channel 3 or 5, or national radio service, and a 5% interest in any second holding. Local proprietors were not restricted in this way, other than by a 20% interest in a regional Channel 3 service that served significantly the same area as the local newspaper. But local proprietors were not allowed more than a 20% interest in a local radio or delivery service. With respect to all these services, there were broadly reciprocal restrictions on licensees' interests in newspapers. A notable omission, however, was the relationship between newspapers and satellite services. As with the exception for non-EC ownership, discussed above, the objection was raised that existing newspaper interests were being given preferential treatment and being allowed to develop undue concentrations of media power; not only News International but also Mirror Group Newspapers had major interests in Astra services. The Government argued, however, that imposing restrictions would curtail investment or that, in any event, there is such diversity in Astra services that the newspaper proprietors would be unable to secure a dominant position for their own channels.<sup>40</sup> This disingenuously ignored the impact of the services on the United Kingdom market, together with the danger that a common corporate policy is likely to create pressure for more homogenized editorial positions or, as has occurred, cross-media promotion.

#### FURTHER RELAXATION: THE 1996 REGIME

Even as the 1990 legislation was being brought into force, there were forces within the United Kingdom media pressing for further relaxation of the ownership rules. There was a concern that the rapid development of BSkyB's satellite operations would dominate the domestic industry. There was also a fear that EC media conglomerates might take over domestic companies. In addition, there was a measure of straightforward ambition to expand

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<sup>40</sup> See HANSARD, STANDING COMMITTEE F., BROADCASTING BILL, Jan. 25-30, 1990, at cols. 358-90.

and diversify into new media opportunities. A temporary lobbying group, the British Media Industry Group ("BMIG") argued that, for these reasons, the British industry should be allowed to consolidate and develop new alliances to compete in the international market. It was a theme which underpinned further legislation in 1996—the belief that British media companies had to be allowed to become more concentrated, larger, and more involved in the new telecommunications and digital technologies.<sup>41</sup> The lobbying prompted a search for different ways of regulating media ownership and a review of the law was initiated by the Government in 1994. Similar issues were being discussed at the European Commission<sup>42</sup> and in Germany<sup>43</sup> during the mid-1990s. In all such discussions, and certainly in the United Kingdom, it was accepted that media power, and its relationship with pluralism, was an appropriate issue for public policy, but a more sophisticated way of squaring that power with the economic advantages of joint ventures and mergers was sought. The theme which emerged as a likely basis for legislation was the notion of "market share."

The basic idea which underlies the market share approach is that media power should be assessed by reference to the influence that it has on its readership and audience. Rather than regulating crudely in terms of individual media sectors (newspapers, radio, television), there should be an attempt to quantify the relative impact of different kinds of media on the individuals who use them. Different genres within each medium and their relative impact on pluralism should, ideally, be fundamental to such an assessment. Competition issues aside, extensive control over news and current affairs output might be expected to raise greater concern than dominance in comedy or entertainment. Furthermore, if influence on audience or readers' opinion is the purpose of regulation, the relationship between radio and television companies and the wider media market (books, magazines, cinema, video, theater) should be included in the measure.<sup>44</sup> Obviously, the problem is

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<sup>41</sup> The BMIG was backed by Pearson, Associated Newspapers, the Telegraph Group and the Guardian Media Group. See G. WILLIAMS, *BRITAIN'S MEDIA: HOW THEY ARE RELATED* 5 (2d ed. 1996).

<sup>42</sup> See Alison Harcourt, *European Commission and Regulation of the Media Industry*, 16 CARDOZO ARTS & ENT. L.J. (published in this issue). L.P. HITCHENS, *Media Ownership and Control: A European Approach*, 57 MOD. L. REV. 585 (1994).

<sup>43</sup> See PETER HUMPHREYS, *The Goal of Pluralism and the Ownership Rules for Private Broadcasting in Germany: Re-regulation or De-regulation?*, 16 CARDOZO ARTS & ENT. L.J. (published in this issue).

<sup>44</sup> For further discussion of these issues, see B. ROBINSON, *Market Share as a Measure of Media Concentration*, in *THE CROSS MEDIA REVOLUTION: OWNERSHIP AND CONTROL* (T. Congdon et al., 1995). The following outline draws upon his analysis.



how to devise a suitable measure. One approach is to use revenue as an indication of economic power and, therefore, the ability to attract readership and audiences. A money measure provides a common denominator across different media and genres, indicating the relative value which is credited to them. However, the precise relationship between revenue and influence may be insensitive to multiple-genre services, may vary depending on the investment policy of the medium, and would not reflect publicly owned media, although it would be possible to introduce weightings to correct those problems. The alternative approach to revenue measures is to concentrate on the audience. An easy method is to measure audience share (receivers tuned to a channel) and readership (copies of newspaper sold) but, it is crude in that it does not take into account both the relative influence of different media sectors and the nature of different audiences and readerships. Even simpler as a measure is the concept of audience or readership "reach": the number of people who view a program or read a newspaper as a proportion of the total number of people in the market. This appears to capture the idea of media influence most closely and offers a common denominator between media but it only provides an aggregate figure, does not show intensity of consumption, and crucially, is difficult to survey in practice.

Notwithstanding<sup>2</sup> theoretical reservations about market share, the idea was the centerpiece of the consultation paper, *Media Ownership: The Government's Proposals*.<sup>45</sup> It duly explored the possibility of an exchange rate which reflected each medium's relative ownership of the total media market, but there was little consideration of the way media markets should be defined and the relationship between markets and media influence was not explored. In the end, devising a suitable exchange rate proved too difficult for the legislators and a modified scheme was introduced to quantify market share. The legislation was implemented in advance of the conclusions of EC's discussions on media ownership and the draft EC directive which had been expected.<sup>46</sup> The revised rules on accumulations use a method of approximating market share by adopting a measurement of audience share for television and radio, and circulation figures for newspapers. The approach should have resulted in a legislative scheme that was much less complex than the one it replaced, but it combines the new method with

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<sup>45</sup> (1995) Cm. 2872.

<sup>46</sup> See HARCOURT, *supra* note 42; Gillian Doyle, *From "Pluralism" to "Ownership": Europe's Emergent Policy on Media Concentrations Navigates the Doldrums*, 1997(3) J. INFO. L. & TECH. (Mar. 23, 1998) <[http://elj.warwick.ac.uk/jilt/commsreg/97\\_3doyl/](http://elj.warwick.ac.uk/jilt/commsreg/97_3doyl/)>.

various fixed limits on ownership relations and, for some purposes, combined the previous cascading of different percentage interests in different media services! There is, indeed, an experimental quality about the revised scheme which is consistent with the incremental deregulation which characterizes the United Kingdom's ownership policy.

The basic rules are these.<sup>47</sup> For television services, no person with more than a 15% share of total audience time may do any of the following: (a) hold two or more licenses for Channels 3 and 5, domestic satellite, non-domestic satellite, licensable program, or digital program services; or (b) have more than a 20% interest in two or more licensees for such services; or (c) hold one license and have a 20% interest in another such licensee; or (d) provide a foreign (that is, other than domestic) satellite service and hold such a license or have a 20% interest in such a license; or (e) hold a digital program services license providing two or more of those services. For these purposes, and to prevent accretion of interests, half the audience time which counts for a service in which a person has a 20% interest is attributed to his or her primary audience share.<sup>48</sup> For television, audience time will be calculated on the basis of total audience time with respect to all television services capable of being received in the British Isles, using figures supplied by the Broadcasting Audience Research Board but subject to the ITC's discretion to determine their relevance. There are absolute limits on the holding of a Channel 3 license (no national license to be held with a Channel 5 license, and no overlapping regional licenses) and multiplex services (no more than three). There are also restrictions on overlapping digital and analogue services, and a points system is introduced with respect to digital program services. In relation to radio services, the 15% threshold is again adopted but in conjunction with the points system that has already been established for radio audiences. This divides services so that twenty-five points are attributed to national radio or digital sound program services. Thereafter, fifteen points are attributed to other services in Category A (which covers a population exceeding 4.5 million), eight points to Category B (1 to 4.5 million), three points to Category C (400,000 to 1 million), and one point to Category D

<sup>47</sup> They are contained in the Broadcasting Act, 1996, ch. 55, sched. 2 (Eng.), which, potentially confusingly, amends the Broadcasting Act, 1990, ch. 42, sched. 2 (Eng.). The two Acts should be read together.

<sup>48</sup> This approach is similar to that which had already been adopted with respect to radio licenses. In relation to Channel 3, however, the Conservative Government's intention in due course had been to alter the threshold, by order, so that the secondary audience time would be attributed to a 15% interest.

(less than 400,000). An absolute limit is placed on holding a national radio service (only one) or providing a national digital sound program service (only one). There are also restrictions on holding overlapping local radio licenses but they are liberalizing, in allowing three licenses (being no more than two FM or AM) to be held. However, such overlapping interests are subject to a potentially strict public interest test. It is based on the likely reduction in plurality of ownership, the effects on the range of independent radio services available in the local area, the effects on the diversity of sources of information available generally in the area, and the effects on the diversity of opinion on local radio in the area.

For the press, market share is calculated by reference to newspaper circulation, with national and local levels being distinguished. A national newspaper proprietor with a market share of 20% or more may not hold a Channel 3 or 5 license or a national or local radio license, and a local newspaper proprietor with a local share of more than 20% may not hold a corresponding regional Channel 3 license. There are also restrictions on participating interests of 20%. The effect is to remove many of the previous upper limits on cross-ownership. Local cross-holdings are also restricted; a local radio license may not be held by a person with a local market share of 50% or more unless the service is shared and he or she does not hold another such license. In any event, and most importantly, the new rules provide for a public interest test to be applied, on a one-off basis, whenever certain cross-holdings become established, for example, between licensees of national programming services and the proprietors of national or local newspapers, or between licensees of regional television or local radio services and the proprietors of national newspapers or newspapers local to the relevant license area. There are three criteria for operating the public interest test: (1) the desirability of promoting plurality and diversity; (2) the economic benefits of concentration; and (3) the effect of the holding of the license on the operation of the market.

#### APPLYING THE RULES

In terms of regulatory style, the approach in the 1990 legislation was to remove most discretion from the regulators and to set out extremely detailed permutations of prohibited ownership, reaching back through as many corporate layers as could be anticipated in order to expose attempts to disguise the effective control of companies who hold licenses. The problem with this approach

is that it does not cater to unpredictable or ingenious ways of discovering loopholes (the schedule was modified many times during the passage of the Bill). But the regulators do have a residual discretion<sup>49</sup> not to grant a license to a person who is not fit and proper to hold it, and any reluctance on the part of a potential licensee to divulge full and frank details of effective controlling interests would enable the power to be invoked. Commission to invoke that power, by sections 3(3)(1), (2)(aa), and (bb), are overriding provisions. In addition, there is a strong and continuing duty imposed on the regulators to set up a procedure for scrutinizing the ownership of all licenses to enforce the rules. They may require information about ownership from applicants for licenses, revoke the award of a license before it has been granted, make the grant of a license conditional on changes in corporate ownership, impose conditions requiring advance notice of changes in the share holdings or directorships of companies, and impose conditions enabling them to give directions as to changes in corporate ownership. They have power, therefore, to make all necessary inquiries in order to determine ownership and to prevent any deficiencies from occurring, or require them to be remedied. In practice, of course, it might be expected that solutions to problems would be negotiated in discussion between the regulators and prospective or actual licensees.

Generally, however, it will be clear that the approach to accumulations and cross-ownership has been extremely complicated and the use of delegated legislation to lend it some flexibility (three statutory instruments in the five years that it operated) has not assisted. The first version of the new rules also promoted a rather mechanical way of quantifying media power, and the cascading figures of 20% or 5% represented only estimates, as the Government conceded, of the holdings that are needed to give effective control.<sup>50</sup> Under the 1996 legislation, the opportunity was taken to amend the definition of "control" to take account of some practical problems (which the regulators had anticipated in 1990) which had resulted as a consequence of the detailed drafting style of the schedule. Various arrangements were devised to avoid its provisions, for example, "warehousing," whereby interests are held in excess of what might legally be held by one company. This is done by creating corporate structures that are technically accepta-

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<sup>49</sup> Broadcasting Act, 1990, ch. 42, §§ 3, 86 (Eng.).

<sup>50</sup> Under previous legislation, the IBA used to interpret "control," in a very liberal manner, so that a voting interest of more than 50% was the strictly legal minimum. See HANSARD, STANDING COMMITTEE F., BROADCASTING BILL, Jan. 25-30, 1990, at cols. 299-307.

ble, and "deadlocked" share holding, whereby equal holdings means that no one body, or a small third body, appears to be in control of a company. These various arrangements have enabled evasion of the spirit, if not the letter, of the law.<sup>51</sup> In addition, despite complex provisions which allow the regulators to search behind corporate veils, arrangements have continued to be made to enable the extent of particular bodies' control to be concealed. Under the revised rules, the concept of control is now defined much more extensively, in terms of control generally, rather than by reference to share holding alone, and includes indirect means of control, such as contractual arrangements or editorial control. The result is to allow the regulators to look through technical arrangements and attribute control to the person who effectively determines corporate policy and decisions. Now, a person controls a company if: (a) he holds or is beneficially entitled to more than 50% of the equity share or voting power; or (b) although he does not have such a holding, "it is reasonable, having regard to all the circumstances, to expect that he will be able, by whatever means and whether directly or indirectly, to achieve the result that the affairs of the body are conducted in accordance with his wishes;" or (c) where he holds the 50% interest mentioned above, "an arrangement exists between him and any other participant in the [corporate] body as to the manner in which any voting power in the body possessed by either of them is to be exercised" or not. These amendments were desired by the regulators and they provide a powerful underpinning for the supervisory powers exercised by them. There is a consequent loss of transparency, of course; the regulators have much greater discretion to act on professional judgments of companies' activities.

#### CHANGES IN OWNERSHIP

Prior to the 1990 legislation, the IBA used their powers to follow a restrictive approach to exchanges of ownership.<sup>52</sup> By contrast, the ITC's and RA's duty to monitor ownership<sup>53</sup> is not intended to prevent take-overs or other changes of ownership in companies holding licenses. There has been a change of regula-

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<sup>51</sup> In *Regina v. Radio Authority*, 1 W.L.R. 333 (1995). The Divisional Court upheld the RA's view that it was powerless to prevent an existing license holder, holding the maximum permitted number of licenses, from setting up a deadlocked company to take over two of those licenses so that it could go on to acquire more.

<sup>52</sup> See *R. v. IBA*, *THE TIMES*, Mar. 14, 1986, at 20 (Q.B.D.).

<sup>53</sup> The Broadcasting Act, 1990, ch. 42, §§ 3(6), 86(7) (Eng.), requiring the ITC's and RA's written consent to transfers, is reflected in a similar provision in the 1981 Act.

tory policy, with the regulators adopting a lighter touch. The absence of a public service relationship with the program provider would make it difficult for them to justify a general ban on takeovers in any case. In anticipation of the newer approach, the ITC showed a more approving attitude to Thorn-EMI's proposal to take full control of Thames Television, early in 1991.

The policy underlying the 1990 Act was that the process of competitive tendering would enable a major financial restructuring of the industry, especially the former ITV sector. But no one envisioned another round of tendering when the first licenses expired. Instead, it was envisioned that further developments would take place through the market process. However, section 21 of the 1990 Act authorized the ITC to impose a moratorium on transfers of ownership of Channel 3 licenses. The aim was to provide a period of stability at the beginning of the license period, in order to prevent resources from being used to fight takeover bids rather than being devoted to programming. The moratorium lasted from the award of the license to the end of the first year of broadcasting (effectively, a two-year period).

In fact, a change of ownership was allowed to take place before the end of the moratorium. For financial reasons, Yorkshire Television was allowed to merge with (and effectively take over) Tyne-Tees in 1992. However, the licenses remained independent of each other, with their original and different conditions which the new company was required to implement. When the moratorium expired in 1993, the Government relaxed the rule preventing two "large" regional licenses to be held together. The two events prompted a spate of take-over activity and three acquisitions were made in 1994. Carlton took over Central, Granada took over LWT, and the MAI group, which owned Anglia, bought Meridian. By the end of that year, these three groupings, together with Yorkshire, accounted for 82% of Channel 3's advertising revenue.<sup>54</sup>

More recently, following the further relaxation in the ownership rules introduced by the 1996 Act, there have been more changes. At the end of 1996, the ITC decided that Scottish Television should be permitted to acquire Caledonian Publishing, a group which owned two Scottish local newspapers in Scottish Television's license area. The local papers did not have a local market share of more than 20% (one of the cross-ownership criteria) and the acquisition would not operate against the public interest. In

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<sup>54</sup> ITC, ANNUAL REPORT AND ACCOUNTS 1994, at 21 (1995).

deciding the latter, the ITC noted the effect on the editorial independence of the Caledonian newspapers, and they also examined the possible influence of the Mirror Group (which owned under 20% of Scottish Television and owned two newspapers in its license area). They concluded that any effects would not be sufficient for the acquisition to fail the test. They also noted the strength and diversity of the Scottish newspaper market, together with the support that they received (from their consultation with the public) for retaining Caledonian in Scottish ownership as part of a new Scottish Media Group.<sup>55</sup> Subsequently, Scottish Media Group consolidated its position in the Scottish market by merging with Grampian Television which has the license for the north-eastern region of Scotland; in this case, because there was no overlap with the Scottish Media Group's local newspapers, the public interest test did not fail to be applied.<sup>56</sup>

At the end of 1996, MAI (who had earlier taken over the Anglia and the Meridian licenses) merged with United News and Media, a large publishing group which included ownership of *The Express*, *The Express on Sunday*, and the *Daily Star*, together with a number of local newspapers and free sheets. Having taken place just before the 1996 legislation came into effect, the ITC were required to examine the merger under the public interest test, but they concluded that the merger would not have an adverse effect. The same company, United News and Media, has recently (as of December 1997) increased its holdings in Channel 3 by taking over HTV Group which holds the license for Wales and the West of England. Again, the ITC consulted on the public interest but decided that the takeover would not be expected to operate against it.

One difficulty with these determinations is that they provide little detail about the criteria used for deciding the public interest, and no indication of the weight given to them. The ITC did publish guidance on the test, but it amounted to little more than a repetition of the statutory language and a procedure for supplying information.<sup>57</sup> By contrast, the RA have been much more open in their thinking about the topic.<sup>58</sup> There is a clear trend towards greater concentration in the industry and it does pose dangers for media pluralism. It is very important, therefore, that the regulators

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<sup>55</sup> SCOTTISH TELEVISION PLC (News Release No. 77/96).

<sup>56</sup> ITC DECIDES AGAINST PUBLIC INTEREST TEST ON GRAMPIAN MERGER (News Release No. 55/97).

<sup>57</sup> ITC GUIDANCE ON PUBLIC INTEREST TEST (News Release No. 69/96).

<sup>58</sup> RADIO AUTHORITY, PROPOSED ACQUISITION OF LEICESTER SOUND LTD BY DMG RADIO (1997) (a detailed account of the application of the "radio specific" public interest test for overlapping local frequencies).

provide good reasons for allowing such consolidation to take place. However, in relation to Channel 3, at least, the 1996 Broadcasting Act made provisions for enhanced enforcement powers to deal with any adverse impact of concentration. Under section 21A of the 1990 Act,<sup>59</sup> the ITC has power to vary license conditions for the purpose of ensuring that the quality or range of regional programming does not suffer from a change in ownership.

#### ASSESSMENT

In tracing the recent development of media ownership regulation in the United Kingdom, what becomes apparent is a gradual, incremental relaxation of the rules which prevent concentration. Prior to the 1990 Broadcasting Act, the IBA had adopted a strict attitude to changes of ownership in defense of the public service values which were reflected in its choice of program contractors. The 1990 Act allowed new participation and finance to enter the terrestrial television and broadcasting sectors and effectively ratified a market-led expansion of cable and satellite. In 1993, the moratorium on "Channel 3" take-overs was lifted and the rules on dual license holding were relaxed further, resulting in a major consolidation of the sector in 1994. The 1996 legislation has opened the market further to new activity. Numerical limitations on the holding of television licenses (except in relation to "Channels 3 and 5") and on the holding of local radio licenses have been abolished and replaced with the 15% limit on total television audience or radio points. The rules which limited common control between terrestrial, satellite and cable broadcasters or providers have also been abolished. Generally, restrictions on 20% of participating share holding have been much reduced. Cross-holdings by newspaper owners are also much relaxed, albeit subject to the public interest test.

Throughout the deregulatory process, two features are notable. One is the continuing commitment, by politicians as well as regulators, to the protection of pluralism. This has amounted to more than a belief in diversity in a competitive market. There has been a real concern to ensure that a multiplicity of perspectives and opinions are made available to readerships and audiences in the United Kingdom. In the face of increasing convergence be-

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<sup>59</sup> This is an additional section, inserted into the 1990 Act by section 78 of the 1996 Act.



tween different media,<sup>60</sup> the residual values of public service broadcasting are continuing to exert an influence by restraining pressure to completely liberalize the media industry. This may be regarded as curious, given the correlative tradition of broadcasting content regulation in the United Kingdom: in theory, if there are adequate rules requiring impartiality and balance in the provision of news and current affairs, it should not matter who holds a program license because the regulator can enforce "internal" pluralism through those rules. Nevertheless, there is a strong resistance among the broadcasting regulators (the ITC and the RA) to sole reliance on internal pluralism. Partly, it may be a lack of confidence about their ability to enforce content regulations in the face of financial pressures from the companies to maximize audiences with more entertainment. But there is also a positive belief that external pluralism needs to be imposed to encourage new ideas to surface and to prevent a common, corporate attitude from (perhaps unwittingly) imposing itself across all the constituent parts of a dominant media company. It is significant that the 1996 statute gives greater discretion to the regulators to determine the public interest on ownership questions and it also gives them enhanced power to enforce the regulations.

There continue to be areas of uncertainty in this process of incremental deregulation, however. There are practical questions still unresolved. One is why the figure of 15% was chosen as the threshold figure for television and radio services and 20% as the threshold for newspaper cross-holdings; and why were 50% of participating interests attributed to the participants' own audience share? There is a strong sense that intuition, rather than evidence, is determining where the line should be drawn but, in an incremental process, such testing by trial and error may be anticipated and even acceptable. There is an alternative possibility, that political considerations have played an important part in devising a scheme which the industry finds acceptable, but the evidence for this is not yet clear.<sup>61</sup> Another issue is the decision to calculate market share by reference to total audience—including public service broadcasting. Since that sector already provides internal pluralism, there is a case for focusing entirely on the commercial sector when determining the thresholds of concentration. Yet an-

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<sup>60</sup> See, e.g., EUROPEAN COMMISSION, GREEN PAPER ON THE CONVERGENCE OF THE TELECOMMUNICATIONS, MEDIA AND INFORMATION TECHNOLOGY SECTORS, AND THE IMPLICATIONS FOR REGULATION, COM(97)623.

<sup>61</sup> This question is one which is currently being investigated as part of the Manchester Media Project.

other question, however, is the extent to which it will continue to make sense to impose ownership restrictions on just one part (domestic mainstream programming) of a converging industry. Indeed, a notable feature of the recent changes in ownership rules has been the absence of special provisions for those companies which control conditional access (through encryption technology and subscriber management) to digital programming. Although such "gatekeepers" will have a powerful position in the industry, the Government decided that conditional access raises questions of competition rather than media pluralism.<sup>62</sup> Therefore, there continue to be uncertainties about the regulation of media ownership, and if the incremental approach is pursued, the answers may emerge. But whether or not policy should be allowed to drift this way is still an open question. It depends on whether regulation of the structure of the industry can really deliver pluralism of information and opinion. It may be that, if there is a real commitment to such pluralism, some system of content regulation and choices about the services to which it should apply will be seen as the way forward.<sup>63</sup>

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<sup>62</sup> The matter is therefore regulated, at present, by the OFTEL. See OFTEL, *THE REGULATION OF CONDITIONAL ACCESS FOR DIGITAL TELEVISION SERVICES: OFTEL GUIDELINES* (1997).

<sup>63</sup> For an earlier discussion of this question, see THOMAS GIBBONS, *Freedom of the Press: Ownership and Editorial Values*, 1992 PUB. L. 279-99. A similar approach has recently been found in R. COLLINS & C. MURRONI, *NEW MEDIA, NEW POLICIES* 73-74 (1996).