

Sweeping Changes in U.K. Media Law Will Affect U.S. and U.K. Publishers

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On July 17, 2003, a complete overhaul of the communications regulatory structure in the United Kingdom (U.K.) received royal assent after a rocky two-year path toward adoption. The 590-page Communications Act 2003 will rationalize the structure under which independent media, and, to some degree, the venerable British Broadcasting Corp. (BBC), are regulated in England, Scotland, Wales, and Northern Ireland. U.S. companies will be allowed to invest in the U.K. broadcast marketplace for the first time. The Act also will implement several provisions of the European Union's (EU) landmark Telecommunications Directives from 2002.¹

Three forces are shaping the reordering of the U.K. media landscape:

- *Telecommunications regulation:* The Act will merge many of the existing state regulators into a single Office of Communications. To U.S. lawyers accustomed to the workings of the Federal Communications Commission (FCC), the British regulatory landscape appears chaotic at best. In a country roughly twice the size of New York State, no fewer than seven regulatory and self-regulatory agencies oversee a dozen national newspapers, hundreds of local newspapers, five national television networks, a nationwide digital satellite system, two national cable companies, four national radio networks, and hundreds of local radio and television outlets. In addition, the BBC answers to its own self-regulatory governing board.

- *Privacy:* The U.K. press's traditionally staid self-regulatory structures have come under renewed strain as Britain moves somewhat reluctantly toward protecting individual privacy under European standards for the first time.
- *BBC Under Attack:* The unprecedented crisis over whether the Blair government oversold the threat of Iraqi weapons of mass destruction has resulted in an explicit threat to the BBC's vaunted charter of independence from both regulators and the government that funds it to the tune of some \$4 billion per year.

Real changes are in store for the daily operations of U.K. media companies and U.S. media and Internet companies providing content that is broadcast in the United Kingdom or accessed by English Internet subscribers. Regulation will be more focused, and self-regulatory bodies will become more powerful. Foreign investment will add zest to an already spicy competitive mix in the United Kingdom. The BBC's privileged position in the communications market, which has allowed it to create one of the world's great global broadcasters but has also made competition by private media difficult, is unlikely to survive intact. At the very least, the media marketplace at the beginning of 2004 will be markedly changed from the market that ushered in 2003.

The impact of the Telecommunications Act 2003, the U.K.'s uneasy shift on privacy issues, and the Blair-BBC scandal are examined further below.

"Rationalizing" the Regulatory Landscape

Perhaps most important for news organizations, the Act will install one super-regulator in place of the several bodies that currently regulate the media. By far, the most dominant subject of the Act is the regulation of telecommunications and other electronic communications services, an area that is far beyond the scope of this

article, but the Act's impact on content regulation in the United Kingdom cannot be overemphasized.

The regulatory structure for media content in the United Kingdom was ripe for an overhaul. Four regulatory agencies potentially have jurisdiction over various types of media and communications regulation and content disputes. The major players include:

- Independent Television Commission (ITC)
- Radio Authority (RA)
- Office of Telecommunications (OfTel)
- Radiocommunications Agency

In addition, a privacy commissioner determines whether journalistic practices constitute "processing personal data" under data protection legislation. Two self-regulatory bodies, the Press Complaints Commission (PCC) for the printed press and the Broadcasting Standards Commission (BSC) for electronic media, address consumer complaints. The BBC's Board of Governors regulates the public broadcaster. Finally, adding one more cook to this regulatory broth, the Department of Trade and Industry has jurisdiction over competition among all the media.

Under the Act, the Office of Communications (OFCOM) will handle most regulatory and content issues. OFCOM's jurisdiction will be familiar to Americans used to the converged regulatory practice of the FCC. Additionally, however, OFCOM will have a role in media content, specifically to "protect the public from any offensive or potentially harmful effects of broadcast media, and to safeguard people from being unfairly treated in television and radio programmes."² On this score, OFCOM will take over significant content regulation from the ITC and the RA. The types of issues that can be addressed by these entities, based on recent actions, can range from requiring television programmers to warn viewers of sexual content in upcoming programs to criticizing programmers for a "distasteful"

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TV show. Examples of the latter include a video clip showing a “bad parent” swinging a toddler over his head or the host of *Big Brother* “humiliating” a contestant.

“Content Quality and Standards”

To further OFCOM’s mandate under the Act, a Content Board will be created to focus on television (terrestrial broadcast, cable, and satellite) and radio. OFCOM has pledged not to regulate the printed media or the Internet. The Act explicitly exempts the print media from the Content Board’s reach, but its language covering the Internet and other online publishing industries is rather oblique. One reason for the lack of clarity may be because the Act is implementing the EU’s technology-neutral Telecommunications Directives, it thus speaks in terms of content transmitted by “electronic communications networks,”³ language that the Content Board uses as well. Nevertheless, the absence of a specific exemption leads many Internet publishers and others to worry that the Content Board could take jurisdiction over Internet content, despite OFCOM’s assertions to the contrary during Parliamentary debates on the subject.

The Act permits OFCOM to determine Content Board goals beyond the Act’s stated goals of increasing media literacy and effective self-regulation. OFCOM’s current view on the role of the Content Board provides that

[t]he Content Board will want to understand, analyse and champion the voices and interests of the viewer, the listener and the citizen. The Content Board will aim to reach those parts of the public interest that competition and market forces cannot and do not reach. The key themes it will grapple with are content quality and standards—the Content Board is in effect the Content Quality & Standards Board. Other themes are diversity, plurality, regionalism/localness and of course “public-service broadcasting”—at times going beyond commercial considerations to wider public concerns.⁴

How is all this going to shake out in the real world of broadcasting? OFCOM’s Content Board will not have direct responsibility for licensing but it will have the ability to provide “input” to licensing decisions.

OFCOM has expressed its ambitions to regulate broadcast content in three “tiers.” Tier One is characterized as “negative content regulation,” covering harm, offense, accuracy, impartiality, fairness, and privacy.⁵ OFCOM intends to draft “codes of practice” in each of

these areas after consulting with broadcasters, the public, and other interested parties. It will bring advertising into this tier as well. Although the BBC generally has escaped the regulatory ambit of OFCOM’s powers because of its self-regulation, OFCOM intends to extend its reach to the institution.

OFCOM’s Tier Two involves quotas. Broadcasters will be required to meet specific goals in terms of how much of their content comes from U.K., European, and independent producers. The Act has extended the issue of local quotas, first introduced under the EU’s Television Without Frontiers framework in the 1980s, to require that broadcasters, particularly the BBC, meet certain levels of independent television production to foster the U.K. film and video industry.

Finally, Tier Three of OFCOM’s content regulation authority will consider the public service broadcasting obligations of private television channels. Each channel will be required to submit a yearly plan and annual progress reports.

OFCOM will not, however, be the sole content regulator in the United Kingdom. The privacy commissioner, who is responsible for the increasingly troublesome issues concerning data protection, will continue to operate separately from OFCOM as will the self-regulatory PCC (press) and the BSC (electronic media).

Media Ownership to Be More Open

Perhaps the most controversial element of the Act covers non-European ownership of television and radio stations. Unlike the United States, which typically refuses to permit non-U.S. ownership of media properties unless the country in which the aspiring owner is located allows U.S. companies to own its domestic outlets, the United Kingdom adopted an open marketplace. The Act simply abolished restrictions in the Broadcasting Act 1990 that limited foreign ownership of broadcast stations. Companies from outside Europe, particularly those in the United States, now can bid on U.K. media properties.

The Act also adopts a more relaxed approach to multimedia mergers, provided that any proposed cross-media mergers are subject to a public interest test under which the Department of Trade and Industry and the Secretary of State consider the effect of the merger on the choice and quality of programs.

This public interest test will apply when any national newspaper group with at least 20 percent concentration attempts to acquire Channel 5 Broadcasting Ltd. (Five), an independent broadcaster that is 65 percent owned by Germany’s RTL; or any independent national radio service. This test also will apply if the acquisition involves any service that has been allocated a Channel 3 license (the largest of which are Granada and Carlton); if ITV or Five propose to acquire any national radio service; or if any two national radio services propose a merger. Rules on local concentration were adopted as well. Finally, the omnipresent OFCOM Content Board will provide “input” on whether particular mergers in the media marketplace should be permitted.

The Act addresses other ownership rules, too. Religious organizations may now hold broadcast licenses although political organizations may not.

U.K. Response to Privacy Directives

The Act does not implement the new privacy regulations required by the EU Telecommunications Directives that Member States must have enacted by October 2003.⁶ The new telecommunications data protection directive requires that recipients of spam affirmatively agree to receiving such e-mail messages, unless a prior business relationship exists. It also requires websites that use “cookies” to provide users with an opportunity not to receive them. A draft proposal implementing these rules in the United Kingdom now has been published for comment.

Self-Regulation and Invasion of Privacy

The U.K. press is, in many ways, the polar opposite of its American cousin. English newspaper publishers are unlikely to form industry associations to advocate their causes, and highly competitive newspaper editors are more likely to criticize their colleagues than work with them. Unlike the U.S. media, which finds self-regulatory bodies too close to governmental regulation to be acceptable under the First Amendment, the U.K. media has created broad-ranging and relatively powerful self-regulatory bodies, the most notable of which is the PCC.

The PCC was launched from the hypothesis that has triggered unsuccessful defamation reform attempts in the United States, that is, readers would file

fewer lawsuits if they had access to a free, pro se forum to handle their complaints.⁷ “Legal controls would be useless to those members of the public who could not afford legal action—and would mean protracted delays before complaints received redress,” says the PCC itself. “In our system of self-regulation, redress is free and quick.”⁸

The U.K. public has responded with enthusiasm. In 2002, the PCC investigated some 2,630 complaints, about 60 percent of which dealt with accuracy in reporting.⁹ Importantly, in a year when only two lawsuits were filed alleging invasion of privacy under the Human Rights Act 2000, the PCC addressed some 600 complaints relating to privacy. Another 7,250 less formal inquiries by telephone, fax, or e-mail were fielded. Perhaps a contributing factor was the speed of resolution—on average, the PCC took thirty-two days to investigate each formal claim and recommend a resolution.¹⁰

The basis for the PCC’s actions is an agreed-upon Code of Practice that was drafted by editors.¹¹ In sharp contrast, such codes in the United States have been difficult to negotiate, partly because of antitrust concerns and fears that agreement on journalistic standards would influence the standard of care in negligence-based defamation actions. For better or worse, the U.K. press has had less reason for concern in the latter area because of the strict liability nature of U.K. defamation law. Complaints can lead to adjudications that the challenged newspaper or magazine must publish “with due prominence.” Despite the high volume of complaints, only thirty-six resulted in published adjudications in 2002.¹²

More Power to the PCC?

The issue of privacy has led to calls for greater power for the PCC from some members of the press as well as from legislators. As in the United States, privacy has become a controversial legal and political issue, although perhaps for different reasons. In the United Kingdom, the Human Rights Act 2000 was enacted for the purpose of implementing the European Convention for Human Rights (ECHR). Among other things, ECHR Article 9 provides that each individual has “the right to respect for his private and family life, his home and correspondence.”¹³

Traditionally, some protection for privacy has been provided under English law by the cause of action for “breach of confidence.” This concept has led to decidedly uncomfortable judicial and scholarly discourse on issues such as whether a “confidential relationship” between a prostitute and a celebrity included a tacit agreement not to disclose the client’s specific activities, and whether a soccer star’s romantic involvements constituted “confidential relationships.”¹⁴

The English courts have, to date, resisted embracing a full cause of action based on the European protection for privacy while the general public and celebrities alike have begun to agitate for greater protection than English law currently provides. Reflecting this focus, a Parliamentary commission issued a report in June 2003, calling for specific legislation to protect individual privacy and an expansion of the powers of the PCC to deal with privacy issues.¹⁵

Among other recommendations, the report called for:

- Adoption of a two-track procedure that would permit claimants either to seek mediation or apply directly for an adjudication under the Code of Practice.
- Expansion of the PCC’s authority to allow it to engage in consensual prior restraints. The PCC would be empowered to act as a liaison between people who have reason to believe that the press is about to publish information about them, and the publisher in question. Along the same lines, the report suggested that a prepublication review team could act proactively before events likely to cause privacy concerns, such as unexpected disasters, to establish press guidelines for coverage in compliance with the Code of Practice.
- Procedural reforms, such as expanding the number of nonpress members on the PCC and establishing an appeals mechanism.
- Expansion of the sanctions available to the PCC. Under such a proposal, the PCC would be permitted to levy fines against the press for the first time (with payment being made to a charity of the complainant’s choice) and to force the press to pay the out-of-pocket costs (not including attorney fees) of the complainant.

The essential character of the PCC would change with implementation of these reforms, notably the payment of fines, reimbursement of expenses, and permitting appeals to be taken against PCC adjudications or refusal to adjudicate. Some in the press, however, see the reforms as protection against calls for additional legislation to protect against invasions of privacy.¹⁶ In any case, it seems increasingly likely that either action by the press to expand the authority of the PCC as a self-regulatory body or action by Parliament or the courts to expand the cause of action for invasion of privacy will result in the next year.

Death Knell for an Independent BBC?

The BBC, said to be “Britain’s most enduringly credible institution—more trusted than the government, more respected than the monarchy, more relevant than the church,”¹⁷ is a unique player on the international stage. The BBC receives some \$4 billion (£2.4 billion) in public funding, mostly collected from the requirement for each home with a television to pay a \$150 annual fee for a “television license.” It has used this extraordinary level of funding to expand into new lines of business, often to the detriment of potential competitors. Among its other activities, the BBC has launched a respected Internet news service that includes archives of BBC broadcasts, a terrestrial digital television transmission service, and a twenty-four-hour news service. It operates several television channels in addition to BBC1, a children’s TV channel, and half of the radio stations in the United Kingdom. Furthermore, the BBC World Service broadcasts twenty-four hours a day to 150 million listeners in forty-three languages.

Despite its reliance on government funding, the BBC has maintained a high degree of journalistic independence. Unlike U.K. commercial media, which must answer to the ITC, the RA, and other bodies, the BBC is accountable only to its Board of Governors, which is solely responsible both for operating the BBC and regulating it. This arrangement threatens to collapse as the result of the unfortunate confluence of two events—the most serious conflict between the BBC and the government in its eighty-one-year history and the imminent expiration of the BBC’s current ten-year charter.

Death of a Confidential Source

The conflict that may threaten the independence of the BBC arises, somewhat ironically, precisely because the BBC is sufficiently independent to criticize the government harshly. In May 2003, BBC war correspondent Andrew Gilligan reported that, according to a confidential intelligence source, the Blair government had inflated the dangers posed by Iraq's weapons of mass destruction. The broadcast was a bombshell that accelerated the pace of the growing public opinion that the United Kingdom had been led into Iraq on false pretenses.

From the moment Mr. Gilligan broadcast his charge, the search was on for his anonymous source. Speculation was intense, only to be resolved when Dr. David Kelly, a highly respected weapons analyst in the Ministry of Defense, committed suicide in July 2003. The government undertook a formal investigation chaired by Lord Hutton, which led to revelations about the government's role in disclosing Dr. Kelly as a source, the BBC's internal newsgathering practices, and the gamesmanship between the government and the press on political reporting issues. A formal report is expected by the end of 2003.

BBC's Charter Expiration

The BBC's reporting on Iraq has led to extraordinary tension between the BBC and the Blair government, to say nothing about questions of the BBC's charter, which will expire in 2006. Opponents have linked the BBC's reports on the Iraq war to the sensitive issue of whether its charter, including such vital issues as funding and "television license" charges, should be changed.

Culture Secretary Tessa Jowell led the charge in July 2003 when she announced that she would "carefully consider any recommendations and conclusions that can be drawn from the Hutton inquiry in relation to the BBC" and said that the BBC was under a burden to prove it was "worthy" of the public trust.¹⁸ In September, Ms. Jowell announced a "root and branch" review that would be the most thorough in the BBC's history.¹⁹ Noting that the BBC's independence from government would be assured, she also warned that the BBC could expect other significant changes when its charter is renewed.

To some extent, this rhetoric can be attributed to the highly politicized

atmosphere surrounding the relationship between the BBC and the government. But there also are legitimate parallels between some of the issues being probed by the Hutton Inquiry and the BBC's charter, including the disparity in level of regulation applied to the BBC and privately owned media in the U.K.. The BBC Board of Governors regulates the BBC, at least on paper, but many observers are concerned that the Board's immediate and strong support for Gilligan's disclosures gave the impression that the BBC is not really regulated at all.

Although this may be acceptable to many Americans, who equate less regulation with more free expression, it is disconcerting to many in the English media market, including the BBC's heavily regulated competitors.²⁰ Others see the Gilligan episode as evidence of bias on the part of the BBC and question whether the large government subsidy is still warranted. If the Board of Governors' "dual role as guarantors of the BBC's independence from government and arbiter of the corporation's editorial standards" is seen as inappropriate,²¹ the BBC, at least according to its critics, should be accountable to the same regulatory structure as private broadcasters.

What Does It All Mean?

The only change discussed above that is a sure thing is implementation of the U.K. Communications Act 2003, which will merge the regulatory roles of the disparate group of U.K. regulatory authorities and establish one far-reaching Content Board. The other sweeping possibilities examined in this article are far from certain. It remains to be seen whether U.S. media companies will move to acquire U.K. media properties, whether the PCC will become a more powerful institution, whether privacy law will be strengthened, and whether the BBC will survive the political fallout from the Hutton Inquiry. Given the exceptional pace of change in the past six months, the U.K. media landscape is likely to undergo a dramatic transformation.

As a practical matter, what this means depends on where one stands:

U.K. broadcasters and U.S. media companies providing content that is transmitted within the United Kingdom: The new OFCOM is likely to intensify the focus on content regulation. In addition, although U.S. media companies can take advantage of lowered barriers to

ownership of U.K. properties, they also can expect a higher level competitive threats from potential non-European owners of broadcast stations.

U.K. newspapers and magazines: More attention to individual privacy rights will result in changes in either the legal landscape or to the self-regulatory structure that has gained widespread acceptance. If the press and Parliament agree on expanded powers for the PCC, complainants may well seek relief from the PCC, and the movement toward greater privacy rights in legislation could be blunted. Even without new legislation, the influence of the ECHR will ensure that privacy rights continue to be a front-and-center issue for the press.

U.K. online publishing industry: Increased vigilance will be necessary to ensure that the OFCOM Content Board does not interpret its regulatory authority as covering either Internet or online content. Calls for regulation of Internet content may expand as the lines between transmission of programming and online, on-demand publishing become blurred, and as publishing websites and online services become more popular among users.

U.S. companies with global ambitions: The U.K. media marketplace may become a focus of potential activity. Legal and regulatory trends will have a significant impact on the value of broadcast properties. For example, a U.S. radio broadcaster may be reluctant to compete in a marketplace in which one company, funded entirely by the government, operates half the radio stations. The same may be true of television broadcasters, especially those focused on news and public affairs. The competitive threat represented by the BBC may become less of an issue if its special status is threatened.

The BBC: The changes that are likely to result from its charter review and scheduled renewal in 2006 are likely to be profound. The BBC has had the freedom to invest in new markets with public funding for the past decade, and it is becoming increasingly possible that its sources of funding may come under scrutiny and its status as a self-regulating entity may be nearing an end.

Perhaps the greatest impact of any of these changes will be felt by the public in the United Kingdom, which may be the beneficiary of a more robust, competitive marketplace with increasing parity among media outlets and a more stable regulato-

ry playing field. An increased focus on protection of personal privacy is likely, but it may lead to less protection for freedom of expression. The open and fierce public debate currently surrounding the U.K. media marketplace threatens decades of tradition that could be lost in a period of rapid legal change.

Endnotes

1. The full text of the Act is available at www.hmso.gov.uk/acts/acts2003/20030021.htm (accessed Sept. 26, 2003).
2. See Ofcom Office of Communications, What Will Ofcom Do?, at www.ofcom.org.uk/about_ofcom/what_ofcom_does/index.htm (accessed Sept. 26, 2003).
3. See, e.g., Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive).
4. See Ofcom Office of Communications, *supra* note 2.
5. See *id.*
6. See Kurt Wimmer & Keith L. Lieberthal, *What Yankee Telecommunications Lawyers Need to Know About EU Regulation*, COMM. LAW., Summer 2002, at 17.
7. See, e.g., RODNEY A. SMOLLA, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM (1992); Rodney A. Smolla, *Taking Libel Reform Seriously*, 38 MERCER L. REV. 793 (1987).
8. See *supra* note 7.
9. See Press Complaints Comm'n, What is the PCC?, at www.pcc.org.uk/about/whatis.html (accessed Sept. 26, 2003).
10. See *id.*
11. See PRESS COMPLAINTS COMM'N, CODE OF PRACTICE, at www.pcc.org.uk/cop/cop.asp (accessed Sept. 26, 2003).
12. See *What is the PCC?*, *supra* note 9.
13. See Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 (Nov. 4, 1950, amended Nov. 1, 1998), European T.S. 155, available at www.echr.coe.int/Convention/webConvenENG.pdf (accessed Sept. 26, 2003). Importantly, Article 10 provides for the protection of free expression:
 - (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
 - (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity

or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The complexity lies in balancing the rights of the individual to privacy under Article 8 with the rights of the press to freedom of expression.

14. See, e.g., *A v B Plc and Another*, Court of Appeal, March 11, 2002 (Lord Woolf, the Lord Chief Justice, finding that "an action for breach of confidence now would, where appropriate, provide the necessary protection"); *Douglas and Others v Hello! and Others*, [2003] EWHC 786; *Naomi Campbell v Mirror Group Newspapers*, [2002] EWHC 499 (QB).
15. See Marietta Cauchi, *U.K. Parliament Report Recommends Stronger Press Self-Regulation and Statutory Privacy Law*, MEDIA/LAW LETTER (Media Law Resource-Center), Aug. 2003, at 57.
16. For example, Alan Rusbridger, the influential editor-in-chief of the daily broadsheet *The Guardian*, testified before Parliament that expanding the powers of the PCC—notably, permitting it to find disputed facts and allowing appeals to lie against its

decisions—would provide more effective redress for those claiming that their privacy rights had been invaded. See *Rusbridger Backs Press Ombudsman*, MEDIA GUARDIAN, at <http://media.guardian.co.uk/presspublishing/story/0,7495,912088,00.html> (Mar. 11, 2003) (accessed Sept. 26, 2003).

17. Sarah Lyall, *BBC, Once Above Reproach, Is Beset by Claims of Bias*, INT'L HERALD TRIB., Sept. 26, 2003, at www.iht.com/articles/111252.html (accessed Oct. 23, 2003).
18. Benedict Brogan, *BBC Is Threatened with Charter Review*, TELEGRAPH, July 27, 2003, available at www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/26/nblair426.xml; Tessa Jowell, Speech to the Biennial Convention of the Royal Television Soc'y (Cambridge, England, Sept. 18, 2003), available at <http://media.guardian.co.uk/broadcast/story/0,7493,1045553,00.html> (accessed Oct. 23, 2003).
19. Matt Wells, *Labour Orders BBC Shakeup*, GUARDIAN UNLIMITED, Sept. 19, 2003, available at <http://media.guardian.co.uk/bbc/story/0,7521,1045339,00.html>.
20. See *id.*
21. *Id.*

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