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Broadcasting and the *Communications Bill*

Bill 6 2002-03

The convergence of communications technologies led to the establishment of Ofcom by the *Office of Communications Act 2002*. Under the present Bill, Ofcom will assume the functions (updated) of five existing regulators: Office of Telecommunications, Independent Television Commission, Broadcasting Standards Commission, Radio Authority and the Radiocommunications Agency.

This paper focuses on those parts of the Bill dealing with the regulation of broadcasting, particularly in relation to access, content, and the role of public service broadcasters like the BBC. Media ownership will be touched upon only in so far as it impacts on these.

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Summary of main points

The pace of broadcasting's development over recent years has accelerated with a proliferation of channels and new, computer-based, technologies. The *Communications Bill* represents a response to the emergence of what has been termed a "teleputer" culture, characterised by a convergence of telecommunications, computing and broadcasting media.

This paper begins with a brief overview of the white paper, *A New Future for Communications* (Cm 5010, December 2000), a main policy proposal being the establishment of a single regulator to govern across the communications sector.

Ofcom was established by the *Office of Communications Act 2002*, with an initial remit to prepare for regulatory duties a Communications Bill would subsequently impose. Library research paper 02/03, *The Office of Communications Bill [HL]* provides background. As indicated by the homepage of the Ofcom website (<http://www.ofcom.gov.uk/>) this body plans, subject to parliamentary approval, to replace the existing regulators: Office of Telecommunications, Radio Authority, Broadcasting Standards Commission, Independent Television Commission, and the Radiocommunications Agency.

In May 2002, the Department of Trade and Industry and the Department for Culture, Media and Sport together published a *Draft Communications Bill* (Cm 5508). This has been subjected to public and parliamentary scrutiny, most notably by the Joint Committee on the Draft Communications Bill, chaired by Lord Puttnam. The Committee's report, *Draft Communications Bill* (HL 169 HC 876 2001-02, 25 July 2002) contained 148 recommendations, 120 of which have found their way (at least in part) into the *Communications Bill*, Bill 6 2002-02.

Published on 20 November 2002, the Bill was referred to several times during a House of Lords debate on the Queen's Speech later that day. This paper uses that debate as a handle on some of the key broadcasting issues the Bill is likely to raise. These include the availability of public service channels (BBC, ITV, Channel 4, S4C, Channel 5) on different digital platforms (such as satellite) and media ownership matters. The latter is only touched upon in this paper, most particularly in the context of the ITC's *Review of the UK programme supply market*, published on 26 November.

The relationship of the BBC to Ofcom seems set to occupy, what many in the industry will feel, a disproportionate amount of parliamentary time. In conjunction with a revised BBC Agreement, the Communications Bill would give Ofcom a measure of oversight, of disputed effectiveness, including the power to fine the Corporation for a breach of some of its more quantifiable public service obligations.

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I The broadcasting future

The outstanding feature of radiotelephony is that it enables a single voice to reach innumerable ears. It can carry speech and melody into every home. It can bring isolated towns and villages into close touch with the great centres of population, and thereby alleviate one of the severest drawbacks to rural life. Already many thousands of people in all parts of the country are enjoying these facilities and responding in greater or less degree to these influences. It may be that broadcasting holds social and political possibilities as great as any technical attainment of our generation.

When, in 1923, a government committee made the above observations on the "future development of radiotelephonic broadcasting",¹ it went on to elucidate the range of possibilities:

New applications of broadcasting will arise from time to time in many directions. Already, in addition to entertainment programmes, matter such as the following is broadcast, and the public is likely to demand further matter of this sort in the future :-

- (a) Announcements of events of universal public interest.
- (b) Important statements by the Government.
- (c) Debates in Parliament and other public bodies.
- (d) Speeches, lectures and sermons.
- (e) Information of value to the commercial public.
- (f) Weather forecasts.
- (g) Sporting intelligence.
- (h) Police warnings.

Other uses will appear as time goes on.

To the "wireless receiving sets" referred to by the Committee, we can now add television and, significantly, computers. And the passive listeners avidly absorbing important statements by the Government, while still with us, have now been joined by active participants, interacting with television and computer programmes on a variety of platforms.

¹ *The Broadcasting Committee: Report*, Cmd 1951, August 1923

Computers manipulate digital electrical signals. Superimposing these on a broadcast radio wave enables transmission of information (sound, video) considerably more efficiently than in conventional (analogue) methods. So more channels and/or better quality pictures can be received. The extra bandwidth (information carrying capacity) also allows for interactive features to be made available.² The most basic permits the choice of different camera angles in a football match, even following an individual player around the pitch. A higher level of interactivity is “two way TV”, whereby the viewer can, for example, compete in a popular game show along with the contestants on the screen.³

Thus compared to its conventional, analogue, alternative, digital television makes much more efficient use of available radio frequencies, allowing either more channels or releasing frequencies for other applications (e.g. mobile phones, wireless internet access). Making available the frequencies currently used, inefficiently, by conventional analogue broadcasts, will necessitate switching off those signals:

Mr. Randall: To ask the Secretary of State for Culture, Media and Sport what the proposed date is for the total analogue switch off.

Dr. Howells: The Government are committed to ensuring that terrestrial analogue broadcasting signals are maintained until: everyone who can currently get the main public service broadcasting channels in analogue form can receive them on digital systems; switching to digital is an affordable option for the vast majority of people; as a target indicator of affordability, 95 per cent. of consumers have access to digital equipment. Our target is to complete digital switchover by 2010.⁴

Details of the Government’s Digital Television Action Plan are available on a dedicated website.⁵ On 26 September 2002, the European Parliament adopted an EU action plan for the successful introduction of digital television in Europe.

Another form of interactivity is video on demand. In 1993 the Independent Television Commission ruled that this does not constitute broadcasting,⁶ though it allows a wide range of videos, from complete TV series to a recent news bulletin, to be sent to a user’s TV – down an adapted (digital subscriber) telephone line or a cable. Though the growth of this industry is limited by the rate at which high speed connections of sufficient quality can be established (broadband roll-out in the jargon) it is one technology⁷ that offers what many viewers want: the ability to choose what they watch and when they watch it.⁸

² “Digital entertainment”, *Scientific American*, November 2000

³ IBC UK Conferences Limited, *TV Broadcasting On-line*, 16 February 2001

⁴ HC Deb 16 January 2002 c 340W

⁵ <http://www.digitaltelevision.gov.uk/>

⁶ Trade and Industry Committee, *Optical Fibre Networks*, HC 285-I 1993-94 p 15

⁷ personal video recorders are another

⁸ “Power in your hand”, *Economist*, 13 April 2002

One can also use computers with broadband internet connections to watch videos and “webcasts”. Neither appear to be accommodated by conventional legal definitions of broadcasting, for example section 6(1) of the *Copyright, Designs and Patents Act 1988* (chapter 48):

In this Part a “broadcast” means a transmission by wireless telegraphy of visual images, sounds or other information which—

- (a) is capable of being lawfully received by members of the public, or
- (b) is transmitted for presentation to members of the public;

and references to broadcasting shall be construed accordingly.

In any case, it would take more than modifications to definitions of broadcasting to regulate a medium as international and flexible as the internet. The impracticality of its regulation will likely contribute to the internet’s growing importance as a medium.

While media have always existed to convey information passively, developments⁹ in “artificial intelligence” are introducing even higher levels of interactivity.¹⁰ That is certainly beyond the horizon of proposed legislation, some way into the future. A future in which, maybe, media makes the message.

⁹ <http://www.ai.mit.edu/projects/infolab/>

¹⁰ Jonathan Drori, “W(h)ither broadcasting? The future of interactive media”, *British Association Festival of Science*, 8 September 2000

II Communications white paper

On 12 December 2000, the Government published *A New Future for Communications* (Cm 5010), the joint work of two departments: Trade and Industry and Culture, Media and Sport. The white paper, and supporting documents are available online.¹¹ In a statement accompanying publication, the then Culture Secretary (Chris Smith) talked of the convergence in communications technologies that was driving many of the proposals:

We are living at a time of revolution in the ways in which we communicate. The worlds of telephony, broadcasting, mobile communications and the internet are changing and converging with astonishing speed. Meanwhile, our current regulatory framework was designed for a different age. We need to update the framework of regulation, and put in place a system that recognises the current fast-changing picture and can cope with the inevitability of change in years to come. The White Paper prepares us for that future, and will set up modern regulation for a modern world.¹²

The most obvious recognition of convergence came with the widely anticipated proposal to create a single communications regulator, Ofcom; this will replace five of the existing regulators including those dealing with economics (Ofel), content (Independent Television Commission, Broadcasting Standards Commission, Radio Authority) and radio spectrum allocations (Radiocommunications Agency).¹³ That Ofcom will report jointly to the departments of Trade and Industry and Culture, Media and Sport was described in a *Broadcast* editorial as a "fudge"; though there had been some speculation about the creation of a new government Department of Communications. This was suggested some time ago by the Culture, Media and Sport Select Committee in their report, *The Multi-Media Revolution*.¹⁴

Mr Smith identified three main objectives underpinning the policies:

...first, to ensure universal access to a choice of diverse services of the highest quality; secondly, to make the United Kingdom home to the most dynamic and competitive communications and media market in the world; and thirdly, to ensure that the interests of citizens and consumers are safeguarded.¹⁵

He went on to summarise the essential proposals; in addition to regulation, these cover access, choice, content and competition. The existing public service television channels, BBC1, BBC2, ITV, Channel 4/S4C and Channel 5, would continue to be free at the point of delivery; the white paper calls for them to be available on all platforms: satellite and

¹¹ <http://www.communicationswhitepaper.gov.uk/>

¹² HC Deb 12 December 2000 c 481

¹³ "Ofcom named as watchdog", *Broadcast*, 15 December 2000 p 2

¹⁴ HC 520 1997-98, 21 May 1998

¹⁵ HC Deb 12 December 2000 c 482

cable as well as via conventional terrestrial broadcasts. Channel 4 would remain in the public sector. Other communications services, such as universal internet access (by 2005), should be available at an affordable price, secured at least in part by the promotion of competition. Mr Smith also alluded to the importance of effecting the switchover from analogue to digital terrestrial broadcasts; the extra capacity and flexibility of the latter allow for a greater volume of content, as well as permitting hitherto passive viewers to interact with their TV. On regulation, Mr Smith said:

We propose a new three-tier approach to the regulation of broadcasting, to provide a more level playing field between different broadcasters depending on the extent of their public service remit.

In the first tier, all broadcasters will be subject to basic rules on minimum content standards, impartiality in news, provisions on the protection of minors and access for people with disabilities. We will require Ofcom to give due weight to the need for improvements in such access for people with disabilities. We also intend that Ofcom should act as a final backstop one-stop shop for complaints for all broadcasters.

The second and third tiers will apply to public service broadcasters. In the second, regulated by Ofcom, those obligations that are readily measurable will be included: independent and original programme production quotas; requirements for regional productions and programming; and the availability of news and current affairs in peak time. We shall amend the BBC's agreement to include such a formal requirement for the first time.

In the third tier--where the general public service provision of high-quality varied schedules will rest--we propose to rely primarily on transparent self-regulation, but with backstop powers in place in the event of failure. Each broadcaster within this tier will be required to make a statement of programme policy updated each year, and to report on subsequent success. Each broadcaster will of course have a distinctive remit, and the backstop power will rest with Ofcom in the case of the commercial broadcasters, and with the Secretary of State and Parliament in relation to the BBC.¹⁶

At the time the BBC felt it had been left "unscathed" by the white paper, the governors retaining their existing responsibilities, for example in respect of ensuring impartiality. However, Ofcom could get involved where viewers wished to take their complaints further.¹⁷ Inevitably, proposals on regulation were likely to attract critical comment. Thus Peter Preston, writing in the *Guardian*:

Be glumly clear. What we have here, unless we are extraordinarily vigilant, isn't an enabling mechanism for greater freedom. Precisely the reverse. Our new breed

¹⁶ HC Deb 12 December 2000 c 482-3

¹⁷ "Governors retain current remit", *Broadcast*, 15 December 2000

of regulators doesn't come fresh and innocent into the world. These men and women have their governmental marching orders...

...Now one agency - and one set of appointments - fixes almost everything in an area that isn't about gas or electricity but ideas, culture and the many shades of truth. Is it possible for such a construct to be "modern and intelligent"? Place long odds on the answer being "no". The broadcasters and net merchants look at the business equations and overlook where their freedoms lie: the newspaper editorialists, through the spectrum, seek a neat and tidy solution. Neither approach fits the bill.

The glory of the digital and net revolution is that, in the purest terms, it is a freedom of expression that Jack Straw [then Home Secretary] will never recognise. Such freedom, of its nature, is messy, bad alongside good, tawdry alongside triumphant. Can it, at heart, ever be regulated? Only messily in turn.¹⁸

Further criticism came from Peter Ainsworth, replying for the Opposition:

A pledge to reform the regulation of media and broadcasting was contained in the Labour party manifesto for the current Parliament; it is another pledge that will not be kept. Will the Secretary of State confirm that the planned legislative changes that he has announced today stand no chance of taking effect until 2002 at the earliest? The media and communications industries are moving fast; the Government are moving painfully slowly. Industry often complains that the Government try to do too much, but here we have an unusual example of the Government getting in the way by doing too little.

Progress toward today's announcement has been helped neither by an undignified turf war between the Department for Culture, Media and Sport and the Department of Trade and Industry nor by the confusion and incompetence that is the hallmark of Labour in office.

He cited as one example of the latter the removal of communications regulation from the *Utilities Bill*; now the *Utilities Act 2000*, this covers only the electricity and gas sectors. Mr Ainsworth did, however, welcome a number of the white paper's proposals, including the establishment of a single regulator "capable of taking a balanced view across converging media".¹⁹

For the Liberal Democrats, Norman Baker welcomed "a sensible and robust set of proposals".²⁰ However, he sought an "assurance that the probable formation of one ITV will not in any way reduce regional programming and regional production". The white paper expresses support for regional programming and the provision of community broadcasting, such as radio services for minority groups. Much comment on this has been

¹⁸ "We must keep a close eye on Chris Smith's big brother", *Guardian*, 18 December 2000

¹⁹ HC Deb 12 December 2000 c 485

²⁰ HC Deb 12 December 2000 c 488

provided by the Community Media Association.²¹ Chris Smith's statement had included a number of comments, relevant in this regard:

In the commercial sector, our view is that increased competition allows us to depend more on Competition Act 1998 powers rather than those specific to the sector, in order to secure diversity of ownership and competition in the relevant markets, such as advertising. We propose to replace the rule preventing anyone from holding two or more licences which attract 15 per cent. or more of the total TV audience share, and we propose to revoke the rule prohibiting single ownership of the two London ITV licences. We will consider changes to the points system for regulating radio ownership. We will also seek to boost the role of local community broadcasting in the digital environment, exploring the suggestion of an access fund for community radio, under the aegis of Ofcom.

²¹ <http://www.commedia.org.uk/index2.htm>

III Draft Communications Bill

A draft Communications Bill (Cm 5508-I 2001-02) was published by the Departments of Trade and Industry and Culture, Media and Sport on 7 May 2002. Initially, it comprised 259 clauses and 13 schedules. It subsequently grew to 278 clauses and 15 schedules with additional media ownership and “must carry” measures.²² From the outset, further revisions to the radio spectrum management provisions were anticipated, as the Government gave consideration to the radio spectrum management review,²³ commissioned by the DTI and Treasury, and conducted by Professor Martin Cave.

Published alongside the draft Bill were a set of explanatory notes²⁴ and a policy narrative,²⁵ the latter supplementing the December 2000 white paper, *A New Future for Communications* (Cm 5010).

The draft Bill aimed to provide a modern framework for the regulation, content as well as economic, of the broadcasting and telecommunications sectors. From the outset, the draft Bill's policy narrative sought to elucidate government thinking – including those provisions, such as media ownership, which had not at the time made the face of the Bill. A briefer statement appeared in a DTI press release on 7 May 2002:

The draft Bill would:

establish a single powerful regulator - the Office for Communications (OFCOM) - replacing the existing five regulators (the ITC, Radio Authority, OfTel, Broadcasting Standards Commission, Radiocommunications Agency);

apply a consistent scheme for regulating the public service broadcasters, with greater regulation for the BBC and more self-regulation for the others while keeping the core responsibilities of the BBC Governors, with additional oversight by OFCOM, but with back-stop powers resting with the Secretary of State for Culture, Media and Sport;

give OFCOM powers concurrent with the Office of Fair Trading to apply competition rules in the Communications Sector;

require OFCOM to establish and maintain a 'Content Board' that would ensure that the public's interest in the nature and quality of TV and radio programmes is strongly represented within OFCOM's structure;

remove the requirement for licensing of telecommunications systems, so removing about 400 licences, and replace it with a new regulatory regime for

²² http://www.communicationsbill.gov.uk/draft_communications_bill.htm

²³ <http://www.spectrumreview.radio.gov.uk/>

²⁴ *Draft Communications Bill: Explanatory Notes* Cm 5508-II, May 2002

²⁵ *The draft Communications Bill - The Policy* Cm 5508-III, May 2002

electronic communications networks, services and associated facilities in line with EC Directives; and

allow spectrum trading to secure more efficient use of the available radio spectrum.

Part 1 of the draft Bill covered the functions of the new broadcasting/telecommunications regulator, Ofcom, now²⁶ being set up as a consequence of a “paving” *Office of Communications Act 2002*.²⁷ Lord (David) Currie of Marylebone was appointed chairman in July 2002.²⁸

Announcing publication of the draft Bill, the Secretary of State for Culture, Media and Sport (Tessa Jowell) said:

The draft Bill is much more than a system for regulating the content of television and radio broadcasting. Telecommunications have become ever more important to our economy and to our society. By bringing together the functions of Ofcom and the Radiocommunications Agency with those of the Independent Television Commission, the Radio Authority and the Broadcasting Standards Commission, we will ensure that content, economics and technology are viewed as a piece, not as fragments.

The competition responsibilities for Ofcom are intended to deliver dynamic competitive markets in networks and infrastructure as well as in content. Our economy needs access to networks to be opened up. That means a regulator that is light-touch where possible, but powerful where necessary.²⁹

From some of the ensuing press coverage one might have thought that media ownership provisions dominated the draft Bill. Though the Government's proposals here were described in detail in the policy narrative, publication of the implementing clauses did not come until 31 May 2002, some three weeks after the main draft Bill. The delay was connected with a specific media ownership consultation exercise,³⁰ to supplement the earlier one triggered by the communications white paper.

The definition of public service broadcasting and the relationship of the BBC with Ofcom seem likely to define much parliamentary interest, as they did during passage of the *Office of Communications Bill*. One viewpoint is reflected in an early day motion 1309 2001-02, tabled by Tim Yeo:

²⁶ DCMS press release P/2002/589, *OFCOM Board Appointed*, 25 September 2002

²⁷ Further background appears in House of Commons Library Research Paper 02/02, *The Office of Communications Bill* [HL], 14 January 2002

²⁸ DCMS press release 155/02, *David Currie is appointed the new chair of Ofcom*, 25 July 2002

²⁹ HC Deb 7 May 2002 c 33

³⁰ http://www.culture.gov.uk/creative/tv_media.html (includes the consultation on media ownership, and a summary of responses)

That this House believes that the Office of Communications should be responsible for regulating the whole of the media and communications industries; that there is no special case to be made for the BBC to be wholly or partly excluded from Ofcom; and that the Government should end this anomaly and establish a level playing field by bringing the BBC fully within Ofcom's remit, so as to leave the BBC governors with an important role, similar to the non-executive directors of other broadcasting organisations with public service obligations.

In this context, it is relevant to note proposed changes to the BBC Agreement, aimed at bringing the BBC within the Ofcom framework. These changes include:

- Placing the BBC under an obligation to comply with specific programme standards codes issued by OFCOM;
- Placing the BBC under the same obligations to other public service broadcasters on matters such as independent and original productions, regional productions and programming and news in peak time;
- Committing the BBC to publishing annual statements of programme policy and to considering OFCOM's overview reports on public service broadcasting; and
- Committing the BBC to complying with requirements to broadcast apologies and corrections³¹

A Joint Committee (chair: Lord Puttnam) of both Houses spent some 12 weeks scrutinising the draft Bill, publishing its report³² at the end of July 2002. The Government response³³ followed in October. Both publications will be referred to regularly in this paper.

A major test will be the extent to which the proposed legislation is future-proofed, at a time when the boundaries between different communications technologies are becoming increasingly blurred. The draft Bill, for example, leaves the internet largely untouched – at a time when “broadcasting” via this medium seems set to increase.

³¹ DCMS press notice 110/02, *Tessa Jowell sets out proposals to bring BBC within Ofcom framework*, 31 May 2002

³² Joint Committee on the Draft Communications Bill, *Draft Communications Bill*, 25 July 2002, HC 876 HL 169 2001-02

³³ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646 October 2002

IV Communications Bill

A. Overview

The *Communications Bill*, Bill 6 2002-03 was published on 20 November 2002, following its first reading the day before.³⁴ An associated government press release identified the key principles of a Bill aimed at creating “the most dynamic and competitive communications industry in the world”:³⁵

- ensuring universal access to a choice of high quality services;
- deregulation to promote competitiveness and investment;
- self-regulation wherever appropriate, backed up by tough measures to protect plurality and diversity;
- ensuring that public service principles remain at the heart of British broadcasting.

The press release identified the Bill’s key proposals as follows:

- Transfer functions to a single powerful regulator - the Office of Communications (OFCOM) - replacing the existing five regulators (the Independent Television Commission, Radio Authority, Office of Telecommunications, Broadcasting Standards Commission, Radiocommunications Agency);
- introduce a new, more coherent structure for broadcasting regulation in the digital age, allowing greater freedom to public service broadcasters to regulate themselves.
- give OFCOM powers concurrent with the Office of Fair Trading to apply competition rules in the Communications Sector;
- require OFCOM to establish and maintain a 'Content Board' that would ensure that the public's interest in the nature and quality of TV and radio programmes is strongly represented within OFCOM's structure;
- establish a Consumer Panel to advise OFCOM and other people and bodies where appropriate, on matters, including ones of major policy, relating to electronic communications;

³⁴ HC Deb 19 November 2002 c 520

³⁵ DCMS (with DTI) press release 203/02, *Communications Bill published*, 20 November 2002

- remove the requirement for licensing of telecommunications systems, so removing about 400 licences, and replace it with a new regulatory regime for electronic communications networks, services and associated facilities in line with EC Directives;
- make provision to allow trading of radio spectrum, leading to its more efficient use;
- reform the rules on media ownership. There would be significant deregulation to promote competition and investment, but a few core rules would be retained to protect diversity and plurality.

Since the Bill was published in draft, several changes have occurred, a few of which were highlighted in the press release. Religious organisations would now be able to hold a digital sound programme service licence, i.e. to operate a (national or local) digital terrestrial radio station.³⁶ The Bill now confirms an earlier commitment to require Ofcom to establish and maintain offices in each of England, Scotland, Wales and Northern Ireland.³⁷

Another provision³⁸ is an order making power to ensure public service channels (BBC, ITV, Channel 4, Channel 5, S4C, public teletext) are made available on all platforms – terrestrial (“airwaves”), cable and satellite; a new “must-offer” clause is also provided for.³⁹ The latter may strengthen the hand of BSkyB in future negotiations with the public service broadcasters “because they are now obliged to negotiate with the company to offer their services on digital satellite.”⁴⁰ The charges levied by BSkyB on ITV (£17m a year) for access to the satellite platform remain a point of contention between the two sides. BSkyB point to their investment in establishing the necessary infrastructure,⁴¹ ITV to their effective subsidising of BSkyB’s “pay TV set-top-box giveaway”.⁴² Evidently referring to some additional “must carry” clauses⁴³ prepared after the draft Bill was published, the BBC have commented:

...we are very disappointed that even the modest provisions contained in the draft Bill for a must offer/must carry regime on digital satellite - which is the dominant digital platform - have been removed.⁴⁴

³⁶ Bill 6 2002-03, clause 335

³⁷ Bill 6 2002-03, clause 1

³⁸ Bill 6 2002-03, clause 60

³⁹ Bill 6 2002-03, clause 265

⁴⁰ “Broadcasters ‘must offer’ channels on digital satellite”, *New Media Markets*, 22 November 2002 p 3

⁴¹ “BSkyB under attack in ‘must carry’ row”, *Broadcast*, 22 November 2002 p 1

⁴² ITV, *Draft Communications Bill – ITV’s Response*, August 2002
<http://www.communicationsbill.gov.uk/responses/ITV%20final.doc>

⁴³ http://www.communicationsbill.gov.uk/pdf/additional_must_carry.pdf

⁴⁴ BBC press release, *BBC response to publication of Communications Bill*, 20 November 2002

The BBC and Channel 4 are each thought to pay around £5m a year for BSkyB's services. So far as cable is concerned, the Bill retains the present system whereby the cable operators must carry the public service channels which the broadcasters must in turn offer.

The Bill's explanatory notes include the following on "must-carry" in the context of the European Convention on Human Rights:

879. Clause 60 implements Article 31 of the Universal Service Directive, which permits Member States to impose reasonable "must-carry" obligations whose effect would be to require the carriage of certain broadcasting services on a network (e.g. a cable or satellite broadcasting system in the UK). Such general conditions could therefore engage rights under Article 1 of the First Protocol, which guarantees the right to the peaceful enjoyment of possessions. The Government consider that the public interest in the widespread accessibility of high quality public service broadcasting is sufficient to justify under the ECHR the power under clause 60 to impose must-carry obligations. In particular, the Bill allows for a corresponding obligation on the provider of a must-carry channel to offer it to the carrier (see clause 264) and power exists for the Secretary of State to make provision as to the terms on which services are carried, including payments by one side (broadcaster or carrier) to the other.⁴⁵

The Government had already announced further changes to the draft Bill, in response to the Joint Committee's recommendations. Ofcom would now,⁴⁶ by virtue of a new BBC Agreement, be able to fine the BBC for breach of (the quantifiable) tier one and tier two public service obligations. David Liddiment, ITV director of programmes, remained unimpressed:

Already one of the most chewed-over pieces of legislation, the bill now reflects months of consultation input, parliamentary scrutiny and public debate. Well, up to a point it does. Among dozens of changes of detail there are few real shifts in government thinking and no shift at all when it comes to the BBC's curiously aloof position in the new regulatory set-up. BBC governors will remain judge and jury of the corporation's activities, almost entirely outside the jurisdiction of new regulator Ofcom. This is the gaping hole in a good bill that the government appears determined not to close.⁴⁷

Another change highlighted in the government press release was the amending of proposals relating to the ownership of local radio,⁴⁸ "to ensure there are at least two commercial radio operators, in addition to the BBC, in every area with three or more

⁴⁵ Bill 6-EN

⁴⁶ Bill 6 2002-03, clause 193

⁴⁷ "What use are BBC governors?", *Guardian*, 25 November 2002

⁴⁸ Bill 6 2002-03, schedule 14 – this contains relevant order making powers

stations.”⁴⁹ Details of the radio ownership scheme are expected to appear in “a draft Order alongside rather than on the face of the Bill.”⁵⁰ That the Government is opting for a “two plus one” rather than the “three plus one” rule favoured by the Joint Committee, was alluded to by Maggie Brown in the *Guardian*:

And in accepting revised ownership rules for commercial radio this month, it [the Government] has opted for more concentration, not less, overruling advice from the soon-to-be-abolished radio authority. This means that in the commercial radio sector, licences in any one area can be owned by two players, plus the BBC. Currently, some 70 companies operate 240 licences across the UK. From 70 to two in one move is a massive change.⁵¹

Commenting on the Bill, the Secretary of State for Culture, Media and Sport (Tessa Jowell) acknowledged the contribution made by the Joint Committee, “as reflected in our decision to accept 120 of their 148 recommendations.” She went on to single out a human rights compatibility difficulty⁵² in relation to political advertising:

As part of the Bill, the present ban on political advertising on television and radio is renewed and clarified. The Government believes, as did the Neill Committee [Cm 4413 July 1999], that this is an important plank in protecting the impartiality of broadcasting and democratic debate. Because of a judgement in the European Court of Human Rights concerning Switzerland, the Government cannot make a statement of compatibility under the Human Rights Act in relation to this ban, but believes that there remains a strong case that the UK ban is compatible and therefore wishes Parliament to consider the Bill.⁵³

The judgment⁵⁴ referred to above held that Article 10 (freedom of expression) rights had been violated when the (then) Swiss Commercial Television Company decided to ban an animal protection commercial on the grounds of its clear political character.

General information on policy aims is best gleaned by reference to the government narrative published with the draft Bill.⁵⁵ The report of the Joint Committee on the draft Communications Bill⁵⁶ and the government response⁵⁷ provide in-depth coverage.

⁴⁹ DCMS (with DTI) press release 203/02, *Communications Bill published*, 20 November 2002

⁵⁰ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646 October 2002

⁵¹ “Bill of rights – and wrongs”, *Guardian*, 25 November 2002

⁵² Bill 6 2002-03, clause 309

⁵³ DCMS (with DTI) press release 203/02, *Communications Bill published*, 20 November 2002

⁵⁴ CASE OF VGT VEREIN GEGEN TIERFABRIKEN v. SWITZERLAND (Application no. 24699/94) 28 June 2001

⁵⁵ *The draft Communications Bill – The Policy* Cm 5508-III, May 2002

http://www.communicationsbill.gov.uk/draft_communications_bill.htm

⁵⁶ Joint Committee on the Draft Communications Bill, *Draft Communications Bill*, HL 169 HC 876 2001-02 <http://www.publications.parliament.uk/pa/jt/jtcom.htm>

Responses from a wide variety of interested organisation have been published online,⁵⁸ along with the rest of the draft Bill material. The Bill's explanatory notes include some useful appendices showing where the various terms are defined, and how the clauses in the draft⁵⁹ and published⁶⁰ Bill relate to each other.

Part 1 of the Bill deals with the general functions of Ofcom, including the establishment of a Content Board with a remit related, at least, to broadcast content and media literacy.⁶¹

Part 2 deals with networks, services and the radio spectrum. So far as networks and services are concerned (chapter 1) the "must-carry obligations" embodied in clause 60 are of particular broadcasting interest. This includes an order-making power allowing the Secretary of State to set the terms on which a television service is to be broadcast on the principal networks. The latter could include satellite, cable or terrestrial networks.

Radio spectrum (chapter 2) is obviously fundamental to all users, ranging from television and radio broadcasters, to mobile phone operators and radio astronomers. Ofcom will have a special duty⁶² to secure sufficient capacity is available on (digital) television multiplexes for qualifying services – such as ITV, Channel 4, and Channel 5. Satellite TV may be caught by "recognised spectrum access", for which Ofcom could make a charge,⁶³ as is the case for wireless telegraphy licences. Recognised Spectrum Access (RSA) is just one tool for managing the radio spectrum (i.e. the range of available radio frequencies). A key aim of spectrum management is to avoid interference between different applications. Consultation on a Radiocommunications Agency paper⁶⁴ closed on 7 October 2002. This may be read in conjunction with a comment made by the Government in its response to the Joint Scrutiny Committee on the Draft Communications Bill:

We accept the Committee's view, also expressed by the independent review of radio spectrum management by Professor Martin Cave [which predates the consultation on introducing recognised spectrum access], that the detailed implementation of spectrum management policy should be a matter for the independent regulator [Ofcom under the present Bill].

Part 3 of the Bill is of particular relevance to this paper, dealing as it does with television and radio services. Chapter 1 covers the public sector broadcasters, and clause 193

⁵⁷ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646, October 2002

http://www.communicationsbill.gov.uk/pdf/Joint_cttee_CBill.pdf

⁵⁸ http://www.communicationsbill.gov.uk/responses_organisations.html

⁵⁹ *Draft Communications Bill*, Cm 5508-I, May 2002

⁶⁰ *Communications Bill*, Bill 6 2002-03

<http://www.publications.parliament.uk/pa/cm200203/cmbills/006/2003006.htm>

⁶¹ Bill 6 2002-03, clause 12

⁶² Bill 6 2002-03, clause 154

⁶³ Bill 6 2002-03, clause 156

⁶⁴ Radiocommunications Agency, *Introducing Recognised Spectrum Access*, July 2002 (deposited paper 02/1708)

(Functions of OFCOM in relation to the BBC) is among those that will likely attract much debate. Subsection 3 would allow Ofcom to impose fines on the BBC for contraventions of some parts (with exceptions, the first and second tier obligations)⁶⁵ of the Agreement with the Secretary of State. The Government intends⁶⁶ that the Agreement's provisions will mirror those of the Bill "wherever appropriate."⁶⁷ Other sections relate to the Channel 4 Corporation, the Welsh Authority (which provides S4C),⁶⁸ and the Gaelic Media Service (currently the Gaelic Broadcasting Committee).

Chapter 2 of Part 3 provides the regulatory structure for independent television services, taking forward a large part of what is at present the remit of the ITC. Clause 206 specifies the television services that Ofcom would regulate. Clauses 226-7 seek to maintain licensing obligation on broadcasting services, while excluding others notably webcasting and the internet from Ofcom's regulatory powers. The Secretary of State has the scope⁶⁹ to change by order the definition of television licensable content services – potentially to embrace technologies like video on demand. At present it seems the latter will be self-regulating if, as seems likely, an industry code of practice (particularly in relation to protecting children from unsuitable content) meets with DCMS approval.⁷⁰

Chapter 3 of Part 3 (regulatory structure for independent radio services) covers an area at present belonging to the Radio Authority. Clause 254 allows the Secretary of State to introduce a new tier of very local radio called access radio – serving small communities, be they based on geography, ethnic or cultural background or other common interest. The Community Media Association has suggested six improvements:

OFCOM should be required to promote the growth and development Community media

a Fund should be established to support community-based radio, television and new media

cable operators and other delivery platforms should be required to carry community media

licence arrangements for community television should be distinct and explicit

⁶⁵ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646, October 2002

⁶⁶ DTI/DCMS, *Draft Communications Bill: Proposed Amendments to the BBC Agreement*, 31 May 2002

⁶⁷ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646, October 2002

⁶⁸ subject to a regulatory regime similar to the BBC

⁶⁹ Bill 6 2002-03, clauses 228 and 347

⁷⁰ "VoD will be exempt from content regulation after drawing up code of practice", *New Media Markets*, 15 November 2002

a firm commitment should be made to community radio with spectrum ringfenced for this purpose

flexible powers should be provided to enable the development of new forms of community media⁷¹

Chapter 4 of Part 3 covers a wide range of regulatory provisions. Clause 255 places Ofcom under a duty to enforce the regulatory regime applying to every holder of a Broadcasting Act licence.⁷² Clause 256 specifies the general public service remit for the BBC, ITV, Channel 4, S4C, Channel 5 and the public teletext service. This includes obligations in respect of culture, news and current affairs, sport, education, entertainment, children's programming, and local programming. Clause 262 provides for the enforcement by Ofcom of public service remits; it allows the regulator to step in and vary the relevant broadcast licence to replace self-regulation with specific conditions. Clause 263 includes a provision the Joint Committee recommended be removed: the power of the Secretary of State to modify, by secondary legislation, the public service remit for any licensed public service channel. The Joint Committee's recommendation (in relation to the analogous clause in the draft Bill) is reproduced below, followed by the government response:

124. We oppose the power to amend the public service remits of licensed public service channels by means of secondary legislation and recommend accordingly that this provision in Clause 188(1)(a) be removed (paragraph 346).

The Government believes that it is perfectly proper for the Bill to include provision for the public service remits, both general and individual, to be amended by order if changing circumstances warrant this. Such an order can be made only on the recommendation of OFCOM, who must have satisfied the consultation requirements, as amended in accordance with recommendation 121, and will be subject to affirmative resolution procedure.⁷³

Clauses 264-268 relate to the availability of licensed public service television; for example clause 264 requires Ofcom to include conditions in the licences to ensure these TV services are offered to every appropriate⁷⁴ network. Other clauses cover quotas for independent⁷⁵ and original⁷⁶ productions, news provision,⁷⁷ and regional programming provision (particularly in relation to ITV).⁷⁸

⁷¹ Community Media Association news release, *CMA response to communications bill: "room for improvement"*, 13 November 2002

⁷² a licence under Part 1 or 3 of the 1990 Act or under Part 1 or 2 of the 1996 Act

⁷³ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill Cm 5646* October 2002

⁷⁴ this could include satellite, cable and terrestrial (wireless broadcast) networks

⁷⁵ Bill 6 2002-03, clause 269

⁷⁶ Bill 6 2002-03, clause 270

⁷⁷ Bill 6 2002-03, clauses 271-5

⁷⁸ Bill 6 2002-03, clause 277

Clauses 289-292 retain, with modifications, the regime for listed sporting events, such as the FA Cup Final. Each will be allocated to one of two groups, securing different levels of television coverage.⁷⁹

Television services for the deaf (subtitles / sign language) and visually impaired (audio description) are the subject of clauses 293-297.⁸⁰ The *Broadcasting Act 1990* already imposes obligations on ITV, Channel 4 and Channel 5 (the BBC policy has been to at least match the provision by other broadcasters). The *Broadcasting Act 1996* extended provision to digital terrestrial services. Under the present Bill, digital cable and digital satellite TV services will also be covered by a code drawn up by Ofcom though, compared to the draft Bill, Ofcom must have regard to a wider range of factors when considering excluding certain descriptions of programmes.⁸¹ Both the RNID and RNIB provided responses to the draft Bill.⁸²

Chapter 4 of Part 3 also includes clauses dealing with programme and fairness standards for television and radio.⁸³ Clause 307 lists the standards objectives, the first of which relates to protecting persons under the age of 18. (Quite how the 9pm watershed will transpose to the digital age of personal video recorders must be an area of legitimate concern). Every programme service licensed by a Broadcasting Act licence will have Ofcom's consequent standards code⁸⁴ incorporated in its licence conditions.⁸⁵ These will be enforceable by a system of fines⁸⁶ and requirements to broadcast corrections.⁸⁷ Ofcom will have a duty to hear complaints relating to content,⁸⁸ including those related to fairness.⁸⁹ Some background was given in the Government's policy narrative accompanying the draft Bill:

8.5.2 Content complaints handling

8.5.2.1 As proposed in the White Paper the draft Bill provides that OFCOM will have the duty to consider "fairness complaints" that is when the interests of a complainant themselves may have been infringed in radio or television programmes or in connection with the obtaining of material included in a programme.

⁷⁹ For further background, see library standard note SN/HA/802, *Listed Sporting Events*

⁸⁰ For further background, see library standard note SN/HA/1486, *Television subtitling*

⁸¹ Bill 6 2002-03, clause 293(6)

⁸² http://www.communicationsbill.gov.uk/responses_organisations.html

⁸³ Bill 6 2002-03, clauses 307-16

⁸⁴ Bill 6 2002-03, clause 312

⁸⁵ Bill 6 2002-03, clause 313

⁸⁶ Bill 6 2002-03, clause 333 and schedule 13

⁸⁷ Bill 6 2002-03, clause 332

⁸⁸ Bill 6 2002-03, clause 313

⁸⁹ Bill 6 2002-03, clause 315

8.5.2.2 Following discussions with broadcasters and regulators, we have decided to retain provision that the regulator may directly consider complaints from the public about broadcast content ("standards complaints"), rather than, as proposed in the White Paper, have to address their complaint first to the broadcaster. While many comments or complaints are best addressed to the broadcaster, and the broadcaster should be directly accountable to its audience for maintaining standards, it is important that people should also feel able to complain to the regulator, especially about breaches of standards which appear serious and which might be detrimental to the public at large. It is equally important that the regulator is able to deal with the complaint promptly.

8.5.2.3 OFCOM's ability to consider complaints directly extends not just to complaints about editorial programming but also to advertising complaints, which may require immediate action, for example in relation to misleading claims.⁹⁰

Clause 323 allows Ofcom to secure compliance by licensed broadcasters⁹¹ with international obligations – a notable one being the EC "Television without Frontiers" Directive.⁹² This provision was welcomed by the Joint Committee.

Chapters 5 and 6 cover a range of provisions, including those relating to media ownership⁹³ and grants to access (community) radio.⁹⁴

Part 4 covers licensing of TV reception. It does not appear to materially affect the present arrangements, the enforcement methods having given rise to some controversy⁹⁵ – specifically in relation to households without televisions receiving periodic requests from TV Licensing to provide an explanation for their not having a licence. The Bill's explanatory notes summarise Part 4:

705. The requirement to hold a licence for the use of a television receiver is currently contained in the Wireless Telegraphy Act 1949, as amended by the Broadcasting Act 1990. The 1990 Act made the BBC (rather than the Secretary of State) responsible for TV licence administration. Part 4 of the Bill consolidates the existing provisions relating to the administration and enforcement of TV licences and separates them from provisions relating to other wireless telegraphy licences.

Parts 5 of the Bill covers competition in communications markets, including newspaper mergers. Part 6 is a collection of miscellaneous and supplemental measures.

⁹⁰ *The draft Communications Bill – The Policy* Cm 5508-III, May 2002

⁹¹ i.e. excluding the BBC and S4C

⁹² Directive 89/552/EEC as amended by 97/36/EC

⁹³ Bill 6 2002-03, clauses 335-8

⁹⁴ Bill 6 2002-03, clause 345

⁹⁵ library standard note SN/HA/1148, *Television Licence Checks*

B. Parliamentary comment

While the *Communications Bill* 2002-03 was anticipated during the House of Commons debate on the Address on 15 November, the House of Lords had the benefit of having (just) seen the Bill when they came to debate media matters. Even so, the Commons was able to signal a range of opinions. For example, Christopher Chope:

I submit that that legislation should abolish both the BBC as we know it and the television tax. In that way, we will secure proper, fair and equal competition. The BBC has abused the privileges given to it by Parliament and it should be brought to book. I am horrified that the Government will not even impose the burden of the regulator on the BBC.⁹⁶

John Grogan agreed with the Government's proposed balance of controls on the BBC:

I agree with the Government's stance on the BBC; it is right that the BBC is under Ofcom for tier 1—consideration of taste and decency—and that when it makes mistakes it should pay fines for the first time, as Lord Puttnam's Committee recommended. It is right that it is subject to quotas on regional production and production by independent producers under tier 2 of regulation. However, the backstop powers in tier 3, which deals with whether the BBC is fulfilling its public service remit, should ultimately be up to the governors and the Secretary of State.⁹⁷

John Whittingdale (Shadow Secretary of State for Culture, Media and Sport) welcomed the broad thrust of the Bill, supporting the Government's "robustly pro-market position" on ownership.⁹⁸ Nevertheless, he sent a clear signal that the role of public service broadcasting and the BBC would feature prominently in debates on the Bill:

There is one area in which we strongly disagree with the Government's approach. Whatever consolidations and takeovers take place in the media sectors following the passage of the Bill, for the foreseeable future there will remain one broadcaster whose dominant position is likely to remain unchallenged—that is, of course, the BBC. That is because of its dominance, because it is owned by the state and because it is financed by a compulsory poll tax, which is enforced by criminal law. It has obligations and duties which do not apply to any other broadcaster. It has a public service remit and it is subject to strict controls on its commercial activities, yet unlike other broadcasters, responsibility for ensuring that it meets the requirements upon it and for adjudicating on complaints about its activities rests not with the new regulator, but with its own board of governors.

⁹⁶ HC Deb 15 November 2002 c 316

⁹⁷ HC Deb 15 November 2002 c 318

⁹⁸ HC Deb 15 November 2002 c 331

Yet the BBC is most in need of external accountability and independent adjudication.⁹⁹

Moving to the House of Lords, for the Government, Baroness Blackstone summarised the (by then) published *Communications Bill* thus:

The Bill will give powers to a single regulator, Ofcom, which will be responsible for the whole of the communications market. It will reform the rules on media ownership: deregulating significantly to promote competition and investment, but retaining a core set of rules that ensure the existence of a range of media voices, safeguarding the vibrancy of democratic debate.

We will not let broadcasting standards or quality slip, but we will not allow excessive regulation to stifle innovation and creativity. The Bill will give public service broadcasters greater freedom to regulate themselves in certain areas. It provides for the demands of the digital age; and it will, through the content board, ensure that the public have a formal voice in the debate about the nature and quality of television and radio programmes.¹⁰⁰

In responding, Lord McNally referred to his work on the Joint Committee:

The committee quickly realised that the world is divided into "techies" and "fluffies". In dealing with the "techies" and the technological developments in the industry, we were convinced that the combination of powers contained in the Communications Bill and the competition and enterprise Acts would lead to the vigorous competitive regime that the noble Baroness said was the Government's aim. At the other end—dealing with the so-called "fluffies" of television, broadcasting and radio—we need to have a more interventionist role.¹⁰¹

While this paper will focus on “fluff”, it is worth keeping in mind the symbiotic relationship between technology and content. The former is not simply an inanimate tool to be deployed in the provision of the latter. As Lord Gordon of Strathblane suggested, technology, as well as ownership and funding, all have an effect on content – justifying their all being “rolled together under Ofcom”.¹⁰²

In performing its general duties,¹⁰³ Ofcom will now have to have regard to effective forms of self-regulation – one of several changes introduced in the light of the Joint Committee’s report. This referred to “accredited self-regulation”, that might, as Lord McNally observed,¹⁰⁴ be of relevance to advertising, the Internet, and the print media.

⁹⁹ *ibid.*

¹⁰⁰ HL Deb 20 November 2002 c 381

¹⁰¹ HL Deb 20 November 2002 c 391

¹⁰² HL Deb 20 November 2002 c 411

¹⁰³ Bill 6 2002-03, clause 3

¹⁰⁴ HL Deb 20 November 2002 c 392

Lord Puttnam had some concerns: the “lazy tendency to confuse or conflate the rights of consumers, customers and citizens”; “the emotive subject of so-called ‘foreign ownership’”. On the latter he elaborated thus:

A tightening of the existing regulations together with the anticipated outcome of the programme supply review to be published by the ITC next week are likely between them to have the effect of accommodating at least 95 per cent of my concerns...

...Without setting out their reasons the Government have chosen to reject the Joint Committee's recommendation that the,

"prohibition on common ownership of a major Newspaper Group and Channel 5, should be retained".

Their thinking may well be immaculate, but it will need to be far better explained, far more evidential and extremely convincing before it is likely to find its way into the hearts and minds of many in this House.¹⁰⁵

A Review of the UK Programme Supply Market was formally published by the ITC on 26 November, its online availability (the evening before) *preceded* by the government response. The Secretary of State for Culture, Media and Sport (Tessa Jowell) took “very seriously” the suggestions for strengthening the hand of the independent television producers, and added:

I particularly welcome the fact that the report supports our view that foreign ownership should be an opportunity not a threat for British broadcasting.

I will make sure that after considering the report and hearing the reaction from industry and Parliament, we will bring forward any changes at the appropriate point in committee.¹⁰⁶

As noted in an ITC press release, the report had been commissioned to examine concerns raised by the Joint Scrutiny Committee on the draft Communications Bill. The report, the full text of which can be downloaded,¹⁰⁷ identifies key issues as being: the efficacy of the independent production quota imposed on public service broadcasters; the likely changes accompanying changes in media ownership rules; suggestions for encouraging a strong UK production base for TV programmes. It goes on to recommend Ofcom be granted powers under the Bill to:

¹⁰⁵ HL Deb 20 November 2002 c 393

¹⁰⁶ DCMS press release 205/02, *Tessa Jowell responds to ITC programme supply review*, 25 November 2002

¹⁰⁷ http://www.itc.org.uk/latest_news/press_releases/release.asp?release_id=656

- Strengthen the longer term viability and growth potential of the independent production sector;
- Safeguard original UK production against the background of the Government's proposed changes to media ownership rules;
- Support production in the Nations and Regions; and
- Strengthen commitment to training across the sector.¹⁰⁸

Acknowledging the successes of the independent production quota, the ITC report drew attention to areas of controversy. Many broadcasters felt it created a dependency culture among small independent production companies, whereas the independents felt that some of the main UK broadcasters (especially the BBC) were using “their market power to squeeze prices and profit margins on primary rights [the first few showings], forcing producers to relinquish ownership of secondary and tertiary rights in order to finance the costs of production.” ITV’s approach, whereby the Network Centre can only buy primary rights, was held an attractive model. Market conditions rendering the quota system obsolete were not yet in place.

On the ownership issue, the programme market report included the following:

The majority of the submissions we received on this topic, supported by the deliberations of the Expert Panel, favoured the Government’s proposed change in the ownership rules. Some remarked on the oddity of allowing European companies to own ITV and Channel 5, while preventing any investors from the main English-speaking television markets from doing so. Most said that current content regulation provided adequate protection from any risk that non-UK programming would flood the main network schedules.

However others – most notably the BBC and Channel 4 –who commission just over half of independent production, believed the new rules could have an adverse impact on UK programming. Small independent producers were also thought to be at risk from the proposed changes.¹⁰⁹

Safeguards additional to the Bill¹¹⁰ were recommended as an insurance policy to cover programme supply risks associated with ownership changes. Ofcom ought to have more direct powers to establish and change obligations for UK and regional programming. In any case, as the ITC programming review notes, the UK spends more on indigenous TV programming “per head of population than any other developed market – including the

¹⁰⁸ ITC press release 88/02, *ITC publishes review of UK programme supply market*, 26 November 2002

¹⁰⁹ ITC, *A Review of the UK Programme Supply Market*, November 2002 paras 41-2

¹¹⁰ Bill 6 2002-03, clause 269 (independent productions), clauses 276-8 (regional programming)

US.” This reflects a body of evidence showing that viewers like local (be it national, regional or community) programming.¹¹¹ The programming review goes on:

186. Alongside this, the balance of analysis we have seen supports the Government’s proposed change to the non EEA ownership rules, which would create an environment in which more expertise and capital could be attracted to the UK.

187. We did however assess the extent to which non-EEA and especially US ownership might result in a reduction in range, diversity and local content on our main networks. The detailed results are contained in our statistical appendix. The headlines are:

- UK networks do not at the moment often schedule US programming at peak times, and US programmes do not generally perform well on the main networks;
- Any such strategy would be counter-productive – if it were a profit maximising strategy for ITV, for example, it would already have been followed (ITV substantially exceeds its UK programming commitments); while Channel 5, which already schedules a substantial amount of US material (films and drama) in peak, is aiming to cut this back;
- Most successful US programming is already available in the UK (mainly on cable/satellite channels) but rarely scores in the ratings - exceptions include the Simpsons;
- Evidence from the US shows that broadcasters like ABC/Disney have learned quickly that they cannot create successful schedules by relying only on their own in-house producers.

Returning to the Lords debate on 20 November, Lord Puttnam also noted that the draft Bill had paid little attention to the newspaper industry, both in terms of mergers and content. However, the new *Communications Bill* had taken “a late stab” in the latter direction.¹¹² He had “only one or two other relatively minor quibbles with the Bill” as it now stood, ending:

This is a good Bill which could, with help, become possibly even a great Bill. I look forward to supporting its passage through this House.¹¹³

A former chairman of the BBC, Lord Hussey of North Bradley considered the BBC’s relationship with Ofcom:

¹¹¹ “Think local – cultural imperialism doesn’t sell”, *Economist*, 13 April 2002 p 12 (part of a survey of television, *Power in your hand*)

¹¹² Bill 6 2002-03, clause 361

¹¹³ HL Deb 20 November 2002 c 394

I agree that to leave the BBC outside Ofcom would invite unnecessary difficulties. The secret of the BBC's success lies in maintaining the standards laid down by the first director-general, Lord Reith, that its purpose was to inform, to educate and to entertain, in that order, offering creative and challenging programmes that the market would rarely provide. That remains its objective.

In this increasingly commercial world there has to be a place for a powerful media influence in the pocket of no individual proprietor, interest group or advertiser, which does not give paramount weight in choice of programmes to what will earn the most money, but which offers instead schedules to tempt audiences and to uplift their interest and understanding. That should be the objective of Ofcom—to strive for quality across the media: newspapers, radio, television and film. Ofcom's objectives and those of the BBC should coincide. No doubt there will be problems. There are always problems, but with sensitive handling I see no reason why Ofcom and the BBC should not together seek to achieve the same worthwhile objectives. I wish them good luck in so doing, and maybe we shall end up with a better BBC.¹¹⁴

These sentiments found an echo in Lord Bragg's contribution:

So far as Ofcom is concerned, I am beginning to think that it might be in the public's and the BBC's best interests for the BBC to come to the table on this one. Without the BBC, Ofcom will be a glass half full. We will most likely have Ofcom in battle against the BBC if they do not join together. Conflict, if they do not join, is inevitable. It could be nasty, especially as the BBC is now entering into commercial ventures where the ground is ripe for strife and confrontation of the most damaging kind. The BBC is such a major player and under Greg Dyke has developed so extensively that its activities now impinge on many smaller and some bigger commercial players.

Perhaps I may therefore suggest that while it is proper for the BBC governors to continue to be custodians of the BBC's special public service purpose in broadcasting programmes, it is also proper for Ofcom to have complete authority over all the BBC's commercial activities—if only in the interests of transparency. Personally, I should like the BBC to surrender itself totally to Ofcom. I cannot see that occurring before the charter review in 2006. Yet, before that review I think that it is important to have a declaration of intent. With the BBC inside Ofcom it would be a formidable force for good in British broadcasting.¹¹⁵

Lord Bragg asserted that Ofcom had “potentially tremendous clout and can, if anything can, square the circle between a lighter touch and an enforcing of public interest and high standards—quality and quantity, one might say.” He went on to put down some markers for future debate on this “tremendous” and “landmark” Bill. The “must carry” issue should not be “allowed to enable Sky to exploit its position at the programme and

¹¹⁴ HL Deb 20 November 2002 c 400

¹¹⁵ HL Deb 20 November 2002 cc 402-3

business expense of the BBC and ITV". There was the problem of the "unfair, overregulation of content and the milking of ITV", like Channel 4 an important public service broadcaster. Finally, Lord Bragg felt it timely to address the "whole area of newspaper accountability".¹¹⁶

Lord Crickhowell, a member of the Joint Committee on the Draft Bill, prefaced his remarks by commenting that the initial reaction of the sponsoring government Departments had been "distinctly unhelpful":

The tone was such as to cast a shadow over the whole future of pre-legislative scrutiny. The line was that the committee was not supposed to deal with major policy matters already decided by Ministers, but only with narrow drafting points.¹¹⁷

Despite this, he then acknowledged the Government had gone on to accept, "in full or in part, more than 120" of the Committee's 148 recommendations. He thought the debate on foreign ownership, and its impact on original production, was by no means over, and drew the House's attention to Greg Dyke's¹¹⁸ "pungent" views in paragraph 546 of the minutes of evidence:

Chairman

546. I think the thrust of the question is what distortions are possible as a result of the changes in ownership?

(Mr Dyke) From the BBC's perspective there must be a danger that if you allow Time Warner to own ITV, a number of American programmes that at the moment come on to the market will not come on to the market at all. There is no doubt that if Time Warner owned ITV you would not have seen "Friends" and "ER" up for sale. They would have gone to a different channel and so there is a difficulty in that and that is the concern that the BBC has—whether this is going to distort the market, and things that come on to the market will not come on for a free-to-air broadcaster. If you ask me about my perspective rather than the BBC's perspective, having been in this industry for 20 odd years and run a number of different companies, I am not sure. Firstly, I think reciprocity is a really interesting discussion and I fail to understand why Britain would want to allow American media companies to own our largest commercial broadcasters, while no European one is going to own a station in Cincinnati and it seems to me reciprocity is a big question. Secondly, there is an argument about dumping material. While I was at Pearson we built up the biggest independent production company probably in the world—we had about 26 different countries—and the one thing you discover really going on in that is that there are only two sorts of

¹¹⁶ HL Deb 20 November 2002 c 404

¹¹⁷ HL Deb 20 November 2002 c 405

¹¹⁸ BBC Director General

television product around the world, American and indigenous, and American dominates the world, and what you were always trying to do in America was to find some guaranteed markets because the deposits on production in America being sold to NBC or ABC are so large that what you wanted was some guaranteed markets, and therefore the real danger is you will get a significant amount of dumping if you allow large American broadcasters who are also production companies having a studio. So Disney, who owns ABC, owning ITV means you suddenly find an awful lot more Disney programmes on a particular channel, which is what has happened on ABC, both good and bad. So I am not at all convinced by the arguments as I have seen as yet for changing the ownership rules in the way that is proposed.¹¹⁹

In their response to the Joint Committee the Government recognised these concerns, and promised to take careful note of any recommendations from the (now published) ITC's programme supply review. "The Bill makes provision for content regulation that will prevent any 'dumping' of US programming in the UK."¹²⁰ Negotiation of reciprocal rights, now, for British broadcasters was suggested by Lord Stevens of Ludgate.¹²¹

In considering mergers and competition issues, Lord Crickhowell considered plurality a key consideration. Along with diversity this is defined in chapter 4 of the communications white paper:

By diversity, we mean the range of different programmes and services available to viewers and listeners. Plurality, on the other hand, is about the choices viewers and listeners are able to make between different providers of such services. Society benefits from both a diversity of services between and within genres (such as news, entertainment, documentaries etc) and a plurality of suppliers of such services (since this increases exposure to a variety of editorial styles and a range of views and opinions).¹²²

The BBC's impact on competition in broadcasting was the second great issue, according to Lord Crickhowell:

The current BBC charter does not expire until the end of 2006, and the Government plan to begin the task of reviewing it only in 2004. The BBC ball is being kicked far into the long grass, while everyone else must play a rough, tough competitive game under new rules. Yet, as the noble Lord, Lord Hussey of North Bradley, said, the relationship of the BBC with Ofcom will be of immense importance. That point was reinforced by the noble Lord, Lord Bragg. It seems

¹¹⁹ Joint Committee on the Draft Communications Bill, *Draft Communications Bill*, HL 169-II HC 876-II 2001-02

¹²⁰ *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646, October 2002 p 28

¹²¹ HL Deb 20 November 2002 c 431

¹²² *A New Future for Communications* Cm 5010, December 2000

inevitable that the future of the BBC will play a more central role in the debates on the Bill than either the corporation or the Government may like.¹²³

This is the position of the BBC today: its constitution is set out in a Royal Charter¹²⁴ while the rules under which it operates are set out in an Agreement¹²⁵ between the BBC and the Secretary of State for Culture, Media and Sport. A new draft Agreement is expected in time for the Commons committee stage of the *Communications Bill*.¹²⁶ Comments on the system of financing the BBC – the licence fee – have already been alluded to. Lord Gordon of Strathblane added to these:

On funding, I favour the licence fee because it avoids other than Queensberry rules competition between the BBC and the commercial sector. It is fairly raw, particularly when the BBC is largely run by former commercial people who still have strong competitive instincts, but at least it is a gentlemanly fight. If we were fighting for the same pot of advertising revenue, the gloves would be off.

I echo previous speakers in saying that it might be better for the BBC to be more fully under Ofcom. It is to a large extent. Stage three is not about the box ticking but qualitative judgments and it is essential that we have convergence of regulation to ensure that the interpretation of the same public service obligations is universal across the system. I honestly feel that it is in the BBC's best interests.¹²⁷

For its part, the BBC has acknowledged these concerns in a paper *BBC Governance in the Ofcom Age* (26 February 2002).¹²⁸ In his foreword, the chairman (Gavyn Davies) pointed out that the Government's plans "would already place the BBC 'under Ofcom' in many crucial areas, including all forms of economic regulation, basic standards on matters like taste and decency, and quotas on regional, independent and original production." Only the public service (tier 3) remit would remain in the Governors' hands, with the Secretary of State retaining backstop powers (Ofcom would have these powers for other public service broadcasters). Mr Davies considered this level of democratic oversight was more appropriate to a publicly owned and funded body like the BBC.

The Lord Bishop of Wakefield remained disappointed by discriminatory restrictions on religious broadcasters, while welcoming the modifications made under clause 335:

As the Government and broadcasting authorities know, there is a huge demand across the United Kingdom for broadcasting stations with a Christian ethos. In the light of that demand the Christian Churches believe that even though Ofcom is to

¹²³ HL Deb 20 November 2002 c 407

¹²⁴ <http://www.bbc.co.uk/info/BBCcharter/charter/index.shtml>

¹²⁵ <http://www.bbc.co.uk/info/BBCcharter/agreement/>

¹²⁶ HL Deb 20 November 2002 c 464

¹²⁷ HL Deb 20 November 2002 c 412

¹²⁸ <http://www.bbc.co.uk/info/news/news385.shtml>

be given the ability to lift some disqualifications, it is counterproductive to continue to disqualify people, in law, because they hold office in a church, synagogue, mosque, or religious charity. It is also counterproductive to restrict licensing by recourse to a fallacious argument over spectrum scarcity.¹²⁹

Baroness Howe of Idlicote (a former chairman of the Broadcasting Standards Commission) thought the remaining restrictions on religious organisations holding a national radio licence to be “barmy”.¹³⁰ Particularly in the context of the bad language and violence “routinely seen on our screens” and the apparent acceptability to some regulators of pornography.

In fact, the spectrum scarcity arguments advanced by the Government are quite plausible in the context of a national *analogue* radio licence – only three such frequencies are available on this geographical scale. Moreover the Radio Authority supports the Government's judgement that scarcity of spectrum militates against religious ownership of national analogue services.¹³¹ Religious organisations will now be able to hold a national *digital* radio licence,¹³² reflecting this more efficient method of broadcasting.¹³³ Further background to this issue appears in House of Commons Library Research Paper 02/68, *Media Ownership and the Communications Bill*.

Baroness Howe returned to a theme that attended the *Office of Communications Bill*:

I make no secret of the fact that I would have preferred the legislation to provide us with two communications regulators rather than the one giant Ofcom proposed—one to deal with the cultural and content issues and the other with the competitive, economic and technical aspects of the industry.¹³⁴

There is a concern that resources might not end up being allocated equally between Ofcom's cultural and economic duties, despite government assurances to the contrary.

Although Baroness Howe acknowledged the “many excellent qualities of the draft Bill” she considered the greater degree of self-regulation¹³⁵ of content to be its most important flaw.

¹²⁹ HL Deb 20 November 2002 c 410

¹³⁰ HL Deb 20 November 2002 c 441

¹³¹ Radio Authority News Release 48/02, *The Radio Authority welcomes the publication of the new Communications Bill*, 20 November 2002

¹³² Bill 6 2002-03, clause 335

¹³³ digital broadcasting superimposes discrete modifications to a carrier radio wave, and these can be manipulated and “compressed” in ways unavailable to the continuous analogue modifications of conventional broadcasting.

¹³⁴ HL Deb 20 November 2002 c 441

¹³⁵ see for example, Bill 6 2002-03, clause 258

For his part, Lord Laird focused on what he saw as the BBC's lack of provision for broadcasting Ulster-Scots in Northern Ireland. This was all the more indefensible in view of the importance attached to linguistic diversity under the Belfast agreement.¹³⁶

Baroness Buscombe signalled the Opposition's support for the Bill's provisions allowing greater cross media ownership, and the relaxation of local ownership rules. She agreed with Lord Bragg on the tensions between the need for light-touch regulation and the public good. "This matter will require considerable debate."¹³⁷ And on the BBC:

We have consistently argued that the BBC should be fully within the remit of Ofcom, and we are pleased that several noble Lords who spoke today—including the noble Lord, Lord Hussey, with his depth of experience of the BBC—take a similar view. It defies logic to pretend that this legislation can possibly fulfil its purpose if Ofcom's powers do not fully extend to the biggest player in broadcasting, commanding about 40 per cent of the television audience and an even bigger proportion of radio. The noble Lord, Lord Puttnam, spoke of the desirability of a genuinely powerful and committed regulator—a tough goal if the biggest player is off the pitch.¹³⁸

For the Government, Lord McIntosh of Haringey, noted these arguments and undertook to continue listening to them as the Bill goes through the House.

The important consideration is that public service broadcasting is, always has been, and always will be very much wider than the BBC. The point was made—again coming back to the noble Lord, Lord Bragg—about Channel 4 news and regional broadcasting in ITV.¹³⁹

Lord McIntosh of Haringey went on to underline the point of radio spectrum scarcity preventing access by religious organisations to (national) analogue radio and to TV multiplexes (bundles of radio frequencies used in digital transmissions). And he attempted to reassure Baroness Howe on another point she had made in relation to content regulation:

The noble Baroness, Lady Howe, asked whether the content board would be sufficiently independent. There will be a majority of lay members and there will be a power to establish committees. Of course, there will be the same power to redress wrongs as there is now. I hope that that gives the noble Baroness the assurance that she seeks. The consumer panel will cover consumer issues such as availability, quality and the price of services rather than issues of content.¹⁴⁰

¹³⁶ HL Deb 20 November 2002 c 419

¹³⁷ HL Deb 20 November 2002 c 460

¹³⁸ HL Deb 20 November 2002 c 460

¹³⁹ HL Deb 20 November 2002 c 464

¹⁴⁰ HL Deb 20 November 2002 c 465

He congratulated the Joint Committee on their work:

We are of course grateful to the noble Lord, Lord McNally, and others, who said that the purpose of the exercise was to make a good Bill better. I am sorry, but one of the immediate consequences has been to make a long Bill longer. It is not just longer, but very much longer.¹⁴¹

¹⁴¹ HL Deb 20 November 2002 c 463

V Further information

Three of the more recent, and directly relevant, library research papers are:

- House of Commons Library Research Paper 02/03, *The Office of Communications Bill [HL]*, 14 January 2002
- House of Commons Library Research Paper 02/67, *Telecommunications and the Communications Bill*, 26 November 2002
- House of Commons Library Research Paper 02/68, *Media Ownership and the Communications Bill*, 28 November 2002

The House of Commons Library intranet pages provide Members and their personal staff with a range of standard notes, some up-to-date, covering specific broadcasting issues. The most relevant subject pages are Broadcasting, Mass Media, and Telecommunications.

The DTI and DCMS have provided both parliamentary libraries with a *List of relevant older papers for the Communications Bill, 2002*.¹⁴²

The following two publications contain a useful cross section of opinions, from broadcasters, telecommunications companies, regulators, parliamentarians, industry and consumer groups:

- Westminster Media Forum, *New Future, or Missed Opportunity? Reaction to the draft Communications Bill 2002*, 7 June 2002
- Westminster Media Forum, *A Good Bill Better? Reaction to the Report of Parliament's Joint Scrutiny Committee on the draft Communications Bill 2002*

Other resources of interest include:

- BBC Radio 4, *The Hitchhikers Guide to the Future*, <http://www.bbc.co.uk/radio4/hitchhikers/> (this multi-media resource includes four radio programmes covering the future of music, publishing, broadcasting and convergence)
- *A New Future for Communications Cm 5010*, December 2000 www.communicationswhitepaper.gov.uk (this dedicated website below includes links to consultation documents, expert papers, and speeches.)

¹⁴² Lords location HINF 2002/2686; Commons location Research HA (Bill Box)

- Culture, Media and Sport Committee, *The Communications White Paper*, 7 March 2001, HC 161 2000-01
- *The Communications White Paper: Government Response to the Second Report from the Culture, Media and Sport Select Committee Session 2000-01* Cm 5316, November 2001
- DCMS, *Media Ownership Consultation Paper*, 2001
- DCMS, *Summary of responses to the consultation on Media ownership Rules*, 2002 (deposited paper 02/673)
- http://www.culture.gov.uk/creative/tv_media.html (includes material relating to media ownership consultation)
- Culture, Media and Sport Committee, *Communications*, 24 April 2002, HC 539 2001-02
- *Communications: Government Response to the Fourth Report of the Culture, Media and Sport Select Committee Session 2001-2002*, Cm 5554, July 2002
- *Draft Communications Bill* Cm 5508, May 2002 (I - draft Bill; II - explanatory notes; III- policy narrative)
- Department of Trade and Industry and Department for Culture, Media and Sport, *Draft Communications Bill: Regulatory Impact Assessment*, 2002
- http://www.communicationsbill.gov.uk/draft_communications_bill.htm (site includes draft Bill documents and consultations)
- Joint Committee on the Draft Communications Bill, *Draft Communications Bill*, 25 July 2002, HC 876 HL 169 2001-02
<http://www.parliament.uk/commons/selcom/dchome.htm>
- *Government's Response to the Report of the Joint Committee on the Draft Communications Bill* Cm 5646 October 2002
- www.communicationsbill.gov.uk (the main government site for the Communications Bill and associated documents)
- ITC, *A Review of the UK Programme Supply Market*, November 2002