

Measuring media plurality

Summary of first AHRC/University of Westminster seminar Held at Ofcom on 1 March 2012, 2-5.30 p.m.

Participants

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*This memorandum records ideas, arguments and issues discussed by participants.
The seminar was held under Chatham House rules: comments are not attributed to
specific individuals or organisations.*

Seminar one, session one

An overview of what media ownership policy should be designed to achieve, and what might constitute "unhealthy" concentration. To what extent we should take into account online information sources, the public sector (i.e. the BBC) and convergence? Regardless of the practicalities, what would be ideal policy outcomes? Is there a case for simply leaving ownership to the market? If interventions are felt to be necessary, are some media sectors more urgent or significant than others? Where do Google, Facebook, YouTube, Twitter and other forms of social and mobile media fit into debates on media plurality?

1. Short introduction and welcome

2. Explanation of AHRC and its role in the meeting

The AHRC, an independent funder of research across arts and humanities disciplines, regularly supports events and policy seminars like these to enhance the contribution that academic research makes to contemporary policy debates.

3. Context and aims of the seminars and "rules of engagement"

The chair outlined the historical context: concerns about media power, and policy initiatives from the Pilkington report (1962)¹ to the Communications Act 2003². In recent years, attempts to deal with media concentration have taken a mainly deregulatory path.

More recently, the issues arising from phone-hacking and the Leveson Inquiry have created a different context and climate. There is now concern that government and opposition parties had over the last 30 years become too subservient and timid in the face of perceived media power, and had thus been unwilling to impose restrictions. There is also a more difficult economic environment, with constraints on business models and advertising revenues. The big picture context is therefore a mixture of restraining undue power and influence while allowing for investment and economic growth.

Two background documents were supplied to the group. One, compiled by Judith Townend, gives the timeline leading up to July 2011 when revelations were made about the interception of Milly Dowler's voicemail messages by News of the World, and the immediate repercussions. Another, by Steven Barnett and published in 2010³, provides some of the policy and economic context for media ownership and public interest debates dating back to the 1990s.

Chatham House rules were agreed, where minutes would be taken and a summary of discussions published but without attribution. This record will be in the public domain as an academic and policy reference document, and will be

¹ The Final Report of the Committee on Broadcasting (Cmnd.1753), published 5 June 1962

² Available at: <http://www.legislation.gov.uk/ukpga/2003/21/contents>

³ Barnett, S. (2010) 'Media ownership policy in a recession: redefining the public interest', *Interactions: Studies in Communication and Culture*, Vol 1, No.2, pp. 217-232.

available on the AHRC and University of Westminster websites. Representatives of Ofcom will attend as observers, but not participants.

The goal of the seminars is to raise and refine ideas rather than come to any specific conclusions or recommendations – but, should they emerge, these will be recorded. Each of the four sessions will follow broad agendas, issued to participants in advance and reproduced here in italics.

Opening sessions are designed to cover very broad questions such as: what should an “ideal” good media ownership policy look like? What is unhealthy concentration? What other forms of ownership might be appropriate? Why not just leave it to the market and competition laws? Given the growth of new media, is there a risk of fighting yesterday’s battle? Is it now about Facebook and Google? The second seminar will then drill down into somewhat narrower questions around plurality and measurement.

4. General discussion

Starting points: public interest test, the news agenda and democracy

A suggested starting point: what was in the mind of Parliament when it first created the ‘public interest’ test? Focussed on the news agenda. Following the Millie Dowler revelations, debates on plurality veered between focussing narrowly on the news agenda and more broadly on market power.

Parliament was trying to address something broader than just news. The first government consultation paper tried to explain what government was worried about: the use of economic power and ends that were damaging for culture and democracy.

One broad principle, as addressed by the American scholar C. Edwin Baker⁴, is the role of media ownership policy for the process of democracy. Various other ways into the discussion: What is media ownership regulation for? What problem are we trying to solve? And what is the menu of ownership rules? Need to look at plurality debates over the years, and the policy objectives. In some jurisdictions, particularly the US, it is to do with the ability or not to suppress a story (i.e. omission as well as commission) and notions of content diversity.

Academics have over the years attempted to define various ideal types: source diversity, exposure diversity, content diversity. What does it mean from the users’ point of view? We have to question the policy objective and whether plurality is the best word.

⁴ See: Baker, C.E. (2006) *Media Concentration and Democracy: Why Ownership Matters*. Cambridge University Press.

Why not leave it to the market? First, it is an industry that is characterised by economies of scale, with a natural gravitation towards monopoly and large players. Second, media ownership converts into influence that can be harmful.

From a democratic point of view, what does pluralism mean? Raises issues of engagement: no media consumption is obligatory, but it can be encouraged. This is something public service broadcasting (PSB) tries to do. The problem is working out a mechanism that works in the current environment: what is our version of pluralism? Reference here to Philip Napoli's distinction about media ownership: you can structure a market to make diversity of ownership available, but what about consumption?⁵

Is it a separate problem and policy objective if a larger number of consumers are only exposed to a single source of content? With the BSkyB issue, if the Times and Sky are bundled together, will there be a larger number of consumers being exposed to a single information source?

Eli Pariser's filter bubble (more media consumers are living on a narrow self-selected media diet)⁶ and Cass Sunstein's 'Daily Me'⁷: can you have a public policy framework dealing with these issues? And should we be talking in terms of consumers rather than citizens? Has policy discourse retreated from democracy and citizenship to the marketplace, and even if so, is this a problem?

Google, Facebook and other social networks are constricting content and increasingly fill the "filter bubble". There are ways we could regulate against this. These companies are being paid to backbone content or paying other companies to backbone content, like ISP providers. Should cross-subsidisation of new launches be permissible under competition law? Perhaps we can further regulate using traditional competition law.

In the run-up to the 2003 Act, there were questions about whether rules were needed at all. The Government wanted to ensure a competitive market, with opportunities for growth and investment. Checks and balances existed in the form of content regulation, competition law, and the basic incentives to meet consumer expectations. But it was concluded that some combinations of power were still too potentially alarming and therefore required protective legislation in the form of ex ante ownership rules – even if such rules tended to be relatively crude proxies for the sort of plurality that policy-makers thought desirable.

Pluralism beyond news?

When considering media power and the "unhealthiness" of concentrated power for democracy, media ownership rules are just one possible measure. Others might include support for PSB; and rules that mandate editorial democracy within dominant news organisations, and thus protect journalistic integrity. The News International 'scandal' is wider than simply media ownership. This brings

⁵ See: http://mediaresearchhub.ssrc.org/person.2006-06-21.043848-3/person_view

⁶ Pariser, E. (2011). 'Filter Bubble: What The Internet Is Hiding From You.'

⁷ See: Negroponte, N. (1996) 'Being Digital'; and Sunstein C. (2007), 'Republic.com 2.0'.

together Leveson's module one (media ethics) and module three (press and politicians).

The DCMS consultation on media ownership rules (2001) states:

'Plurality maintains our cultural vitality. Different media companies produce different styles of programming and publishing, which each have a different look and feel. A plurality of approaches adds to the breadth and richness of our cultural experience'.⁸

Though plurality has been narrowed to news provision, the DCMS document implies a wider view: it mentions news as a central component, but it wasn't the only focus. The news agenda can relate to the choice and content of documentaries and what emerges more broadly from different outlets.

But the public interest test inserted into the CA03 centred on the news agenda. Whatever the cultural hinterland this emerged from, the scope for intervention was framed in very specific terms.

A clue to the background comes from the report of the Joint Scrutiny Committee on the Draft Communications Bill: ⁹

All decisions on media ownership controls are thus seen as reflecting a balance between plurality and cultural considerations, on the one hand, and economic efficiency, on the other.

There was a strong sense that it was not just about news: ten years ago the availability of diverse ways of presenting culture was critical to people's understanding of plurality. It was only when Ofcom and the Competition Commission looked at BskyB's purchase of ITV shares that the issue focussed on news because it was measurable.

Disconnect between policy aims and legislation

There is a disconnect between the plurality discussions in government papers leading up to the CA03 and 1996 Broadcasting Act, and the legislation which followed. The 03 consultation was trying to ask what kinds of markets are right and healthy and to balance the need for regulation with an economically healthy market – the consumer, as well as the citizen, is relevant.

It is easy to see how, in terms of the plurality test, Ofcom felt that it had to focus on something measurable – hence the emphasis on news, which seemed the most important area of output in this context. Parliament may well have felt that this interpretation was not delivering its original aims and objectives, that too much was stripped away.

⁸ DCMS (2001). Consultation on Media Ownership Rules.

⁹ See par 220, p.169, Joint Committee on the Draft Communications Bill Report, Volume I (2002).

Media behaviour and ethics

Corporate cultures: journalists say that certain dominant groups are influencing the culture of journalistic practice, across the whole profession. The National Union of Journalists, for example, talk about the pressures and working conditions (fewer resources, freelance pay etc.) which force journalists to behave in ways they might not have done ten years ago. Sometimes these emanate from proprietorial pressures whereby stories or angles are pursued because they fit with the culture of the newspaper.¹⁰ The ethos feeds into editorial and programming decisions more widely.

In truth, the only proprietorial power that matters is the hiring and firing of the creative leader, no matter how many boards are established. The editor will do as instructed by the boss who pays his salary. This does not necessarily happen through direct communication, but through instinct or second-guessing.

Media ownership rules and measures

What type of media ownership laws are we talking about? Restrictions on the quantity that can be owned, or the quantity of market share? Or are we thinking more loosely about an extra regulatory oversight and responsibility that might be introduced once you reach a degree of measured media power?

Once measurement criteria for thresholds have been worked out, one can envisage measures that might be brought to bear on media owners who cross them: ethics inside the company, internal democracy, programme councils. In Germany, once a certain share of the media market has been reached, a pluralistic programming council then becomes involved in television programming decisions. There could be an obligation to make programme windows available to a third party.

A key question is the definition of 'control', both of content and of supply of content. In terms of new media: who is supplying information and content? How are rights packaged and how does that affect distribution? Infrastructure: who is controlling bottlenecks, the EPGs and the conditional access agreements? The modern version of "who controls"?

The last Ofcom report on news provision looked at radio in particular, and community radio. Community and commercial radio stations are using Sky News because it was the cheapest available, giving Sky a monopoly of commercial radio news content.

¹⁰ See, for example, evidence given to the Leveson Inquiry by the former Daily Star reporter Richard Peppiatt.

Issues around Google: why are we allowing Google third party sale of data, if consent is required? Why are we not requiring ISPs to opt out of Google Doubleclick¹¹, for example? Imagine a scenario where Google could take over 29% of News Corp. What control would we have over that? Are there existing rules which might allow regulation of content provision?

Limitations of the Competition Commission's role

When Sky took a major stake in ITV plc, ITV highlighted the opportunity for savings and one obvious area was news provision. Had ITN and Sky News been merged there would only have been one non-BBC broadcast news operation in Britain. The Competition Commission did not deem that this would be a problem¹², although Ofcom found that it would.¹³ You cannot always look to the Competition Commission for reassurance on news plurality.

The CC tends to use a traditional competition and economic approach, although this issue is not a strictly economic one. It found that journalistic standards and safeguards were sufficiently high to buttress against a media owner's attempts to influence editorial content. This goes to the heart of the 'Is ownership a problem?' issue.

Creating internal media pluralism

Could there be some sort of obligation for the editorial team to express themselves more freely from proprietorial direction? There could be some sort of regulatory framework that prescribes some kind of internal media pluralism. Because of a corporation's media dominance, media external pluralism is diminished; therefore there should be an obligation to create an internal pluralism.

"Triggers and thresholds"

"Triggers and thresholds" might not be so different from the current situation, where a merger can be approved if certain undertakings are agreed with the Secretary of State. Those kinds of undertakings might be internal walls, separation of newsrooms, etc. – an ad hoc menu that does not offer any certainty. But maybe a broader system of thresholds could be more convincing. To be discussed: what triggers and thresholds should there be? Would it be possible to agree a menu of undertakings?

¹¹ <http://www.google.co.uk/doubleclick/>

¹² See: Competition Commission (2007). 'Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the Shares in ITV PLC', report to Secretary of State for Business, Enterprise and Regulatory Reform.

¹³ See: Ofcom (2007) 'Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of 17.9% shareholding in ITV plc'. Other documents available at: <http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest/broadcasting-and-cross-media-mergers>

Historical context: theoretically one can impose rules, but in practice owners find ways of circumventing them (while many do not). The only guarantee is a diversity of suppliers. Both main parties have admitted they were timid about dealing with this in the past. Does Ofcom have sufficient discretion *in law* to take this challenge on – as well as sufficient resources?

Earlier, we identified a disconnect between the Green Paper ideals and the legislative outcome of the 2003 Act. Is that because it couldn't be done or because there wasn't the political will to do it?

What about news agendas? Is there no self-reflection or audit on agendas to provide empirical evidence of ownership impact? Had the Sky spin-off gone ahead [in 2011], that might have been tested.

Film, sport and other content outside news

If we think about owners determining output, do we broaden that beyond news? Murdoch's history: biographers agree that he appoints people who think like him. What about other types of content, arts and drama, for example?

This might be included in the proposed ownership approach: once a company has reached a point of media power, perhaps there could be an obligation to provide other types of programming and contribute to quality content creation in other areas of cultural production. They would have to become a "little bit more public service".

20 years ago, the 25% independent quota was introduced partly to achieve precisely that: a guaranteed route through the broadcaster to the audience. That has worked pretty well to offer some cultural plurality.

The structure of British broadcasting is severely distorted by the dominance of one company over two crucially important types of pay television, films and sport. One company is able to extract billions of pounds per year from the TV market because it has a monopoly, in effect, on those categories, which means that its control over the wider broadcasting ecology is far greater than anyone ideally wants in an a pluralistic democracy.

How do we articulate that problem as a set of principles that might deliver the desired end point? There are two issues: whether dominance in particular content markets (sport/film etc.) need to be tackled; and whether simply measuring news is enough to regulate or curb degrees of influence?

If we widen it out, we might end up including all sorts of peripheral programming and therefore risk losing sight of the democratic purpose of news and current affairs.

A hypothetical question: suppose a large organisation or individual wanted to become the principal benefactor of the British arts or film industry and by his or her benefaction created a huge market share, would that be a problem?

Concerns we might have about unhealthy concentration go beyond ownership of news to ownership of media. The main avenues where people get their ideas: newspapers, television, radio, internet. Rather than simply looking at news content, what matters is who owns these: who is responsible for the main conduits through which people are getting their ideas?

Commerce and investment

What is the impact on investment? While protecting pluralism and democracy, media industries also need to flourish economically. So there is a pragmatic political consideration as well as the risk that politicians are afraid to introduce measures that cut across powerful media interests.

Permissible levels or thresholds have to allow people to run a plausible business. There is no shortage of interest in running media businesses – but media ventures are going bust every day of the week. These are risky investments. Notions of trigger points or thresholds imply that once a business is successful and reaches a certain market share, the reward will be extra regulation.

Different ownership structures may help here: e.g. not-for-profit, community etc. We need new media ownership laws for good economic reasons - Google is sweeping up advertising revenue while Sky is dominating subscription revenue. Once enterprises reach a certain size, rules might kick in which oblige them to pay a small levy into a fund that sustains a more diverse media ecology. This might be content production, or giving over airtime to third party media - something which lowers the entry barriers they have created through their dominance.

These should not be levels that prevent business development. One might, in the interests of democracy, have ownership constraints that ensure supplier diversity, but this is not in principle an argument against an economically healthy media sector.

Off-setting the "pollution"

To make an analogy: one might allow a company to engage in polluting activity but pay for the "pollution". Companies are not allowed to mine or exploit resources to a limitless extent, but constraints are imposed because of the externalities they create. That principle hasn't been applied to media ownership.

Matters are complicated by "freedom of expression" issues. Since the 17th century the press has been associated with political independence and freedom from licensing. Any attempt to regulate is presented/perceived as a challenge to freedom of expression (cf. some objections raised in regards to the Leveson Inquiry). Freedom of expression and freedom of operation are very different, but politically they are difficult to separate. Solutions will have to be pragmatic.

What about Time Warner? Employs about 100 journalists in CNN London newsroom, investors in Harry Potter films, own a large magazine business in the UK. What message are we sending to an American business in three markets? Counter-argument: they should be aware that there are thresholds and limits because citizens and politicians in the UK have agreed such constraints are important for democratic reasons. The message for investors is that if you want to become a mass-market news provider, you enter a compact which accepts that there are responsibilities associated with that.

How are people influenced and how should it be regulated?

So, in abstract terms, where are the ideas coming from which influence people's ideas, participation in democratic life or what they create/consume in cultural life? That has to be broader than news. If power emanates from the media and particularly from mass media (putting social media in the same box as "conversations in the pub"), don't we have to go broader?

The problem is getting large dominant media organisations to invest in cultural production beyond news. The last ten years have been about Ofcom recognising there are more ways to influence the market than just through PSB obligations. But introducing a licencing regime and attaching conditions is a very big step. In terms of imposing obligations on pay operations, we might have missed the boat: Canada has managed to extract money from commercial cable providers, as has France, to contribute to cost of programming.

The history of our media regulation, starting from establishment of Sky, has been to deregulate and it is very difficult to claw it back. Path dependencies are very hard to break. But when windows of opportunity arise policy can shift. The Leveson Inquiry/ News Corp scandal presents an opportunity: there is no guarantee that it will break path dependency, but if there is a moment this is it.

What would we want to achieve? To move away from the notion that you have to deregulate to keep business happy and the media on your side. To ensure that there is not a dominant commercial player.

The BBC issue: the BBC does provide internal pluralism. It is the biggest content creator and does things that we want these other companies to do in return for their dominance. That would also help solve Ofcom's problem of how to maintain a degree of public service plurality. Once a company has reached a particular threshold (whether audience, advertising, revenue etc.), regulatory responsibilities and obligations kick in.

The proposed obligations would not use News Corp money to invest in its own content; it would go into a third party fund (see, for example, the Lords report on investigative journalism 2012¹⁴). This would allow reinvestment in journalism, particularly at a local level. The companies essentially pay compensation for the barriers of entry they create for smaller players. That in turn adds to diversity.

¹⁴ <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25602.htm>

The internet

Everyone says the internet lowers entry costs and distribution costs. Paradoxically, the lowering of marginal costs for big players increases their ability to dominate the market. Media players including Google should be expected to fulfil certain responsibilities because its dominance makes it harder for small players to start up. Evidence suggests that online audiences are concentrating on a limited number of news websites, most of which are run by existing media enterprises. That's the power of strong media brands. Although the internet, in theory, brings down distribution barriers, it actually entrenches dominance in audience share terms.

Concluding comment from the Chair: A core theme which seems to be emerging is the idea of threshold / triggers which might be worth taking forward. We also need to come back to the question of the BBC.