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The Regulation of Commercial Radio Broadcasting in the United Kingdom

Timothy H. Jones*

The regulation of commercial radio broadcasting in the United Kingdom is about to enter a period of rapid change. The Government is committed to increasing the number of commercial radio stations and to a measure of deregulation. Legislation to effect these changes is expected in the near future. Up to the present time, an independent agency, the Independent Broadcasting Authority (IBA or Authority), has strictly regulated commercial radio broadcasting.¹ Commercial radio services have been restricted to those of a "local" character.² This regulation of Independent Local Radio (ILR) is generally regarded to have been a failure, and the IBA's effectiveness as a regulatory agency has been called into question on numerous occasions.³ Many of the problems which face ILR are the result of its origins and development over the past seventeen years, since its inception in 1972.

This article critically examines the history of the IBA's regulation of ILR, describes the problems currently besetting ILR, and outlines some of the reforms which have been suggested.

I. The Independent Broadcasting Authority

A. Introduction

The IBA is the public body authorized by Parliament⁴ to organize and supervise the Independent Broadcasting System.⁵ In addi-

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² The term "local" is not defined in detail in legislation. See infra notes 73-75 and accompanying text. In practice, the term means that each commercial radio station broadcasts to a specific geographical area, most commonly a large town or city.
⁵ The term Independent Broadcasting System is used to describe commercial radio and television services as regulated by the IBA.
tion to ILR, this system consists of Independent Television (ITV). 6 Both ILR and ITV are part of a two-tier system comprised of the IBA and a number of private companies. The radio stations are owned by private companies who enter into contracts with the IBA to provide local radio services. 7 Both are financed by the sale of advertising time. The Independent Broadcasting System is almost wholly dependent upon advertising revenue for its financing. Broadcast services are paid for by the sale of “spot” advertising time by the program companies. 8 The IBA obtains its income from rentals paid by the program companies under the terms of their contracts with the Authority.

The ILR companies are subject to financial conditions imposed by the Broadcasting Act 9 and their contracts with the IBA, in addition to those which flow from company law. The initial funds required by the companies are found in the normal way; that is, by the issue of shares or acceptance of loans from third parties. The ILR companies must therefore seek to secure an income from the sale of advertising time which is sufficient to meet the cost of their operations and to provide a reasonable return for their shareholders.

The IBA consists of the Chairman, Deputy Chairman, and ten other Members. At present, its existence is guaranteed by statute until 1996, 10 subject to extension by statutory order. 11 The Home Secretary appoints all the Members. 12 Three of the Members are specifically appointed to make the interests of Scotland, Wales, and Northern Ireland, respectively, their special responsibility. 13 A Member holds office for a fixed period, not exceeding five years. 14

With regard to ILR, the 1981 Broadcasting Act lays down four main functions for the IBA: selection and appointment of the program companies; 15 supervision of the programming; 16 control of the amount and content of the advertising; 17 and transmission of all the

6 ITV is the name given to commercial television (as opposed to the BBC, which is run as a public corporation) in the U.K.
7 These contain the contractors’ basic broadcasting obligations as well as some administrative detail. The basic contractual requirements repeat the key provisions of the 1981 Broadcasting Act.
8 “Spot” advertising is when a distinct portion of time is sold to an advertiser. It can be contrasted to the use of advertising magazine programs, where advertisements would be shown continuously for a longer time, up to half-an-hour, perhaps.
9 One such condition is the payment of rental to the Authority to cover transmission and administrative costs. See Broadcasting Act, 1981, ch. 68, § 32.
10 Id., ch. 68, § 2(1).
11 Id. § 2(5).
12 Id. § 1(1), sched. 1. The Home Secretary is referred to as the Secretary of State in the Broadcasting Act of 1981.
13 Id. § 1(2).
14 Id. § 2(1).
15 Id. § 3.
16 Id. § 4.
17 Id. §§ 8-9.
programs and services.\textsuperscript{18} The functions of the program contractors are to provide the program material\textsuperscript{19} and to raise revenue from the sale of advertising time to provide the finances on which the system depends.\textsuperscript{20}

\section*{B. Functions of the Authority}

The major role of the IBA is to attempt to reconcile the commercial interests of the broadcasting companies with the public interest. The main aspect of this role is to make sure that the pursuit of commercial objectives does not become the companies' dominant activity to the detriment of program standards. Equally, the Authority must make sure that any requirements which it imposes on the broadcasting companies' output of programs remain compatible with a successful appeal to a substantial portion of the audience. The IBA represents an example of the traditional British compromise between tight state control and unfettered commercial activity.

The IBA became responsible for the development of ILR as a result of the 1972 Sound Broadcasting Act, which first introduced local commercial radio to the United Kingdom.\textsuperscript{21} This Act renamed the Independent Television Authority (ITA) as the IBA and gave it the powers to establish "local sound broadcasting services," now known as ILR.

ILR is part of the public service broadcasting system of the United Kingdom. The precise meaning of the "public service" concept of broadcasting has proved to be a fruitful topic for debate, but, in essence, it means that broadcasting is not determined simply by market forces in terms either of programming or of access to the broadcast services.\textsuperscript{22} Two further aspects of the public service concept are that broadcasting is to be used for the benefit of the public as a whole, rather than for the benefit of a minority, and that the broadcast service should be of a high standard. Various implications as regards the regulation of broadcasting flow from this concept of public service. In the case of the IBA, this concept means that the IBA's responsibility for broadcasting is that of a trustee for the public interest and that it is independent of government in its decision-making. The relationship between the IBA and the Government should be at arms-length, with the independence and integrity of the Authority being respected. There are also positive duties imposed on the IBA to provide a certain type and standard of service. The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{18} Id. \S\ 3.
\item \textsuperscript{19} Id. \S\ 20.
\item \textsuperscript{20} Id. \S\ 21.
\item \textsuperscript{21} Sound Broadcasting Act, 1972, ch. 31, \S\ 2(1).
\item \textsuperscript{22} See Broadcasting Act, 1981, ch. 68, \S\ 2(2)(a).
\item \textsuperscript{23} Baldwin, Cave & Jones, \textit{The Regulation of Independent Local Radio and Its Reform}, 7 \textit{Int'l Rev. L. & Econ.} 177, 179 (1987).
\end{itemize}
\end{footnotesize}
The report of the Committee on Financing the British Broadcasting Corporation (BBC) suggested that "the best operational definition of public service is simply any major modification of purely commercial provision resulting from public policy."

The Committee noted that the scope of public service should vary with the state of broadcasting itself. This limited concept of public service is far from helpful if an attempt is to be made to clarify what the present implications of the concept are. Public service broadcasting is better understood as "imposing requirements on broadcasters not simply to refrain from transmitting material which is inaccurate, misleading or unsuitable, but positively to provide wide-ranging programmes of quality." This view of public service broadcasting envisions a strict regulatory regime for broadcasters, with positive requirements imposed in relation to program content and style. This is the approach which lies behind many of the provisions of the Broadcasting Act. The 1981 Broadcasting Act attempts to incorporate the essence of public service broadcasting into the function and duties of the IBA. Section 2 of the Act states:

The function of the Authority shall be to provide, in accordance with this Act . . . television and local sound broadcasting services, additional in each case to those of the B.B.C. and of high quality (both as to the transmission and as to the matter transmitted), for so much of the United Kingdom . . . as may from time to time be reasonably practicable.

It shall be the duty of the Authority—

(a) to provide the television and local sound broadcasting services as a public service for disseminating information, education and entertainment;

(b) to ensure that the programmes broadcast by the Authority in each area maintain a high general standard in all respects (and in particular in respect of their content and quality), and a proper balance and wide range in their subject matter, having regard both to the programmes as a whole and also to the days of the week on which, and the times of the day at which, the programmes are broadcast; and

(c) to secure a wide showing or (as the case may be) hearing for programmes of merit.

Requirements such as these reflect what is known as the "principle of universality," which is an important aspect of public service broadcasting. According to this principle, broadcast services should attempt to provide some programming of appeal to every member of the listening or viewing public, because spectrum scarcity restricts
the number of possible services. The principle also requires that news and coverage of socially controversial topics be politically impartial in character. Certain material cannot be broadcast, such as material which would be an incitement to crime or highly offensive. It may also be necessary, as in the case of ILR, to broadcast a proportion of programs in minority languages.

1. Selection and Appointment of the Program Companies

One of the IBA's most important functions is that of choosing the program contractor.28 The Annan Committee29 recognized this fact when it stated that "the most important way in which they [the IBA] exercise their watching brief is by selecting the company which in their belief will give the best service to its region . . . and then by awarding it the franchise."30 The selection of a particular contractor from competing applicants is entirely a matter for the Authority. Among the relevant considerations are financial strength, the extent of local support, and past performance or future potential.31 Other important decisions within the discretion of the IBA are the determination of the areas to be advertised and the requirements of the service to be provided by contractors. Among the relevant factors in this context are financial circumstances, technical requirements, and the character of the region to be served.32

2. Supervision of Programming

Although not itself involved in program making, the IBA is answerable to Parliament and to the public for everything which ITV and ILR transmit. As already noted, the IBA's function under the Broadcasting Act is to provide local sound broadcasting services of high quality, "both as to transmission and as to the matter transmitted."33 The Act imposes a statutory duty on the IBA to ensure that the programs provide a proper balance of information, education, and entertainment;34 "a high general standard in all respects,"35 and, so far as possible, accuracy in news; due impartiality in matters of political and industrial controversy; and the avoidance of offense to good taste and decency.36 The programs have to be made avail-

28 For a full discussion of this function, see Baldwin, Cave & Jones, supra note 23, at 178.
29 This is the committee which produced the report cited infra note 30. The Chairman was Lord Annan.
30 REPORT OF THE COMMITTEE ON THE FUTURE OF BROADCASTING, 1977, CMND. SER. 5, No. 6753, at 192 [hereinafter FUTURE OF BROADCASTING].
31 Baldwin, Cave & Jones, supra note 23, at 182.
32 Id. at 185-86.
33 Broadcasting Act, 1981, ch. 68, § 2(1).
34 Id. § 2(2)(a).
35 Id. § 2(2)(b).
36 Id. § 2(2).
able to as much of the United Kingdom as possible.\footnote{37 Id. § 2(1).}

Each ILR company has to observe the requirements of the Broadcasting Act, the terms of its contract with the IBA, and the IBA requirements that stem from these sources. The IBA examines program schedules in advance of broadcasting and monitors the output. This monitoring process includes audience research.\footnote{38 Id. § 45.}

The IBA’s role in the supervision of programming, however, is considerably more expansive than that of simply imposing statutory and contractual duties on the ILR companies. The IBA is closely involved in the formulation of program policy and in the process of program planning.\footnote{39 See infra notes 34-35 and accompanying text.} In this way the Authority has a more positive, proactive involvement than that of a program censor. This task of examining program proposals and of making subjective qualitative judgments is an unenviable one. Having to perform such a function makes the IBA an easy target for critics who may question the legitimacy of its decisions.

The IBA’s powers of direction over the ILR companies are undoubtedly considerable, but the mere exercise of such powers will not lead to the desired end result of high quality programs. To achieve this end, the IBA must be concerned with the creation of the conditions in which a good service will be produced and must encourage quality in the variety of ways available to it. This encouragement takes the form of a dialogue between the IBA and the ILR companies. The Authority makes known to the companies its general view on the quality of companies’ output and effectiveness.\footnote{40 This dialogue normally occurs on a relatively informal basis. See, e.g., INDEPENDENT BROADCASTING AUTHORITY, THE ILR SERVICE (1984).} "Output and effectiveness" is a pretentious way of describing programming.\footnote{41 The IBA is empowered to undertake audience research. Broadcasting Act, 1981, ch. 68, § 45. Complaints could be received directly by the Authority or be referred to it by a radio station. The exercise of judgment by the Authority would seem to be inevitable.} The more negative aspects of the IBA’s control of program content derive from the particular duties which the Authority is given under the Broadcasting Act. The ILR \textit{Notes of Guidance} contains the specific rules relating to program standards.\footnote{42 Id. § 4.} The \textit{Notes of Guidance} assembles the outcome of discussions between the IBA and the companies on many program matters over the years, including possible
offense to good taste and decency, accuracy, privacy, fairness, impartiality, crime, and politics.

The Notes of Guidance covers highly controversial issues, and it is within these areas of possible controversy that the program companies tend to be most jealous of their own editorial role alongside the statutory responsibility of the IBA. The Authority, therefore, must perform a neat balancing act to avoid being a purely negative and restrictive influence on program companies. The regulations in the Notes of Guidance are intended to give the program companies the greatest possible freedom of action within the Authority's interpretation of the terms of the Act. These regulations stress the preparedness of the IBA to discuss individual problems on an ad hoc basis, and this dialogue is one of the more important functions which the Authority fulfills.

3. Control of Advertising

The IBA controls all the advertising transmitted on ILR. It makes certain that the frequency, amount, and nature of the advertisements are in accordance with the Broadcasting Act and with the rules and standards laid down by the IBA. The Authority also regulates the frequency and duration of the advertising intervals to ensure that they do not detract from the statutory requirement that the medium be one of information, education, and entertainment.

All advertisements have to comply with the IBA Code of Advertising Standards and Practice, which is drafted in consultation with the IBA's Advertising Advisory Committee. Specialist staff at the IBA and the Independent Television Companies Association, which regulates radio companies' advertisements, also have to satisfy them-

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45 INDEPENDENT BROADCASTING AUTHORITY, ILR PROGRAMMING NOTES OF GUIDANCE—FORWARD ¶ 1, 3-6 (Apr. 1980).
46 Broadcasting Act, 1981, ch. 68, § 3.
48 The committee must be:
   (i) organisations, authorities and persons concerned with standards of conduct in the advertising of goods and services . . . and
   (ii) the public as consumers, to give advice to the Authority with a view to the exclusion of misleading advertisements . . . and otherwise as to the principles to be followed in connection with the advertisements.

Broadcasting Act, 1981, ch. 68, § 16(2)(b).

The Act provides in relevant part: "The functions of the committee . . . shall include the duty of keeping under review the [Code of Advertising Standards and Practice] . . . and submitting to the Authority recommendations as to any alterations which appear to them to be desirable." Id. § 16(3).
49 Specialist staff comes from the IBA's Advertising Control Division and those involved in copy control at ITV stations.
selves that advertisements comply with the law, that they meet all the provisions contained in the Code, and that advertisers' claims have been substantiated.

The IBA and, on occasion, the Government are responsible for changes to the Code and to matters of taste and truthfulness. The Broadcasting Act requires the IBA to consult from time to time with the Home Secretary as to the classes and designation of advertisements which must not be broadcast, and to carry out any directions the Home Secretary may give them in those respects.\(^{50}\) The IBA also has the responsibility to regulate programs funded by non-broadcasters (that is, sponsorship).\(^{51}\)

4. Transmission of the Programs

Responsibility for transmission of program services has long been recognized as an essential part of the Authority's functions. In the White Paper on Television Policy, which was published in November 1953 before the ITA was formed, the then Government recognized that the body regulating the new service would need to own and operate the transmitting stations.\(^{52}\) The IBA's continued responsibility for transmission gives it ultimate control over what is broadcast and enables it to plan the transmitter network so as to achieve the Broadcasting Act's requirement of bringing the services to as much of the country as is reasonably practicable.

The IBA's main engineering functions are:

1. to plan the transmitter networks, their frequencies, assignments, and the distribution networks;
2. to plan and build all transmitting stations radiating ITV and ILR programs;
3. to operate and maintain these transmitting stations;
4. to ensure transmissions of a high quality; and
5. to maintain a specialized program of engineering research in order to keep the Independent Broadcasting System up-to-date in technological development.\(^{53}\)

II. The Development of Independent Local Radio

A. Origins of Independent Local Radio

In the early days of radio broadcasting in the United Kingdom, there was general acceptance of the view that because the "social and political possibilities" of broadcasting were as great as its technical

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Broadcasting Memorandum on Television Policy, 1953, Cmnd. Ser. 4, No. 9005 at 7.

potential, the new form of communication should advance the interests of the whole nation and not just promote the financial interests of commercial companies. This view that broadcasting should be run as a public service owes much to the political and social environment of the time. Among the factors contributing to the public service view of broadcasting were “widespread dissatisfaction with the ad hoc nature of industrial competition” in the early part of the century, the growth of public corporations exercising governmental control over utilities in these same years; and the desire of government not to be seen as acting unfairly by giving a monopoly to a single commercial enterprise.

Proponents of the public service view of broadcasting believed that a noncommercial monopoly in broadcasting was essential if high standards were to be maintained and that the only alternative to a public monopoly was the broadcasting chaos which had reigned in the United States, where, according to Ronald Coase, there was “no coordination, no standard, no guiding policy.” Furthermore, these proponents believed that a radio service financed by advertising was incompatible with a wide ranging broadcasting system operating in the public interest.

There were, however, those who held very different views about the aims of broadcasting and were attracted by the commercial opportunities that it presented. The origins of commercial broadcasting reflect this divergence of view about the purposes of broadcasting. Should broadcasting be treated as a public resource or as a private commercial enterprise?

According to Asa Briggs, the BBC’s monopoly over television broadcasting was finally broken in 1954 because the commercial lobby saw in broadcasting “a potential for profit and power which encouraged them to struggle against any continuation of the institutional status quo.” The lobby for commercial television was an amalgam of advertising, industrial, and political interests. A similar alignment of economic and political interests succeeded in introducing commercial radio in the form of ILR in 1972.

The advertising industry quite naturally was associated with moves to commercialize radio broadcasting. It was impressed by the medium’s ability to make money, as demonstrated by experience in

56 Id. at 128-34. See R. Coase, British Broadcasting: A Study in Monopoly 46-47 (1950).
57 R. Coase, supra note 56, at 49 (quoting J. Reith, Broadcast Over Britain 81 (1924)).
60 H. Wilson, Pressure Group 129-50 (1961).
Europe and the United States. Various other industrial and financial organizations brought their considerable influence to the lobby for commercial radio. The appearance of "pirate radio stations" in 1964 was another important aspect of this campaign for commercial radio. The pirates illegally broadcast a mix of pop music and advertisements from off-shore locations to avoid government radio broadcasting regulations and were able to exploit a genuine demand which was not adequately catered to by the BBC at that time.

Thus, during the 1960s a powerful, if loosely aligned, lobby supported the introduction of commercial radio into the United Kingdom. They were helped by the existence of the pirates and also by the wish of British companies to use radio to advertise their products. The natural political ally of this lobby for commercial radio was the Conservative Party. A Conservative government had introduced commercial television in 1954, and an influential section of the party believed that the commercial opportunities in radio would further industrial interests and the market economy. Support for commercial broadcasting within the Conservative Party was by no means unanimous in the 1950s, but, whatever the internal debates within the party, by 1970 Conservative support for commercial radio was overt. The Conservative election manifesto of that year pledged to introduce "private enterprise radio closely linked with the local community."

The arguments initially used in support of commercial radio which enabled its introduction have contemporary significance because similar arguments can still be heard in current debates about broadcasting policy. In 1959 supporters of commercial radio argued that the BBC's monopoly in radio broadcasting was "contrary to the best interests of the large listening public" because it restricted the range of programming available to listeners and that "independent sound broadcasting organizations" would improve the situation. The most cogent argument put forward in support of commercial radio associated commercial radio with other forms of free enterprise in communications. In 1971, for example, the Conservative

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61 The most notable of these are the record companies.
63 Before the Marine, &c., Broadcasting (Offences) Act of 1967 closed them down, a "dozen or so" pirate radios operated off the coast of England, broadcasting from "make-shift studios on rusty ferries, minesweepers, freighters and abandoned World War II anti-aircraft towers just outside the three-mile limit." They claimed 20 million listeners a week. Pirating the Pirates, TIME, Sept. 15, 1967, at 70.
64 H. Wilson, supra note 60, at 129-30.
65 Id. at 15.
67 The Times (London), Nov. 26, 1959, at 12, col. 5.
Minister for Posts and Telecommunications stated that the Labour Party was unable “to think of any reason why commercial radio was wrong in principle if commercial television was right.”

Another frequently aired argument in favor of commercializing radio was that commercial radio would be a local form of broadcasting, in contrast to the BBC’s national and regional services. Localism proved to be an attractive and fruitful concept to the commercial radio lobby. Significantly, because supporters argued that the services were to be community based and not a purely commercial enterprise, the concept had public service implications. The adroit use made of the local radio concept is demonstrated by the fact that when commercial radio was introduced in 1972, it was in fact called “local sound broadcasting.” Since no such service existed, however, the “job description” for a local radio service was a matter for debate. Doubts were expressed at that time about what was meant by the term “local.” As The Economist put it:

[Local radio must be clearly shown to have greater intrinsic virtues than national commercial stations. That would be far from apparent if all the government did was to set up a number of stations which were local only in so far as their transmitters covered a very limited area, while stations were virtually indistinguishable from one another in their output.]

Powerful though the lobby for commercial radio may have been, considerable opposition both delayed the arrival of ILR and ensured that upon its arrival it was a strictly regulated system of broadcasting, within a public service framework. The BBC was a forceful opponent to the introduction of commercial radio and was able to bring considerable pressure to bear on governments. It attempted to demonstrate that local radio could be run on a public service basis by establishing a number of local radio stations in the late 1960s. Another consistent source of opposition was the Labour Party, which had opposed the introduction of ITV in 1954. In a debate in the House of Lords in 1959 over proposals for commercial radio, the Labour peer Lord Shackleton claimed that its supporters were “firing the first shot in a new campaign to extend the range of commercial and advertising interests into radio.” The Labour governments of 1964 and 1970 supported the BBC’s attempts to undermine the case for commercial radio by allowing the BBC to experiment with local stations and to create new services which catered to demands for pop music. The Government also acted strongly against pirate radio stations with the passage of the 1967

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69 Sound Broadcasting Act, 1972, ch. 31, § 2(1) (emphasis added).
71 The BBC continues to run an extensive network of local radio stations.
73 A primary example of this is Radio One, which broadcasts popular music only.
Maritime Offences Act.\textsuperscript{74} The Labour Party vigorously opposed the 1971 Sound Broadcasting Bill. In 1970, Anthony Wedgwood-Benn summed up the Labour Party’s attitude well when he wrote that there was a need to oppose those who would put commerce before communication, and profits before programs.\textsuperscript{75}

\textbf{B. The Sound Broadcasting Act 1972}

We have already seen that the Conservative Party came into government in 1970 promising to introduce commercial radio. In order to carry out its manifesto commitment, it had to contend with the British tradition of public service broadcasting and with the considerable opposition to commercial radio. The resultant compromise was the Sound Broadcasting Act of 1972.\textsuperscript{76} William Phillips claims that “in Britain commercial radio is local because of an accident of history... The desire to compromise with radio’s noncommercial heritage... led the Heath Government to settle for a new service of advertisement-financed local broadcasting.”\textsuperscript{77}

Not too surprisingly, there was no precise definition in the Act of a “local sound broadcast.”\textsuperscript{78} Section 2(3) of the Act stated that “[i]n this Act ‘local sound broadcast’ means a programme which is broadcast... from a station so constructed and operated as to have a range of transmission limited to that which is sufficient, in normal circumstances, to ensure adequate reception throughout a particular locality.” The weakness of this technical section was pointed out by one Labour Member of Parliament (M.P.) who commented, “[A] local sound broadcast is to be a sound broadcast which is local. That does not seem to greatly advance the law of the land or the edification of the House of Commons.”\textsuperscript{79} Later in the debate the Minister for Posts and Telecommunications agreed that the task of defining the concept of “locality” was to be left entirely to the discretion and expertise of the IBA.\textsuperscript{80}

The definition of what constitutes a “local program” was left similarly vague in the Act: “[I]n the case of local sound broadcasting services... the programmes broadcast from different stations for reception in different localities [should] not consist of identical or similar material to an extent inconsistent with the character of the services as local sound broadcasting services.”\textsuperscript{81}

The 1972 Act placed the new local sound broadcasting services

\begin{footnotesize}
\textsuperscript{74} Marine, &c., Broadcasting (Offences) Act, 1967, ch. 41.
\textsuperscript{75} Benn, \textit{A Socialist Policy for Radio}, 80 \textsl{New Statesman} 168 (1970).
\textsuperscript{76} Sound Broadcasting Act, 1972, ch. 31.
\textsuperscript{78} Sound Broadcasting Act, 1972, ch. 31, § 2(3).
\textsuperscript{79} \textsl{825 Parl. Deb.}, H.C. (5th ser.) 1266 (1971).
\textsuperscript{80} \textit{Id.} at 1258.
\textsuperscript{81} Sound Broadcasting Act, 1972, § 12, sch. 1, sec. 3.
\end{footnotesize}
under broadly the same framework as ITV and by doing so paid service to the ideas of public service broadcasting. Admittedly the public service obligations were very loosely defined, but, had it not been for the strength of the public service tradition and the opposition to commercial radio, a much more loosely regulated system of broadcasting could have been introduced.

C. The Annan Committee

The newly elected Labour Government of 1974 acted quickly to stop any further expansion of ILR. In April 1974 it established the Committee on the Future of Broadcasting under the chairmanship of Lord Annan. The task before the Committee was “[t]o consider the future of the broadcasting services in the United Kingdom . . . ; to consider the implications for present or any recommended additional services . . . ; and to propose what constitutional, organisational and financial arrangements and what conditions should apply to the conduct of all these services.”

Much of the evidence before the Committee on the quality of service provided by ILR was highly critical. A great deal of criticism was directed at the perceived failure of IBA to hold ILR contractors to the terms of their original applications. Despite such evidence, however, the Annan Committee itself gave a cautious approval both of the performance of the service provided by ILR stations and of the role of the IBA. The Report concludes that:

Most of us, however, approved of the way in which the IBA had handled the matter. . . . Too many fearsome regulations in the initial stages can cripple commercial enterprises. We agreed with the IBA that rigid adherence to the terms of the franchise application was not necessarily the right policy; the stations' programming policies should develop in the light of experience. . . . It was up to the Authority to ensure that the programming was varied and gave a good service to the locality.

Yet again one sees here the desire, already evident in the 1972 Act, to leave the discretion of the IBA largely untramelled. The Annan Committee relied on the IBA's expertise to legitimate the Government's policies.

Somewhat inconsistently, the Annan Committee took a critical line on whether the IBA should continue to be responsible for the development and regulation of ILR. The committee observed that “the I.B.A. had tended to transpose a system of supervision devised for . . . television services into local radio” and concluded that the IBA had not “developed quite the right touch for supervising a very

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82 Future of Broadcasting, supra note 30, at 3.
83 Id. at 157.
84 Id. at 158.
large number of disparate local radio stations." The Committee recommended the establishment of a Local Broadcasting Authority to take the responsibility for all local radio services.

Subsequent to the publication of the Report in March 1977, the Labour Government produced a White Paper in July 1978. It rejected many of the Annan Committee's recommendations and proposed that expansion of ILR should be allowed under certain guidelines, which suggested that "[t]he initial phase of expansion should include . . . , if practicable, a station run by a non-profit-making trust." This White Paper never reached the legislative stage, however, because of the Labour Government’s fall from office in May 1979.


The newly elected Conservative Government published its Broadcasting Bill in February 1980. This Bill was intended primarily to extend the life of the IBA and to give the Authority the responsibility of supervising a fourth television channel. The Bill also contained a provision requiring the IBA to terminate ILR contracts after an eight year period and to test public opinion in the areas concerned before awarding new contracts. The Authority's initial response to the draft legislation was that it would permit the IBA to continue with existing contract procedures. This would have meant the continuation of the “rolling” contract procedures under which the termination and renewal of contracts would have been a privately conducted formality.

During the passage of the Bill, however, a number of M.P.s pressed for the public re-advertisement of contracts at these eight-year periods and for the IBA to hold public hearings during the re-advertisement process. This concept of re-advertisement was in line with the Government’s commitment to the promotion of competition policy. Consequently, and against the wishes of the IBA, the 1980 Broadcasting Act carried a clause requiring the IBA to terminate and re-advertise ILR contracts at fixed intervals.

85 Id. at 160.
86 Id. at 207.
88 The principal recommendation that was rejected was that the IBA should cease to be responsible for local radio services and should be replaced by a new Local Broadcasting Authority, which would also take over responsibility for the BBC’s local services. Id. See Future of Broadcasting, supra note 30, ¶¶ 7.10, 14.3-14.9 (recommendations which the White Paper rejected).
III. Independent Local Radio in the 1980s

A. Decline and Deregulation

The 1980s have witnessed a gradual decline in the expansion of ILR, largely as a result of mounting economic pressures on the industry. There has been increasing concern about the financial basis of ILR and about the difficult financial situation of many of the program companies. ILR has not been successful at attracting advertising revenue, even though total advertising expenditure has been expanding rapidly. By 1988 only half of the ILR companies were making a profit. The pattern of the industry was of a small number of large companies producing healthy profits and a large number of small companies facing growing financial difficulties through a failure to attract sufficient advertising. As a result of such pressures, there has been an increasing trend towards concentration of ownership in the industry, with more profitable contractors acquiring failing ILR stations. The difficult financial status of the industry has led to growing complaints from the ILR contractors that the regulations imposed upon them are excessively burdensome. These contractors have targeted their fire on the public service duties to maintain a certain quality of output and balance of programs. In November 1984 this campaign achieved partial success when the IBA announced a number of important changes in the administration and regulation of ILR. Although the IBA took the opportunity to stress its continuing commitments to the requirements of public service broadcasting under the 1981 Broadcasting Act, these "deregulation" measures did represent a considerable change in emphasis by the Authority.

This change was the result of persistent lobbying by the Association of Independent Radio Contractors (AIRC), an organization to which the ILR program contractors belong, and the Government putting its weight behind the AIRC. The intention was to make savings in IBA costs which could be passed on to the ILR companies through a reduction in the level of rentals paid by the companies to the IBA for transmitters and administration.

As part of the economy measures, ILR development on the present basis was limited to the fifty-one areas for which contract arrangements had already been made. Services for future new contract areas, as well as extensions to existing contract areas, were to be achieved by "forward funding." Previously, both the capital and running costs of stations, including IBA regulation, had been met by the IBA and recouped by the annual rentals charged to the compa-
this practice has continued for existing contracts. For future new contract areas or extensions to present areas offered by the IBA, contractors would be expected to adhere to “forward funding” by meeting the full costs, including an advance payment to cover the initial capital outlay, without support from the rest of the ILR system. Running costs have continued to be met by an annual rental to the IBA.

The AIRC based its arguments for less regulation by the IBA on Government moves to deregulate telecommunications, the upsurge in pirate activity, and the prospect of community cable radio in the late 1980s, as well as the forthcoming national commercial stations. ILR contractors submit to IBA regulation as a quid pro quo to protect their advertising monopoly. If that monopoly is to be eroded, then arguably the regulations should be relaxed accordingly.

The IBA emphasized, however, that the changes arose from the poor financial state of the ILR network—two stations had collapsed and many were trading either at a loss or too low a profit to pay a dividend—and did not herald a shift towards deregulation. In fact, a close examination of the measures announced by the Authority demonstrated that they could not be viewed as anything other than “deregulatory” in both intent and effect.

Perhaps the most significant change announced by the IBA was that mid-term contract reviews of the program companies were to be introduced in place of the existing biennial “roll” of contracts. The system of “rolling” was originally devised instead of fixed-term contracts. Nevertheless, under the terms of the 1981 Broadcasting Act the IBA was obliged to re-advertise all ILR contracts at fixed periods. This new review procedure considerably reduced the Authority’s regulatory role.

Within the discipline of the mid-term review system and terms of the 1981 Broadcasting Act, ILR companies were to be allowed to diversify their business activities without seeking IBA permission. For example, the IBA withdrew the guidelines to ILR stations on involvement in publications, and contractors can now publish newspaper...

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94 Cable radio is the radio counterpart of cable television. It would be delivered by the same cables used to deliver cable television services.

95 The Cable and Broadcasting Act, 1984, ch. 46, § 48, authorized the IBA to take the initial steps towards establishing a national commercial radio service. Under the regulatory regime proposed in the Government’s 1987 Green Paper, the national commercial stations will be regulated by a new Radio Authority. Information on this proposal may be found infra at notes 110-27 and accompanying text. As a national service the new commercial radio network will broadcast to a much larger geographic area than the ILR stations. It is still unclear what the exact programming format will be. For proposed standards, see infra notes 120-23 and accompanying text.


pers and magazines. These guidelines stated that ILR publications should deal "wholly or predominantly" with ILR or the Arts and should not come out more than six times a year.

Advertising space in publications had to be sold separately from the selling of radio airt ime and they could only carry enough advertising to pay their way, but, by implication, should not be treated as profit-making. With the withdrawal of the guidelines, ILR publishing was deregulated.

One change very welcome to the ILR companies was that they were to have greater freedom to raise money from shareholders outside their geographical areas, and over their share structure generally. This was an important aspect of ILR at a time when many companies were declaring no dividends, which was discouraging potential investors. In 1984 approximately seventy-five percent of investment in ILR was in the hands of local companies or local people, but nothing in the 1981 Broadcasting Act mandated this result. The Act merely lists the sorts of bodies or individuals who cannot have a "controlling"—fifty-one percent or more—interest in any station because of a conflict of interest, for example those involved in the music industry. At a time when money was tight, it appeared increasingly unrealistic to insist that shareholding should be local. In one legendary case, a shareholder died and left about one hundred shares to his son, but the IBA refused permission for him to become a shareholder because he did not live in the area.

Despite the IBA's best efforts, the financial squeeze on ILR has continued and this squeeze has been reflected in program standards. The drama and education output has largely disappeared and local news coverage has been reduced. The realism of expecting each small ILR service to fulfill public service broadcasting obligations has been increasingly questioned. Consequently, critics have argued in increasing numbers that fresh legislation is needed to relieve the ILR companies of many of their statutory obligations and the IBA of many of its statutory responsibilities. The AIRC supports deregulation in areas such as programming, advertising, technical standards, hours of broadcasting, news services, and ownership of stations.

The IBA is not likely to go any further along the "deregulation" route within the requirements of the Broadcasting Act. A fresh legislative initiative would be required to effect any major changes.

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101 Id. § 20(8)(a).
104 Id. at 2-6.
B. The Peacock Committee

Such a legislative initiative was recommended by the Committee on Financing the BBC (the Peacock Committee) in 1986. The Committee, although clearly not focusing specifically on the Independent Broadcasting sector, did make some important recommendations in relation to both ITV and ILR. The basic conclusion of the Committee was that broadcasting in the United Kingdom "should move towards a sophisticated market system based on consumer sovereignty." Under such a system the public would have "the option of purchasing the broadcasting services they require from as many alternative sources of supply as possible." The overall vision of the Committee was thus of a world where broadcasting, as a result of technological developments, could be like publishing. It identified "the fundamental aim of broadcasting policy" as being "to enlarge both the freedom of choice of the consumer and the opportunities available to programme makers to offer alternative wares to the public."

The Committee clearly believed that technological developments held the key to the abandonment of the current model of "strict" regulation of broadcasting, including pre-broadcast vetting of programs. Yet by advocating a "consumer sovereignty" model of broadcasting, the Peacock Committee was able to reject a free market. The Committee noted that a laissez-faire approach to broadcasting would not meet "British standards of public accountability for the private use of public assets."

In relation to ILR, the Committee advocated a looser regulatory regime in line with its philosophy as outlined above. It emphasized the need for reform in order to allow the industry to attain some basis of profitability. The Committee accepted the proposals of the AIRC as to what revisions to the 1981 Broadcasting Act would be needed to bring about the "looser regime" it envisioned. Under the AIRC's proposals the IBA would retain control over the allocation of frequencies and transmitter power and would continue to formulate guidelines for programming and advertising, but the ILR stations would henceforth:

1. own their own transmitters and be responsible for broadcasting in their franchise area;

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105 Financing the B.B.C., supra note 24, at 133. This committee was known as the Peacock Committee because Professor Alan Peacock chaired it. Id. at iv.
106 Id. at 133.
107 Id.
108 Id. at 125.
109 Id. at 133.
110 Id. at 140.
111 Id.
be permitted to accept any advertising currently acceptable for the print media;

(3) decide their own hours of broadcasting, sources of program material, manning levels, news-services, ownership, and technical standards;

(4) be free to carry sponsored programs; and

(5) be released from the obligation to achieve a certain quality of output; maintain "proper balance" in programming; and provide a service of information, education, and entertainment.\textsuperscript{112}

The Peacock Committee concluded that "[r]egulation of the [hard-pressed] commercial sector does little for the listener."\textsuperscript{113} A majority of the Committee further recommended that ILR franchises should in the future be auctioned to the highest bidder.\textsuperscript{114}

\textbf{C. The 1987 Green Paper}

The Government's response to the Peacock Committee's proposals in relation to ILR was contained in a Green Paper published in early 1987.\textsuperscript{115} The Government recognized that ILR had reached a stage of "stagnation" and that "the prognosis for the financial well-being of ILR under the present statutory framework is poor."\textsuperscript{116} It identified the cause of the financial difficulties as "increasing competitive pressures, both for audiences and for advertising revenue."\textsuperscript{117} The Government's recommended "cure" was unsurprising: "The ILR companies believe that a lighter and less expensive regulatory framework is possible. A development along these lines would be consistent with the Government's general policy of encouraging enterprise by enhancing competition and minimising regulation, while retaining essential protections."\textsuperscript{118} This last caveat is significant, for the Green Paper still envisions a continuing role for regulation, albeit a much less rigorous system of regulation than now governs ILR. The Government clearly rejects any idea of a free market in radio services based on the principle of consumer sovereignty.\textsuperscript{119} It reasserts the traditional justification for government regulation of broadcasting: "The frequency spectrum is a finite public resource. For this reason, and . . . considerations about frequency planning and frequency management . . . , control of the spectrum used for broadcasting must remain with the Government or a public

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} at 141.

\textsuperscript{114} \textit{Id.} at 140.

\textsuperscript{115} \textit{Radio: Choice and Opportunities, 1987, Cmnd. Ser. ---, No. 92, at 6.}

\textsuperscript{116} \textit{Id.} \S 3.1, at 18.

\textsuperscript{117} \textit{Id.} at 1.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} \S 4, at 20.
authority acting on behalf of the Government.”

The proposals in the Green Paper for the regulation of ILR center around a relaxation of the public service requirements currently imposed on the industry. The argument put forward is that only the local services of the BBC should have such requirements imposed and that the ILR companies should be freed from such constraints and be put in a better position to overcome their financial difficulties. This change in the current structure is justified on the basis of the increased competition the ILR companies would face as a result of the additional commercial radio services (at both national and community level) proposed in the Green Paper.

The Green Paper envisions that the administration of both national and local independent radio services would be entrusted to a single authority within a “light” framework of regulation. Some limited regulation of program content, technical standards, and ownership of broadcasting companies would continue, although the companies would generally have independence in making their own programming, financial, and transmission arrangements. This last change would represent a major deregulatory move away from the current system in ILR, where transmission is organized by the IBA.

One issue left unresolved in the Green Paper is whether the IBA, subject to amending legislation, is the appropriate authority to be responsible for the system of independent radio at both the national and local levels. In favor of the IBA is its experience of developing ILR and “of balancing the competing considerations of regulation in a creative field.” On balance, however, the Green Paper concludes that the IBA is not the appropriate authority and that the functions might be better exercised by a body distinct from the IBA:

But, despite the real achievements which stand to its credit, there would be some awkwardness in combining the IBA’s responsibilities as a broadcasting authority for television within a public service framework with a separate role as a regulatory authority for radio under different and lighter rules. . . . There is also a view . . . that an authority which can devote all its attention to radio—as the IBA manifestly cannot—would best serve the interests of the medium. On this argument a new authority should be created.

The programming requirements suggested in the Green Paper do not meet the full requirements of public service broadcasting as defined under the 1981 Broadcasting Act, but certain programming standards are proposed:

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120 Id. ¶ 3.3(ii), at 19.
121 Id. ¶¶ 6.1-6.16, at 27-30.
122 Id. ¶ 7.2, at 31.
123 Id. ¶ 7.3, at 31.
124 Id.
COMMERCIAL RADIO BROADCASTING

(1) to ensure that any news given in whatever form in programs is presented with accuracy and impartiality;

(2) to exclude from the programs all expressions of the views and opinions of the persons providing the service on religious matters, or on matters which are of political or industrial controversy, or relate to current public policy;

(3) to avoid allowing the views and opinions of particular persons or bodies on such matters to predominate;

(4) to ensure that nothing is included in programs which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; and

(5) to deliver the kind of services which they had promised when applying to use the frequency.125

It is debatable how “light” these requirements would prove to be in practice, if enforced effectively. Programming requirement (4) is in the 1981 Broadcasting Act126 and requirements (1), (2), and (3) have their equivalents in the present legislation.127 Their application in practice would entail similarly complex judgments to those currently made by the IBA. It would also involve considerable resources. For example, the principle of due impartiality in news broadcasts is difficult to assess. In contrast to a judgment on “incitement to crime” which may be made by considering a program in isolation, a judgment as to whether a radio station is being impartial needs to be built up over a period of time. Similar considerations would apply in assessing whether the views and opinions of the people providing the radio service are predominating, and in assessing the other criteria mentioned above.128

The Green Paper envisions a “reactive” rather than a “proactive” regulatory regime. Only selective monitoring is proposed, with the main trigger for enforcement action being complaints, whether from listeners or other radio stations.129 Radio stations, however, would be required by the terms of their licenses to keep tape recordings of their broadcasts in order to facilitate the investigation of any alleged breaches of license conditions on program content.130

Advertising would be regulated on lines similar to those existing at present, with the radio authority required to draw up a code regu-

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125 Id. ¶ 7.7, at 32.
127 Id. §§ 4(1)(a) (equivalent of (i)); 4(2), 5(a) (equivalent of (iii)); and 4(2) (equivalent of iii).
129 RADIO: CHOICE AND OPPORTUNITIES, 1987, CMND. SER. —, No. 92 ¶ 7.18, at 34.
130 Id.
It also may be possible to loosen restrictions on the sponsorship of radio programs, given that the services are not to be run on a public service basis.

### IV. Conclusion

From the proposals put forward in the Green Paper, the Government clearly believes that ILR should be more lightly regulated than at present. The Green Paper states a case for a new radio authority to regulate all commercial radio services within a new statutory framework. The Government proposes a limited range of statutory requirements relating to program content, ownership, and funding of services. The radio authority would regulate the services within this statutory framework. It also would have a number of sanctions available, including withdrawal of licenses.

In fact, the Government's proposed statutory requirements are not as limited as the Green Paper suggests. If these requirements are taken seriously and enforced effectively, they will involve the radio authority in complex judgments. The Government must make a more decisive choice between a relatively expensive regulatory system to enforce the requirements or allowing broadcasters greater freedom.

The Government clearly favors a new radio authority, instead of the IBA, to develop and regulate the new independent radio services. The IBA's experience of regulating ILR has been far from easy. The criticisms made of the IBA take two general forms. First, some critics accuse the IBA of interpreting its statutory mandate too strictly and of imposing overly stringent regulations on the ILR companies, as a consequence of which the industry has found itself in financial difficulties. Second, other critics accuse the IBA of being too lax in applying the legislative requirements and of being overly accommodating to the ILR companies, thereby failing to impose sufficiently stringent regulations. There are also critics who make both types of criticism, claiming that the IBA has failed to strike the right regulatory balance.

The validity of such criticisms is a question of individual judgment, but these criticisms are sometimes misdirected at the IBA. They are better aimed at the architects of the statutory framework

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131 Id. ¶ 7.15, at 34.
132 Id. ¶ 7.17, at 34.
133 Broadcasting in the '90s: COMPETITION, CHOICE AND QUALITY, 1988, CMND. SER. — No. 517, at 37-38.
134 See, e.g., Financing the B.B.C., supra note 24, at 141.
136 See, e.g., Baldwin, Cave & Jones, supra note 23.
which has left the crucial decisions on the development of ILR to the IBA and has imposed an inappropriate regulatory regime on the industry. Little coherent thought on broadcasting policy has been forthcoming from the Government, with the 1987 Green Paper representing a welcome break from tradition.

Further difficulties have arisen from the fact that many of the provisions of the Broadcasting Act are permissive rather than mandatory.\(^\text{137}\) The Act allows the Authority large discretionary powers, leaving the drawing of the boundaries of appropriate behavior to subsequent negotiations. One Member of Parliament made the following comment on the original Sound Broadcasting Bill in 1971: "What the Bill does in essence . . . is to provide a legislative and legal framework within which the IBA will exercise its discretions. Its discretions are wide; and its discretions are virtually unlimited."\(^\text{138}\) As far as this legislator was concerned "the Minister has a clear idea as to how he wishes the Authority to behave. But he has not set them out in the Bill, nor has he told the House of Commons how he wishes it to be done."\(^\text{139}\) Some fifteen years later an IBA officer was still able to observe that "[t]he Act is so wonderfully widely phrased that you can read anything into it."\(^\text{140}\)

The difficulty in interpreting precisely what is the IBA’s legislative mandate is of significance because the giving of form and purpose to concepts such as “quality” or “balance” must, of necessity, be contentious. The existence of a broad statutory mandate inevitably causes difficulties for a regulatory authority. The regulators must give form and purpose to the abstract statements of Parliament.\(^\text{141}\) The agency is forced to engage in what Roberto Unger has called “ad hoc balancings,”\(^\text{142}\) a literal application of the statutory provisions or a suspension of the statutory provisions where the agency feels that strict implementation is not vital for the success of the legislative program.\(^\text{143}\) This balancing act will not normally be reducible to general rules.\(^\text{144}\) As a consequence, a degree of confusion about a regulatory agency’s aims and policies is only to be expected. There can be no guarantee that the priorities set by the agency will be consistent with earlier legislative or executive expectations. Great confusion and inconsistency bring into question the legitimacy of the regulators’ actions. The unpredictable application of the relevant

\(^{138}\) Id. at 1267.
\(^{139}\) Id. at 1268.
\(^{140}\) The author interviewed the quoted IBA officer in 1985 and guaranteed him anonymity.
\(^{142}\) R. Unger, Law In Modern Society 197 (1976).
\(^{143}\) R. Kagan, supra note 44, at 49.
\(^{144}\) R. Unger, supra note 142, at 197.
legislative provisions causes a degree of cynicism or skepticism about agency methods and objectives. Confusion about agency priorities also leads to a lack of accountability. Uncertainty over objectives makes it difficult for interested parties to evaluate how effectively the agency is operating.

The apparent "regulatory failure" of the IBA, therefore, is the consequence of defectively designed legislation. Philippe Nonet and Philip Selznick observed that many instances of "regulatory failure" occur because the intended legislative policy did not give a clear mandate to the responsible regulatory agency. As the Managing Director of one ILR station has remarked, "The IBA can only interpret what it's got."4

A program of regulation can only be as strong as the relevant legislation allows it to be. If the legislative scheme is defective, then the regulatory agency will be unable to meet popular perceptions of adequate and appropriate enforcement, the regulated may be able to avoid its full impact, and those who are supposed to benefit may not do so.14

When Parliament creates a regulatory agency such as the IBA, it should state as clearly as possible and in plain and unambiguous language the appropriate objectives for the agency to pursue. This ideal is not always attainable in practice, but it should be the aim of legislators. As James Landis wrote some fifty years ago, "[W]isdom in the formulation of standards, in the grant of powers, is the first step toward realization of those hopes now so definitely held of the administrative process."148 The constituent Act is the legal linchpin for the regulatory agency's activities and should seek to provide a coherent and rational framework. One can but hope that any future Broadcasting Act will do just that.

146 This individual was interviewed by the author in 1985 and guaranteed anonymity.
149 This is not to say that legislation could ever cater adequately for all the complexities of the issues which the agency must inevitably confront. Many questions of policy will only come to light once the regulatory program is under way. An agency mandate that was too specific could have the equally undesirable effect of stifling an agency and saddling it with inappropriate restrictions. Any regulatory agency needs to be able to adapt to changing circumstances.