Submission on the proposed acquisition of Sky plc by Twenty-First Century Fox, Inc.

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As National Secretary of the Campaign for Press and Broadcasting Freedom I fully endorse the CPBF's submission and so will not repeat here the points made there. However, I wish to add some additional comments on the issues of cross-promotion sponsorship, and commercial references in programmes. These matters are relevant for the plurality public interest consideration, contextual factors, and for the broadcast standards public interest consideration, in particular Section 319 fa, h, I, j, k.

Cross-media promotion

The opportunities for cross-promotion across a wholly owned BskyB would be very considerable indeed. The creation of a corporate entity commanding major shares of broadcasting and on-demand services on all platforms, news media, wholesale radio news, publishing and other media, fixed and mobile telecoms and broadband would be unprecedented. A wholly-owned BskyB would offer its 'quad-play' services - broadband internet access, television, telephone and wireless – across its combined channels and across the range of properties of Fox and News Corporation/News UK. Such extensive multi-platform, intra-firm cross-promotion is not addressed in either Ofcom's Cross-Promotion Code and Broadcasting Code, nor in the provisions of other UK regulators for newspapers, advertising or other media, nor in the 1994 newspaper code that News Corporation announced for its own self-regulation. This scale of cross-promotion would be detrimental to competition, plurality, broadcasting standards, and to public interest considerations.

The assessment of broadcasting standards, and of plurality, must have regard to the scope for cross-promotion by the merged enterprise and assess whether the existing rules, or revisions to those rules, may be expected to satisfy those standards. This is a material consideration affecting the judgement on the merger and on the nature of any undertakings required if the merger is permitted.

When Ofcom reviewed the News Corp-BskyB planned merger in 2010-11 it argued that plurality concerns could be limited to news and current affairs. Ofcom identified cross-promotion as a possible concern, but grouped this amongst longer-term effects of the transaction that were inherently uncertain. Cross-promotion, bundling of services or launching new integrated products were developments that could not be linked exclusively to the proposed merger, Ofcom argued, might occur anyway, and might have consumer benefits, even where the effect on plurality was detrimental. Ofcom stated that its formal advice was based entirely on the “static” analysis of the immediate impact of the merger on share of news. This approach cannot be maintained in 2017 in view of the nature and implications of the proposed merger. **The merged firm’s ability to cross-promote quad-play services, content and other services make it imperative that the implications for all affected markets are assessed not just news.**

The evidence of corporate activity to date and corporate statements shows that the benefits of cross-promotion and cross-selling are recognised and exploited across the company. Sky’s 2015 corporate plan outlined ‘cross-selling at scale’ as a key priority (Darrock 2015). BSkyB has been cross-selling telecoms services to pay-TV subscribers since July 2006, when Sky broadband launched. Sky is the last of the four major UK broadband suppliers to offer mobile, with a potential market of some 23 million in Sky Households (Sandle 2016).

Over three decades, News Corp. has demonstrated how media properties can support and enhance its worldwide commercial activities, using its enormous promotional resources to mobilize interest in movies such as *Avatar*, major sports events, product launches, subscription deals and services. Cross-promotion forms part of manifest efforts to use media resources to serve strategic business and political objectives, as a host of former executives, journalists and analysts attest (Hardy 2010, 119-127). They include Tim De Lisle who resigned as Arts Editor of *The Times* in 1989 when his pages were remade without his consent to promote Sky. Tim de Lisle (2012) wrote:

> Seeing it, I felt physically sick. It wasn't really a matter of principle – I had, after
> all, agreed to run the damn thing [on a listings page], and I had freely joined a
> Murdoch paper. It was more a matter of taste, and feeling exploited. Charlie
> Wilson [the editor] didn't see this: his idea of sympathy was to make macho
> noises like ‘welcome to the big bad world of newspapers’. He wouldn't repeat his assurance that it wouldn't happen, and I wouldn't have believed him if he had. So I resigned.

In 2010, an executive revealed efforts to ensure that News Corp.’s media outlets would prominently feature Fox movies while excluding coverage of rival studios (Lee 2010).

At present, the opportunities for corporate cross-media promotion between News UK’s newspapers (and other media assets) and BSkyB, while extensive, are restricted in important ways. While, Fox has a controlling share in BSkyB is it not able to dictate policy so as to maximise resources for cross-promotion. Fox/News Corp can cross-promote BSkyB, but BSkyB’s promotions are not entirely in Fox’s control. The presence of other shareholders and the role of independent board members places limits on Fox. The Murdoch’s controlling influence on BSkyB is constrained by the latter’s separate corporate identity. As business analyst Claire Enders (2010) noted, having "shareholders with no links to the Murdoch family prevents News Corp. from using Sky to further its own business interests." Total ownership of BSkyB would allow News Corp. to undertake far more extensive, and integrated, cross-promotion, benefitting from operational synergies but also the absence of countervailing influences on corporate decision-making. As Lord Puttnam commented in the House of Lords debate (Hansard 2010b):

> With the opportunities that cross-subsidy, cross-promotion and the bundling of services would bring, we could easily see News Corp.'s dominance in newspapers increase far beyond its present share. It is not in the interest of a plural society for a singular mindset or entity of any kind to hold that degree of influence, political patronage or commercial power.

Total ownership of BSkyB would allow Fox/News Corp to undertake far more extensive, and more integrated, cross-promotion, including across the three main types of editorial cross-promotion:

1. coverage of the business affairs and interests of parent companies.
2. coverage of the news and entertainment products and services of parent groups.
3. coverage of allied media platforms and services such as "converged" online content.

Newspaper/news brands cross-promotion

In November 2007 Murdoch told the House of Lords Select Committee on Communications (2007) 'that there was no cross-promotion between his different businesses. He stated that *The Times* was slow to publish listings for Sky programmes. He also stated that his own papers often give poor reviews of his programmes'. [1] Murdoch's denial, and coyness, concerning newspaper cross-promotion is in stark contrast to News Corp.'s promotion of corporate integration and synergies to investors. When News Corp. purchased Intermix Media, owner of Myspace.com, for $580m (£332.85m) in 2005, Murdoch announced that the social networking site would drive traffic to his Fox TV sites. Murdoch told BSkyB's AGM (BSkyB 2000, 4), the company was "developing a range of new media services with the aim of providing seamless content across all platforms."

Against this background, I investigated evidence of cross-media promotion of BSkyB in News International (NI) newspapers, originally though a comparative analysis of newspaper content in

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1 Rupert Murdoch reiterated this stance under cross-examination by Robert Jay QC at the Leveson Inquiry. On April 25 he stated 'I take a particularly strong pride in the fact that we have never pushed our commercial interests in our newspapers'. On April 26, he denied ever instructing or encouraging editors to pursue stories which promoted his business interests, stating 'I certainly do not tell journalists to promote our TV channels or our TV shows or our films'. Murdoch was not challenged on the adequacy of these responses or questioned further on cross-promotion (Leveson Inquiry 2012a: 26-27; 2012b: 61-62)

October–November 1998, when SkyDigital and ONdigital (later ITV Digital) launched rival digital television services (Hardy 2010, 119-156). The study found that cross-promotion in NI papers did not confirm a hypothesis of systematic corporate control in that promotional resources were not deployed fully and consistently across titles. For instance, the *News of the World*, the paper with the largest readership, devoted less space to all varieties of BSkyB promotion than other NI papers. There was also evidence of journalistic autonomy in criticisms of Sky, and disclosure of ownership interests by media, business and financial journalists in the elite papers. However, sports, entertainment journalists, and “anonymous” sections were more promotional. NI editorial content tended to favour Sky, Sky channels received disproportionate coverage in listings, and all NI papers carried advertorial supplements promoting Sky. In these ways NI papers cross-promoted Sky, but they also acted to impede competition, just as they had done in 1989 when challenging BSB.

Updating this study to examine newspapers in June 2011 confirmed the patterns. NI papers heavily cross-promoted Sky, but this was done more through advertising and TV listings than editorial content. *The Sun* carried two-pages of Sky advertising on average with some issues carrying more than three. In listings, all NI papers featured Sky channels more prominently and carried more satellite channels than market competitors, with the exception of *The Times* which carries a total of 21 channels compared to *The Telegraph*’s 26. *The Sun* carries the most, 70 channels in its TV magazine, compared to 40 in *The Mirror*’s. Although editorial copy was rarely overtly promotional, all NI papers heavily cross-promoted a pay-per-view boxing match (Haye vs. Klitschko) on Sky. *The Sun* carried features and cast interviews on *X-Men: First Class* (20th Century Fox) while numerous celebrity entertainment stories promoted current shows on Sky.

In 2010 Murdoch embarked on an audacious strategy to extend paywalls around his newspaper brands. The move made NI’s elite newspapers even more intensely promotional for their digital editions and online services, with the relaunch in July of *The Times* and *Sunday Times* websites. As well as promoting in-house digital services associated with the papers, and third-party readers’ offers, the papers were used to cross-promote and integrate Sky services. For instance, Sundaytimes.co.uk provided an interactive culture planning tool allowing subscribers remotely record TV shows on Sky. Analysis of a single edition of *The Times*, from Friday October 1st 2010, illustrates the promotional range. The main section is 116 pages. Fifteen pages carry promotions for *The Times* online, including one full page and one half-page advert for the Times+ subscription service. Four pages carry promotions for the upcoming Saturday edition and one for *The Sunday Times*. Adverts for Sky comprise two half-page and one smaller backpage ad. Other promotions include *Times* Reader offers (on five pages); promotions for *The Times*' announcements, dating and listing services; and promotions for contents within the same edition ranging from navigational page references to larger, graphic promotions (known as teasers and promos). Promotional reflexivity extends backwards as well as forwards, with cut-outs of previous issues, known as ragouts, accompanying a reader review of yesterday's edition, a feature on the 100th anniversary of *The Times*' women's supplement, and references to previous news stories. The paper thus included promotional hooks common across newspapers, while heavily cross-promoting Times+ and Sky in advertising and promotions. Yet, in this sample issue at least, the paper maintained a "separation" between article content and promotions, with negligible editorial cross-promotion.

In the tabloid papers and websites such separation is less evident. A PR 'news' story on the *Sun*'s website (2 Feb 2009) promoted Sky heavily under the claim 'Telly is boost for the blues'. The *Sun* gave gushing editorial support for the launch of Murdoch's iPad-only paper *The Daily* (3 Feb 2011), a product not available outside the United States. This seems to be part of a long tradition for News Corp. newspapers. Similar puffery occurred in a mid-1990s *New York Post* story on launch of the F/X channel, both owned by News Corp. The reporter, Steve Bornfeld, commented "Not only did we run a splashy story on the day they debuted, but we ran a splashy story on the day after they debuted about a network that no one in the five boroughs of New York could see." He continued "My choice was to write the stories or be fired. I didn't like it very much. But there was no shame about it at the *Post*" (Gunther 1995).

Organizing newspaper resources to serve allied corporate interests is evident from the study of NI papers. News Corp.'s cross-promotion warrants wider consideration, as coordinated intra-firm promotion risks "locking in" consumers not only to integrated products and services but to a restricted editorial environment.

Broadcasting cross-promotion

Across its output, BSkyB carries more extensive promotions than traditional UK channels. One study (Carter 2000) found that Sky One ran almost three times as many promotions as any of the five main channels. While most of these promotions were for upcoming programmes, both Sky and the BBC carried a significant proportion of promotions for their other media activities. On August 8, 2000, for instance, 65 out of a total 133 promotions on Sky One were for other Sky channels and services (Carter 2000). Another study (Channel Four 2001) found promotions in peak viewing hours during one randomly selected week (April 28 - May 4, 2001) to be (in seconds): BBC1 (101), BBC2 (53), ITV (108), C4 (108), C5 (83), Sky One (250). BSkyB was more promotional than other broadcasters in part because it had a larger portfolio of channels, services and "events" such as live sports and first-run movies than competitors. BSkyB also incorporated promotional practices that were more developed in the US system, not least by News Corp. itself. In their analysis of "Foxification," Cushion and Lewis (2009, 144) found that Sky News "pays particular importance to marketing itself as being 'first with breaking news,'" and had adopted the moniker "news alert" from Fox News whose own dramatic presentation styles influenced those of rivals CNN and MSNBC.

My own study of output in June 2011 found that promotions had significantly increased. Over six peaktime hours, Sky One carried on average 319 seconds of self- or cross-promotions per hour. Sky News carried no self-promotions outside program time but averaged 138 seconds of corporate cross-promotion per hour. While over two-thirds of Sky One promos were cross-promotions, by contrast ITV1 carried an average of 127 seconds per hour over the sample period, which included only one 20-second cross-promotion.[2]

Ofcom (2008) found BSkyB guilty of breaking the cross-promotion code when it ran a 'targeted campaign to get viewers to lobby Virgin Media not to drop the Sky channels'. BSkyB ran 11 anti-Virgin adverts a total of 2,500 times while the two broadcasters were locked in negotiations regarding carriage of Sky's basic channels on Virgin Media's cable network. References to Sky's retail TV service broke the rules permitting only 'broadcast-related' promotions outside of the time allowed for advertising, and prohibiting 'undue prominence' in references to products or services. Sky appealed against the orginal decision by Ofcom, resulting in a review by the Ofcom Board. This found that only three promotions breached the Cross-Promotion Code in place of the original four. However, Sky was unsuccessful in its appeal against breaches of the Broadcasting Code Rule 10.4, prohibiting undue prominence, found in respect of two of the promotions (Ofcom Bulletin 120, 2008).

The problems of cross-media promotion

Cross-promotion has been a neglected issue in media regulation. However, there are a range of important concerns that arise.

i. Market Power

News Corporation can use intra-firm cross-promotion as a tool for market advantage over competitors. There can be a very significant advantage if media outlets give editorial coverage that promotes and benefits other media or services within the company. Intra-firm advertising arrangements and rates can benefit firms over competitors. Firms may restrict the opportunities for competitor firms to use its media for their promotions. Both editorial and advertising access can be used to 'lock out' competitors. For instance, in the late 1998s several reports on digital television in NI papers, particularly the *Sun* and *News of the World*, promoted Sky

2 Research carried out with assistance from Edward Yeadon.

services but simply ignored the alternative services provided by OnDigital and digital cable. Intra-firm promotional resources may strengthen firm's dominance and raise barriers against competitors that serve to limit the range and diversity of content available. Firms may restrict advertising opportunities, or otherwise "lock out" competitors, for instance by ignoring or denigrating rival suppliers in editorial.

ii. Media Power

Cross-promotion raises problems of 'media power' not just market power. Amongst the principal problems of cross-media promotion are the integration of editorial and advertising and the shaping of media content in accordance with corporate media interests. Such cross-promotion extends commercial values within specific media content, and shapes editorial/programme agendas more broadly. Cross-promotion may be used to promote corporate or commercial interests in editorial at the expense of fairness to competitors' or viewers' interests. More broadly, cross-promotion may undermine editorial independence. With the extension of 'promotional' speech into media content, the separation between editorial and advertising is also further eroded.

Where there is lack of disclosure in editorial or other 'media' content, corporate or commercial interests may be disguised. Cross-promotion may undermine editorial independence, and serve corporate interests over viewers' or wider social interests. Media content may lack transparency in regard to its partiality or persuasive intent and so be misleading.

So, cross-promotion may increase market power and raise barriers to market entry that serve to limit the range and diversity of content available. Cross-promotion also increases the influence of media platforms, services and brands relative to those lacking such promotional resources. The 'problems' of cross-promotion may be conceived in terms of the impact on media diversity. A second problem, connecting both citizens' and consumer welfare concerns, is that media content may be misleading. A third problem is that of misrepresentation or distortion in editorial content arising from the interests of those who own or control media. Here cross-promotion needs to be considered alongside broader concerns about proprietorial, corporate and commercial influence on editorial. A fourth problem is the influence of commercial ('promotional') values on media content. Such concerns arise, for instance, where the dominance of a commercial, promotional ethos across media 'serves to close down creative alternatives, offering only a narrowly acceptable range of content tied to corporate megaprofits' (Andersen 2000:7).

News International and the Sadler Enquiry into Cross-Promotion

News International’s cross-promotion has been the subject of regulatory scrutiny before, most notably in the *Enquiry into Cross-Promotion* undertaken by John Sadler in 1989 (Hardy 2010). British Satellite Broadcasting (BSB) made a complaint to the Office of Fair Trading (OFT) about unfair Sky advertising, which was passed to the Advertising Standards Authority (ASA). Then, in December 1988, BSB commissioned the European Institute for the Media (1989) to produce an independent report, which found disproportionate coverage of satellite TV in Murdoch’s papers compared to other newspapers. Further weight was given to the charges when Tim de Lisle, arts editor of *The Times*, resigned in protest after his page was remade without consultation to feature a prominent promotion for a production of Carmen being shown exclusively on Sky. This, de Lisle argued, undermined editorial independence and credibility. The House of Lords Select Committee in 2008 described the studies conducted into Sky’s satellite television launch in 1988/9 as amongst the ‘few systematic studies of cross-promotion’. In the 1980s claims that *The Times* carried articles criticising the BBC, and advocating its dismemberment, as part of a campaign to further Murdoch’s commercial interests, were rejected by the papers independent directors (The Times 1985) but later research found that the ‘editorial and reporting approach to broadcasting matters being pursued by News International was having a material effect on the opinions of readers’ (Barnett 1989: 19):

> Whatever the editorial intentions, concentration of newspaper ownership is clearly capable of being exploited to promote the owners’ interests elsewhere. Largely, it seems as a result of reading its newspapers, significant numbers of people hold views which are patently to News International’s financial advantage.

Research studies have shown that Murdoch' s UK newspapers have invested in extensive editorial cross-promotion for allied media interests, including BSkyB. **The proposed acquisition of Sky by Fox should be rejected. It needs to be rejected because of the very detrimental impact it would have on media pluralism and diversity, and it needs to be rejected because the media resources, including cross-promotional resources, of the merged firm could be exercised to damage competitors and undermine the quality of media content.**

Sponsorship and commercial references in programmes

Sky and Fox are not alone in breaching the Broadcasting Code rules on commercial communications. What is unusual, and highly problematic, is the poor level of engagement with the rules and regulatory system. Some Sky or Fox corporate responses indicate a lack of understanding of the rules themselves or mount defences that do not demonstrate a serious effort to ensure that rules are adhered to. Repeatedly, the licensee has responded with a defence that has been found wanting and Ofcom has ruled that breaches of Section Nine, or other rules, have occurred. **Taken together, the breaches of rules and responses shown by the company give grounds for concern and warrant further investigation to determine the level of compliance with broadcasting standards.** The wider context is relevant. The practices of Fox are rooted in a highly competitive, thoroughly commercialised media system in the United States with comparatively weak regulation governing sponsorship and commercial involvement in programmes, and which allows much greater advertising minutage than is permitted under EU and UK regulations. Looking forward, the pressure to accommodate marketers in and around programmes can only be expected to increase significantly. It matters, therefore, that the breaches of Ofcom rules show a lack of consistent adherence to existing broadcasting standards.

Sky was found in breach of rules on sponsorship credits for sponsorship of the Financial Report on Sky News by Finspreads, a spread betting company (Ofcom Bulletin 237, 2013). The sponsorship breached the restriction on the advertising of spread betting companies outside of specialist financial channels or programming. Sky argued that the Financial Report item, which was under a minute long, was a specialist financial programme in itself, and so could be sponsored. Ofcom rejected that argument, stating it ‘did not consider a short financial update shown either integrated with or alongside general news content on a channel appealing primarily to a general news audience, was likely to be of particular interest only to business people or finance professionals’.

In 2013, a programme on Fox Extra was found in breach of rules on undue prominence after featuring close up shots of a pet food brand. Fox stated that ‘neither it, the programme producer, nor any person connected with either, received payment or other valuable consideration for the inclusion of the references to IAMS during the item, and that therefore the references had not been subject to any product placement arrangement’. Ofcom accepted that paid placement had not occurred in breach of the rules, but found the programme in breach of rules prohibiting undue prominence. Ofcom also noted that the programme had failed to advise viewers about the commercial relationship between the featured guest and IAMS pet food (Ofcom Bulletin 227, 2013).

To take another recent investigation, Fox News Channel was found to have breached Rule 9.2, which requires that ‘Broadcasters must ensure that editorial content is distinct from advertising’, for a programme, *Fox and Friends*, broadcast on 28 June 2016 (Ofcom Bulletin 319, 2016). The complaint arose from a four-minute segment called *It's Your Money*, featuring discussion between two programme presenters and Megan Meany, a representative of the website Mega Morning Deals. As Ofcom reports, 'Each discussion focused on a particular product offered exclusively to Fox & Friends viewers at a discounted price. Viewers were directed to the programme's website to take advantage of the special offers'. Mega Morning Deals gained publicity through on-screen graphics, visual links to the website's deals and verbal references. FNN stated that 'Megan Meany's appearance in the Programme was not connected to any financial arrangement for which Fox News or the hosts of the Programme were beneficiaries. Neither Fox News nor the hosts received any compensation as a result of the Programme'. However, the Mega Morning Deals website featured as an icon and hyperlink on the Fox and Friends website, with viewers directed there to obtain discounts. In the segment, one of the presenters advised viewers 'just click on the Mega Morning Deals icon on the Fox and Friends website...yeah foxandfriends.com...shop "til you drop!"' FNN's statement does not cover the totality of economic benefits that might arise from featuring the Mega Morning Deals website on the Fox and Friends website. Were there to have been some material economic benefits then the statement given to Ofcom would be insufficient and that is a matter of concern both in regard to the incident, and in regard to approach taken by the licensee to the regulatory authority.

FNN argued that the section was programming, not advertising and stated *It's Your Money* was 'clearly distinguished as a featured segment distinct from advertising by the absence of the use of lead-in and lead-out bumps and teases that broadcasters use to alert viewers when a commercial interstitial is appearing'. Ofcom's ruling made clear that it dismissed the argument that this was programming rather that advertising: 'Although the content was scheduled and presented as programming, Ofcom considered that it served the function of advertising, i.e. the promotion of the supply of products in return for payment by viewers'.

Ofcom added that it 'was concerned by FNN's suggestion that using devices such as "lead-in and lead-out bumps and teases" is sufficient to ensure distinction between advertising and editorial content. Although such devices can be useful signals to alert viewers to a transition between a programme and an advertising break, their absence does not negate the need for broadcasters to ensure that content presented and scheduled as programming does not function as advertising'. That admonishment indicates a more serious problem of understanding of the rules and compliance with them. This case, like others, arose from one complainant alerting Ofcom. **For its evaluation of broadcasting standards, Ofcom should conduct its own much more extensive review of**

output by Sky and Fox to assess the levels of compliance with broadcasting standards.

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