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REPORT

REPORT

THE
STRENGTH
DIVERSITY

LIFE AFTER LEVESON

THE CHALLENGE TO
STRENGTHEN BRITAIN'S
DIVERSE AND VIBRANT MEDIA

Nigel Warner

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NEW IDEAS
for CHANGE

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PROLOGUE

November 2022

You were in such a rush this morning you didn't take anything to read on the Tube. So you're forced to look around at what others are watching on their way to work.

No one has a 'proper' newspaper of course. Even 10 years ago you could get a quality paper delivered to your house. It's hard to believe. The printed press – millions of throwaway free sheets aside – doesn't exist anymore. People don't seem to care. London's wi-fi delivers 100mbps, even down here, so everyone is using tablets. Just thin pieces of Perspex that do nothing but open the door on a vast cloud of global content.

Some wear headphones, some wear privacy glasses so you can't see what they're watching. What the Kindle did for secret readers of Fifty Shades of Grey 10 years ago, tablets, glasses and headphones do for today's video viewers. You shudder to think what the two teenage lads opposite you are watching so intently.

Some people are looking at news sites, if you can call them that. The Telegraph and the Guardian still survive, though both are just aggregators for opinion; conservative and liberal bloggers, commentators and video self-publicists. The money leached out of news as the advertising went elsewhere and consumers weren't prepared to pay to look at something online they'd been used to getting for free. Once print circulation died, the funding for investigative journalism died with it. Investigative journalism – it sounds like an exhibit from Antiques Roadshow (which is still on the BBC, by the way).

There's always the Mail or OK TV, for those with an insatiable appetite for celebrity gossip and the latest bikini bodies. Whatever you used to think of the Mail – and you weren't a great fan – at least it, like other papers, was home to some good writing and had proper correspondents covering the news, home and abroad.

Nowadays it's all aggregation – global news producers serving a white-labelled diet of news from nowhere. Or it's comment. There's no shortage of that. Everyone has an opinion and everyone is a publisher. You don't even need be able to write; you just switch on the camera, open your mouth and away you go. Some services try to filter out the worst of it, but it's a losing battle. Lots of people are commenting on the news, but nobody is actually reporting the news.

You remember thinking 10 years ago that Rupert Murdoch was too powerful and had too much influence, but at least his News Corp was willing to bankroll The Times and the Sunday Times from the profits of other parts of his empire. Today you haven't a clue who owns the news sources you watch. When new plurality laws forced Murdoch to sell The Times, an Indian steel magnate, then a Chinese concrete producer and finally a Russian oligarch passed it between themselves and then shut it down to protect their other UK media interests: ITV and the privatised (now defunct) Channel 4. What they used to call the 'print-to-digital profit destruction ratio' took most of the papers the same way. How could companies support losses of billions a year?

At least the BBC survives, though it's a bit 'one size fits all' these days, with nothing much to distinguish between what you see on the video wall in the living room and what you get on every mobile device you carry around. Why bother producing different products – especially as money is so tight? The future's very uncertain now; the five-year licence settlement granted in 2017 ends this year in favour of subscription. No one has a 'TV' (as such) these days, so why pay for a TV licence? With no secure income and even commercial revenues gone (since the sale of BBC Worldwide) you're worried that the BBC will ultimately go the same way as other traditional media: drowned out by mass global competition.

It's strange how things turned out. As a result of the phone hacking scandal and the subsequent Leveson inquiry, the last big media inquiry, Britain imposed some of the strictest media rules in the world. But it tied up traditional media too tightly, despite the explosion of competition online, and in the name of plurality broke up the news media and watched it die. Most of what we have now is online and offshore, and it is either not covered by the rules or has found ways round them. News survives on charity, or through big corporate backers who just use it to further their business objectives.

Of course there's lots of new stuff out there and some of it is innovative and brilliantly creative. New players are constantly entering the field. But the vibrant mix between the old and the new, the serious and the frivolous, the impartial and opinionated that we enjoyed as recently as 10 years ago has all but disappeared.

You could argue the old newspaper industry brought it on themselves by not taking regulation seriously. Yes, changes had to be made, but they were rushed through amid moral panic and a good deal of political posturing after Leveson. It's just a shame that as a result a traditional (and in retrospect, much-liked) industry – which was already struggling economically – was killed off. With it went a lot of good things, as well as bad. And what replaced it has turned out to be worse.

Too gloomy? Far-fetched? Perhaps. A none-too-subtle argument for preserving the status quo? Maybe. Surely after the phone hacking scandal we do need better rules and regulations to govern our out-of-control press? Surely, we need to avoid situations where one person can come within a whisker of taking control of a huge chunk of our media industry? Well yes, we do need change. But the above (to us) nightmare scenario shows just how much care needs to be taken in responding to the current crisis facing the media industry.

Without careful thought about the principles which should underpin a new policy and regulatory framework, and wide consultation on detail, there is a danger that well-intentioned reforms to deal with abuse and scandal and combat overconcentrations of power and influence will have severe unintended consequences.

This report attempts to steer a course between the need for better regulation and the need to ensure that the Britain's media industry, in all its diversity, remains economically viable. The status quo is not an option, but despite recent scandals we believe that the media mix on offer to the public at the moment is exceptionally rich. If we are not careful we could end up looking back on this period, phone hacking notwithstanding, as a lost golden age. The future needn't be like this, but it's important that we realise what the risks are.

EXECUTIVE SUMMARY

The UK is extremely well-served in its supply of media and information. Traditional media (newspapers, broadcast television and radio) are still producing strong content and are valued by audiences; producers and consumers are also enjoying the fruits of the new media revolution.

The media industries hold a unique place in democratic and cultural life, with systems in place to uphold standards in content and prevent the overconcentration of media in the hands of one individual or organisation.

But these systems are breaking down. Polling evidence produced for this report suggests the public now supports stricter media regulation in an atmosphere in which there has been an erosion of trust.

The crisis in the print media in 2011 calls for a new system of press regulation.

But this must be seen in the context of wider changes occurring in the media as digital convergence unites text, audio and video content on the same platforms: broadcast and broadband, fixed and mobile.

Continuing to treat media as existing in discrete markets with regard to competition and content regulation risks inhibiting adaptation and growth, as well as confusing the public and failing to meet legitimate expectations of content standards.

The Leveson inquiry offers an opportunity to put necessary reform of press regulation into the wider context of regulation for a rapidly changing media landscape.

Technology, economics and consumer behaviour

Digitisation of media content combined with the rise of new platforms and devices (mobiles, tablets, internet-connected televisions) and ever-expanding broadband capacity are together transforming the media landscape. As old media converges with new, as well as blurring the regulatory boundaries there is a marked economic shift. **Revenues are moving online and existing producers of content – whether in news, drama or entertainment – are struggling to capture them.**

Digital is the only area of audience growth in newspapers, yet the vast majority of revenue still resides in traditional print circulation. Television audiences remain strong, especially for live 'event TV', but the rise of on-demand services risks fragmenting revenues further, as advertising spending overall migrates steadily online.

Any new approach to regulation must recognise the new relationships that exist between all forms of digital media competing in the same space. Otherwise we risk building a whole edifice around one type of media – print – that leaves the long-established media groups hamstrung economically in competition with newer media forms. It also risks creating a regulatory framework that is out of date before it even comes into effect. This has implications for how we look both at media ownership restrictions (to maintain plurality and choice) and content regulation.

Convergence and media standards

The traditional approach to media content regulation has been segmented, with print regulated differently from broadcast and differently again from online. This approach is breaking down as all three types of media converge onto the same platform.

Consumer expectations around, for example, news impartiality on-screen, the safety of television content or the freedom of expression online, may have to change over time.

Regulation needs to help consumers navigate through the changes convergence will deliver.

The current confusion of regulatory bodies and complaints systems, absence of clear content signposting for regulation across platforms, and variety of systems for controlling access to content in the home is not a viable framework to meet consumers' needs in a converged media environment.

A new, platform-neutral approach is needed.

Convergence and plurality

Consumers are moving into digital media for their news consumption, with publishers and broadcasters following suit. Television news audiences remain strong, but like print, television news cannot stand on its own two feet economically. Online news sources, whether produced by newspapers, broadcasters or purely online services now compete in the same space.

Plurality in the media can be defined as having a variety of voices with the capacity to influence public opinion and the political agenda. Under this definition, **television, radio, print and online news are all part of the same 'market'. Regarding different media as segmented for plurality purposes is therefore no longer viable.**

In the UK and elsewhere, new approaches to measuring cross-media concentration and protecting plurality are being developed. These will become the norm, but require further thought and consultation, especially to determine their economic impact on media markets.

Principles for reform

- It should be the constant aim of regulations and regulatory structures to preserve the UK media industry's current strengths; and better still to facilitate ways to help it develop and grow.
- Where public trust is declining, economic pressures are piling up and changes in technology are making the old rules ineffective, a new approach is needed.
- Clear principles will help guide the development of a new approach to media regulation. The following principles should be included in the plan for reform:
 - Regulatory structures should be clear and coherent and support platform neutrality.
 - Regulation should be sufficient to maintain standards and avoid concentrations of undue power but should have as light a touch as possible in order to avoid regulatory suffocation.
 - Regulation should enable media companies to adapt to and take advantage of the opportunities afforded by media convergence, including access to new sources of revenue.
 - Competition and plurality assessments within media markets should prevent organisations or individuals gaining undue dominance and influence, but should also take account of economic viability.
 - In a converged media world, trusted and valued public service operators (including the BBC, ITV and Channel 4) are at a premium; they should be afforded greater long-term certainty over their roles and funding.

- Regulation should be free from political interference, sufficiently independent of industry to command public confidence, and binding on all media within its scope.

Key recommendations

Overall regulation of media for setting content standards and assessing and protecting media plurality should take account of convergence and become platform-neutral.

Promoting consistency in content standards

- Distinctions between forms of regulation and regulatory bodies should be based on the type of content being regulated, not the platform on which it is delivered (these are currently undergoing convergence). For example, licensed and non-licensed news content is distinguished by the former's adherence to standards of impartiality, and this should be maintained.
- Freedom of the press to express opinions must be protected, including where newspapers develop television-like online content for distribution on demand.

A new system of independent regulatory authorities (including for the press)

- Content-led regulation would see the replacement of the existing confusion of regulatory bodies with four main independent authorities focusing on licensed news content; unlicensed news publishing; non-news content and advertising.
- A new system of cross-platform classification for video content would be developed through an industry-led process, to be overseen at arm's length by a new body merging the Authority for Television on Demand (ATVOD) and the current functions of the Office of Communications (Ofcom) Content Board.
- One of these bodies, potentially called the News Publishing Authority, would replace the Press Complaints Commission (PCC) in its oversight of news publishing (in print and online) as well as taking on ATVOD's oversight of on-demand programming that may develop in news.
- Each of the new authorities would be independent, but involve industry and consumer representation in developing standards and overseeing day-to-day operations.
- Each of the new authorities would provide a clear focus for the public in handling complaints.
- Compliance with the new regulatory authorities would be compulsory (with regulators having recourse to Ofcom's statutory authority to enforce this if necessary) subject, in the case of news and online content producers, to a threshold stipulating a minimum size of organisation.
- Benefits of membership could include dispute resolution services, professional training and enhanced protections in legal proceedings, for example in the case of the News Publishing Authority.

Ofcom as the backstop authority

- Each new body would operate at arm's length from Ofcom, which would act as backstop authority to each, with functions including hearing appeals, approving draft standards codes and giving support for sanctions (again having recourse to Ofcom's statutory authority if necessary).
- Ofcom could help the development of best practice and consistency in areas such as privacy and the public interest, where a great deal of overlap already exists between the current PCC Editors' Code, the BBC Editorial Guidelines and the Ofcom Broadcasting Code.

Public service content

- Regulation of accuracy and impartiality in BBC content should be treated like most BBC content regulation is today, with overlapping responsibilities between the BBC Trust and, in the future, the new body overseeing licensed news content.
- The future of the UK's public service broadcasters should be made more secure as convergence leads to an explosion of choice online and on internet-enabled televisions.
- The next BBC charter and agreement should provide security of status and funding for 10 years in return for a much more open and transparent process for setting the licence fee and a clear programme of activities set out by the BBC.
- ITV and Channel 4 should be given greater security over their public service status, with sustainable obligations, and licences renewed for 10 years in 2014.

Sustaining plurality

- Ofcom should be tasked with conducting periodic plurality reviews in order to publish information about market changes and assess the state of media plurality. Ofcom's first report would establish a critical 'baseline' year.
- Plurality assessments, which should be limited to news media and be platform-neutral, should be made on a range of measures, including consumption, availability and impact metrics.
- Influence on public opinion and the political agenda should be the key overall plurality measure.
- News on the BBC (across platforms) should be included in plurality assessments, but weighted to reflect the BBC's enhanced public accountability and the operation of impartiality rules, oversight of which would be enhanced (see above).
- Once Ofcom's baseline measurement is complete, a threshold should be applied to overall levels (or 'share') of influence, but taking account of economic viability.
- Competition issues within media markets will in future be matters for Ofcom; the quasi-judicial role for secretaries of state should be ended.
- Ofcom's accountability to parliament will be enhanced through, for example, scrutiny of its plurality assessments by the culture, media and sport select committee.

INTRODUCTION

The media industries are unique and are treated as such in law, policy and regulation in most countries across the world. This reflects the unique capacity of the media to reach into our homes and introduce us to material that is educational, informative and entertaining.

It also reflects the place that the media holds in democratic life and the influence it can have on public opinion either in favour of or against a particular issue, political party, institution or individual.

Because of the special place the media occupies, it is widely acknowledged in liberal democratic societies that it is right to prevent the emergence of media organisations (or, indeed, single individuals) with a predominant influence over public opinion.

Most developed countries have constructed regulatory systems to ensure that there are checks and balances within media markets to stop overconcentration of power and to achieve a plurality of opinion.

Most systems also uphold certain prescribed standards that apply to media content. Rules are put in place, for example, to protect individuals' privacy from media intrusion, to require fairness of treatment, to limit the potential for content to cause harm or offence and, in some cases, to ensure accuracy and impartiality in media output.

This report analyses the pressures that are being brought to bear on the traditional approach to regulating both media plurality and content standards.

It examines the impact of media convergence, the process that brings different media forms – text, video and audio – all together onto the same platforms and devices: personal computers, tablets, mobile phones and connected televisions.

This revolution in communications technology and in consumer behaviour has only really just begun. As broadband speeds increase and the computing power built into communications devices grows exponentially, the process of convergence will continue to accelerate.

In itself, this provides enough of a challenge to the existing policy and regulatory framework, being founded on the Communications Act 2003, which contains no mention of the internet.

But the events of 4 July 2011 have provided a catalyst for action. The disclosures about the hacking of murdered schoolgirl Milly Dowler's mobile phone sparked a chain of events, leading to a major public inquiry, and caused politicians across the UK political divide to reappraise their approach to media policy in this country.

The UK has one of the most diverse and vibrant media sectors in the world with a very high threshold of choice and innovation in broadcast media (notably public service broadcasting), platform choice and content creation, as well as the range of our printed press and magazines.

This is a media environment that serves UK audiences well and retains high levels of popularity, despite the systemic and cultural failures that the Leveson inquiry has been investigating.

The danger inherent in the process being led by Lord Justice Leveson is that a narrow focus on regulation of the print media will not be able to accommodate the wider changes taking place that impact profoundly on the economic sustainability of Britain's traditionally rich media mix.

The challenge posed by this report, therefore, is to map out how the range and diversity of the UK's media can be maintained and enabled to flourish in a very different (digital) media market from the one that has presented itself to policymakers in the past.

So, as the government develops a new Communications white paper, drawing on – but not limited to – the recommendations of the Leveson inquiry, the key questions we are seeking to answer are as follows:

- What are the core principles that should underpin a new approach?
- How do we help maintain plurality in our media, while ensuring economic viability?
- How should policymakers respond to the pressures that media convergence is placing on the existing regulatory framework?
- How do we meet public expectations for protecting standards in media content in this new media environment?
- How can regulation best support (or not inhibit) growth and innovation in the media sector?
- How can the position of existing trusted sources of news and information be protected in the new highly competitive media world?

The report draws on original polling data looking at public attitudes on trust, impartiality and ownership in the UK media, which was commissioned by IPPR from YouGov in May 2012.¹

It has also benefited from two roundtable seminars, attended by academics, journalists, analysts, politicians and industry regulators, which focused on developing a coherent framework for regulation across all forms of media content – print, broadcast and online; and plurality, diversity and viability in media ownership.

Throughout these and subsequent discussions, we have concentrated on two basic needs: to respond to the immediate crisis in public trust and develop new thinking around press regulation, and to set this in the context of the profound changes taking place in the media marketplace that in themselves demand a new approach.

Is there life after Leveson? Undoubtedly yes. But the argument of this report is that we should take this opportunity not only to reinforce standards and best practice across our media industries, but also to strengthen the wonderful diversity and vibrancy that Britain enjoys from its broadcasters, newspapers and online services today.

¹ The survey (IPPR and YouGov 2012) was conducted online by YouGov among 1,705 adults, with fieldwork undertaken between 20 and 21 May 2012. The figures have been weighted and are representative of all British adults (aged 18+).

1. THE POLITICAL CONTEXT FOR MEDIA REGULATION

‘Freedom of expression is a fundamental and internationally recognized human right and a basic component of a democratic society. Free, independent and pluralistic media are essential to a free and open society and accountable systems of government.’

OSCE 1997

A free press is vital to the maintenance of a free society. Unfettered by constraints upon its freedom of expression and empowered to shine a bright light into the dark corners of individual, political and corporate hypocrisy and wrongdoing, a free press is the vehicle for speaking truth unto power.

For investigative journalism, that may sometimes mean bending the rules or even, in extreme cases, breaking the law, for which it is widely acknowledged that there can be a justification in the public interest if the purpose is to detect or expose crime, corruption or injustice, protect public health and safety, or prevent the public being misled by governments or corporations.

This principle is enshrined in the codes of practice employed for both the printed press and the broadcast media, including the BBC.

The UK has a proud tradition of press freedom, sitting in the top 30 (out of 179) countries of the Reporters Without Borders (2012) World Press Freedom Index. Despite the anxiety and recriminations connected to the phone hacking scandal, the political consensus remains that the freedom of Britain’s press must be protected.

Along with press, the broadcast media is vital to democratic debate. It helps to facilitate the establishment of facts and a basis for consensus. This involves more than just a cacophony of voices and opinions, which in itself could leave citizens bewildered and searching for the truth. It also requires the expression of balanced and impartial voices able to inform democratic discussion without necessarily leading the debate in one direction or another.

A healthy media in a liberal, democratic society is a rich blend of the serious and the popular, the partial and the balanced, the factual and the opinionated. On the face of it, the UK today is extremely well served in this regard.

Fifty years ago, at the time of Lord Shawcross’s Royal Commission on the Press (a forerunner to the Leveson inquiry, which reported in 1962) media consumers had a choice of only two channels on television (BBC and ITV), only the BBC in domestic radio and nine national daily newspapers.

Today most households have access to over 50 digital television channels, a vast array of national, local, public and commercial radio stations, 11 national daily newspapers, and an almost limitless supply of sources of news, information and comment online. The UK, according to Ofcom, ‘has one of the highest volumes of newspaper readership in the world’ (Ofcom 2007a: 17) and now that digital switchover is complete at least two 24-hour television news channels are universally available to UK households for the first time.

Alongside traditional media, new communications technology has facilitated the free flow of news, information and comment as never before. In just 20 years the internet has revolutionised access to information in the UK and across the world. It has taken the production of, and audiences for, freely-expressed opinions to an altogether different order of magnitude.

Since the turn of the millennium, domestic internet access has gone from around a quarter of the population to over 80 per cent. More than half of all UK households now say they have three or more internet-enabled devices (Ofcom 2012a).

With such a range of options, why should we worry about the level of diversity and plurality in our media?

The end of the deregulation consensus

Media policymaking in the UK has long sought to balance important economic, democratic and cultural objectives, using an array of interventions: public ownership, discreet subsidies, tax incentives, ownership controls, quotas and content regulations.

Critics argue that for at least the last two decades, economic arguments have won out too easily, driven by powerful industrial lobbies. Deregulation, relaxation of media ownership restrictions, and a reluctance on the part of UK politicians to challenge the press for fear of its power have been part of this trend.

Before the general election in 2010, the then shadow culture secretary, Jeremy Hunt, said that he wanted in government to ‘strip away the regulations [in media] in the same way that Big Bang revolutionised the City’ (Pierce 2009). This statement, though seemingly radical, represented an extension of the previous Labour government’s approach.

When the last major piece of communications legislation, the Communications Act 2003, was passing through parliament, the then culture secretary, Tessa Jowell, said, ‘It will free the industry of unnecessary interference, give it freedom to grow and diversify, allow it an opportunity to change as the world of communications changes, and to gain access to new sources of investment as well as new ideas and challenges.’ (Jowell 2002a).

At the time, David Cameron (elected MP for Whitney the year before) also argued the deregulation case, speaking in the same debate and saying, ‘the lesson that we must learn is not that there has been too much deregulation, but there has not been enough ... If we set the media industry free we will be able to watch it grow’ (Cameron 2002).

The Labour government’s approach in 2003 was consistent with the position adopted by governing parties in the UK for at least two decades. Conservative national heritage secretary, Virginia Bottomley, introduced the Broadcasting Act 1996 to parliament, saying, ‘[This] Bill provides substantial further liberalisation to enable media businesses to grow and operate more flexibly in an ever more competitive world’ (Bottomley 1996). The Broadcasting Act 1990 was brought in with similar ambitions to facilitate technological development and an expansion of choice (Waddington 1989).

The argument that media deregulation (or ‘liberalisation’) is necessary to enable the industry players to grow their businesses, to attract new investment from overseas, and to ensure UK companies are able to adapt and compete in an increasingly global marketplace has dominated policymaking in recent years.

The events of July 2011 called a halt to that process and effectively broke the political consensus in favour of deregulation. Up to that point, the British government was ready to allow Rupert Murdoch’s News Corporation (News Corp) to add 100 per cent control of BSkyB television (Sky) to its 40 per cent control of the national newspaper market in the UK. While there were political opponents of the deal, there was no realistic prospect of them blocking it.

The phone hacking scandal not only thwarted News Corp's ambitions, it also ushered in a new mood among politicians, reflecting, in part, current public attitudes.

Increasing choice and declining trust

In preparing this report, IPPR commissioned a survey into public attitudes on trust, impartiality, and ownership in the UK media (IPPR and YouGov 2012). The survey showed that there is strong support for strict limits on newspaper and cross-media ownership in the UK. Two-thirds of respondents to the survey thought that newspaper ownership should be limited to one or two titles – a significantly greater degree of control than applies today.

Historically, UK citizens have placed a good deal of trust in the news they receive, especially television news. An Ofcom survey in 2007 recorded levels of trust in news on the BBC as high as 85 per cent and in ITV at 78 per cent (Ofcom 2007: 66). Not surprisingly, given the battering the news media has taken in the last year, when asked a similar question in the IPPR and YouGov survey, by far the largest number of respondents (64 per cent) said they didn't trust *any* news organisation.

The unavoidable conclusion is that there has been a serious breakdown of trust in the news media. The BBC continues to be the most trusted organisation (though even there, only 16 per cent of respondents cited it as a news organisation they trusted) while the other main broadcasters – Sky and ITN – attracted lower levels of support. As for newspapers, the survey suggests that trust in broadsheets is considerably higher than trust in the tabloids (again, hardly surprising given the phone hacking context). The *Guardian*, *Independent* and *Telegraph* were the top three most-trusted newspapers.

A multiplicity of sources

UK consumers want to get their news from a range of providers, and to hear and read a range of voices and opinions (IPPR and YouGov 2012). Different sources of broadcast journalism on television often mark their distinctiveness more by style and choice of subject matter than by divergence of opinion. The main news bulletins on BBC1 and ITV1 appeal to slightly different demographic audiences, though there is considerable overlap in stories. Channel 4 News has traditionally had a greater focus on international stories (Ofcom 2007b: 103). It is interesting to note that, currently, the broadcast news bulletins on the three commercial public service broadcast channels – ITV1, Channel 4 and Channel 5 – are all produced by a single news provider: ITN. So the scope is certainly there, at least within licensed broadcast news, for one producer to supply a variety of different types of news programmes, with distinctive story selection and editorial styles.

What underpins them all, however, is a statutory regulatory framework, policed by Ofcom, that requires the news on broadcast television to be 'reported with due accuracy and presented with due impartiality' (Ofcom no date). The Ofcom Broadcasting Code sets out how compliance with those provisions will be assessed in more detail. Particularly strict provisions on impartiality apply during periods in the run-up to elections and referendums.

News publishing, whether in print or online, has no requirement to be impartial. The freedom to report stories accurately and without fear of state or corporate reprisals goes hand-in-hand with the freedom to voice opinions and to take sides in debates on issues. It is this freedom which gives rise, perhaps above all, to concerns about the need for a diversity of different voices and opinions in the media.

As well as taking sides on national and local issues, newspapers are free to offer endorsements to individuals or political parties during election times. In deciding what to say, the only pressure faced by editors is from their proprietors and, to an extent, from the market for readers. Since the share of the vote held by the UK's two main political parties at general elections rarely falls below 30 per cent, many papers habitually support one of the main parties, and so appeal to the general sympathies of their readers. In this way they can try to secure loyalty in their readership and a certain proportion of their sales.

Newspaper loyalty in general in Britain remains fairly strong. According to the National Readership Survey (2012), the proportion of readers of a newspaper title who 'almost always' read that title and those who 'only read one title' are both very high (64 per cent and 58 per cent respectively on average across the daily newspaper titles).

So on one level, the market works in the sense of delivering a diversity of voices and opinions. But of course the market is never perfectly balanced, in a political sense – newspapers can and do switch allegiances and concern about the power and influence of newspaper owners remains.

Regulating power and influence

Because the print media does take sides in political debates it has long been subject to special regulations designed to prevent an overconcentration of power and influence in any one media group.

Ordinary competition law provides for intervention in media markets (as in any other market) if a merger between two or more organisations leads to the new organisation exceeding either the standard 'turnover' or 'share of supply' thresholds (DTI 2004). Beyond this, special provisions have applied to newspaper mergers since the 1960s, following the Shawcross report (1962) and the Monopolies and Mergers Act 1965, which introduced the requirement for the consent of the secretary of state, alongside approval by the competition authorities. The concern that control of the press was a matter of 'considerable public sensitivity' has provided the case for making specific provisions for media markets ever since – initially for newspapers; subsequently for all mass media.

The case for special measures to deal with proposed media mergers was put forward strongly by Lord Puttnam during the passage of the Communications Act 2003. Lord Puttnam proposed an amendment to reinforce the prominence of public interest criteria in media mergers through the introduction of a 'media plurality public interest test' (Puttnam 2003). In arguing successfully in favour of his amendment, Lord Puttnam said, 'You might argue that those powers [under the Competition Act and the Enterprise Act] are all we need to address unacceptable concentrations of media power. But they are designed to look at competition from a purely economic standpoint ... They cannot take account of the very special role the media plays in an informed society ... We also need a powerful player on behalf of the citizen, a powerful player already available to us in the Bill – the public interest test.'

Alongside the public interest test, specific *ex ante* rules also apply to prevent overconcentration of ownership in media markets. Overlaps between the printed and broadcast media, for example, have been restricted at both the local and national level. Today, following a long period of deregulation, the most significant remaining provision that applies is the so-called 20/20 rule designed to prevent any organisation with more than a 20 per cent share of national newspaper circulation taking control of more than 20 per cent of the Channel 3 television broadcaster (currently ITV) (Ofcom 2012b). Most of the

remaining *local* cross-media ownership rules were removed under the Media Ownership (Radio and Cross-Media) Order 2011.

Lord Puttnam's media plurality public interest test has been employed on two occasions since 2003 in relation to cross-media ownership changes. Both have involved News Corp owned or controlled companies. The purchase of 17.9 per cent of ITV by Sky in 2006 provoked a three-year review which ultimately concluded that Sky's action was against the interests of competition and required the company to reduce its shareholding in the Channel 3 broadcaster. The second occasion – a remarkable case study – is discussed below.

News Corp controversy

The 2010 proposed takeover by Rupert Murdoch's News Corp of 100 per cent of Sky provided an opportunity for the regulators to explore and establish new precepts in assessing plurality issues in cross-media mergers. Unfortunately it rapidly became mired in political controversy.

In November 2010, the day after News Corp made its official filing with the European Commission proposing to acquire the 60.9 per cent of Sky it didn't already own, the business secretary, Vince Cable, issued a notice to intervene. A number of News Corp's rivals had, for some weeks, been urging Cable to step in on media plurality grounds and he did so – as he was formally entitled to under section 67 of the Enterprise Act 2002 (BIS 2010).

Ofcom was charged with investigating whether any media plurality issues arose from the acquisition. The European Commission (EC) simultaneously began its own investigation on competition issues under European law. Within a few weeks the EC approved the merger on competition grounds, but deferred to the UK authorities on the matter of media plurality (Europa Online 2010).

On the same day as the EC gave its approval for the merger, however, Vince Cable found himself stripped of responsibility for overseeing the public interest investigation after it became known that he had told two undercover journalists that he had 'declared war' on Rupert Murdoch (Winnett 2010).

The position of the secretary of state in relation to a merger of this kind is a quasi-judicial one, which requires an approach that is conspicuously fair and balanced. Cable's language gave the impression of bias and as a result his responsibility for deciding on the merger and indeed the bulk of media and digital communications policy was shifted to the then culture secretary, Jeremy Hunt.

Ofcom's initial advice to Jeremy Hunt was that the proposed acquisition 'may be expected to operate against the public interest' on plurality grounds (Ofcom 2010). It recommended a fuller second-stage review of the issues by the Competition Commission (ibid). Importantly, in its advice Ofcom rejected the argument that the robust regulatory safeguards applying to broadcast news content were enough protection in themselves against an increased concentration in ownership.

This was a rebuttal to another longstanding argument made in support of ownership deregulation: that the public interest could be protected by licensing procedures, and in particular, the 'statutory requirements for accurate and impartial news' (McIntosh 2003).

Ofcom argued that news content regulations ‘would not necessarily prevent an individual with control of a media organisation from influencing the news agenda through the selection or omission of stories’ (Ofcom 2012c). Furthermore, ‘while impartiality rules may contribute as a safeguard against potential influence on the news agenda by media owners, they cannot themselves necessarily ensure against it.’ (ibid).

After Ofcom’s initial report, a protracted period of analysis and consultation followed involving News Corp, the culture secretary, the Office of Fair Trading (OFT) and Ofcom, over whether proposed undertakings offered by News Corp and Sky (in lieu of a referral to the Competition Commission) could be sufficient to allay the initial concerns that had been expressed.

Chief among the undertakings offered was the proposal that Sky News be effectively spun off from the newly merged entity and set up as an independent publicly limited company. News Corp would be limited to a 39.1 per cent holding in the new company for 10 years, unless permitted to increase it by the secretary of state. Behavioural remedies – including an independent chair and directors on the Sky News board and editorial committee – were also included in the undertakings, as were measures to try to help ensure the financial viability of the new company.

This combination of proposals led Ofcom to conclude in June 2011 that ‘the revised proposed undertakings offered by News Corp would address the plurality concerns identified in our report of 31 December 2010’ (Ofcom 2011). Following a short further consultation it seemed that Jeremy Hunt was set to accept the undertakings of Ofcom and the OFT’s advice.

However, the phone hacking scandal then broke, and the government came under extraordinary pressure in parliament and the media to refer the bid to the Competition Commission. In the end, News Corp spared the secretary of state from having to make a decision, first by withdrawing the undertakings (which would have obliged Hunt to refer the bid), and subsequently by withdrawing the bid altogether.

That could have been the end of the political storm around the merger, were it not for the revelations to the Leveson inquiry in April 2012 of private communications during the merger negotiations between Jeremy Hunt’s special adviser, Adam Smith, and Fred Michels, a News Corp employee. These revelations led Smith to resign, saying that his ‘activities at times went too far and have, taken together, created the perception that News Corporation had too close a relationship with the department’ (Ross 2012).

Proposals for change

The controversy over the handling of the News Corp/Sky merger suggests that, 50 years after Shawcross and the Monopolies and Mergers Act 1965, serious questions need to be asked about political involvement in complex media mergers (DTI 2004).

It also demonstrates that under the current rules, even with the powers to intervene on public interest grounds, the merger of the biggest newspaper company in the UK and a major player in UK broadcasting could still be permitted.

In its report on the public interest test in the case of the News Corp/Sky merger, Ofcom identified a number of important plurality issues not addressed by the current public interest test procedure and suggested that ‘a more fundamental review and possible reform of the current statutory framework may be required’ (Ofcom 2010).

The Leveson inquiry, though set up in light of the phone hacking scandal, has a remit to look much more broadly at the ‘culture, practices and ethics of the media’ and make recommendations on the policy and regulatory regime, including the extent to which it supports media plurality (Leveson 2011).

The inquiry has heard in detail of the failures of the current system for press regulation, particularly around the shortcomings of the Press Complaints Commission (PCC). Its recommendations are expected to provide some guidance to the government and parliament on how next to proceed.

However, with such a broad remit the inquiry could never be expected in the time given to address all, or even most, of the wider challenges facing policymakers in relation to developments in the media industries. On the matter of media plurality, Lord Justice Leveson has asked whether his ‘aspirations’ should in fact be limited to ‘setting out the concerns that various witnesses have expressed, and the counterbalancing arguments, and suggest appropriate authorities examine the position’ (Leveson 2012b: 56).

The highly politicised atmosphere in which the inquiry has operated, with different parties looking to settle old scores, has hardly helped the development of a new consensus. To some on the left, the inquiry and its sharp focus on the activities of News Corp, presents a once-in-a-lifetime opportunity to tackle concentrations of power in the UK media, particularly the power which is in the hands of Rupert Murdoch. To some on the right, the opening up of the debate about the media’s influence on politics and public opinion is a vehicle to challenge the scale and influence of, as they see it, an over-dominant BBC.

As the baton passes to the government and parliament, as in other areas of public policy, politicians will have to wrestle with competing priorities. They will have to focus on what is practical as well as what is desirable. They will have to take account of the technological constraints of a globalised media marketplace, and the economic constraints of sustaining growth and development in a valuable industrial sector.

Currently, mixed signals have been emerging from the Coalition on its likely response to the Leveson inquiry, while the Labour opposition appears to have drawn a line in the sand on limits on newspaper ownership. The scope for consensus in media policy seems a long way off.

And yet the experience from other countries and analysis from the UK’s media regulator suggests that if we move away from a traditional segmented outlook (that treats different media as if they operated in discrete markets) and recognise the profound change that media convergence is bringing about, then it may be possible to find common ground for a new approach.

2. TRENDS IN NEWS AND GENERAL MEDIA CONSUMPTION

Understanding the trend developments in media markets and how consumers are behaving in relation to media products is an important underpinning for a new approach to media regulation. The picture is not uniform, with traditional broadcast television continuing to perform strongly, including in news, while print newspaper circulation seems to be in stubborn decline.

Television's continuing popularity

According to Ofcom's *Communications Market Report* (Ofcom 2012a), television remains the most popular platform for news in the UK. Research for the regulator shows that '85 per cent of the population access news through television, while 53 per cent use the radio and 53 per cent use newspapers' (ibid: 224).

The continuing reach and importance of television news is a key factor for policymakers in determining its future regulation. Despite the scrutiny all players in the media have undergone in the past 12 months, current licensed broadcast services continue, in general, to outperform rival media outlets on measures of trust and authority.

Shifting to online

However, the pace of change in media consumption continues to accelerate. Ofcom's report (ibid) also showed that '41 per cent of the population now go online to access news, which represents a 50 per cent increase on five years ago'. Online is fast catching up with print and radio as a key point of access to news.

On the internet, as in television and radio, the BBC is very strong – and there it competes directly with print-sourced news websites. Ofcom's figures show that in March 2012 the BBC had almost twice as many unique users in the UK as its nearest print news rivals, Mail Online and the Guardian Online (ibid: 274).

Declining newspaper circulation

Where digital news consumption is growing, circulation numbers for printed copies of national newspapers are declining across the board. In fact, today the only growth for the UK's main national newspaper titles is in online consumption (ibid: 277). In some cases this is complementary to print consumption, but not always. According to Ofcom, since owning a tablet device, 25 per cent of readers say they are reading a paper copy of a newspaper less often (ibid: 66).

This trend is replicated in developed economies across the world, and traditional print media companies are employing different strategies in response. In Australia, for example, Fairfax Media, owner of the *Sydney Morning Herald* and the *Melbourne Age*, has raised the possibility of going digital-only, following year-on-year declines in its print readership. Overall readership is rising but the only growth is in digital. Digital-only readers already constitute well over 50 per cent of its newspapers' total readership, up from just over a quarter six years ago (Hume 2012).

Follow the money

Advertising spend in the online space is growing rapidly, and, at £4.8 billion, exceeded any other category of advertising in the UK for the first time in 2011 (Ofcom 2012a: 228). Unfortunately the proportion of this revenue going to existing print newspaper companies is small and newspapers remain highly dependent on the cover price of their titles and print advertising for revenues. Many titles, such as the *Guardian*, the *Daily Mail* and the *Daily Telegraph*, remain available for free on the internet, so the growth in digital readers is not producing a corresponding growth in revenues.

To date, experiments with charging for access to online versions of newspapers have proved more successful for some types of publications than others – particularly more specialist publications with a large body of corporate customers such as the *Financial Times* (Sabbagh 2012). Putting content behind paywalls, charging specific fees for mobile and apps, bundling subscriptions for print copies with online and mobile access, ‘freemium’ models (allowing access to some content for free but then charging for more – a model with growing success for the *New York Times*) – all are being tried in order to offset the decline in print circulation and in print advertising revenues.

Mail Online is the world’s biggest newspaper website and its digital revenues are growing strongly. But in the last full reporting year (2011) digital advertising revenues were still only £16 million, alongside a total income for the *Daily Mail* and *Mail on Sunday* of £608 million (DMGT 2011a). Over time this will change: revenues at Mail Online are growing at 70 per cent in 2012 (ibid). But the real problem is the rate at which print revenues are being lost compared to online revenues gained. Some recent estimates in the US suggest that the loss in print revenues could be as much as \$25 for every \$1 gained online (Preston 2012). This ‘profit destruction ratio’ suggests that digital development is unlikely to transform the fortunes of ailing newspaper brands even when online growth may be increasing overall readership numbers.

It also seems that readers are less faithful in their online newspaper consumption, often accessing multiple sources. Overlap of audiences between news sites is generally high, especially when content is available for free. Visitors to BBC News Online are also likely to visit the websites of newspapers, such as the *Independent*, the *Guardian* and the *Daily Telegraph*. More surprising, overlaps occur online at relatively high levels between the *Guardian*, the *Sun*, the *Independent* and the *Mail* (Ofcom 2012a: 278). It seems that easy and free access between newspaper websites grants us all a more eclectic range of news content and makes us more promiscuous consumers.

BBC Online

In the online space, the BBC is a direct competitor to other news sources, without the need to devote resources to selling advertising and with the security of a guaranteed income. Some have argued that the existence of BBC Online, giving its news content away for free, is a major barrier to the success of pay strategies among other UK online news providers. Former BBC director-general, Mark Thompson, has acknowledged that ‘the BBC needs to think carefully about its boundaries, especially in digital environments, given the scale of the challenge facing our colleagues in print’ (Thompson 2012).

It is undoubtedly true that the existence of high-quality news sites employing high-calibre professional journalists available for free makes it more difficult for newspaper websites offering a similar diet of news to attract readers to paid-for content.

As will be discussed in chapter 4, this has led to suggestions that any assessment of the market for online news or indeed news more generally, for competition or plurality purposes, should include the BBC. If the BBC is a direct competitor to online newspaper provision then surely it should be included in any overall assessment of the market and the market shares of individual organisations.

New players in the market

Other organisations have also developed a significant presence within the online news market in recent years, from online-only publications such as the Huffington Post, to aggregators of news content such as Google News, to hybrids such as Yahoo! News. The

last of these, Yahoo! News, was the fifth most popular news site in the UK in the snapshot taken by Ofcom in March 2012, ahead of the news site for country's most popular print newspaper, the *Sun*.

The transition online of news content follows that of music and, increasingly, video. Revenue from digital music sales and services (such as Spotify) exceeded sales of CDs and albums for the first time in Q1 2012 (Sweeney 2012). This is perhaps significant as much for the fact that digital revenues are finally coming through in music sales, as for the sale of physical products continuing to decline. Where music has gone, video will surely follow, boosted by a government-led drive to increase broadband speeds across the UK and improve the online video experience.

The game changer could be the transition from video accessed via a laptop or a tablet to television-like content delivered via broadband to an actual television set in the living room.

Cable television companies, such as Virgin, have led the way in mixing broadcast television channels with catch-up services (such as BBC iPlayer) and pure on-demand services for film and television content. The development of hybrid platforms combining existing broadcast services (satellite, cable, terrestrial) with one-to-one services delivered online is the next big evolution in television following the completion of digital switchover.

Internet protocol television

Internet protocol television (IPTV, also known as connected TV or smart TV) presents television consumers with a potential explosion of choice in content through their television sets. It can be made available to anyone utilising a combination of broadcast delivery plus broadband connectivity. Digital terrestrial versions simply require an aerial connection and home access to internet of at least 2mbps. It has the potential to reach the same number of households as those currently covered by the terrestrial broadcast network – the only exception being those areas where broadband is not yet available.

Unlike cable or satellite systems, hybrid terrestrial IPTV makes possible the provision of internet-delivered film and television services on the same scale as ordinary, subscription-free television. This combination of mass-market potential and consumption through the main television set in the home brings with it a number of important regulatory challenges.

It is early days for the sale of connected televisions, and consumers may well not be aware of the functions and services that internet connectivity can add to their conventional television experience. In some cases, consumers will have only just switched over to digital television. But already in the UK some 20 per cent of television sales are of connected sets. Catch-up and on-demand services are available in conjunction with existing free-to-air services on, for example, Freeview-enabled smart TVs, and there are a number of other devices, including games consoles, which enable internet connectivity to a standard digital television.

The launch of YouView, a mass-market, subscription-free service promoted by the UK's main public service broadcasters and two of the four largest broadband suppliers could well lead to a gear-change in public awareness of, and interest in, connected television.

Changing consumption

The change in consumer experience for many people may be quite profound. The shift from analogue to digital television in the last 10 years has been a major change in the number of services most consumers can access and how they access them (though an on-screen menu or electronic programme guide – EPG).

The next evolutionary stage sees the shift from standard broadcast television to a system where programmes are available from any point in the television schedule over the preceding seven days. Content can also be accessed away from the television schedule (off-EPG) via apps and websites and beyond into the open internet. This raises the potential for any member of the family from the comfort of the sofa to access any kind of content through what still looks like a conventional living room television set.

It may take longer for actual consumer behaviour to change. Studies show that even armed with an array of on-demand and catch-up services, consumers still tend to stay with standard broadcast television for the majority of their viewing. Television viewing remains a social experience, with most people choosing to watch the big shows either live or near-to-live (Economist 2010).

The social nature of television and its place within the home has given rise to a set of assumptions about the safety and reliability of the medium. Plugging the television into the internet opens up a vast range of new choices, but will also challenge some of these assumptions and, as a consequence, raise new questions for regulators.

3. CONVERGENCE, CONFUSION AND CONTENT REGULATION

Traditionally, media markets (print, radio, television) have been segmented and have been regulated accordingly.

Content produced and distributed across scarce and valuable broadcast spectrum has, in most cases, been licensed and subject to strict regulatory requirements. Since spectrum is a public asset, governments can control its distribution and place regulatory obligations on those to whom it is either given or sold.

Printed content, on the other hand, comes to the market much more freely, is generally unlicensed and is usually protected by constitutional safeguards for freedom of expression and opinion. Content distributed via the internet has experienced only light regulation or none at all.

As a consequence, different types of media are also generally subject to different types of regulatory authority: some statutory (usually related to broadcasting), some co-regulatory and some self-regulatory (which is most common for the print media).²

Standards in the press

The UK newspaper industry has operated under self-regulation since 1953, following the first royal commission report in 1949. The General Council of the Press was operated and funded by the newspaper industry. Criticisms of its operations gave rise to the second royal commission in 1961, and the resultant Shawcross report (1962). A revised Press Council emerged from this which included 20 per cent lay membership. Further concerns, particularly about privacy issues (reflected in the 1972 Younger report) and the handling of complaints against newspapers were aired in the third royal commission, chaired by Lord McGregor of Durris, which reported in 1977. Lord McGregor called for the development of the first written code of practice for the press, which the Press Council rejected.

The threat of further reform was prompted by growing concerns about press intrusion and poor media ethics in the 1980s, leading to a number of bills in parliament sponsored by individual MPs,³ which attracted considerable cross-party support. The response from the government was to set up the Calcutt committee in 1989 to look at measures (including legislation) to protect individual privacy from the activities of the press and improve access to redress for individual citizens.

Sir David Calcutt's report paved the way for the establishment of the Press Complaints Commission (PCC) to replace the Press Council, and the introduction of a press code of practice to give editors, journalists and the public, a better idea about what was and wasn't acceptable for publication. The 1990 report of the Committee on Privacy and Related Matters also declared that it was giving the newspaper industry 'one final chance to prove that voluntary, self-regulation can be made to work' (Calcutt 1990). Or as then Home Office minister, David Mellor, put it in a television interview, 'the press – the popular press – is drinking in the Last Chance Saloon'.

The first Editors' Code contained 16 clauses covering areas such as accuracy, privacy, harassment, protection for children and the use of confidential sources. It has gone through a number of refinements since then, designed to strengthen the code and respond to public (and political) concerns. Certain clauses in the code are covered by

² Denmark is an interesting exception within the EU in having a statutory press council, whilst still ranking highly in the annual Press Freedom Index. http://en.rsf.org/spip.php?page=classement&id_rubrique=1043

³ Private Members Bills relating to privacy and press regulation were sponsored by, among others, Clive Soley MP, Tony Worthington MP and John Browne MP.

a public interest defence, which includes matters such as exposing crime or serious impropriety, protecting public health or safety, exposing misleading claims by public officials or exposing incompetence. In this sense it is not dissimilar to the provisions in the code of practice that applies to broadcast journalism.

Calcutt produced a second report in January 1993 with a damning conclusion: ‘the Press Complaints Commission, as set up by the press, has not proved itself to be an effective regulator, and [I] have had to recommend that the Government should now introduce a statutory regime.’ (Calcutt 1993).

However, hostility from the press has ensured that this recommendation has never been acted upon and the PCC has continued to operate in the same way for 20 years. Despite a number of critical reports from parliamentary select committees (ibid), self-regulation was never really challenged until the events of 2011.

Broadcasting standards regulation

By contrast, television production and distribution in the UK has always been a highly regulated activity: industrial regulation helps to ensure a healthy and diverse UK production sector; competition regulation ensures that there are a plurality of voices delivering news and current affairs; and that output is governed by clear rules on accuracy and impartiality, as well as fairness and privacy. General content is policed for high standards of taste and decency and a regulatory ‘bright line’ exists at 9 pm every evening between family and more adult-oriented programming.

The operation of this regime has remained unchanged for many years. Its origins are in the development of UK broadcasting from the monopoly of the BBC to the duopoly of BBC and ITV that survived for over 25 years before the arrival of Channel 4 in 1982.

Established by a royal charter in 1927, content standards applying to the BBC originate in an accompanying licence and agreement between the BBC and the government of the day. This licence and agreement recognises the BBC’s editorial independence and sets out its public obligations in detail. It also deals with funding. The BBC develops detailed editorial guidelines covering a wide range of issues including impartiality, harm and offence, accuracy, fairness, and privacy. These arrangements are subject to periodic review and renewal; the current royal charter is the eighth in the history of the BBC.

For most of the 20th century, regulatory oversight of the BBC remained the sole preserve of the 12-strong board of governors.

Two pieces of legislation passed in the 1980s introduced partial external regulation for the BBC, setting up the Broadcasting Complaints Commission (handling complaints about unfair or unjust treatment by individuals) and the Broadcasting Standards Council focusing on programme standards (principally in relation to on-screen sex and violence). In each case it was stressed that responsibility for enforcing standards would remain with the BBC’s governors (and the Independent Broadcast Authority in the case of commercial media), but that the powers of these bodies needed ‘reinforcing’ by a new external authority (Hurd 1988).

In 1996 these two bodies were merged into the Broadcasting Standards Commission, charged with handling complaints and monitoring standards of taste, decency, fairness and privacy for all broadcast output – television and radio.

The BBC experienced a more profound change in 2007 when the board of governors was replaced by a new body, the BBC Trust, with shared, overlapping responsibilities for content standards with the new communications regulator, Ofcom. This arrangement extends to all areas of content regulation with the exception of assessments of the accuracy and impartiality of BBC output.

Ofcom's specific powers in relation to BBC content come under the Communications Act 2003. In fact, many in parliament at that time wanted the legislation to go further and to extend independent regulation to all areas of BBC content. This view was summarised by the then Conservative culture spokesperson, the MP John Whittingdale, who said, in response to the second reading of the Communications Bill, 'It is indefensible that when every other broadcaster is subject to independent scrutiny and regulation, the BBC should be exempt from it.' (Whittingdale 2002).

In commercial television, the Independent Television Authority (the Independent Broadcasting Authority, or IBA, after 1972 when commercial radio was added to its remit) was not only responsible for the development of the transmission network, but was also the legal 'publisher' of the programmes, responsible for prior approval of programme schedules.

The 1990 Broadcasting Act replaced the IBA with the Independent Television Commission (ITC), facilitated the privatisation of the transmission network and ensured that when the new licences were awarded for Channel 3 (ITV) and Channel 4 in 1993, the licensee itself was made responsible for programme content. Licence conditions were enforced by the ITC, which also oversaw the development of codes of practice on programme content, advertising and sponsorship, and imposed penalties for failures in compliance.

Since the creation of Ofcom and the passage of the Communications Act 2003, oversight of television and radio content has rested with Ofcom's Content Board, governed by a comprehensive Broadcasting Code. Ofcom enforces the code which applies to the standards of content in all television programmes broadcast in the UK (Communications Act 2003). Its purposes include protection of those under the age of 18 and the application of 'generally accepted standards' to television content which provide 'adequate protection for members of the public from ... offensive and harmful material'. Under the Act, Ofcom is also required to take account of 'likely expectations of the audience as to the nature of the nature of the programme's content', the extent to which this can be 'brought to the attention of the potential audience', and the likelihood of people 'who are unaware of the nature of a programme's content being unintentionally exposed' to it (ibid).

There are also specific provisions around news, advertising and programme sponsorship. The application of these codes to all television content and the highly visible investigations and adjudications that often occur when standards are transgressed, continues to support high levels of public confidence in the safety of the television experience.

Regulation in the online space

A different set of assumptions has grown up around consumption of content on the internet. During the passage of the Communications Act 2003 ministers were clear that 'we [the government] do not intend to regulate the internet' (Jowell 2002b).

For many years the dividing line for policymakers between broadcasting regulation and other types of media was a matter of principle. Broadcasting was a licensed service, beamed into the nation's living rooms; universally available and paid for, at least in part,

through compulsory taxation. It existed by consensus. Television and radio were part of the family, often 'just left on in the background'. So what appeared on television had great potential to upset and offend. The establishment of regulatory standards and proliferation of regulatory bodies was a reflection of the special place that broadcasting held (and still holds) in public and private life.

Newspapers, on the other hand, were something that you chose to buy and as such took some responsibility yourself for your choice and its content. This division between media we *actively* choose to consume and those we receive more passively has remained an important distinction in regulatory terms. The argument in broadcasting, that you can 'just change channels' or switch the television set off, has never held much sway with consumer bodies or politicians.

To this extent, the internet has been treated more like the printed press – on the assumption that it is more like a publisher than a broadcaster. Producers utilise the internet as an open and democratic forum for the distribution of content and ideas, while consumers access that content as an active choice, including paying for on-demand materials. Specific regulation has arisen around commercial and consumer issues such as e-commerce. But successive UK governments have been wary of inhibiting the online space from being, as the foreign secretary, William Hague, said in 2011, 'open to innovation and the free flow of ideas, information and expression' (Hague 2011).

The need to ensure the 'free flow of ideas, information and expression' online remains the predominant political view. But the rise in consumption of video content online and concern about ease of access, particularly for children, has led to a gradual drift towards more regulation of content delivered over the internet.

The approval of the Audio Visual Media Services (AVMS) directive by the European parliament in 2007 provided a basic framework for the regulation of both editorial and advertising content on television-like services delivered on demand over the internet (either free or paid for). This is based on a platform-neutral approach, that is, irrespective of the platform used to deliver the service – whether that is a television, a personal computer, tablet device or mobile phone. As far as content standards are concerned, the AVMS provisions (as transposed into UK law) are fairly minimal, being restricted only to the prevention of material likely to incite hatred and the need to limit access to material which 'might seriously impair the physical, mental or moral development of minors' (AVMS 2010a). Other, commercial, restrictions also apply which relate to advertising, sponsorship and product placement.

In the UK, television-like services are policed by a co-regulatory body called the Authority for Television on Demand (ATVOD) which sets out guidance in relation to statutory provisions. ATVOD operates under contract from Ofcom, with the latter acting as the backstop regulator with powers to hear appeals, and impose sanctions as necessary. This is similar to the approach Ofcom takes with regulation of advertising where day-to-day responsibility rests with an independent, industry-funded body, the Advertising Standards Authority (ASA), operating independently from Ofcom, but with Ofcom (along with the Office of Fair Trading) exercising backstop powers, including in relation to referrals of particularly difficult cases and sanctions.

Other EU countries have taken a different approach to implementing the AVMS directive. For example, in France the regulatory authority, the Conseil Supérieur de l'Audiovisuel (CSA), has direct oversight of both broadcast- and online-delivered content and has,

following approval of the AVMS directive, extended the general classification system for television programmes in France to on-demand content as well as introducing specific ‘watershed’ timings on access to some content and requiring pin-code access to any content classified as category V – not recommended for viewers under 18 (ILO 2011).

As part of its consultations around the implementation of the directive in the UK in 2009, Ofcom commissioned qualitative research into consumer views on video on demand regulation. The research identified clear concerns, particularly among parents in the sample group, about the arrival of on-demand and internet-sourced material on mainstream television (Ofcom 2009a). Nevertheless, the challenges of regulating content from multiple sources were recognised. The research identified three areas of priority for regulation in a converged space: ‘controlling the visibility of unsuitable content; clear signposting of potentially harmful content; and adequate controls in place for parents where possible’ (ibid).

Earlier research by Ofcom in 2006 into attitudes on the quality of programme information available to television viewers led the regulator, in light of concerns expressed by research participants, to propose that stakeholders in the industry should come together to ‘consider the creation of a common framework to be used across the audiovisual content industries on a self-regulatory, voluntary basis.’ (Ofcom 2006a). Although there were some discussions following the report, it appears that it went no further (DCMS 2012).

In June 2011, a report from Mothers’ Union chief executive, Reg Bailey, on the commercialisation and sexualisation of childhood made a number of recommendations in relation to media standards and regulation. It suggested putting age ratings on music videos, more rigorous standards for what is broadcast prior to the 9 pm television watershed and creating a clearer and simpler avenue for parents to complain about unsuitable media content regardless of platform or format (Bailey 2011).

A number of content and internet service providers have been taking steps in this direction in recent years. Within the music industry, a drive to introduce a parental advisory scheme and have certain content (particularly of a sexual or violent nature) marked ‘explicit’ has been led by the British Phonographic Industry (BPI 2011). The government is also currently consulting on extending statutory age rating to, among other outputs, music DVDs.

Among the internet service providers, Talk Talk Group (a major UK provider of broadband services) has attracted attention and support (particularly in parts of the UK press) for the development of its Homesafe service. Homesafe gives parents an active choice to switch on a filtering system for internet content which blocks access to certain categories of website either generally or at specific times of the day.

Across the industry, in the autumn of 2011, media regulators came together with the government to launch Parentport, a single online portal for parents wishing to complain about a piece of media content that they think is unsuitable for children. The portal works by effectively funnelling potential complainants to the appropriate regulator’s website. Helpful as this is, it exposes two main problems:

- Different standards apply across different media and there is no consistent means of classifying content, which would at least help manage parents’ expectations.
- The site reinforces the confusion of the current regulatory framework by presenting parents with a blizzard of acronyms and abbreviations as possible respondents to their complaint: Ofcom, BBC Trust, BBFC (British Board of Film Classification), ASA,

ATVOD, PCC, and VSC (Video Standards Council). Although the site guides users to the most appropriate body, the simple existence of so many different bodies is bewildering in itself.

A new approach

Undoubtedly, in future, parents will need to take a greater role in policing the material accessed by their children, either via the television or via tablets or laptops. But there is also, surely, a responsibility for producers, broadcasters and internet service providers to help parents manage their children's media consumption. There may even be a competitive advantage for those service providers or device manufacturers who seek to make life as easy for parents as possible.

Developments in digital media content and digital means of distribution present a number of fundamental challenges to the segmented approach to media content regulation.

As traditional platforms and new devices become interchangeable, opening up access for consumers to text, audio and video material produced from multiple sources, the traditional boundaries between regulatory systems and structures are also breaking down.

If these trends continue, as most analysts expect, the distinctions between our current regulators could soon become as meaningless as the distinctions between the media they seek to regulate. A more integrated approach is needed.

4. PLURALITY: MEASURING POWER AND INFLUENCE

Assessing ‘sufficient’ plurality

On 29 January 2008, John Hutton, then secretary of state for business, enterprise and regulatory reform, issued a decision following a public interest intervention into the purchase of 17.9 per cent of ITV plc’s shares by Sky. Sky was required to reduce its shareholding to below 7.5 per cent on the basis that the acquisition had ‘resulted in a substantial lessening of competition’ within the UK market for television services (BERR 2008).

However, despite the fact that Sky was forced to reduce its share in ITV, the decision attracted controversy. That was because the Competition Commission, and subsequently the government, explicitly *rejected* the argument made by Sky’s competitors and others that allowing the UK’s biggest Pay TV operator to take a major stake in the UK’s biggest commercial terrestrial broadcaster should raise *plurality* concerns.

The commission claimed that there was ‘insufficient evidence to suggest that BSkyB’s 17.9 per cent shareholding in ITV would give Sky or its parent company (News Corp) the ability or incentive to exert editorial influence over ITV’s news output.’ It also pointed to ‘the existence of separate regulatory mechanisms governing the provision of news’ which would likely mean that ‘there [was] no prejudice to the independence of ITV news and no adverse effect on the range of information and views available to the relevant audiences’ (BERR 2008).

In 2010, the focus was somewhat different: when faced with the prospect of News Corp taking over 100 per cent of Sky – a company in which it already held nearly 40 per cent of the shares – plurality concerns were given precedence and, as we have seen in chapter 1, a set of specific remedies proposed to address them.

It could be argued that the effect of the 2008 decision was the same – Sky was forced to divest substantially – whether on competition or plurality grounds, and an approach based on the application of a media plurality public interest test had worked. But even so, the difference between the two decisions demonstrates the inherent difficulties in making assessments about what a ‘sufficient plurality of persons with control of media enterprises’ actually means in practice – not least because there is no definition of ‘sufficient’ in law, which inevitably brings an element of subjectivity into the judgment.

Newspapers: a national obsession

We have already seen that the UK today has an extraordinarily diverse range of media, which is unprecedented in its history. And yet it remains the case that certain types of media continue to exercise a disproportionate level of influence over public opinion in general and the decision-making of politicians in particular. When I entered the Labour government as a special adviser at the Northern Ireland Office in 1997, I attended an early meeting on media strategy involving a number of ministers and civil servants. At one point in the meeting a minister commented, ‘Well, I can’t see that going down very well with the *Daily Mail*’, to which one of the officials present responded, ‘I didn’t realise a Labour government would be as obsessed with that newspaper as the last lot were.’ The truth is that all governments (and indeed opposition parties) are obsessed with media coverage and obsessed the most with the newspapers that have the biggest audiences. At 1.9 million the *Daily Mail* has the second largest circulation of any daily newspaper in the UK. It trails behind only the *Sun*, at approximately 2.5 million, and is considerably ahead of the next biggest, the *Daily Mirror*, at approximately 1.1 million (Dean 2012).

However, these figures look less impressive compared to broadcast news. BBC television's evening news broadcasts regularly draw 4–6 million viewers. The ITV early evening news is regularly seen by an audience of more than 3 million (BARB no date). Radio 4's flagship Today programme reaches a weekly audience of more than 7 million listeners (Rajar 2012).

But influence – either general or political – is more than just a numbers game. The *Daily Mail* is significant not just for the size but also for the demographic profile of its readership. With its comparatively high proportion of women readers, popularity among older readers (who are more likely to vote), appeal to better-off groups (more than 80 per cent of its readership are ABC1C2 adults) and high level of sales in the southern areas of England (News Works 2012), the *Daily Mail* audience exists in the 'sweet spot' for the main UK political parties. It speaks to a demographic of potential voters that can effectively swing a general election. And of course, it is opinionated; endorsing political parties and overtly supporting political, social and moral causes.

The famous switch of the *Sun*'s support from the Conservatives to Labour in the run-up to the 1997 general election and its switch back in 2009, may have been no more than an acknowledgement of the likely eventual outcome (Rupert Murdoch is renowned for his desire to back winners), but political parties take this kind of support seriously.

Despite the decline in print circulations, newspapers remain disproportionately influential. Newspapers still often set the daily news agenda with front page scoops, and can keep the journalistic heat on politicians and other public figures in ways that no other media can. They also support professional investigative journalism in ways that simply do not fit with the (current) business models of the new generation of online news providers.

Cutting newspaper groups down to size?

Public concern about the continuing level of influence of British newspapers is reflected in polling data compiled for this report (IPPR and YouGov 2012).

The overall results suggest that there is a strong trend in the public mood towards a more interventionist approach to the regulation of print and online media than is currently the case. In response to a question on how strict regulations should be, 94 per cent of respondents said they thought regulation of the press should be 'very' or 'fairly' strict. Over three-quarters of those surveyed supported limits on the number of newspapers any one person or company could own and, interestingly, over half of all respondents also supported the introduction of 'laws to regulate content on online news outlets', with only 13 per cent opposing this suggestion.

Newspapers remain important and influential, and issues around which individuals and companies own which newspaper titles remain the subject of political and public debate. In its submission to the Leveson inquiry, the Labour party proposed that a fixed limit should be placed on newspaper ownership such that, 'No single person or company would be allowed to own more than a certain percentage, perhaps 30 per cent, of the UK's national newspaper circulation' (Harman 2012).

What would be the effect of such a proposal on today's newspaper market? Labour's submission is clear, 'Rupert Murdoch owns too many newspapers. 37% of national circulation before the *News of the World* closed – owning *The Times* and the *Sun*, two of our most influential dailies, and the *Sunday Times* and the *News of the World*, two of our most influential Sunday papers – was too much' (ibid). Under Labour's proposals, even with the clo-

sure of the *News of the World* – now replaced by the *Sun on Sunday* – News International would be obliged to divest at least one of its newspaper titles.⁴ What would happen then is an interesting question. *The Times* newspaper is not currently profitable. Some of the other major media groups may be prevented from purchasing it on plurality grounds, so it would either have to close or be bought by someone who is prepared to invest sufficiently to try to bring the publication back in to profit again, or continue to run it at a loss.

Is this a desirable outcome in public policy terms? Sale or closure of *The Times* newspaper could potentially reduce News International's share to below 30 per cent, which would pass a plurality test and lead to a net reduction in the overall influence of News International as an organisation. But in the case of the paper's closure, the cost would be felt in terms of loss of choice for consumers.

The only circumstance in which you would see a net increase in the number of persons or companies controlling media enterprises is if a new entrant to the national market were to take on the title or titles, as happened with Alexander Lebedev's purchase of the *Independent* and *Independent on Sunday* for £1 in 2010 (BBC News 2010).

Does such a proposed market-share limit capture the main public and political concern about plurality of media ownership? It's unlikely that publications as influential as the *Daily Mail* and *Mail on Sunday* would be affected by it, unless as a result of organic circulation growth among the titles owned by the Daily Mail General Trust (DMGT).

The risk with fixed limits (whether focused on particular segment of the market, or on a cross-media basis) is that they can lead to perverse outcomes: divestments can lead to reduced choice for consumers in exchange for a net gain in plurality; the exit of one organisation from the market could lead to another organisation exceeding the limit; an organisation may exceed the limit through organic growth, which risks penalising success; and of course there is the problem of a contracting market generally (as is the case with print newspapers) in which an individual player becomes simply by default a larger performer in a smaller market. As David Elstein, media analyst and former broadcasting executive, has remarked, 'there is no automatic correlation between market share and political influence' (Elstein 2011). Size is a factor, but a far-from-perfect proxy for influence.

Looking to Germany

The UK is not alone in facing these issues. In Germany, for example, the Commission on Concentration in the Media (KEK) has produced regular reports on developments in media concentration since it was established in 1997. Such reports are designed to improve transparency in media ownership patterns and identify the potential for any single individual or organisation to achieve a dominant influence over public opinion. Dominance is determined against a threshold of 30 per cent or greater share of the relevant audience, either exclusively in television or as a combination of television and other relevant media holdings.

The KEK is empowered to enforce measures to ensure plurality, for example by requiring a broadcaster to concede broadcasting time to independent third parties or the establishment of a programme advisory council (Scheuer et al 2012).

⁴ Mediatique estimated that the News International share of newspaper readership was approximately 32 per cent following the closure of the *News of the World* and its replacement by the *Sun on Sunday* (Mediatique 2012).

The most recent KEK plurality report makes clear that, to date, no individual broadcaster has exceeded this 30 per cent threshold (KEK 2010). RTL Group came closest with an audience share of 25.2 per cent.

The KEK's approach to restricting overconcentration across media has been tested over a long period recently by the proposed merger of the German broadcasting giant ProSiebenSAT.1 and the Axel Springer publishing group (publisher of Germany's biggest-selling newspaper, *Bild*) which began in 2006.

Working to its 30 per cent threshold, the regulator took ProSiebenSAT.1's 22 per cent share of viewers, and then made an equivalence assessment from Axel Springer's 26 per cent share of the newspaper market, which it calculated to be the same degree of influence as a broadcaster with an audience share of 17 per cent (the calculation was based on a series of weighting factors – including audience reach, time spent with content and repeated exposures – which produced an equivalence valuation of approximately two-thirds – KEK 2005). This combined figure (22 per cent + 17 per cent) for overall 'influence on opinion' exceeded the threshold and the merger was blocked on plurality grounds. (It was also, incidentally, blocked on competition grounds within the advertising market).

The merger did not proceed, but Axel Springer has continued to pursue its argument in the German courts. In February 2012 a Bavarian state court overturned the decision of the KEK on grounds that the initial threshold for intervention – that a broadcaster should have a least a 25 per cent audience share – was not reached by ProSiebenSAT.1 at the time (Grünwald 2012). Nevertheless as others, such as media analyst Claire Enders, have identified, the case was a milestone in Europe for a being a 'systematic attempt ... to measure the influence of a cross-media merger' (Enders 2010).

Ofcom's challenge

Under section 391 of the Communications Act 2003, Ofcom has a duty to report regularly on the operation of the UK's media ownership rules. The purpose of these reviews is, however, rather narrower than those carried out by the KEK. The provisions of the 2003 Act removed a number of specific media ownership restrictions and Ofcom was given the task of reviewing the remaining provisions every three years in order to determine whether 'further liberalisation might be needed' in light of changes in the media landscape (Ofcom 2006b).

Ofcom's reviews (ibid and Ofcom 2009b) have therefore focused on asking whether those rules that remain (including the media public interest test) are working effectively (though Ofcom has consistently pointed out that these rules are an 'imperfect proxy' for assessing plurality of viewpoints in the media). The 2009 review reflected on the particularly acute economic difficulties being faced by local commercial media and recommended a further relaxation of the local radio ownership and local cross-media ownership rules in the interests of 'helping to ensure that local content continues to be commercially provided' (Ofcom 2009b).

Looking ahead, Ofcom is now proposing to do something different. In light of the withdrawal of the News Corp/Sky bid, and the launch of the Leveson inquiry, the then

culture secretary, Jeremy Hunt, asked Ofcom to advise him (and the inquiry) on measuring media plurality. One of the key recommendations of the resultant report was that the regulator should conduct a periodic review of plurality every four or five years. This would enable a full assessment to be made of changes in the media market and the relative strengths of media organisations (including through organic growth), without having to be triggered by a particular merger situation (Ofcom 2012c).

Ofcom's report provided its most thorough articulation yet of the challenges faced in regulating in favour of plurality in a converging cross-media environment. For Ofcom, neither revenue measures nor consumption measures are, of themselves, sufficient to provide a full picture of what it means to exercise influence over public opinion or the political agenda. Instead Ofcom suggests that a 'basket of measures' should be used, including assessments of availability of media, consumption and impact.

The media plurality conundrum

Ofcom has subsequently been criticised for failing to produce a silver bullet answer to the cross-media plurality conundrum. And indeed, it has left a great deal for parliament to resolve, including:

- the appropriate approach for exercising the high degree of judgement in measuring media plurality
- whether further guidance (including statutory guidance) is necessary in defining what 'sufficient plurality' means
- whether existing *ex ante* rules (such as the 20/20 rule) should remain.

Nevertheless, Ofcom is right that any assessment of plurality requires a degree of subjectivity and, by necessity, flexibility to make judgements that are both proportionate and practicable. And while it has left some questions open, Ofcom has come down clearly on a number of contentious issues. For example, it argues that plurality assessments should be confined to the production and distribution of *news and current affairs* content.

Claire Enders has argued that because news is cross-subsidised by more profitable entertainment content (particularly in the broadcast media) we need to look at *total* revenues derived from all sources to give us an indication of any given media organisation's capacity to make an impact in news through, for example, high levels of investment in professional journalism (Enders 2010). Overall financial muscle may also be a relevant factor in an organisation's capacity to influence the political and regulatory process, for example, through its ability to sustain expensive and lengthy litigation.

The risk in taking account of the overall total of an organisation's revenues is that some companies could score very highly on such measures, even though their actual news output is very small. For most commercial organisations, news production is a voluntary activity. Conversely, organisations that would score less highly on overall revenue measures can nevertheless exercise a disproportionate influence on political opinion. The Daily Mail and General Trust is, in terms of overall revenues, smaller, than News Corp, ITV or the BBC, but its capacity to influence political and public opinion is nevertheless significant (DMGT 2011b and ITV 2011). Consumption measures and weighting will be an important part of assessing and capturing this degree of influence.

Factoring in online

Ofcom also concludes that online media should be included, though notes that this presents a challenge to the existing statutory definition of 'media enterprise', since this currently does not include providers of internet content. However, what *kind* of online media to include is an issue.

As we saw in chapter 2, the migration of readers to online news sites is a threat to the long-term sustainability of many leading UK newspapers. But much of this content (or at least the substance of it) is simply transferred directly from print publications or broadcast bulletins to online services. So its net value is to add incrementally to the degree of influence of the publications or broadcasters themselves. Many people who read a newspaper also keep up to date with news during the day through that newspaper's website.

Online-only news sites present a particular challenge. If they are not UK-based then there may be jurisdictional issues when it comes to content regulation. Many sites providing self-generated (as opposed to aggregated) news and comment are very small, both in terms of readership and, particularly, revenue. Undoubtedly these sites contribute to the wealth and variety of UK sources of news and comment. But they are not substantially equivalent to well-funded professional journalism that remains largely the preserve of the traditional print and broadcast organisations. However, organisations of scale such as the Huffington Post (owned by US internet giant AOL) are increasingly professionalising their content and contributing to original newsgathering.

Another category is reserved for news aggregators, including Yahoo! News and Google News. These are giant companies in terms of revenue, but it is an open question whether news aggregation should be regarded as merely a way of helping consumers find other news sources, or whether it does have a wider editorialising effect (and therefore the capacity to influence opinion) through the choice or prioritisation of its search results.

Looking further ahead there is also the risk of selective exposure to sources of news and information through systems that personalise data based on previous choices. Such factors potentially belong more in the domain of online content regulation than plurality protection measures. However, the degree to which online aggregators are open and transparent about the news sources they select and the simple objectivity of their search algorithms is relevant in plurality terms. With nearly two-thirds of internet users in the UK today on Facebook and 90 per cent of all UK searches on the internet going through Google, these are powerful organisations and their activities in relation to news should be included in the regulator's assessment of what levels of influence individual organisations have on the formation of political opinions in the UK today.

The role of the BBC

The existence of the publicly-funded BBC is in itself a major public policy intervention in the UK's media market. The BBC is not just an important cornerstone in broadcasting, but across all electronic media platforms, particularly in news content.

As such, the BBC potentially holds a pivotal place in any assessment of the market for news and current affairs. With a current annual income of over £3.5 billion and the most popular news services on television, on the radio and online, the BBC's position is extraordinarily powerful. But the inclusion of the BBC in any market assessment is problematic. In any market definition that includes the BBC's news and current affairs

content, the relative size of its commercial competitors reduces significantly. This is obvious particularly if consumption measures are given the greatest weighting.

The inclusion of the BBC in a cross-media market definition, with an estimated spend of £430 million on news and current affairs output in 2011 (Mediatique 2012), increases the overall size of the market for news and current affairs significantly. This would result in the relative shares of that market held by the BBC's competitors being reduced, which could mean that the biggest of the BBC's competitors could consolidate their position further without triggering a formal plurality review. Among Ofcom's 'basket of measures', for example, the 'share of references'⁵ metric would give News Corp an estimated share of the retail news market of 17 per cent compared the 37 per cent attributed to the BBC (Ofcom 2010).

This is not to say that the BBC shouldn't be included in a cross-media market assessment. But it does suggest that that its contribution should be weighted to take into account factors such as the requirement that all its content be impartial, which limits its capacity to influence opinion one way or the other on an issue. The BBC is also accountable through its governance and management structures – to both the public and parliament – in ways that don't apply to commercial media organisations. The notion of internal plurality at the BBC is also significant, since its different services (television, radio, online) and different audiences (UK and global) are generated by different parts of the organisation.

That said, the BBC is the market leader in each platform where it has a news presence, and this brings with it specific responsibilities and requires a certain degree of oversight to which we will return in the final section of the report.

Measuring a range of factors

If in considering plurality what we really want to measure is the actual degree of influence any given individual or organisation has on public opinion or the political agenda, then in our view, in a converging media market it is inevitable that a range of factors will need to be taken into account, including:

- financial strength
- share of overall consumption of news media (however it is measured)
- consumer reactions to what they are reading, viewing or hearing – including qualitative assessments, such as Ofcom's 'share of references'.

A system of weighting will need to be applied that recognises, for example, that broadcast news services, however popular, are licensed and required to comply with high standards of due accuracy and due impartiality that are not imposed on newspapers or online outlets. As such, the ability of the owner of a broadcast news service to influence opinion or the political agenda is more limited (though, as Ofcom has identified, not negligible) than that of an opinionated news source, whether delivered in print or online (or both).

Weighting (as with the Axel Springer/ProSiebenSAT.1 case in Germany) would also need to account for the different amounts of time people spend with individual pieces of news content and also their capacity to access the same content elsewhere, which might suggest that online news content should be weighted more lightly than print, for example.

5 In Ofcom's cross-media audience research (Ofcom 2010) a 'reference' is defined as 'a news brand/title that is cited by a consumer as a source of regular (i.e. at least once a week for all sources, except for weekly newspapers and magazines where it is defined as at least once a month) UK or international news or current affairs for them'. 'Share of reference' is 'calculated as the aggregated number of references for each media provider, expressed as a proportion of all references'.

Factoring in economic viability

Ofcom also recognises the centrality of questions about the ongoing viability of news media: ‘the desire to ensure that no organisation has too high a share of consumption may be in some circumstances conflict with the requirement for commercial sustainability.’ (Ofcom 2012c). As we have seen, the market for print news publications is shrinking, online content has yet to generate compensating revenues, and the production of news and current affairs – investigative journalism in general – is a by and large a subsidised activity. In the case of the BBC, the subsidy is in the form of substantial proportion of a compulsory licence fee. For commercial broadcasters news production is supported by entertainment content that generates higher advertising revenues.

In the News Corp/Sky case, principal among the undertakings being proposed as part of the merger was that Sky News be spun off as an independent publicly limited company. However, it was recognised that certain measures would need to be taken to support the viability of the news service, including a 10-year carriage contract on the Sky platform and seven-year brand licensing agreement.

The economic challenges facing the newspaper industry have already been discussed in some detail. The suggestion, therefore, that having a plurality of media owners must always take priority over the economic risk to individual news outlets clearly draws on a rather narrow sense of where the public interest lies.

Who makes the judgements?

Flexibility, along with a detailed understanding of the dynamics of a changing media market is essential in making assessments both of the public interest and matters of plurality. It may never be an exact science, resolvable simply by the application of complex metrics. This means a human being – or a group of human beings – has to make the assessments. Up to now, a secretary of state has been given this final, decision-making power. But recent events have called this arrangement into question. Secretaries of state have shown themselves to be either too fearful to exercise discretion themselves and so have been completely reliant upon the regulator’s view, or too inclined to a particular view and prone to override or bypass the regulatory process.

There is a strong case, therefore, for reviewing the powers granted to secretaries of state under the Enterprise Act 2002, and for looking towards a new system for adjudicating on plurality issues within the media. Such a system should work on the basis of objective data and formulae, but still have the capacity for discretion in relation to, for example, the economic viability of news operations.

5. CHALLENGES FOR POLICYMAKERS

In the second half of this report we explore options for a new approach to media policy and regulation.

For a number of years before the Leveson inquiry began, the laws and structures around UK media regulation were passing their sell-by-date. The hearings of the inquiry have exposed how flawed the system of press regulation has become. At the same time the inadequacies of the framework for assessing and protecting plurality in UK news media have been exposed, particularly in the light of converging media technologies. Both require a fundamental overhaul.

Technological convergence and changing consumer behaviour are making the old platform distinctions between print, broadcast and online content both meaningless and unhelpful in regulatory terms and for consumers. For the industry too, if some traditional media are disadvantaged in regulatory terms against new competition online, then this will simply compound the economic pressures they face.

As a consequence, the UK needs to move toward a system of regulation that is effectively platform-neutral, both for maintaining standards in media content and for the assessment and protection of plurality.

In particular:

- Users need to have a better idea of what to expect by way of standards, and have more straightforward routes to complain and seek redress.
- Independent regulation – involving but not dominated by the industry – should be the norm, but it should operate within a framework of codes and standards that are consistent across media platforms.
- Independent regulation should be underpinned by statutory powers, but these should be ‘backstop powers’ only invoked when they are needed.
- In media plurality assessments, the current confusion of authorities and responsibilities needs to be settled. It should involve a single regulator, free of political interference.

These premises are fleshed out in the following sections, in which the basic principles and more operational aspects of a new approach are outlined in more detail. But before turning to the future, we need to look at some of the objections raised to the establishment of a new, platform-neutral approach and how they might be confronted.

Objections

‘You can’t regulate content on the internet’

Two arguments are often put forward in response to suggestions that content delivered over the internet should be subject to specific regulation on anything like the same level as more traditional media.

First, it is argued that the internet is global: individuals and organisations will simply move (themselves or their servers) to operate out of countries that apply the lightest regulation. Within the EU, this is questionable, since the regulatory provisions of directives such as AVMS, the E-Commerce directive and the emerging Data Protection directive apply in all member states. Jurisdictional powers also apply, for example under article 3 of the AVMS directive, to address concerns about operators setting up in one member state in order to benefit from a lighter regulatory regime while targeting their services at another member state (AVMS 2010b).

Wider international agreements on such matters as copyright protection also apply. Nevertheless, it is possible that the operator of a news website in the UK which objected, for example, to the extension to online services of the codes that apply to print newspapers could relocate its service outside of the UK and its jurisdiction. This has of course been the case previously with other media technologies, notably in radio and satellite broadcasting. Eventually these services have moved on-shore and chosen to work within rather than outside the UK regulatory framework.

There should always be incentives to encourage participation with a reasonable regulatory framework and any new approach to platform-neutral regulation will need to recognise this. So for example, the system should not be too heavy-handed, and it should have exceptions which apply to smaller operators.

A recent, major review in Australia into the media and communications policy framework there by the Convergence Review Committee addressed this point. Within its broader proposals for a new converged regulatory system, the review recommended that a minimum size threshold (based on both revenue measures and number of users) should apply to prevent smaller organisations from excessive regulatory burdens (DBCDE 2012). In the UK, in the context of the Leveson inquiry, the Media Standards Trust has proposed that a threshold (based on the Companies Act definition of a small business) be applied to future regulation of news publishing to prevent the system capturing individual bloggers and potentially stifling the development new sources of online news (Leveson 2012c).

Nevertheless, even organisations that fall below an agreed threshold could be encouraged (rather than required) to participate in the new regime, assuming there were advantages to doing so. They could benefit, for example from the aura of trust and approval that comes from being part of a system that guarantees certain standards. In the case of news regulation other incentives could be built in to encourage participation, such as enhanced protections in legal proceedings on matters such as defamation (as has been proposed to the Leveson inquiry by Hugh Tomlinson QC – Leveson 2012d) or additional support for the professional development of journalists.

The second argument advanced by those opposed to further regulation of the internet is that alongside the jurisdictional objection, there is a technological one. The thrust of this argument is that there is no point trying to enforce specific standards in online content (and on content distributors) since it will always be possible to find a technical way around them. This objection has been raised frequently with regard to software protections for copyright on digital content distributed over the internet. Of course it is always likely that any system for regulation will have gaps, and determined individuals will find ways around the rules. But that is no argument for dispensing with rules altogether. If regulations act to uphold standards to the benefit of most people, most of the time, then this is surely better than not having the rules in the first place.

Politicians have already moved away from the notion that the online space either shouldn't or can't be subject to any content regulation, over and above the normal laws of the land. AVMS and the regulation of on-demand content have shown that attempts can be made to apply at least a minimum set of standards to content that is distributed over the internet, as long as that content conforms to the description of 'television-like'. In the UK the system set up to regulate on-demand programme services is coming under strain and facing pressures it is struggling to respond to. As we will argue in chapter 7, this should also be part of a new approach.

‘Self-regulation is the only system compatible with press freedom’

A second set of objections to the development of a more coherent and platform-neutral approach to media regulation comes from those who argue that opinionated content is different, should be governed by the basic principles of free expression, and should be dealt with *sui generis*: kept free of any kind of statutory framework or underpinning. Self-regulation of the press is the most obvious case of this, though the same arguments could easily be extended to providers of opinionated news and comment services online. The failures of the PCC provide the clearest examples of the limitations inherent in this approach. Since the second Calcutt report in 1993, the suggestion that press regulation should be put on more of a statutory footing has hung like the sword of Damocles over the heads of newspaper editors and proprietors.

A number of arguments have been presented to the Leveson inquiry as to why statutory underpinning for a system of independent press regulation would be inimical to press freedom. In his appearance before the inquiry, Lord Hunt, the current chair of the PCC, said that, ‘It would be, for many of my colleagues in parliament, a wonderful moment if they were given the opportunity to move amendments, to debate a bill regulating the press, and I just do not know what would emerge the other side’ (Leveson 2012e). In short, parliament cannot be trusted not to amend legislation, even if it is introduced with the best of intentions.

Others, such as David Newell, president of the Newspaper Society, have drawn attention to the very real difficulty of determining which organisations and types of publications would be covered by a new regulatory regime. As Newell puts it, ‘The proponents of a statutory regime have failed to address the fundamental issue. Can such a line be drawn on a rational, sustainable, fair and workable basis which does not impact fundamentally on freedom of expression and the freedom to publish?’ (Press Gazette 2012).

Self-regulation certainly reduces the risk of politicians deciding (over and above the general laws of the land) what it is and isn’t acceptable to say in freely-produced news publications. It supports an environment in which journalists and editors feel able to hold parliament and the government to account without fear of statutory reprisals.

Nevertheless, there are a number of fundamental weaknesses in the current system which have been identified in the past (not least by the Calcutt commission) and, in the light of the Leveson inquiry, cannot be ignored. These include the inability of a purely self-regulatory system to compel participation by qualifying organisations. The absence of statutory support also makes the operation of binding procedures for arbitration more difficult and limits the effectiveness of sanctions for breaches of agreed codes of conduct.

The press itself is not uniformly opposed to the use of legislation to support aspects of a new system for regulation. For some, at least, the degree to which a new approach to press regulation can be empowered by statutory force is a matter of practice rather than principle. Alan Rusbridger, editor-in-chief of the *Guardian*, identified in his testimony to Leveson some scope for statutory recognition for the new system to ‘protect its integrity’ and statutory mechanisms to support new powers for the regulator with regard to, for example, alternative dispute resolution (Rusbridger 2012). Under the editorship of Lionel Barber, the *Financial Times* has recognised, through its leader column that, ‘It may well be that some sort of statutory underpinning will be necessary. So long as the regulatory body itself is genuinely independent, this should be workable.’ (FT 2012).

The general public would seem to agree. In the survey into public attitudes on media regulation conducted for this report, 62 per cent of respondents said they thought the press should be regulated through a 'legally established body', with less than one in five preferring a continuation of self-regulation.

As to the argument that parliament may seek to over-egg the pudding should a new statute be introduced, this is surely a risk in other contexts as well. If we expect parliament and the government to legislate properly in other areas, then why should they not be able to in the case the press regulation?

Newell's objection that it is difficult to draw a line between qualifying and non-qualifying publications for the purposes of regulation is genuinely problematic. Penalising some publications with a more restrictive regulatory regime than others could put them at a competitive disadvantage. And given the economic challenges facing the newspaper industry, this is a real concern. One response to this may be, as discussed above, to establish a size threshold to ensure that the new regime only applies to organisations which really can have a material influence on the formation of public opinion and the political agenda. As well as giving the press more room to manoeuvre in the delivery of new services.

'Applying consistent standards to general media content will be bureaucratic and unworkable'

Many countries across Europe and globally have developed systems for classifying content on television that are more sophisticated than the UK's pre- and post-watershed guidelines. Some are also extending those systems to apply to content distributed online, as we have seen for example in France. That is not to say that the 9 pm watershed has not been an effective regulatory tool; it certainly passes the tests of being straightforward and easily understandable. However, in a world of electronic programme guides that run back through a week's programming, time-shifting and on-demand television, the 9 pm watershed will no longer be effective.

The recent *Convergence Review* in Australia came to the conclusion, following its detailed examination of developments in the cross-media and cross-platform content markets, that a new system was needed, with classification obligations 'applying to media content including: publications, films and computer games; online and mobile content; and broadcast and subscription television content' (DBCDE 2012).

It could be argued that the sheer volume of content available online and on broadcast channels in the UK is one of the barriers to the development of a similarly consistent, cross-platform system of content classification here. It is true that it would not be feasible (or desirable) to develop a system like that operated by the British Board of Film Classification, whereby all content for theatrical release or release on DVD is examined in advance of distribution and certified independently.

A critical feature of the Australian review's recommendation is the role to be played by the industry in developing a consistent system for platform-neutral content classification. The proposed new scheme in Australia is designed to 'introduce additional elements of co-regulation into the classification system'. Most content would in the future be classified by 'authorised industry classifiers', subject to regulatory oversight and review. As the *Convergence Review* identifies, this would allow for a more efficient system of classification in a new media environment 'characterised by vast volumes of content'. The proposed scheme also provides for the development and operation of industry

classification codes, which would include ‘details on the application of classification markings, display requirements for restricted content, reasonable steps for restricting access and complaints handling’.

A new system in the UK could follow something like this approach. It could be producer- or broadcaster-led and policed, but not pre-judged by an independent regulator as now. Producers and broadcasters could agree a code of practice and system for programme ratings that is clearly comprehensible to the public. Preventing any new system becoming more of a burden on one part of the media industries than another is clearly important. The role of the regulator will be to help to facilitate agreement and operate, as now, reactively in response to public concern when the programme makers and/or the broadcasters get it wrong.

In press regulation, the distinction between print news publishing and online news publishing has disappeared. The same standards should clearly apply to both, with the only proviso being the operation of a threshold to prevent smaller operators and individual bloggers being brought into the regulated space, unless they choose to be. The regulation of advertising already takes a cross-platform approach.

‘A converged market requires less, not more, regulation to enable UK companies to grow’

Lifting regulatory burdens from industry has been an article of faith for most recent governments. Any imposition of regulation needs, and has needed, to be fully justified.

To take a recent example, in 2011 the government relaxed the ownership restrictions around local media. This made sense given the alternative was likely to be the loss of local news services altogether, leaving a local monopoly for the BBC. In this case, lifting regulation was the pragmatic approach, taking account of the commercial viability of media, even if it resulted in consolidation in some cases.

Equally it is potentially damaging to try to extract too many commitments from licensed media as a price for being awarded the licence. Local radio licences, for example, are subject to rigid format controls, which many licensees have long complained are a burden and not economic for them.

Commercial public service broadcasters, such as ITV and Channel 5, are required to fulfil a number of public service obligations in return for the privileged use of broadcast spectrum and access to the public service transmission network. Through this, they gain access to 98.5 per cent of the UK’s population, which is greater than would be possible using the existing commercial networks. In return broadcasters are required to provide, for example, news services at certain times and of particular duration, commission a substantial proportion of programming from UK and independent producers and follow tighter limits on advertising than apply to purely commercial channels.

Over the years, the overall level of obligations has been reduced. For example, the quotas for religious, arts and children’s programming on ITV have been relaxed. As digital switchover has progressed, the value of exclusive access to UK homes via public service networks has diminished. So effectively, as the value of the regulatory asset awarded with a licence to broadcast has fallen, the obligations – which often represent an opportunity cost to the broadcasters – have been reduced accordingly. Some obligations, such as those requiring a high proportion of UK production, remain in place largely because they align with the commercial incentives of the broadcaster. It clearly makes no sense and is

not sustainable to overload commercial channels with obligations that are disproportionate to the advantages they get from public service status or access to spectrum they have been granted.

Regulation needs to be proportionate, transparent, straightforward and practical. But it has to work for the benefit of consumers as well as the industry.

In the case of the PCC, this has clearly not been the case, as evidence to the Leveson inquiry has made abundantly clear. The introduction of a new system for the printed press is an opportunity to update the UK's regulatory framework more generally to take account of the transformative effects of media convergence. If it has a sufficiently light touch and works with media players, then it can be more responsive to technological change. It can also avoid too much of a regulatory gulf opening up between new and old media. And if it has sufficient powers of compulsion and effective sanctions – even if these are held in reserve – then it will go further to meet public expectations than, as the polling conducted for this report shows, media regulation does now.

‘Attempts to measure cross-media influence are too complex, it would be best to leave it to competition law and the competition authorities’

The UK competition authorities have a pretty good record of dealing with media mergers. But as Lord Puttnam and others identified during the passage of the Communications Act 2003, the particular provisions of competition law and the Enterprise Act can only take us so far. And a proper assessment of plurality within the media industries is not necessarily achieved by a static, snapshot analysis of the economics of the market at any given moment in time.

Competition cases in cross-media markets are notoriously difficult and a case-by-case approach is not always sufficient to take account of the general dynamics of the market or broader public interest. For example, in 2007, when reporting on the Sky/ITV case, the Competition Commission made a working assumption that News Corp's 39 per cent ownership of Sky gave it ‘material influence’ over the satellite broadcaster (Competition Commission 2007). It was difficult therefore in 2010, looking at News Corp's prospective purchase of the remaining 60 per cent of the company to say (on competition grounds alone) that its level of influence over Sky's operations would be dramatically increased. Only in its assessment on plurality grounds was Ofcom able to take a different view.

When the European Commission cleared the News Corp/Sky merger on competition grounds in 2010, it said that even in markets where one company already had a particularly strong position – as, for example with Sky's exclusive deals for premium movie rights with the major Hollywood studios – the transaction would ‘do little to worsen the market situation that exists already today’ (Europa Online 2010). This was not exactly a ringing endorsement of the status quo.

If plurality is really a concern about the capacity of an individual or organisation to exercise a dominant influence over public opinion or the political agenda, then it cannot be measured on economic grounds alone. And although alternative measures are even more complex – such as consumption or impact measures – they nevertheless help us get to a more complete picture of the potential impact of major shifts in the power balance within media markets.

A dual approach, focusing on both competition and plurality, is common in developed liberal economies, and often different regulatory authorities are given specific roles in

relation to each part, for example the Federal Communications Commission and the Federal Trade Commission in the US (Baker 2010) or the German Federal Cartel Office (Bundeskartellamt) and the KEK.

‘The time has come to let parents decide for themselves what their children can watch and put the nanny state behind us’

Undoubtedly parents have to take ever greater responsibility today for the media their children have access to. Ten years ago, most homes in the UK still had access to only five television channels (Ofcom 2004) and only 40 per cent of homes had internet access – and it was pretty slow, with only 6 per cent connected via broadband (Ofcom 2002).

Today digital multichannel television is near universal, more than 80 per cent of homes have access to broadband and more than half have at least three internet-enabled devices in the home (Ofcom 2012a). All of these devices offer video content; and many of them offer unlimited access to a global superstore of online content from any number of regulated and unregulated sources, free and paid for. So inevitably parents will have to take greater care to ensure they are aware of what content their children are consuming – either by design or accident – with such a variety of media sources available to them.

But the burden of responsibility should not be left to parents alone. Broadcasters, internet service providers and content aggregators (such as YouTube) are all making greater efforts to offer parents active choices in how they control access in their homes to media content. This is partly consumer driven, partly a response to public and political concern, and partly a commercial choice to brand services as family friendly.

The expansion of internet enabled devices is likely to grow – coming soon not just to a television set but to a fridge door, a bathroom mirror or a pair of Google goggles near you. As such, this shared responsibility, on both parents and content and service providers must develop in a more open and mature way. The role of government should be to help both parties, by creating a regulatory framework that is as coherent and accessible as possible; that provides consumers and citizens with the information they need to make informed choices for themselves and their families; and that provides ready avenues for complaint and redress when necessary.

6. PRINCIPLES FOR A NEW APPROACH

The UK is in a golden age in its supply and consumption of media and information. Traditional media such as newspapers, broadcast television and radio are still producing strong content and are valued by audiences. At the same time producers and consumers are enjoying the fruits of the new media revolution.

It should be the constant aim of regulations and regulatory structures to, at the very least, preserve the industry's current strengths, and better still to facilitate ways to help it develop and grow. At the same time, where public trust is declining, economic pressures are piling up and changes in technology are making the old rules ineffective, a new approach is needed.

Both the former culture secretary, Jeremy Hunt, and Ofcom's chief executive, Ed Richards, have recognised this and raised the possibility of establishing a set of core principles and aims that might underpin a new approach to regulation, which spans diverse media platforms and content.

We began this report by asking what the foundations for a new regulatory system should be, to help preserve and strengthen the diversity and vibrancy of UK media. Having looked at the impact of new technologies, economic shifts and trends in consumer behaviour, we suggest the following principles should be taken as a guide to help the development of this new system:

- regulatory structures should be clear, coherent and support platform neutrality
- regulation should be sufficient to maintain standards and avoid concentrations of undue power but be as 'light touch' as possible so as to avoid regulatory suffocation
- regulation should enable media companies to adapt to and take advantage of the opportunities afforded by media convergence, including access to new sources of revenue
- competition and plurality assessments within media markets should prevent organisations or individuals gaining undue dominance and influence but should also take account of economic viability, particularly in relation to news content
- in a converged media world, trusted and valued public service operators (including the BBC, ITV and Channel 4) are at a premium: they should be afforded greater long-term certainty over their roles and funding
- regulation should be free from political interference, sufficiently independent of industry to command public confidence, and binding on media within its scope.

In the following section we examine each of these principles in more detail, and then go on to answer any questions raised in our recommendations in chapter 7.

Regulatory structures should be clear, coherent and support platform neutrality

The starting point for a new approach should be that consumers need to know what standards to expect (regardless of delivery platform) and where to go for redress. Media companies need to deal with as few different regulatory bodies as possible.

Regulation of all forms of media should therefore:

- have clear codes of practice and editorial guidelines
- have clear, consistent and well-promoted opportunities for consumer redress
- involve industry expertise to make sure the codes are workable, and also to promote industry buy-in

- have sufficient authority to monitor consistency and help ensure enforcement and compliance.

The current, fragmented system of content regulation does not achieve this. The various powers and responsibilities over convergent content exercised by the PCC, ATVOD, the Advertising Standards Authority, Ofcom, the Internet Watch Foundation and the BBC Trust have grown incrementally over time into a confusing and overlapping muddle. The system needs to be simplified urgently to the benefit of both consumers and the industry.

The convergence of all forms of media onto the same screens and devices presents an opportunity to do this, with the adoption of a platform-neutral approach in recognition of the fact that traditional distinctions between media platforms are disappearing rapidly. The focus of regulation should shift away from the platforms themselves and towards the different categories of content increasingly available on all platforms.

Regulation should be sufficient to maintain standards and avoid concentrations of undue power but be as ‘light touch’ as possible so as to avoid regulatory suffocation

Avoiding regulatory suffocation means not placing burdens on media businesses that are disproportionate to the desired outcomes, or that go so far against the grain of an organisation’s business model as to be economically unviable. It also means not placing regulations on one area of the media that systematically disadvantage it against other areas. So, for example, there is a real danger that the development of a new structure and rules for regulating the printed press will undermine its capacity to compete effectively with burgeoning online services. Working towards platform-neutral regulation for UK news services is an important response to this threat.

In some cases the system needs more teeth in order to help rebuild public confidence. But it should strive wherever possible to be more inclusive of the industry, not less. Greater clarity and consistency will be necessary as media consumption patterns shift increasingly towards a multi-platform world where content arrives indiscriminately by broadcast or broadband, and is increasingly disintermediated from conventional platforms and channels.

A system of regulation that operates with a lighter touch need not be less able to enforce standards. Models such as the Advertising Standards Authority, which works with the industry, but has recourse to a statutory backstop regulator, have been shown to be both effective and adaptable to meet the challenges of the multi-platform world.

The implementation of the AVMS directive in the UK has been achieved through the establishment of a body (ATVOD) which involves the industry and is at arm’s length from the statutory regulator, but again with recourse to backstop powers if required. Enabling the industry to retain an appropriate degree of ‘ownership’ over the regulatory system – for example through drafting codes of practice – is a way of providing reassurance that the arrangements will remain flexible and have a light touch, while at the same assuring consumers that the necessary standards will be upheld.

We believe this model has more general applications for regulation of content and standards in a platform-neutral media environment.

Regulation should enable media companies to adapt to and take advantage of the opportunities afforded by media convergence, including access to new sources of revenue

Moving into the digital space requires all traditional content producers to look at new business models. The content may remain broadly the same: print, audio and video – either individually or in combination. But the capacity to earn revenue around that content – either by selling it directly or through selling advertising around or within it – has changed dramatically.

For some industries, there are opportunities to help counterbalance the risks. In book publishing, for example, the rise of e-books raises the potential of reducing the physical costs of production and increasing profitability. In newspapers, the story is more complicated as the physical costs of production are not such a high proportion of overall costs (compared to the costs of employing large numbers of professional journalists, for example) so the switch to digital production may not have a such a direct impact on the bottom line. Additionally, many newspaper companies remain committed (for the time being at least) to the free distribution of content online.

Newspaper companies moving online, like television companies, need to be able to exploit new sources of revenue. The regulatory structure should aim to aid the growth of media content companies in this space, not inhibit it. As media convergence progresses it is inevitable that the current unlicensed news publishers, including the traditional newspaper groups, will wish to develop increasingly video-rich, web-based services. These are popular with customers and, since online delivery facilitates new and more direct relationships with those customers, can be valuable to advertisers. The ability to offer targeted advertising packages around video content may provide an additional source of revenue for what are currently print-based operations.

The problem is that if newspaper groups develop their online content in this way, the content could increasingly come to resemble broadcast news, which raises questions about whether impartiality rules should apply. We are clear that where these services are delivered on demand and online, they should not. Rather the regulatory framework should allow for the development of new video news services, expressing an array of opinions which are distinct from licensed, impartial services, but in line with the principle of platform-neutral regulation. Such an approach would, we think, best preserve the UK's excellent mix of both licensed and unlicensed news services, though key to achieving this will be expanding public understanding of the difference between the two in a converged environment.

Competition and plurality assessments within media markets should prevent organisations or individuals gaining undue dominance and influence but should also take account of economic viability, particularly in relation to news media

This is a difficult balance for regulators, but must be part of the equation in making recommendations in media plurality cases. The expertise and market knowledge of the regulator is a crucial factor in making an accurate assessment of where a threat to economic viability is real, rather than just an argument presented in favour of consolidation.

As we saw in the 2010 News Corp/Sky case, sustaining the ongoing viability of the Sky News service was an important part of the consideration of the undertakings offered in the context of the proposals to make Sky News a separate business entity. In another

recent example, Ofcom, drew upon economic viability arguments in making the case for loosening the restrictions on cross-media consolidation in local media markets. Following its 2009 *Media Ownership Rules Review*, Ofcom recommended ‘removing the local radio service ownership rules’ in order to ‘reduce regulation on an industry facing difficult market conditions and increase the likelihood that stations continue to be viable.’ The report also recommended ‘liberalising the local cross-media ownership rules’ which would ‘increase the flexibility of local media to respond to market pressures’ (Ofcom 2009b).

However, some local plurality concerns remained, which took precedence and prevented Ofcom from recommending the removal of local cross-media rules altogether. These included the restriction on owning all three of: local newspapers with a local market share of 50 per cent and above, a local radio station, and a regional Channel 3 licence.

Looking to the future, even if regulation does move towards a system of plurality analysis based on a number of different metrics for media consumption and impact (as we believe it should), we will still need to give due weight to questions of economic viability in deciding how to respond to proposed changes in the media marketplace.

In a converged media world, trusted and valued public service operators (including the BBC, ITV and Channel 4) are at a premium: they should be afforded greater long-term certainty over their roles and funding.

As we have seen, broadcast television news remains the most popular and trusted form of news consumption. The BBC in particular is popular on all the platforms it serves. ITV’s evening weekday news bulletins count their audiences in millions, and its ‘nations and regions’ news broadcasts are highly valued in many parts of the country. Although there is less of it overall today, current affairs broadcasting on the BBC, ITV and Channel 4 continues to support in-depth investigative journalism and to challenge authorities, corporations and individuals on matters of public interest.

Commercial news services, such as Sky News, also contribute significantly to the overall news ecology and help to drive up standards through competition to the public service broadcasters. However, the key distinction between public service channels and purely commercial services is that the former is *guaranteed* under licence and service obligations. News production is very expensive and is always at risk of being sacrificed in favour of profitable programming. So the maintenance of these guaranteed services will be critical to upholding a balance in news and current affairs as convergence progresses. Consumers are unlikely to abandon the need for trusted and impartial voices in the media, and we need to ensure that the future of these services is made more, not less secure. This is particularly true in a context where newspapers may be expanding their video news output on websites without having to meet licence obligations on matters such as impartiality.

The periodic review and renewal of the BBC charter and agreement has become a confused and opaque process. The link between renewal of the charter (every 10 years) and agreeing the level of the licence fee has been broken, leading to greater uncertainty and vulnerability to the political pressures of the day. In 2010, the process leading to the agreement on licence fee uprating and service obligations was concluded in a great rush in the context of the wider government spending review. The absence of due process and a total lack of transparency made it impossible for licence fee payers or the media industries more widely to make any contribution to the process. The impression was given

that the BBC belonged not to licence fee payers, but to the government – as though it were a department of state.

A new, more open and participative process needs to be agreed before the next round of negotiations start in approximately 2015, which we discuss further in the recommendations below.

ITV and Channel 4 would also benefit from having some of the uncertainty over their respective futures removed. ITV's current licence to be the Channel 3 broadcaster expires in 2014. At the time of writing, no clear indication has been given as to the duration of the next licence settlement, nor to the process by which it will be awarded. For Channel 4, the main area of uncertainty has long been over its status as a public corporation and a periodic debate about whether or not it should be privatised. The inclusion and then withdrawal of Channel 4 from the Public Bodies Bill 2010, for example, caused unnecessary uncertainty with the listing of the channel in a schedule alongside other public organisations whose status could be changed significantly with only minimal parliamentary scrutiny. This mistake was rectified as the bill passed through parliament, but the fact that Channel 4 was even thought of as a candidate for inclusion in the first place suggests that its value as an independent public corporation delivering public purposes is not sufficiently recognised.

Regulation should be free from political interference, sufficiently independent of industry to command public confidence, and binding on media within its scope

A regulatory system which is more coherent, consistent and accessible to both citizens and the media industries is required to deliver platform-neutral regulation. It needs simplifying and the number of different bodies with unique, though potentially overlapping, responsibilities should be reduced. In order to improve flexibility and effectiveness a presumption should be made in favour of managing the day-to-day operation of the system by independent regulatory bodies, working with the industry, but separate from it.

It clearly needs to have sufficient authority to prevent organisations simply walking away from regulation if they don't like it. It needs to be open and transparent, visible to the public and able to manage the process of complaint handling and arbitration without consumers having to resort to the courts (except as a final resort). The presumption should be that the system itself is capable of providing redress where it is needed.

In particular the regulatory regime needs to be kept as free as possible from political interference. This is not only critical to guarantee freedom of expression for the news media, but also to prevent developments in the media markets (including matters relevant to plurality and competition) from being overly vulnerable to the vicissitudes of the political process. In the next chapter we will examine how this should be done.

7. RECOMMENDATIONS

If regulation of media content is to become platform-neutral, then the current confusion of regulatory standards and regulatory bodies is not fit for purpose. A new approach is needed that offers the media industry greater certainty about what is expected of it, regardless of how it chooses to distribute its content and in what formats. A new approach is also needed to provide consumers with clear signposting around the content they are accessing (on whatever platform); clear and consistent systems for controlling access (such as parental controls); and a well-publicised and accessible route for complaint if their expectations around content standards are not being met.

The strong case for developing a more coherent regulatory system in the light of convergence should not, however, mean that identical rules have to apply across all content. There are distinctions in place today between different sources of content which it will be important to preserve, at least for as long as that is technologically and economically feasible. In particular the treatment of licensed broadcast news services and unlicensed news publishing needs to be kept distinct even if the look and feel of the content they produce continues to converge in the online space. This is to preserve freedom of expression in the press and also to maintain the impartiality of broadcast news.

Developing a platform-neutral approach to competition and plurality regulation in the media is strongly in line with current trends among policymakers and regulators in open societies across the world. Websites compete with newspapers and, increasingly, television channels for audiences and for revenues. A measurement of influence over public opinion and the political agenda must take account of an organisation's presence in print, online and on-screen. However tempting it might be for the sake of ease of measurement, taking a segmented approach no longer represents a realistic view of how consumers are using media.

Structures for content regulation

The establishment of a converged regulator for the media and communications sector has been one of the successes of the Communications Act 2003. The regulatory framework now in place has the capacity to evolve to accommodate the impact of the convergence of media more generally. A radical restructuring of the regulatory architecture should not be necessary, but moving towards a system of platform-neutral regulation will require some changes. Some simplification of the current regulatory maze would undoubtedly be helpful to the industry and to consumers alike. Looking ahead, the challenges of a changing and converging media landscape will make greater use of industry involvement and independent regulation in a number of areas both necessary and desirable.

Ofcom will clearly continue to play a central role. But for the future we should look more towards the systems it has already established for independent co-regulation for certain types of media, such as advertising and on-demand content. One advantage of this approach is that it reduces Ofcom's day-to-day responsibilities and keeps it in reserve to perform, for example, an appellate function, deal with hard cases or examine codes of practice in draft.

It also enables the industry to take a more active role in its own regulation. This works successfully in the case of the Advertising Standards Authority, keeping costs down and reducing the need for heavy-handed intervention by a statutory regulator. This

lighter-touch, industry-involved approach was also employed in the establishment of ATVOD, to police video-on-demand content. As a new body it is too early to judge ATVOD's effectiveness, but Ofcom has had to be noticeably active in handling appeals, particularly from organisations challenging ATVOD's jurisdiction over their content with Ofcom overturning ATVOD's judgement in a number of high-profile cases.⁶ It is interesting to note that many in the print media, while publicly opposing any recourse to statutory regulation, have been keen to enlist Ofcom's support in disputes with ATVOD over the classification of video content on their websites.

Platform-neutral regulation will require a move away from sector or format specific regulation towards an approach that is more content led. It should focus on identifying the distinguishing features of different categories of media content and deciding, as a consequence, whether they should continue to be regulated separately. For example:

- Commercial content such as advertising should continue to be regulated separately from editorial content, not least because of the utility of closely involving the advertising industry in its system of regulation.
- Licensed news and current affairs content currently distributed on broadcast networks should be distinguished (particularly by its obligation to be impartial) from general news publishing, even if the latter involves substantial television-like elements.
- General non-news content will increasingly be delivered by a combination of broadcast and broadband channels, some scheduled, some on-demand, and some both. As the distinctions continue to break down, a more coherent system of regulation and content classification needs to be found.

We recommend, as an evolution of the current regulatory structure, a new approach in which separate, independent regulatory bodies are established to focus on particular categories of content, regardless of the platform on which it is distributed.

So, for example, the current responsibilities of the PCC and ATVOD (as the latter relates to online news video) should be merged into a single commission or authority dealing with news publishing on all platforms. Similarly, the current functions of ATVOD for dealing with general (non-news) content should be merged with the functions of the Ofcom Content Board, currently focused on broadcast networks. This is an argument for placing all regulation of general, non-news content, into a single body operating within a co-regulatory framework.

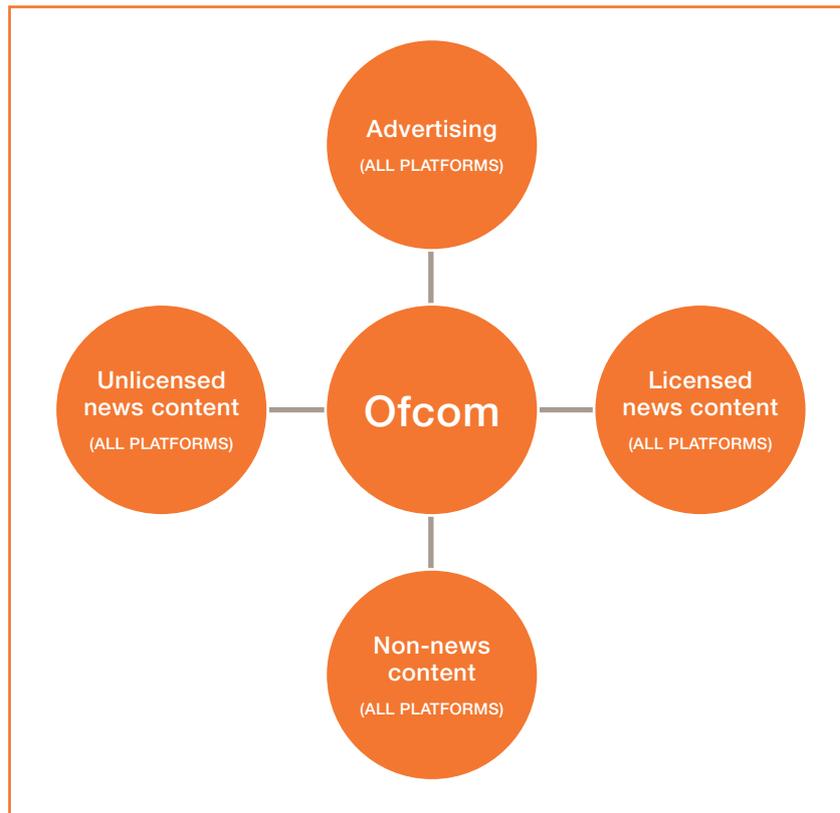
We will also argue that there is a strong case for putting regulation on matters of impartiality and accuracy at the BBC onto the same footing as all other areas of broadcast content regulation. Currently Ofcom and the BBC have overlapping responsibilities in all areas *apart from* impartiality and accuracy. This should change so that joint jurisdiction extends to these aspects of content regulation as well, overseen by the BBC Trust and the new body dealing with licensed news regulation.

The role of Ofcom will evolve in this context. Day-to-day functions would be delegated to the independent authorities, which would be the principal regulators. Ofcom would then be free to perform more of a backstop and oversight role for each them, buttressed by statutory powers.

6 Recent appeals by BBC Worldwide, Sky television and the *Sun* newspaper were all upheld by Ofcom against ATVOD's initial determination regarding its jurisdiction over the service or each organisation's liability for the regulated content.

At its simplest, a new regulatory framework for all media formats and delivery systems could look like this:

Figure 1
A blueprint for a new regulatory framework



Such a system could provide a considerable improvement in the consistency of regulation for different categories and sources of content across all platforms. For example, editorial codes and general provisions around the protection of privacy and the public interest should be brought more closely into harmony, especially since there is already considerable similarity between the provisions of the BBC Editorial Guidelines, the Ofcom Broadcasting Code and the current PCC Editors' Code.

Creating a common standard for privacy across all media – monitored and policed by independent regulators, but with Ofcom providing backstop authority – could relieve some pressure on the courts, and prevent parliament being constantly challenged over the absence of further statutory protection.

Each of the independent bodies would take on the day-to-day regulatory functions for relevant content categories, with both enhanced industry and lay and consumer involvement. The role for Ofcom would be as backstop regulator in each case, with specific powers to be determined, but which could include:

- assisting with the development and approval of common codes of practice and standards across media platforms
- providing a forum for adjudication and appeals
- an option for referral of exceptionally hard cases

- providing statutory backup to independent bodies to employ sanctions, including fines, and compel participation of qualifying organisations
- potentially to have step-in rights in extreme cases
- monitoring the effectiveness of the independent bodies to help prevent ‘regulatory capture’ by the sectors concerned.

At arm’s length from Ofcom, each of four independent regulators would focus on the specific media content within its remit, on a platform-neutral basis. More detailed discussion of their possible functions is set out below.

Licensed news services (all platforms)

News content that is currently produced or distributed by licensed broadcasters, and is subject to specific regulatory obligations, should continue to be treated as such. However, there is a case for bringing all aspects of this regulation under one roof and applying a consistent set of standards to them all.

This could be accomplished by separating out broadcast news and current affairs from the rest of the Ofcom Content Board’s regulatory functions and establishing a new independent authority at arm’s length from Ofcom. The new body would be charged with overseeing the maintenance of, for example, standards of accuracy and impartiality, as well as the fairness and privacy provisions of the Broadcasting Code as they apply to news and current affairs.

One reason for approaching it in this way is to address the outstanding anomaly in the regulation of impartiality and accuracy in content on the BBC. As we have seen, the BBC Trust and Ofcom have overlapping jurisdiction with regard to most content regulation (including complaints assessments and adjudication) and Ofcom has the power to impose sanctions, including fines, on the BBC. The exception to this is on matters of impartiality and accuracy where, as the recent report of the House of Lords Select Committee on Communications (LSCC) put it, the BBC remains ‘its own judge and jury in these matters’ (LSCC 2011).

The LSCC set out proposals for improving the complaints process and reducing the confusion for consumers of having two regulators handling the same complaints. It recommended that ‘final adjudication of complaints should be external to the BBC.’ The committee also set out a number of options for handling complaints over matters of accuracy and impartiality in BBC content. One of the options – which was supported by a majority, though not all members of the committee – was ‘for matters of impartiality and accuracy on the BBC [to be] considered by Ofcom in the same way as all other BBC standards issues’. The committee also suggested a compromise option whereby a separate adjudicator is appointed (possibly by the BBC Trust) within Ofcom to address these matters as they arise in relation to BBC content.

There are some differences between the BBC Editorial Guidelines and the Ofcom Broadcasting Code, and it remains sensible for the BBC Trust (as the guardian of licence fee payers’ interests) to continue to exercise broader responsibilities than would be appropriate (or practical) for an external regulator. So, for example, since the BBC impartiality provisions range more widely than just news and current affairs, the BBC Trust should continue to look across the broadcaster’s output to ensure appropriate balance is being upheld. The BBC Trust’s recent, major review of the BBC’s science output is a good case study in how this responsibility can be effectively discharged.

As the LSCC described, the current provisions for handling complaints about BBC output are unsatisfactory. Dual responsibility continues to produce confusion. A principle that applies in other areas of content regulation is ‘broadcaster first’, in other words, that complaints should in the first instance be directed at the content distributor, with recourse available to an external regulator if the response of the distributor is unsatisfactory. As a general principle this should apply to the BBC Trust, with external regulation being available if the response received from the BBC Trust is considered inadequate.

Under these new arrangements, the BBC Trust would continue to regulate the whole of the BBC’s output. But in future the public would have recourse to external scrutiny, including in areas where question marks were raised about the balance in that output. We believe this would help protect public confidence in the BBC, without undermining its independence. As with all future regulation, it should be platform-neutral, just as the current BBC Editorial Guidelines extend beyond its broadcast output to its online services.

The News Publishing Authority

Just as it is important to ensure the continuation of impartial broadcast news and current affairs, so it is vital to protect the position of *unlicensed* news publishers to be free to express opinions and hold public authorities and personalities to account. The deliberations of the Leveson inquiry call not just for a replacement for the PCC, but have opened up the possibility of converging press regulation into a single body covering all non-licensed news publishers whether their content is delivered in print or online, as text, video or audio.

We recommend that a new independent body be established, perhaps called the News Publishing Authority (NPA) to regulate unlicensed news media on a platform-neutral basis.

Consistent with the principle of enabling media companies to adapt to a convergent marketplace, regulatory structures should not inhibit potential new revenue growth. In a separate submission to the Leveson inquiry, the Department for Culture Media and Sport (DCMS) identified the current regulatory distinction between ATVOD and the PCC as a potential inhibitor of the development of more video-rich content on newspaper websites, which might provide new revenue streams (Hunt 2012).

The DCMS has identified the possibility of a successor regulator for news publishing combining the responsibilities of the PCC with those of ATVOD with regard to online news content, which increasingly includes video. The purpose of this would be to avoid the regulatory ‘step-up’ that print publishers currently risk in developing a more television-like news offer on their websites. The DCMS leaves as an open question what kind of relationship (if any) a newly merged ‘news regulator’ would have with Ofcom, currently the backstop regulator for ATVOD. We agree with taking this platform-neutral approach, which could benefit the industry by creating greater flexibility, bridge a potential regulatory gap and also benefit consumers with a clearer route for complaints.

The role for Ofcom as a backstop regulator for (even part of) the news publishing industry is clearly one of the most contentious possibilities in this package. As discussed in chapter 5 there are several arguments made against having some kind of statutory underpinning for the regulation of news publishing – including that parliament will embellish the legislation; that once the Rubicon is crossed, further statutory restrictions will be added over time; or that specifying which organisations should qualify for inclusion will be too difficult (and potentially discriminatory). All are, however, in our view, either surmountable or outweighed by the potential advantages.

If the case for having a backstop authority is accepted, then since Ofcom already exists and performs similar functions in relation to other independent regulatory bodies, why look to invent a duplicate just for the press?

Ofcom may need some additional expertise, but the key point of delegating regulation to an arm's length body is that Ofcom should have only a minimal role in regulating on a day-to-day basis, reserving its powers and authority for the most difficult cases where the principal regulator required its support, or for appeals.

All of the day-to-day regulatory functions for unlicensed news publishing, on all platforms, could be performed by the independent News Publishing Authority, funded by the industry and with an appropriate mix of lay and industry involvement. Much of the current work of the PCC would need to be continued by the new regulator, including dealing with complaints, offering prepublication advice to complainants, giving guidance to editors, and helping with the training and development of journalists. On the last of these, it is crucial that the new regulator pays particular attention to the development of guidance and training on good journalistic practice and ethics.

In this context, the role of Ofcom as the backstop regulator could be reserved for:

- adding its seal of approval and providing robust backing to the development of a revised code of conduct for news publishers, agreed by the industry and the new independent regulator
- supporting a more coherent approach – for example, by assisting in the development of a common understanding on the handling of privacy and public interest issues, given the common ground that exists in the editorial codes between broadcasting and general news publishing
- requiring membership of the new regulatory system, if necessary through the use of its statutory powers
- supporting arbitration and adjudication services, which will clearly be an important feature of the new system, not least if they provide an incentive to companies to participate with the prospect of acting as mitigation in court proceedings
- providing statutory authority, as needed, for the application of sanctions, such as fines, and potentially hearing appeals.

Participation in the new regulatory structure for news publishing would need to be compulsory for all qualifying organisations. Some incentives may operate to encourage participation – such as enhanced protections in legal proceedings on matters such as defamation, as discussed in chapter 5. But as the MP Kenneth Clarke has pointed out in his evidence to the Leveson inquiry, these measures are not without their difficulties – especially the risk of creating an unlevel playing field in defamation cases – which do not apply to the media alone (Clarke 2012). Incentives alone are not enough to ensure the full participation of all our most influential news organisations.

Finding a way to compel news publishers to participate in the system is clearly one of the most difficult questions facing Lord Justice Leveson. Looking again at the models that have been developed with Ofcom as the statutory backstop authority supporting arm's-length regulators, a system of notification (similar to that operated by ATVOD in relation to providers of on-demand programme services) could be used to require news publishers to sign up to the new regulator and provide necessary funding for its operations.

In the case of ATVOD and on-demand programme services, Ofcom has backstop powers to impose sanctions (including fines) on qualifying organisations which do not comply with or refuse to support the regulatory framework. In deciding what is a ‘qualifying organisation’, a minimum size threshold should be applied so a new regulator working in both the print and online space would not capture individual blogs and community services. This is sensible and also aligns with the recommendations of the *Convergence Review* in Australia.

Consensus among contributors to the Leveson inquiry would appear to support the new independent regulator having increased powers to mount investigations, mediate and adjudicate over complaints, impose sanctions, and insist on prominent apologies and corrections for inaccurate stories. In response to the survey conducted by YouGov for this report, there was very strong support for the principle that newspapers should print apologies or corrections of equal prominence – 84 per cent of respondents supported requiring a newspaper to print a correction and/or an apology on the same page number as the original story if it reported something incorrectly, even if the original story was on the front page. The power to require this important means of redress should be part of the new regulator’s armoury.

In short, the News Publishing Authority would be a fully-fledged regulator rather than simply a complaints body, authorised to operate on platform-neutral basis, working with the industry, but independent both of the news industry and the government. Alongside having recourse to Ofcom’s statutory authority as required, this approach could provide the foundations for a new era in regulation for the press and online news publishers.

General (non-news) content regulation

Making a distinction between licensed news content and other news publishing is particularly important to protect the ability of the latter to freely express opinions and takes sides in debates. Unless we go down the route of insisting on impartial newspapers, or allowing broadcast news to become opinionated, then applying separate regulatory scrutiny to reflect this fundamental difference in content remains important.

In non-news content, while different standards do apply to broadcast and online video content and there are separate regulatory processes policed by Ofcom and ATVOD (with overlapping jurisdiction for the BBC), these different approaches are based on distinctions in *delivery method*, rather than fundamental differences in the type of content. In the case of a public service broadcaster like ITV, the same content can be regulated by different bodies depending on whether it is delivered live on ITV1 or on demand via the ITV Player.

Convergence brings time-shifting and search functionality to any television with an internet connection. Outside the framework of scheduled television it is an easy jump to on-demand television and movie services, and beyond that to the open internet. Viewers are presented with an array of options for controlling access to this content in the home: age-related tick boxes, pin numbers, and various signposts attached to content indicating the need for parental guidance. What the system lacks is consistency.

In line with the principle that regulation should be clear, coherent and support platform neutrality, content standards for non-news services should be harmonised and overseen by a single independent regulatory organisation. This should build on the co-regulatory approach developed between Ofcom and ATVOD and take on the relevant responsibilities of the Ofcom Content Board. In the case of the BBC, where there is overlapping

jurisdiction, external regulation, for example of complaints, should be held back for appeals and should follow the principle of ‘broadcaster first’.

Content delivered on demand need not be subject to the same gold standard in regulatory terms that applies to broadcast content, but the process should be more of a continuum between the two: consistent and clearly identified for consumers in terms of what they are getting.

As a first step the industry and the new body should work together to develop a system of broadcaster- and producer-led content classification across all platforms, similar to the age-related labels already familiar to consumers on films and DVDs. Where the content is for distribution through licensed broadcasters, the approach would be reasonably straightforward with the broadcaster responsible for compliance, becoming responsible for the classification. This would help overcome any confusion where content is distributed both on a broadcast schedule and via on demand or catch up services. If it is classified as, say, inappropriate for children under the age of 12 then this would be reflected appropriately in its time-slot on a broadcast schedule, clearly badged on the screen and identified in listings and other programme information. If necessary the content would also be pin-protected for catch-up and on-demand services.

Where the editorial responsibility lies for some on-demand services is today becoming an increasingly grey area, depending on the degree to which the company providing the service selects and organises the content. Where on-demand service providers act more like broadcast channels in selecting and organising content, they are deemed editorially responsible under ATVOD rules. But increasingly we may need to look towards producers to take responsibility for the classification their content, with the regulator providing support and guidance as required. The regulator can also monitor classifications and assess them reactively in response to complaints.

As well as helping industry to develop the system for classifying content, the new regulator will need to work with channels and device manufacturers to develop a more consistent system for, amongst other things, applying parental controls and setting pin numbers. Clarity and simplicity for parents and citizens would be its guiding principle.

Again Ofcom would provide necessary backstop powers, including hearing appeals on jurisdictional issues in relation to on-demand services, as now.

Advertising regulation

Since the Advertising Standards Authority already operates on a platform-neutral basis and maintains a co-regulatory relationship with Ofcom. We are not recommending any specific changes to this arrangement.

Public service content

While not specifically the focus of this report, the centrality of public service content, particularly on television, and the institutions that provide it will continue to play a major role in all aspects of the development of converged media services.

In news, current affairs, factual and entertainment programming, the investments made by public service broadcasters help to sustain a multi-billion pound production sector in the UK. Broadcast television news remains the most popular and trusted form of news consumption. In technology too, innovations such as iPlayer, digital terrestrial television

and now connected television are driving forward the creation of new platforms and new popular services.

We must be careful to ensure that these core trusted services are not undermined as convergence challenges their funding models, just as it does for all traditional media. Affording greater long-term certainty over the roles and funding for the public service broadcasters will therefore be an important principle in the next stage development of UK media policy. We make a number of recommendations in this regard.

The next BBC charter and agreement is due to begin in 2017. At that point the BBC should be offered the certainty of a 10-year charter and agreement and the licence fee level should be clearly set for the same duration. The debate about the level of the licence fee will likely begin a year or two earlier. It needs to be a much more open and transparent process, with the BBC clearly setting out what it wants to do over the charter period and costing the programme accordingly. Parliament and licence fee payers need to be more openly consulted and involved in the process too, with licence fee payers being asked more searching questions than the standard ‘willingness to pay’ research designed to underpin a BBC bid. At the point at which ministers eventually decide on the appropriate level of the licence fee, it should be made clear to all stakeholders what levels of service the BBC will be able to provide on the basis of a secure income.

The licences for both ITV and Channel 4 expire in 2014. In the case of ITV this needs to be resolved quickly in favour of a long licence settlement which will give it the security to continue to invest in technology and production in order to grow its business and serve the public. ITN News is particularly dependent on its service contract with ITV, so greater certainty for the broadcaster will help provide ITN with better security for making its own investments in growing its news products.

As discussed in chapter 6, Channel 4 has had the threat of privatisation waved in front of its face many times over the past 10 years. This is a recipe for destabilisation and exacerbates the element of risk in Channel 4’s long-term investments. Channel 4’s position as a publicly-owned, statutory corporation should be reaffirmed strongly in the context of the award of a new licence, with some recognition that it will not in future be treated like just another quango.

We began by discussing the strengths of the UK media story, with its unique diversity and vibrancy. Our public service broadcasters have been at the centre of that story throughout all the disruptive technological changes of past decades. Providing them now with greater security and confidence to go on investing for the future, and in the future, would send a very clear signal about the kind of standards and quality policymakers want to see upheld in the even more complex and demanding media world ahead.

Plurality and competition regulation

We envisage an enhanced role for Ofcom in relation to media plurality and competition regulation. Ofcom has presented detailed analysis to the DCMS and the Leveson inquiry on the challenges presented in assessing plurality within a converged media marketplace and has opened up a detailed discussion on the metrics for measuring the scale and impact of cross-media organisations.

As will be clear from discussions elsewhere in this report, we particularly agree with Ofcom on two issues: that plurality assessments should be limited to news media and that – based on a platform-neutral approach – online news media must be included.

Following Ofcom's report and in the context of ongoing consultations on future communications legislation, further work is needed and important decisions have to be made in a number of key areas. These include:

- the role for and scope of periodic plurality assessments
- whether fixed limits or thresholds should be set as limits on any one individual or company's overall media market share
- whether opinionated and impartial media should be treated differently based on their ability to influence public opinion and the political agenda
- what the future role of politicians should be in relation to media competition and plurality assessments.

We address each of these points below.

Plurality reviews

We endorse Ofcom's recommendation for open and transparent plurality reviews to be held every four or five years.

Importantly, these should be less like Ofcom's previous media ownership reviews and more like those undertaken by the KEK in Germany which describe in detail the current pattern of media ownership and assess the level of influence over public opinion of any given individual or media organisation. For example, the 2010 report on developments in media concentration in Germany examined new research on the capacity of online news services to impact on public opinion as well as detailing movements in single and cross-media markets which had occurred since its previous report (KEK 2010).

The effect of these reports is to provide the industry, consumers and policymakers with an ongoing analysis of how the market is changing and where potential concentrations of ownership and influence are developing. It also notes changes in domestic and European law which might impact on its plurality assessments.

The UK would benefit from a similar, periodic, analysis of the changes taking place in our media marketplace. These would provide a basis for assessing the impact on plurality of organic changes in the media marketplace and the capacity of an individual or organisation to affect a level of influence over public opinion and the political agenda. They would also allow Ofcom and policymakers to determine the effects of more dramatic events such as the exit from the market of a particular media player, which would not in itself currently trigger any assessment of changes in plurality, even though it may have a material effect.

Thresholds and limits

In making these periodic assessments, an important question is whether thresholds or fixed limits should be established and, if they were shown by the review to have been exceeded by any individual or organisation, what action would be taken? Should a threshold be set, as in Germany of, say, 25 or 30 per cent of market share, based on a range of measures with different weights depending on, for example, the type of news media, the nature of its consumption, and its general availability? Do these provide, taken together, a good overall proxy for 'influence'?

In *Measuring media plurality*, Ofcom favours an approach where the assessment of market share (and potentially dominant influence over public opinion) is based on a 'basket of measures'. Ofcom has indicated it doesn't support absolute limits, though it does suggest

that an assessment based on this set of metrics might indicate a level of cross-media market share at which plurality concerns arise (Ofcom 2012c).

The difficulty is that we can't know precisely what the impact of setting an overall share limit of, say, 25 per cent (a standard threshold for competition purposes) within a cross-media market would be until we know what priority and weighting is being given to the various measures used.

For example, in the News Corp/Sky case, Ofcom's 2010 public interest report awarded the prospective combined entity with market shares of 42 per cent, 16 per cent or 17 per cent, depending on whether the measurement used was (respectively) audience reach, share of minutes of news consumption or share of references. This was looking at the retail market for news. Taking the wholesale market (since Sky supplies news services to commercial radio and, at the time, supplied news for Channel 5) the respective figures were 51 per cent, 23.7 per cent and 22 per cent.

These findings were enough in the specific case of the proposed News Corp/Sky merger to indicate to Ofcom in 2010 that there was a potential plurality concern and to trigger a further review. But the process was not definitive and, as we now know, the merger was eventually cleared on plurality grounds.

It may be possible that an overall index measuring 'share of influence' can be reached following Ofcom's route – the German experience would certainly suggest that it is possible – and from that to determine when the limit has been reached and the overall level of influence exceeds what is in the best interests of a sufficiently plural media market.

A system that sets an overall cap would be less risky if there was an open and transparent system for periodic plurality reviews – so that the public, parliament and the media organisations themselves could keep track of the impact of movements in the media marketplace. It would also be important that sufficient weight was attached to the requirement to take account of the viability of media within any plurality assessment. Under these circumstances, the establishment of a clear threshold need not necessarily penalise success, force uneconomic divestments on individual media organisations or risk the loss of valued publications and news services.

Further discussion about potential remedies, in the event that a threshold is breached, is also needed. This should include discussion of the use of behavioural remedies – particularly to address the level of scepticism about the genuine value of measures such as the establishment of independent editorial boards for newspapers and other news services.

The first and crucial step in this process is for Ofcom to establish an early baseline year and make a full assessment using its basket of plurality measures. From that, policymakers will be able to assess what levels of influence different media organisations exercise, and agree a cap on overall 'share of influence'. In this regard the conventional threshold of 25 per cent (in competition terms) provides a useful yardstick, but how effective that will be in guaranteeing sufficient plurality will need to be assessed in the light of Ofcom's first full plurality review.

Opinionated versus impartial news media

One important caution in relation to this approach is the need to distinguish between media that by its nature seeks to exercise an influence over public opinion and media that is required by law to exercise 'due impartiality'. If what concerns us most is the risk of a

dominant influence arising over public opinion than those organisations that are regulated for impartiality are in a different category.

Competition and plurality measures – even those that treat the market for news media as one converged whole – should recognise that services such as BBC or ITV news (whether broadcast or online) are accountable in other ways and should be weighted accordingly in market measures. Notwithstanding Ofcom’s comments in the News Corp/Sky case regarding the influence of ownership on broadcast news output, impartial news services on any platform should be weighted as having somewhat less influence overall on public opinion than opinionated ones.

Enhanced powers and accountability for Ofcom

While Ofcom may, under by this new approach, be relieved of some day-to-day content regulation, its powers and responsibilities as a backstop regulator will be extended, notably in the direction of news publishing.

There is also a strong case for amending present legislation to make Ofcom the principal authority for adjudicating on competition issues within the media. The powers granted to secretaries of state under the Enterprise Act 2002 should surely now be reviewed, given the crises that have befallen recent secretaries of state in their attempts to perform a quasi-judicial role in relation to media plurality and the public interest.

However, if the secretary of state is no longer to play an active part, then a new system of greater accountability for the regulator will be needed. Ofcom’s powers will be significantly enhanced and it is important that the regulator and, potentially, some of its decisions, be opened up to more regular public scrutiny. For example, parliament (perhaps through the select committees) should be given a greater role in screening the regulator’s recommendations in draft on any media plurality issues that arise and, at least, have the power to ask the regulator to think again, if not the power of veto.

CONCLUSION

It is common currency among interested politicians and across the media industries that policy directed towards the sector should, as far as is possible, be ‘future-proof’. Legislation that requires revision with each new technological innovation is not worth the paper it’s printed on (or the screen it’s read on).

The danger now is that, in all likelihood, the transformative effects of convergence between broadcast and broadband technologies are only just beginning to be felt, and the wider and longer-term implications barely understood. This report doesn’t claim to pass the ‘future-proofing’ test in all its particulars. But it is an attempt to describe a new regulatory approach that has the capacity to adapt as both technology changes and the media industries adapt in response.

This report’s recommendations present both challenges and opportunities to many existing media organisations:

- for the print media it means accepting that the time has come for a system of mandatory regulation with at least some form of statutory backstop, but with it should come an entitlement to develop new services, particularly in video on demand, without facing new regulatory hurdles, and no requirement for impartiality
- for the BBC it means a further element of external regulation, but combined with greater security of status and income that some of its commercial rivals will not enjoy
- for television channels and on-demand video service providers it means facing the challenge of classifying programming in a way that is consistent and easily understandable for consumers, but done in a way that is industry-led according to a co-regulatory model
- for Ofcom it means relinquishing some day-to-day responsibility over content regulation, but gaining wider backstop powers for the media industries as a whole; it also brings new powers in relation to media plurality, counterbalanced with greater accountability to parliament.

The Leveson inquiry provides an opportunity, following the widespread recognition that the PCC system has failed, to look afresh at media regulation more generally and the place of regulation of the printed press within it.

The arguments in this report are predicated on the assumption that regulation of the printed media can no longer be divorced from the wider regime for media regulation overall, not least because an approach that focuses just on the printed press risks further hampering the sector’s capacity to compete with new services being delivered online.

If any good is to come of the awful events exposed in the of summer of 2011, then perhaps it is that the demand for reform of press regulation leads to a fresh look at the way politics and the media in the UK interrelate, and how our regulatory system overall mediates between them. We hope this report and particularly its principles and recommendations will provide a constructive contribution to that debate.

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