

Robert Timothy Lord

Leveson Inquiry into the culture, practices
and ethics of the press

Witness statement of Robert Timothy Lord

24 April 2012

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1. I am a lawyer specialised in competition issues in the UK broadcasting and telecommunications sectors and have worked on these issues for some twenty years. I believe that the facts stated in this witness statement are true.
2. On three separate occasions I have worked for UK companies that were adversely impacted by the business practices of BSkyB. Those organisations considered regulatory intervention by the UK competition authorities to constrain or investigate that behaviour. In each case, attempts to obtain proper action by those authorities was frustrated by the real or perceived threat that newspapers controlled by News Corporation could harm the interests of the individuals or businesses seeking the intervention or those responsible for carrying out the investigation or their political masters. The risk of adverse publicity and intrusions into privacy was sufficient to scare off potential claimants and to influence those responsible for the investigations either directly or indirectly.
3. I believe these incidents may be relevant to Modules 1, 3 and 4 of Justice Leveson's inquiry.
4. Module 1 - members of the public felt sufficiently threatened and intimidated by the risk that News Corporation papers would publish private information about them that they were unwilling to raise questions about the business practices of BSkyB in the pay TV market. I believe that was in part a function of News Corp's papers ability to obtain private information and publish it without penalty about which more information has now come to light. This has had a significant adverse impact on the proper regulation of broadcasting in the UK.
5. Module 3 - that politicians, and more specifically members of the Government, intervened to prevent proper investigation of BSkyB by the competition authorities in the belief that this would deliver a more favourable editorial line in the News Corporation papers on them as individuals and on Government policy more generally.
6. Module 4 Remedies - that these concerns were caused by the shared ownership of newspapers and pay-TV businesses by News Corporation. Essentially that the monopoly profits earned

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by BSkyB from pay TV were protected by the influence established by the ownership of newspaper titles. This is particularly the case because the profitability of pay TV businesses is strongly impacted by the extent of government regulation they face and the degree of competition. The relevant remedy would be restrictions on the control of newspapers and ownership of other businesses such as pay TV.

7. I set out below the three cases in which Murdoch's influence over the broadcasting industry was felt as a result of his control of newspapers.
8. Videotron Corporation Limited. I was in-house counsel from 1993 for three years. Videotron was the licensed cable operator for franchises covering two thirds of London and for Southampton. Cable systems covering the UK had been licensed under the Cable and Broadcasting Act 1984 and were mainly owned by North American cable and telecommunications companies such as NYNEX and Telewest. Videotron's parent was a Canadian cable television company. As Videotron's business was located in London I played a co-ordinating role with the other UK cable companies and the Cable Communications Association which was the trade body that represented their interests.
9. Building a national cable infrastructure was a key national project to deliver fibre access to UK homes. Each cable company had a build obligation to meet which required homes to be built past by certain dates.
10. UK cable companies had two lines of business - pay television and fixed local telephony. The business was highly capital intensive as it required digging up the street to install the necessary fibre infrastructure. During this build phase they were significantly cash flow negative and faced competition from established incumbents. In pay TV this was BSkyB and in local telephony, BT.
11. I was responsible for Videotron's relationship with Oftel and with BT which was both a key supplier and our competitor in local telephony. We filed a number of complaints about BT with Oftel (predecessor to Ofcom). Despite BT's size and considerable political influence at no stage was it suggested that the cable industry would do anything other than fight its corner in relation to competition issues. One of these issues was the availability of number portability which was resolved by the Monopolies and Mergers

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Commission in favour of the cable companies in November 1995 despite BT's vociferous opposition.

12. The cable industry also had competition concerns with BSkyB which controlled the rights for premium sport and movie programming in the UK. Cable operators had to buy this programming from BSkyB which was also their competitor. In summary, the question arose as to whether the terms on which BSkyB was making premium programming available to the cable industry was intended to exclude them from the market and was an abuse of market dominance prohibited by EC Law. I note that this question continues to be the source of litigation and regulatory scrutiny some fifteen or more years later and has yet to be finally resolved.
13. On behalf of the Cable Communications Association I prepared with external counsel a complaint to the EC Competition Directorate about BSkyB's terms of supply for its premium sports and movie channels which was submitted to the Commission in draft. A meeting of the Cable Communications Association was called to decide whether to submit the complaint in final form. I did not attend that meeting but was told by our General Counsel, Bradley Herrmann, that a number of the participants, senior executives from the cable industry, were "too scared" of Murdoch and his newspapers to submit the complaint formally.
14. No concession was reached with BSkyB but the EC complaint was not pursued by the CCA. The decision struck me as odd as the individuals involved would have represented organisations that were also powerful, such as NYNEX, Telewest, Bell Cable Media, Comcast and General Cable and sophisticated about anti-trust issues.
15. At no point were the cable industry "too scared" of BT - also a key supplier.
16. In addition to other factors the ongoing failure to address the issue of premium channel pricing has had a serious impact on the UK cable industry. Losses were significant and all the companies consolidated. From a public policy point of view the companies did not meet their build obligations to cover some 90% of the UK with a fibre optic network - cable coverage today is around 50% of UK homes and it is unlikely to increase significantly beyond this.

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17. BBC. I was hired by the BBC and worked there as a senior policy adviser from 1995 to 1997. The BBC were keen to hire me because of my experience of pay and multichannel TV in the UK which was beginning to be significant to the free to air and public service broadcasters.
18. Around February 1996 I was asked to prepare a submission from the BBC to the Office of Fair Trading on BSkyB's market position. The OFT was considering a reference to the Competition Commission of BSkyB's businesses. My first draft contained references to an earlier Competition Commission report that had found that BSkyB was dominant in the provision of pay sports and movie channels in the UK. It expressed concern that the BBC and licence fee payers could be adversely impacted by a commercial player with market power in DTH distribution - a distribution mechanism that the BBC may have to adopt to maintain its universal coverage.
19. Patricia Hodgson, then the secretary to the BBC Governors having read the draft came to see me. She said the document could not be submitted to the OFT because "Rupert Murdoch controls enough newspapers to get the DG fired." I remember this very clearly. I was shocked by what she said.
20. I pointed out that the submission to the OFT would be confidential but she thought this was irrelevant. I remember being surprised that someone of this seniority would be so intimidated by the risk of adverse coverage. Specifically that she linked what the BBC might say in a confidential response to the OFT to what would appear in Murdoch's papers about the Director General. I attach a note I made some days later with my advice on how the meeting with the OFT should be handled which confirms the outcome of the discussion i.e. the BBC made no competition arguments in writing to the OFT.
21. In December 1996 the Director General of Fair Trading decided not to refer BSkyB to the MMC preferring instead to accept informal undertakings from BSkyB. "The Director-General's Review of BSkyB's Position in the Wholesale Pay TV Market, December 1996"
22. The BBC has spent many multiple millions of pounds of the licence fee to pay for the carriage of its channels on DTH and for electronic programme guide positioning in part

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because of the lack of competition in pay TV. In 2000 I calculated that the BBC was paying BSkyB £21.60 per year for each BSkyB subscriber for conditional access services (6 BBC channels at 30p/channel/month) i.e. 20% of the licence fee for those homes.

23. ITV Digital. I was head of regulatory affairs for ITV Digital plc from 2000 to 2002. I also continued to work with the liquidator of ITV Digital until 2004.
24. ITV Digital was formed as a joint venture in January 1997 with Carlton, Granada and BSkyB to offer pay television nationally using digital terrestrial technology as opposed to satellite and cable distribution. DTT was an important national project as its national coverage would eventually allow the switch off of analogue television broadcasting releasing valuable radio spectrum for other uses. All the public service broadcasters had their own capacity to offer their channels directly to the public in addition to ITV Digital's pay TV service.
25. The joint venture originally included BSkyB until the European Commission forced BSkyB out of the joint venture for competition reasons in June 1997. A "divorce" agreement was rapidly negotiated and ITV Digital then sought to establish its service in competition to BSkyB.
26. ITV Digital launched in November 1998 (under the brand ONDigital). ITV Digital indicated that it was not prepared to use BSkyB's conditional access system provided by NDS, a News Corp subsidiary, and from that point in BSkyB took a aggressive attitude to the new competitor.
27. This led to a range of competition complaints to both the UK and the EC authorities which I was involved with or managed. In the office, BSkyB's strategy towards ITV Digital was known as "death by a thousand cuts".
28. The main UK competition complaint related to the pricing and other terms on which BSkyB provided certain premium pay TV channels to ITV Digital. The case alleged an abuse of dominant position by imposing a margin squeeze on ITV Digital such that an efficient competitor would be forced out of business if it paid the prices imposed by BSkyB for key content.
29. The OFT began its investigation on 11 January 2000. It took nearly two years for a preliminary infringement decision in

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December 2001 and another year for the final non-infringement decision in December 2002 - some nine months after ITV Digital had ceased trading. Throughout this time we pointed out that the delay in reaching a conclusion risked making the investigation pointless. Throughout the process both myself and our professional advisers found it difficult to understand why the process was taking so long or why the OFT were so unwilling to investigate effectively.

30. There were also a number of other issues including (this is only a partial list):-
 - 30.1. channel holdbacks, BSkyB had agreed with a number of channel providers that they would not offer their services to ITV Digital - Disney, Discovery, MTV, Living, Paramount, The Box, and Nickelodeon, the OFT refused to act on this and this went to the European Commission.
 - 30.2. terms for access to the DTH platform for ITV's own sports channel, referred to Oftel/Ofcom
 - 30.3. cross promotion of the DTH services in the sports and movie programming provided by BSkyB, complaint to the ITC
 - 30.4. BSkyB's refusal to carry advertising for ITV Sport, referred to the ITC
 - 30.5. the permitted maximum power level of digital terrestrial transmissions, an issue for the ITC.
31. The only complaint that was actually resolved was that handled by the European Commission on channel holdbacks. All the other issues were with UK regulators who made no relevant decision on any of these matters until after ITV Digital went out of business. No justification for the delays were ever given, at least, on the record.
32. A number of unusual things occurred as we pursued the margin squeeze case with the OFT.
33. We instructed Sir Jeremy Lever QC, a competition law silk, to advise. At our conference with him on 6 September 2000 he said that as this case was against a Murdoch business we would be well advised to assess if anyone at the OFT or other regulators could be subject to a blackmail threat. He thought that if anyone had any issue they wanted to keep

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private then we could not rely on them giving us a fair hearing - as Murdoch's papers would threaten to intrude on their private lives. We didn't pursue this concern but it is the only time in twenty years that I have received advice of this kind. Given what we now know about journalism at News Corporations' papers it is perhaps more relevant.

34. On 26 March 2001 we had a meeting with the European Commission to express concern over the time the OFT was taking to investigate the margin squeeze case and reach a conclusion. The EU case officer, Kevin Coates, said we were wasting our time bringing a case against Murdoch in the UK because of the close associations between the UK government and Murdoch. He said the rule of law does not apply to Murdoch in the UK. I remember him saying that the EC has a list of countries in which the relationship between the government and the media had an adverse impact on democracy and the rule of law. Italy was on list and the UK was number two. He also suggested that the situation in the UK was arguably worse than Italy because at least in Italy it was obvious what was going on.
35. Some months after ITV Digital closed in April 2002 I was approached by Michelle Childs who was a member of the Advisory Panel to the Director General of the Office of Fair Trading. She also worked for the Consumer's Association. I was originally introduced to her through a friend.
36. On the 5 September 2002 she told me over an "off the record" lunch that the OFT had been prevented from properly investigating BSKyB by the Government. She apologised that effectively we had been wasting our time by seeking regulatory intervention by the OFT for three years. She said John Vickers had ruled himself out of any involvement at the beginning because of his previous comments on BSKyB's market power. Then the issue had been passed to a fairly junior official (Mark Bethell) and was given no further support by the office. BSKyB's lawyers had found it an easy task to delay the process in those circumstances and essentially the OFT and the Government had been happy with that. She too was disappointed but was clear that it was naive of me to expect anything else given Murdoch's direct and real influence over the government at the highest levels.
37. I exhibit a copy of a speech given by Stuart Prebble, CEO of ITV Digital in which he discusses what caused the failure of

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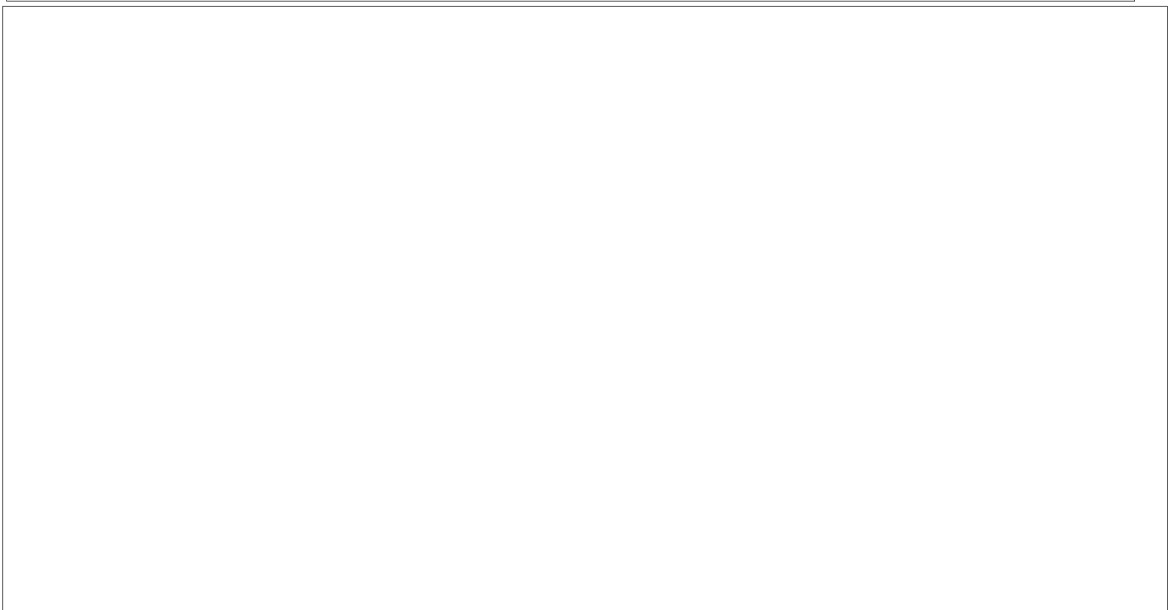
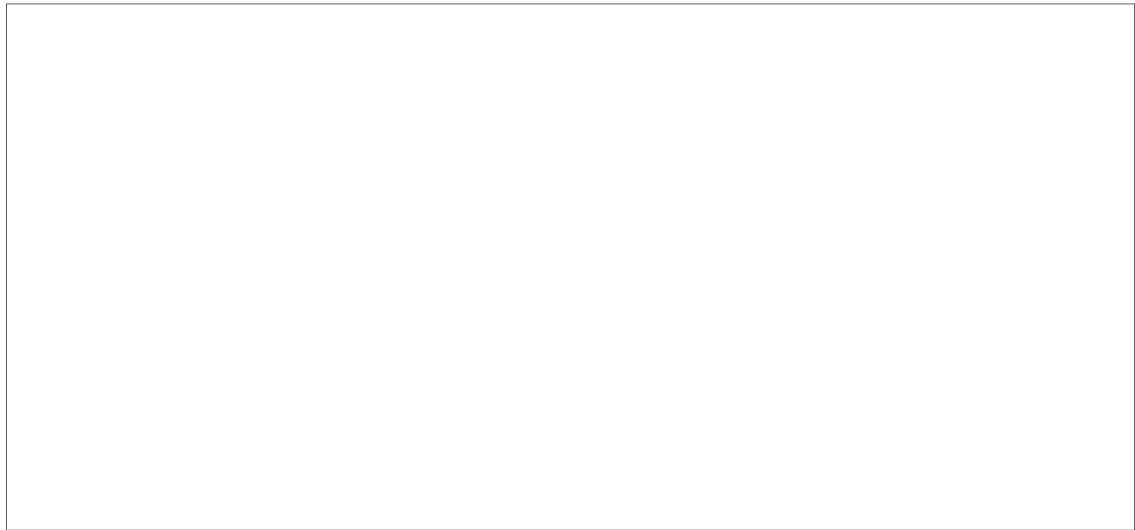
the business - key to that failure in his view was the OFT's delayed investigation.

38. The OFT's final decision in December 2002 (published in the week between Christmas and the New Year) did find a margin squeeze though it decided it was too small to act upon - in direct contradiction to what we had been told during the investigation by the case officer. The OFT had also refused to run a "central case" for the calculation and had basically given BSkyB the benefit of the doubt at every stage.
39. Throughout the process I was involved in briefing MPs about ITV Digital's business (see early day motion of Linda Gilroy MP in whose constituency an ITV digital call centre was located) and the competition complaint. Many MPs refused to meet with us as they did not want to be seen talking about the Murdoch issue - also I believe because of the fear of the Murdoch press. Those who were prepared to speak with us left us in no doubt about Murdoch's influence at the highest levels through the leverage of the papers. They said they would like to help us but were either too scared to do so or that they were not permitted to do so by the party whips.
40. I also attach excerpts from Lance Price's Book, "Where Power Lies" and The Journals of Woodrow Wyatt Volume 3. The excerpts suggest that Murdoch lobbied the government on his pay TV businesses and that Blair reached some sort of understanding with Murdoch to let his pay TV business operate without interference in exchange for more favourable coverage of him and the Labour party. The "without interference" appears to have extended to not being properly investigated by the OFT and other regulators in the UK.
41. I believe that it was important to Murdoch's pay TV businesses that the papers he controlled were able to intrude into people's private lives, intimidate them and go unpunished precisely because this sustained a culture of fear amongst politicians and regulators. This in turn meant that his pay TV interests were never properly regulated and BSkyB's profits were and remain unconstrained by competition or regulation. A review of media ownership rules could usefully consider the risk of newspaper proprietors using editorial control to influence politicians in protecting or favouring their other business interests. In my view this risk provides a strong argument that such co-ownership should not be permitted.

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42. Additional points. As a result of my involvement in the ITV litigation I was contacted by a number of people who passed information to me about Murdoch's relationship with the Government and particularly Blair over a number of years. I do not have direct knowledge of what was told me but the inquiry may want to investigate further because, if true, the allegations may be relevant to its deliberations.

43.



44. In 28 January 2003 the Sun published information from the Hutton Report into the death of David Kelly 24 hours in advance of the report's release to the public and the press. Trevor Kavanagh, the Sun's political editor, claimed that this was a journalistic scoop. At the time I told a number of my friends that it was, in my view, a deeply immoral (and

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illegal) act to use a breach of confidence in the report in to a man's suicide to sell more newspapers. As a result of my saying this I was contacted by a colleague who said he had been contacted by someone at Number 10. My colleague reported to me that the Hutton Report had been leaked by Peter Mandelson to Trevor Kavanagh and that Mandelson had access because he had a pre-publication copy of the report given to officials at Number 10. I reported this information to the solicitor running the leak investigation a few days later. The leak investigation however failed to find the source of the leak.

45. The illegal disclosure of the Hutton report allowed the Murdoch press and Sky News to increase the pressure on the BBC leading eventually to the resignation of the Director-General - thus further intimidating the BBC. It has always struck me as odd that the breach of confidence by News Corp papers was not properly investigated by, for example requiring Trevor Kavanagh to name his source or face contempt proceedings. No possible public benefit could be said to arise from the access given to the report to Murdoch's papers 24 hours in advance of its general publication.

Statement of Truth

I believe the facts stated in this witness statement are true.

Signed

Date 23 April 2012

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Annexes

BBC Note

Prebble Speech

Excerpts from Woodrow Wyatt Journals - Volume 3

Excerpts from Lance Price - Where Power Lies

BBC Radio Programme from 2007 on relationship between Blair and Murdoch and the Europe Issue

Press Cutting on Tony Blair's u-turn on the European referendum

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