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[p. 665] **The relation between content providers and distributors: Lessons from the regulation of television distribution in the United Kingdom**

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Abstract

Using the United Kingdom (UK) as a case study, this article analyses the growing commercial and regulatory significance of broadcaster-distributor relations within the contemporary television industry. The first part of the article argues that despite important changes in broadcast delivery technology, more recently shaped by the growth of the Internet, and the associated growth of options of receiving television content, the traditional delivery platforms (digital terrestrial, satellite and cable) remain by far the preferred choice for viewers in Britain. At the same time, public service broadcasters continue to be the biggest investors in domestic original non-sport content and account for over half of all television viewing. The strength of PSBs in content and their growing reliance on commercial proprietary subscription platforms (cable and satellite) and gradually on the Internet presents challenges in the nexus between broadcasters and distributors. The article focuses on the debate over retransmission fees between PSBs and Sky, and on the question of whether Sky should be required to offer some of its premium content to rival pay-TV platforms. These two examples highlight the impact regulatory intervention can have on the balance of power between broadcasters and distributors. The article concludes that such debates concerning the commercial relations between content providers and distributors will remain pivotal and become more heated given that similar issues are raised in the Internet environment.

Keywords: UK television regulation, retransmission fees, Pay-TV, Ofcom, Public service broadcasting

1. Introduction

Understanding the television industry in the United Kingdom (UK) used to be fairly straightforward. Until the 1990s, there were three terrestrial broadcasters – the BBC, ITV and Channel Four – each with reasonably well defined, albeit slightly different, public service remits, and two main sources of funding: either a compulsory licence fee paid by television owning households (the BBC) or the sale of advertising time (ITV and Channel Four). By contrast, the contemporary UK television landscape has become increasingly marketized and far more complex. Specifically, over the last couple of decades or so there has been an enormous increase in the number of channels (and/or aggregated audio-visual content) available to viewers via a range of new delivery technologies, such as satellite and digital television, as well as, most recently, the Internet. Just as, if [p. 666] not more significantly, these technological developments have been accompanied (and often driven by) the emergence of a new and increasingly significant source of revenue, namely subscription payments from viewers. At least partly as a result, a key feature of the contemporary UK television industry is the increased commercial and regulatory significance of the relationship between broadcasters (i.e. channel owners and/or content aggregators) and distributors (i.e. owners and/or controllers of key delivery platforms).

When spectrum scarcity limited the number of available channels, power and profit were chiefly located in control of distribution, rather than content production (Garnham, 1987). However, as the number of delivery options for broadcasters has increased, the dominant position of distributors could be seen to have lessened, while at the same time the commercial power of broadcasters who produce or control popular content has increased (Christophers, 2008). Consequently, the balance of power between broadcasters and distributors in the contemporary television industry is much less clear. Rather than inherently favouring the dominance of broadcasters by distributors, distributor-broadcaster relations are more clearly characterised by a mutual dependence. On the one hand, to reach viewers (and, in case of pay-TV broadcasters, often to receive a small share of the subscription revenue paid by viewers to delivery platform operators), broadcasters still require access to the leading delivery platforms, such as Freeview (terrestrial), Sky Digital (satellite) or Virgin Media (cable) in the UK. On the other hand, however, to ensure the competitiveness of their delivery platform, rival platform operators require access to the most popular channels/content, most notably Hollywood movies and live premium sport for pay-TV platforms. Moreover, established and emerging market concentration further complicates the broadcasting-

distribution relation as well as the broader competitive dynamics in the market. For instance, Sky has always been a broadcaster and a distributor. The vertically integrated Sky is under a regulatory obligation to provide fair, reasonable and non-discriminatory access to its platform in order that it does not favour own and affiliated services at the expense of competing services (see below). Against this background, rather than a simple linear power relationship with a definite winner and loser, the balance of power between broadcasters and distributors can be best seen as shaped by specific market and regulatory conditions (Evens and Donders, 2013). It is with this in mind that the remainder of the article provides a detailed analysis of the relationship between broadcasters and distributors in the contemporary UK television industry.

The first part of the article sets out in more detail how recent developments in broadcast delivery technology have led to a growth in the number of ways of receiving television services for viewers. This section highlights the continued importance of the traditional television delivery platforms, namely Freeview (digital terrestrial), Sky Digital (satellite) and Virgin Media (cable). It also draws attention to the potentially powerful position of Sky within UK broadcasting as a highly successful vertically integrated distributor-broadcaster.¹ Drawing on a wide range of primary documents produced by the UK government, regulators and industry policy stakeholders, the second part of the article focuses on two high profile (and ongoing) case studies in the regulation of television distribution in the UK: first, the dispute between public service broadcasters² (PSBs) and Sky over commercial terms for the distribution of their channels/services via its Sky Digital satellite delivery platform; and, secondly, the imposition of a Wholesale Must-Offer (WMO) obligation on Sky by the UK's communication regulator, Ofcom, in relation to the supply of its two principal premium sports channels (Sky Sports 1 and 2) to rival pay-TV platforms. Both of these cases demonstrate how, over the last decade or so, changing market conditions have had an impact on distributor-broadcaster relations, which, in turn, have led to increased calls for legal and/or regulatory intervention. Furthermore, these two examples have been selected because they highlight the impact regulatory intervention (or even just the threat of regulatory intervention) can have on the balance of power between broadcasters and distributors in the case of either a dominate distributor or a dominate broadcaster (or both). Overall, the UK case illustrates that

¹ Until November 2014, Sky was known as British Sky Broadcasting (BSkyB), but to avoid confusion is referred to throughout in this article as Sky.

² The main public service broadcasters in Britain are the licence-fee funded BBC and the commercially funded ITV, Channel Four and Channel Five.

the regulation of television distribution is an increasingly important policy tool for government to use in pursuit of public interest objectives, such as increased funding for PSBs or greater competition within the pay-TV market. As a result, the UK case may well provide a valuable reference point for other countries with similar market structures seeking to achieve the same policy goals. More generally, and perhaps more significantly, the UK example also highlights the underlying point that the ability of governments to shape the nature of the television industry did not disappear with the ending of spectrum scarcity. On the contrary, through the regulation of distributor-broadcaster relations policy makers and regulators retain a potential means to achieve most, if not quite all, of their policy objectives. It is this lesson that makes the regulation of UK television distribution a salient case for both those outside the UK and/or those with interests related to the future of the media industries more generally.

2. Developments in UK Television Distribution

Television broadcasting has always been about audiovisual content as well as audience access to it (Michalis, 2014). Over the last decade or so, due to a combination of technological, market and policy developments, issues relating to distribution and control of networks have become an ever increasingly important part of the TV industry and its regulation.

Following the proliferation of channels with the emergence of cable and satellite analogue platforms in the 1980s and the subsequent rise of strong pay-television operators, the UK media and communications market has experienced more fundamental transformations in recent years, notably the completion of the switchover process from analogue to digital television in 2012; the rise of broadband Internet supporting IP delivery of audio-visual content and the popularity of connected and [p. 667] portable consumer devices (Ofcom, 2014a: 2). All these developments have radically altered the structure and competitive dynamics in television and associated markets. There is now a multitude of media outlets (delivery mechanisms) and consumer equipment through which one can access television material.

Yet paradoxically, despite higher penetration of broadband Internet, the rapid take-up of connected devices, and increased competition for audience attention,³ television viewing has remained robust at just under 4 hours per day in 2013 (Ofcom, 2014c: 6). More crucially, TV consumption patterns have proved resilient. The three traditional digital television platforms - namely Freeview (terrestrial), Sky Digital (satellite) and Virgin Media (cable) - remain the main means of accessing television content. Two of them - the free-to-air Freeview and the subscription platform Sky Digital - have polarised the market. In 2014, these two platforms accounted for nearly 80 per cent of households, with the remaining 20 per cent subscribing to Virgin Media (Mediatique, 2014: 16, 65). BT's hybrid DTT and IPTV platform has yet to make great market inroads. As of mid-2014, seven years after its entry into the television market and roughly a year after the launch of the BT Sport channel, BT TV had just over one million subscribers, similar to TalkTalk's subscribers (the second hybrid DTT/IPTV platform) though the latter has not acquired expensive sport rights making some to question whether BT's investment in sports is paying off (Informatv, 2014).

Most viewing continues to be to linear channels, with adults spending on average three hours daily watching live television (Ofcom, 2014c: 8). Although the main five PSBs (BBC1, BBC2, ITV, Channel 4, and Channel 5) and their portfolio channels have experienced a decline in their audience share, they still account for 72.3 per cent of all viewing and they offer 16 of the 20 most watched TV channels (Ofcom, 2014a: 179). In addition, the main PSBs account for 43 per cent of all programme spend (Ofcom, 2014c: 166). This large proportion is even more significant if one considers that it is pay-tv subscriptions that drive growth in total sector revenues. Put differently then, and this point is worth emphasising, despite its smaller volume in terms of duration and number of viewers compared to linear viewing and despite its lower spend on first-run original non-sport programming compared to PSBs, pay-viewing delivers on average higher revenues. According to the latest available data, in 2013, pay-tv subscriptions continued to experience the highest growth: revenues grew by 6.7 per cent to nearly £5.9bn, making it the first most significant category (46 per cent) of TV industry revenue, behind advertising which accounted for 28.6 per cent (Ofcom, 2014c: 159-161).

³ At the beginning of 2014, 77% of households had broadband Internet 8% - over 6 million - of mobile subscriptions were 4G; 61% of adults owned a smartphone (almost the same as laptop ownership) whilst household take-up of tablet computers doubled within a year to reach 44%. Penetration of smart TVs increased and stood at 12% of households out of which 82% used the TV set to access the Internet (Ofcom, 2014a: 3-4, 10).

The expansion of broadband connections underlines the potential of online delivery via the open Internet (Over-The-Top, OTT, delivery via an Internet browser or an application) or on a managed TV connection (IPTV) to become the fourth distribution platform alongside the three traditional ones (terrestrial, cable and satellite). Indicatively, video-on-demand (VoD) services are rapidly moving online where a variety of players are present. Many of the OTT players offering professional audio-visual content on demand, especially films, are not traditional broadcasters and often come from outside Europe like Google's YouTube. In this market, the subscription VoD category experienced strong growth reaching £281m in 2013 and it continued to be dominated by Netflix (45.1 per cent market share) and Amazon (48.5 per cent market share). Digital subscriptions (OTT SVoD) increased by 120 per cent year-on-year and were worth £19m in 2013 compared to the TV-based SVoD which increased by 22 per cent and reached £85m. (see EAO, 2015: 172)

In 2011, Amazon acquired Lovefilm, the UK's first legal film download service. It was followed a month later by the entry of Netflix into the OTT subscription VOD market. Netflix and Amazon Instant Video (as Amazon renamed Lovefilm in 2014) offer predominantly a library of previously broadcast television programmes and movies and as such do not, as yet, present a serious threat to traditional broadcasters. More recently, however, both Netflix and Amazon have started investing in original content. For instance, Netflix, which produces the popular *House of Cards* and *Orange is the New Black* series, announced plans to increase its original programming three-fold from 2014 to reach 320 hours in 2015 (Steel, 2015). Similarly, Amazon has entered TV production through series and children's animation. In addition to their popularity, some of these original productions on streaming services won for the first time Golden Globe Awards in 2015 (Netflix's *House of Cards* and Amazon's *Transparent*) (BBC News, 2015).

Traditional broadcasters have responded to these challenges by investing in content and platforms. For instance, PSBs continue to invest in original content and at the same time they have sought to expand their distribution footprint. The BBC - required to make its services universally available, respond to audiences preferences, and promote the take-up of new technologies – is available on many platforms with overlapping footprints and delivers content in 30 different formats to more than 600 devices (Mediatique 2013: 5, 17). In line with PSB values, the BBC prefers open free-to-air platforms which support a horizontal

market in consumer equipment and mitigate against powerful gatekeepers. Accordingly, the BBC has invested in Freeview, Freesat (the satellite FTA platform) and YouView (the IP-enabled TV platform) with other industry partners. This strategy allows the BBC to retain editorial control and manage the user experience. The BBC also supports OTT delivery and to this end they have developed applications most notably the iPlayer, the BBC's catch-up service. Since 2013, the BBC has started premiering some content on the iPlayer. If OTT is not possible, the BBC cooperates with the distributor in question and has, for instance, made the iPlayer available via Sky's own catch-up proposition. Given the rising saliency of distribution issues for the BBC, its governing body the Trust has announced the introduction of a new Distribution Licence which will allow it to lay out and implement a clear distribution strategy, consider online and traditional distribution together, increase transparency of associated costs, review the Corporation's participation in multiple FTA platforms, and assess the value for money of the arrangements in place (Mediatique, 2013).

[p. 668] Given its popularity as mentioned, PSB content is core to cable and satellite pay-TV offerings. But in parallel, pay-TV platforms have thrived on exclusive premium content, notably films and sport. For instance in 2013, spend on sports programming grew by 19 per cent over the previous year and accounted for just under 60 per cent of all programme spend across commercial non-PSB channels (Ofcom 2014c: 159). Pay-TV players have strived to enhance the premium content they offer by acquiring rights to films and sports (e.g. BT), through content deals with other players (e.g. Virgin Media and Netflix), and by securing wholesale access to rival pay-TV platforms premium content (e.g. Virgin and Sky, see next section). For instance, BT has in recent years spent nearly £2bn on sports rights, mainly UEFA's Champions League and Premier League football matches. In launching the BT Sport channels in August 2013, BT's aim has been to challenge the pay-TV dominance of Sky in sport. But given the relatively low audience of BT Sport noted above, BT's acquisition of sport programming can be interpreted as primarily a strategy to defend its broadband market share through bundling offers from erosion due to increased competition from Sky Broadband and related bundled packages. Indeed, BT's strength is still in the broadband market where in mid-2014 it commanded 40 per cent of the market (7.39m subscribers against Sky's 5.25m) (Informatv 2014). Similarly, in 2013, a month after a deal to offer BT's sport channels to its cable subscribers, Virgin Media launched the Netflix application on its TiVo set-top box. The aim has been to broaden the range of premium content and increase the attractiveness of its platform. In July 2012, Sky launched Now TV, an OTT service

initially offering just films and subsequently sports on a subscription or transactional (pay-as-you-go) basis. This is the first time Sky has unbundled Sky Movies and Sky Sports. Sky Now is a response to growing competition from YouView and other OTT services and is aimed at extending Sky's distribution footprint to users with no subscription TV. Still, with a meagre 6.2 per cent of the subscription VoD market in volume in 2013, Sky's Now TV has yet to challenge the dominance of Amazon and Netflix (EAO, 2015: 172).

Pay-TV platforms support closed technologies that allow them to control access to the consumer, shape the user experience and, importantly, track user behaviour. Proprietary technologies allow the manufacturer (e.g. Apple) or platform controller (e.g. Virgin and Sky) to assume a gatekeeping role and pre-approve the content, services and applications that users can access (OECD 2013: 24-26). Moreover, vertical integration, as is the case of Sky, allows market players to increase their market power by controlling all segments of the value chain. Finally, in recent years, commercial players have launched triple-play bundle offers (a single player provides television, broadband Internet and voice telephony) in an attempt to lock in subscribers. For instance, two Internet service providers, BT and TalkTalk have used the YouView platform to strengthen their triple-play business model, drive usage of their broadband networks, and provide an outlet for any content they might acquire, as is the case of BT and sport rights. Competition is heating up and convergence is becoming evident as the worlds of television and the Internet are getting closer and as the distinctions between a traditional fixed or mobile telecommunications operator and a traditional media operator are blurred. In 2015, BT agreed to buy mobile operator EE (owned by Deutsche Telekom and Orange) for £12.5bn which, pending regulatory approval, will allow BT to offer quad-play packages by adding mobile telephony. Sky has opted for the less expensive option of acting as a Mobile Virtual Network Operator which means Sky has opted for the less capital intensive option of using the network of an existing mobile network operator (Telefonica's O2) rather than an expensive investment in an own cellular mobile network. Sky plans to launch quad-play offers in 2016 (Mance and Thomas, 2015).

Consumption of online content has grown very slowly. As of 2013, it stood at 10 per cent, out of which half was on-demand catch-up services notably the BBC iPlayer, 3 per cent represented downloaded or streamed content such as Netflix or Amazon Prime Video, and the

remaining 2 per cent short video clips (Ofcom 2014c: 10). In other words, non-linear consumption is growing incrementally and complementary to, not substituting, linear TV.

The hold of the two traditional pay-TV platforms (cable and satellite) is likely to increase in the medium to long term (e.g. Mediatique 2014). This scenario looks more plausible if plans to further squeeze digital terrestrial spectrum to the sub-700 MHz UHF band in order to accommodate demands by the mobile industry materialise (see Ofcom, 2015). A weakened DTT platform will strengthen the role of content aggregators and pay-for proprietary platforms (satellite and cable) and result in powerful gatekeepers. It will also put at risk the considerable investment in original content undertaken by PSBs which is sustained by the DTT platform, the main distribution platform for PSBs. There exists a 'virtuous circle', rooted in the analogue television era, whereby public service broadcasters are guaranteed free or low cost access to the terrestrial distribution platform and the significant reach and large audience this platform affords in order that they fulfil certain public service obligations, notably investment in original quality content (HoL, 2013, para. 154). As certainty over access to this spectrum and the DTT platform with its benefits is threatened, the risk is that this virtuous circle will be disrupted and investment in UK originated content will be jeopardised as a result.

All the above point to the continuing and increasing need for regulatory oversight over traditional (terrestrial, satellite and cable) and non-traditional (online and on-demand) distribution matters in the context of the dynamic relationship between content providers and distributors. They concern a variety of issues including carriage fees (e.g. retransmission fees on traditional platforms and the debate on network neutrality in IP delivery), the supply of content to rival platforms, and the findability and prominence of content on electronic programme guides and similar listing and navigation facilities. Some of these issues are examined in the next section.

[p. 669] 3. The Regulation of UK Television Distribution

3.1 Public Service Broadcasters and Retransmission Fees

The introduction of digital television during the late 1990s was accompanied by regulatory initiatives, at both the European Union (EU) and UK level, designed to remove the possibility of any abuse of control of ‘gateway’ technologies by dominant delivery platforms (Michalis, 2007; Smith 2007). Perhaps most significantly, in accordance with the EU’s regulatory framework for electronic communications networks and services directive, Ofcom’s *Provision of Technical Platform Services (TPS)* guidelines aim to ensure that broadcasters are offered access for their channels to Sky’s digital satellite platform on ‘fair, reasonable and non-discriminatory terms’ (FRND) (Ofcom, 2006). For the most part, however, agreements between broadcasters for carriage on delivery platforms, including Sky Digital, are commercially negotiated and payments can flow in both directions (Ofcom, 2014a: 119-120). On the one hand, ‘content fees’ are habitually made by delivery platforms to broadcasters in order to secure the presence of particular channels (or aggregated content), usually on a (few pence) per subscriber basis (Horsman, 1997: 155-21). On the other, broadcasters pay ‘platform charges’ to secure access to delivery platforms and/or to cover specific technical costs, such as regionalisation and the provision of electronic programme guide services (EPGs). The latter is a significant commercial and regulatory issue in its own right. For example, when Sky reorganised its Sky Digital EPG, it was reported that a number of channels, including Viacom’s *MTV* and *Comedy Central*, paid as much as £3.5 million over five years to move to a more attractive position (Bulkley, 2011). These commercial negotiations are carried out under the auspices of Ofcom’s specific *Code of Practice on Electronic Programme Guides*, which requires services to be offered on a FRND basis and ensure ‘due prominence’ for the main (BBC1 and 2, ITV, Channel 4 and Channel 5), but not all (e.g. *BBC4*, *ITV2*, *E4* and *Five USA*), channels offered by PSBs (Ofcom, 2004). Partly as a result, the positioning of the BBC’s children’s channels, *Cbeebies* and *CBBC*, on the second, rather than the first, page of Sky Digital’s EPG has been a contentious issue between the BBC and Sky (Neilan, 2012).

More significantly, this dispute over the positioning of channels on Sky Digital’s EPG can be seen as part of a wider conflict between PSBs and the operators of the UK’s leading pay-TV platforms, Sky and Virgin Media, over the distribution of their channels and services. As ever, disagreement has centred on who pays who and how much. However, in the case of the main public service channels, negotiations are also framed by long standing rules designed to ensure the widespread availability of these channels. Specifically, the 1988 Copyright, Designs and Patents Act exempts cable providers from having to pay content fees to carry

public service channels and the 2003 Communications Act includes ‘must carry’ and ‘must offer’ obligations. To date, Ofcom has not needed to introduce a directive bringing the ‘must carry’ obligation into effect and ‘must offer’ obligations are subject to the need to agree terms in accordance with Ofcom’s TPS Guidelines (Ofcom, 2014a: 121). Partly as a result, the impact, if any, these regulations have had on negotiations between public service broadcasters and pay-TV platform operators is difficult to gauge. What is more clear is that, during the late 1990s and early 2000s, when digital television services were introduced, the immediate success of Sky’s satellite platform, together with the uncertainty surrounding the future of digital terrestrial television, placed Sky in a powerful position in its negotiations with PSBs. Against this backdrop, to guarantee the continued widespread availability of their channels, the BBC and ITV each ended up paying Sky a negotiated yearly fee (in the region of £10m-£20m each) for carrying their channels on Sky Digital (Mediatique, 2012: 12).

Over the last decade or so, however, two of the key market developments detailed above have combined to strengthen the bargaining position of PSBs. First, the unprecedented success of Freeview has greatly reduced the possibility of a loss of universal availability for PSBs in the digital era. Second, while the audience share of the PSBs main channels has slowly declined over the last ten years, it has also become increasingly apparent that public service broadcasters continue to provide, by some distance, the most popular channels and VoD services available to UK viewers (see above). At around the same time, PSBs have also faced significant financial pressures caused by threats to their main sources of revenue. In 2010, as part of the newly elected Conservative led coalition government’s plans to cut public spending, the BBC agreed to accept major cuts to its own funding, requiring it to make annual savings of around £700m for the next five years 2015/16 (Kanter, 2013). Furthermore, audience fragmentation and the growth of the Internet, has meant that commercially funded PSBs have faced much reduced revenue from advertising. Although partially offset by income gained from their additional digital (portfolio) channels, between 2008 and 2013, the commercial PSBs, have seen net advertising revenues for their main channels fall by £505m in real terms (Ofcom, 2014a: 36).

Against this background, it is no surprise that PSBs have become increasingly focused on securing more favourable terms for the delivery of their channels via pay-TV delivery platforms, particularly Sky. To begin with, in 2003, the BBC, opted to transmit its channels ‘in the clear’ via satellite, which removed the need for conditional access services provided

by Sky and enabled it to negotiate a reduced 'platform fee' for EPG and regionalisation services. The BBC's example was almost immediately followed by ITV and then, in 2008, by both Channel 4 and Channel 5, paving the way for the launch of the free-to-air satellite television platform, Freesat (Mediatique, 2012: 13). Just as, if not more significantly, PSBs have also repeatedly called for regulatory change to facilitate a shift from fees being paid by PSBs to pay-TV delivery platforms to the payment of 'retransmission fees' by pay-TV platforms to PSBs. The case for change was most clearly articulated by the then BBC director general, Mark Thompson, in his 2010 Mac Taggart memorial lecture, where he contrasted the billions invested in original programme production by PSBs with Sky's annual programme budget (excluding sport) of around £100m. Following on from this, Thompson concluded that, as in the United States, broadcasters who invest most in original [p. 670] content, and whose channels as a result are the most popular, should receive payments from distributors who depend on the presence those channels. As a publicly funded broadcaster, Thompson argued that BBC services should always be available via all delivery platforms without a retransmission fee, but that the Corporation should not have to pay 'platform fees' either. However, for commercially funded public service broadcasters, Thompson concluded, retransmission fees could provide a valuable source of additional funding and, in turn, increase investment in original programme production (Thompson, 2010).

The PSBs case for retransmission fees received partial political support from the UK government. In 2012, the Department for Culture Media and Sport (DCMS) published an independent report it had commissioned on the issue (Mediatique, 2012). This report concluded that the 'current arrangements' benefit platform operators more than public service broadcasters and that 'changes might be warranted' (Mediatique, 2012: p.6). It also estimated that if carriage on pay-TV delivery platforms was freely negotiated by commercial PSBs (with a back stop 'must carry' obligation on platform operators, but no 'must offer' obligation on broadcasters) then broadcasters could receive payments ranging from £10m to £190m a year (Mediatique, 2012: p.6). However, to date at least, the government has stopped short of supporting retransmission payments for PSBs. Instead, as part of a wide-ranging consultation document, the DCMS has proposed a compromise of 'zero net charges, where the fees for access to the main platforms and for PSB channels cancel each other out' (DCMS, 2013: 26).

This proposal would fulfil the demands of the BBC and also has tacit support from Sky. At least partly in an attempt to lessen the need for regulatory change, from 2012, Sky has markedly reduced its annual platform charges for both the BBC (from £10m to £6m and then to £4.4m) and the commercial PSBs (Farber, 2012). Furthermore, most recently, in a move that reflects the growing commercial power of PSBs, Sky agreed ‘zero net charges’ distribution deals with both the BBC and ITV, which incorporated the provision of the BBC’s iPlayer service and other digital portfolio channels (Farber, 2014). However, the UK government’s ‘zero net charges’ proposal has failed to satisfy the commercial PSBs. Perhaps most notably, Channel 4’s chief executive, David Abraham, has claimed that securing retransmission fees from pay-TV platforms could be worth up to £200m each year to commercial PSBs (Campbelli, 2014). Unsurprisingly, this claim has been rejected by both Sky and Virgin Media, but, at the same time, the latter’s parent company, Liberty Global, has been prepared to pay £481m for a 6.4 per cent stake in ITV. At least in part, this move can be seen as an attempt to minimise any future retransmission fees to be paid to ITV (Evens, 2014).

Admittedly, there are some risks associated with the deregulation of PSB distribution negotiations. As Sky has pointed out, deregulation would increase the risk of ‘black outs’, where channels are withdrawn when negotiations between distributors and broadcasters fail to reach an agreement (McWilliam, 2014). Furthermore, unlike the regionally focused markets of the USA, in the UK, broadcasters and major pay-TV platforms operate and negotiate carriage on a nation-wide basis, which would make the potential impact of black-outs far more significant (Ofcom, 2014a: 121; see also DCMS, 2015). In addition, there is also a danger that the any revenue gained by commercial PSBs would be returned to shareholders, rather than invested in increased programme production. However, these potential risks could be minimised by regulatory oversight. For example, an approach similar to Ofcom’s existing TPS regulation could lessen the likelihood of black outs and the level of investment in original programming could be monitored as part of Ofcom’s more general licensing and regulation of commercial PSBs. If policy makers and/or regulators are committed to sustaining (and increasing) the level of investment in original British programming, then regulatory change to favour PSBs in their negotiations with pay-TV platforms, at least in part, represents a means to achieve this objective.

3.2 The Regulation of the Wholesale Pay-TV Market

Sky's position as a highly successful vertically integrated broadcaster-distributor has also repeatedly placed it at the centre of commercial and regulatory disputes over the supply of key content to pay-TV delivery platforms. In fact, over the last couple decades, Sky's position in the UK pay-TV industry has been subject to near constant investigation by competition regulators. Perhaps most notably, two major investigations have been undertaken by the OFT (1996; 2002), as well as a lengthy review of the pay-TV market by Ofcom (2010), which is itself currently the subject of a review by the regulator (Ofcom, 2014b). Broadly speaking, these investigations have examined: first, whether Sky can be said to have a dominant position in the UK pay-TV market; and, secondly, whether there is evidence that Sky has abused a dominant position so as to lessen competition in the market(s). Given the phenomenal commercial success of Sky since around the mid-1990s, on the issue of market dominance there has been little to debate. The OFT's (1996) review of the wholesale pay-TV market and its (2002) Competition Act investigation both pointed out the dominant position of Sky within the UK pay-TV market. In particular, the OFT's investigations highlighted the significance of Sky's dominant position in the market for the wholesale supply of certain premium sports and film channels, which, in turn acted as a significant 'barriers to entry' for any potential competitors (OFT, 2002, 5).

The issue of whether Sky has abused its dominant position within the UK pay-TV market has proved much more controversial. The OFT's investigations into the wholesale pay-TV market considered a number of complaints from cable broadcasters over their treatment by Sky. Perhaps most seriously, the cable broadcasters alleged that Sky exercised a 'margin squeeze' on the distribution of its premium channels (OFT, 2002, 2). Following its 1996 review, the OFT concluded that Sky had not acted anti-competitively and agreed some 'informal undertakings' with the broadcaster regarding its future relationship with cable operators (OFT, 1996, 17). By 2002, the OFT's position was less clear cut. While the regulator concluded that there were 'insufficient grounds for finding that Sky had abused a dominant position' (OFT, 2002a, 10), the OFT's [p. 671] Director General, John Vickers, described Sky's conduct as 'around the borderline of anti-competitive behaviour' (OFT, 2002b). A few years later, Ofcom reached a less generous conclusion. Following an exhaustive (2007-10) review of the UK pay-TV market, Ofcom concluded that Sky had 'market power in the wholesale provision of premium channels' and 'exploits this market power by restricting the distribution of its premium channels to rival pay TV providers'

(Ofcom, 2010b). To remedy the situation, Ofcom announced the establishment of a ‘wholesale-must-offer’ (WMO) system, which compelled Sky to offer its premium sports channels (*Sky Sports 1* and *Sky Sports 2*) to other outlets on a wholesale basis at prices regulated by Ofcom. Since then, Ofcom’s decision has been subject to (a still ongoing) legal challenge from Sky, but ‘interim relief measures’ put in place by the Competition Appeals Tribunal guaranteeing the supply of Sky Sports 1 and 2 to Sky’s main rival pay-TV platforms, including Virgin Media, TopUp TV, and BT (via DTT and IPTV from 2014, but not OTT), have meant that the WMO has been, at least partially, in place since 2010.

Ofcom’s current review of the WMO has highlighted a number of issues that are important to an understanding of the wholesale pay-TV market and its regulation. To begin with, Ofcom has attempted to identify the key content that may be used as a source of market power by a dominant broadcaster (or vertically integrated broadcaster-distributor, such as Sky). This has proved to be reasonably straightforward. Around the world, pay-TV broadcasters have, with varying degrees of success attempted to use premium content, such as Hollywood movies and exclusive live coverage of major sporting events/competitions to attract subscribers. Furthermore, the enormous sums paid by broadcasters for sports rights in the UK (and beyond) suggests that sports rights are valued particularly highly by pay-TV operators (Evens et. al, 2013). More specifically, in the UK market, the exclusive live rights for Premier League (PL) football have proved by far the most valuable set of rights. In February 2015, the PL agreed a record £5.1bn deal for the sale of three seasons of live domestic television rights to Sky and BT (Premier League, 2015). Furthermore, the value placed on PL football by pay-TV broadcasters has also been supported by Ofcom’s own research. According to Ofcom, live PL coverage is considered ‘essential’ by 60 per cent of subscribers to Sky and/or BT (Ofcom, 2014: 39). Put simply, live PL football is the key content within the UK pay-TV market.

The second major issue addressed by Ofcom was the impact that a restricted supply of such key content would have on competition in the pay-TV market. To assess this issue, Ofcom analysed the ownership of the rights to key content, most notably PL football, alongside the market position of the rights holders. As noted above, the UK rights to live PL football are currently shared between Sky and BT, but with Sky having the rights to many more matches per season than BT (126 and 42 respectively) (Premier League, 2015). However, as previously mentioned, since 2012, BT has invested considerable sums in television sports

rights, including around £900 million for the exclusive rights to UEFA Champions League (previously broadcast by Sky and ITV) and Europa League matches, for three seasons from 2015/16 (Gibson, 2013). Nevertheless, Sky remains by some distance the UK's leading buyer and supplier of sports content. Sky's share of expenditure on sports rights in 2013/14 was over 60 per cent of all sports rights expenditure, in comparison to BT's less than 20 per cent, and around 20 per cent from free-to-air broadcasters (Ofcom, 2014b: 51-2). Just as if not more significantly, between 2009-2013, Sky's share of the total revenue from the supply of sports channels was consistently in excess of 90 per cent, and has declined by just 6 per cent since BT Sport entered the market (Ofcom, 2014b: 51). On this basis, it is difficult to argue with Ofcom's conclusion that rival pay-TV platforms which 'are unable to offer the key sports content available on Sky Sports may face difficulties in competing' in the UK pay-TV market (Ofcom, 2014b: 59). By contrast, given its relatively weak market position, Ofcom has argued that, even after its investment in UEFA football rights, the impact of a decision by BT to limit the supply of BT Sport would prove much less significant and could even have the positive long term effect of allowing BT to develop into a more effective competitor for Sky (Ofcom, 2014b:59).

Finally, Ofcom's WMO review examined the likelihood of the limited distribution (i.e. a refusal to supply, or the supply on unfavourable commercial terms) of key content. For a dominant vertically integrated broadcaster-distributor, like Sky, a key strategic decision is whether to maximize revenue through the wholesale distribution of channels/content to potentially rival delivery platforms, or whether to limit supply in order to promote the take-up of its own delivery platform, even if this means the loss (at least in the short term) of some additional revenues that could have been secured from a wholesale supply deal. The balance of this decision is likely to vary according to the market position of both the vertically integrated broadcaster-distributor and the rival delivery platform. For example, Ofcom details how Virgin Media's relatively high subscriber base means that Sky has a 'strong incentive' to supply key content to Virgin Media, as limited distribution would lead to a significant loss of revenue (Ofcom, 2014b: 67). By contrast, in the case of rival pay-TV platforms with a smaller subscriber base, such as BT, the losses from limited distribution would be far less significant. Furthermore, if the rival delivery platform, like BT, is seen as a strategic threat in the market for sports rights and pay-TV more generally, there would also be a strong incentive for Sky to limit the supply of key content to BT (Ofcom, 2014b: 67). On the basis

of this analysis, Ofcom concluded that it may be ‘appropriate to maintain regulation on Sky with the objective of ensuring fair and effective competition’ (Ofcom, 2014b: p.73).

Albeit operating from a much weaker position in the pay-TV market, BT is also a vertically integrated broadcaster-distributor and is therefore faced with a similar strategic decision over whether to wholesale supply its key content (i.e. its BT Sport channel(s)) to rival delivery platforms. For BT, the significant loss of revenue that would accrue from limited distribution to established pay-TV platforms, such as Sky and Virgin Media, provides a strong incentive to reach wholesale supply deals with these platforms. However, the situation is much less clear in relation to smaller pay-TV platforms, such as Talk Talk (YouView), especially given that Talk Talk’s offers a combined pay-TV and broadband service which may be considered as a rival to that offered by BT. Indeed, Ofcom points out that, to date at least, BT has opted not to supply BT Sport to the Talk Talk You View platform (Ofcom, 2014b: 68-70). It is somewhat of surprise therefore that Ofcom has concluded that [p. 672] ‘it is not minded to consider that regulation of BT is necessary to ensure fair and effective competition in pay TV at this time’ (Ofcom, 2014b: 75). To some extent this decision could be justified by an underlying desire to facilitate the long term growth of a more meaningful rival for Sky in the UK pay-TV market. At the same time, however, this recommendation also highlights the limitations of a piecemeal approach to the regulation of the supply of key content in the wholesale pay-TV market. The establishment of legal guidelines for the supply of key content on FRND terms, in the same vein as Ofcom’s existing TPS guidelines, may offer a more satisfactory long term solution to the regulation of the supply of key content to a variety of distribution platforms.

4. Conclusion

The aim of this article has been to highlight the growing commercial and regulatory significance of content provider – distributor relations within the contemporary media and communications industry. It has focused on television distribution in the UK and has analysed two regulatory issues: first, the payment of retransmission fees between PSBs and Sky; and second, the question of whether Sky should be required to offer some of its premium content to rival pay-TV platforms. Both of these issues have been the subject of protracted (and still ongoing) legal and political debate, which suggests that dominant commercial interests will do all they can to avoid (and/or limit the impact of) regulatory

intervention. Clearly, to achieve public interest objectives, the regulation of content provider – distributor relations will require both political will and constant regulatory oversight. In the case of UK television, the UK government has threatened, but to date at least, stopped short of legislative change to ensure improved terms for PSBs from the distribution of their channels. However, even the threat of legal change has brought clear financial benefits for PSBs. With the introduction of a WMO obligation on the supply of Sky's premium sports channels, Ofcom has demonstrated how regulatory intervention can enhance competition within pay-TV, but in all likelihood, a less piecemeal and more strategic approach to the regulation of the supply of key content will be required in future. Nevertheless, taken together, these examples highlight the impact regulatory intervention can have on the balance of power between broadcasters and distributors. This underlying point has a resonance well beyond the case of UK television.

The issues examined here have strong parallels with debates in the Internet environment. The debate over retransmission fees on traditional platforms has strong similarities to the debate on network neutrality in IP delivery. The latter is rapidly becoming a commercial negotiation about the distribution of value and money between content and Internet access providers. Similarly, debate over prominence on electronic programming guides is very similar to that on Internet search and navigation. Yet, despite the parallels between content providers and distributors in the television and Internet industries, it seems that two cases are going in opposite directions (Flores, 2014). As detailed here, in broadcasting, the balance of power may be seen to have begun to tilt in favour of content providers (always in relative terms since there are strong interdependencies between the two negotiating parties). In contrast, in the case of the Internet, there is evidence from the USA that the outcome of the negotiations between content and carriage providers is going in the opposite direction. For example, in 2014, Netflix in the USA agreed to pay Comcast, the biggest cable TV and Internet broadband provider, for direct interconnection of its video servers to Comcast's network (Rayburn, 2014). Thus, in contrast to recent developments in the television market, in the Internet case content providers are beginning to pay Internet access providers and therefore (again without wanting to stretch this argument given the two-sided nature of the market) it appears that in the case of the Internet the balance of power is tilting in favour of the Internet access providers.

What matters here is less which way the balance of power between content providers and distributors is shifting and more what is at stake. Despite technological and underlying economic differences between the television and Internet markets, in both cases, content provider-distributor commercial negotiations concern not only the distribution of value and money in the value chain (commercial and economic efficiency considerations) but they relate to fundamental public policy issues too, including access to diverse content and information, their funding, and freedom of expression. A related common issue is free and open access by content suppliers to potential consumers (Waterman and Choi, 2011: 972). Distributors have a so-called ‘termination monopoly’ which means that they control access to consumers and their market power is strengthened by the lack of competition in the relevant market. For example, as noted above, BT’s market power in the retail and even more in the wholesale broadband market as well as the increasing bundling of services (triple- and quad-play offers) by providers makes it more difficult for consumers to switch providers.

The parallels (and overlaps) between the issues raised in relation to television and Internet regulation highlight the ever increasing need for political and regulatory oversight of distribution matters. While commercial negotiations between content providers and distributors may often seem to rest on the finer points of corporate strategy and/or economic analysis, it should always be remembered that, just as in other areas of public policy, regulatory (non) action is ultimately determined by political decisions and value judgements.

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