

## Proposed acquisition of Sky by Twenty-First Century Fox Evidence to Competition and Markets Authority

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### Introduction

1. I am submitting these comments as an independent academic and commentator on communications policy at the University of Westminster. I have been involved in research and policy analysis on media ownership and plurality issues for over 30 years, have directed a number of relevant research projects, have authored several relevant books, book chapters and articles, and have made a number of contributions to the policy-making process. In particular:
  - I have been called several times to give oral evidence to parliamentary committees, including the Joint Scrutiny Committee of the Communications Bill (2002) and the Media Plurality inquiry initiated by the House of Lords Select Committee on Communications (2013/4).
  - In 2007/8, I acted as specialist adviser to the same House of Lords committee for its inquiry into media ownership, travelling with the committee to meet media proprietors and senior editors in the US (including Rupert Murdoch).
  - In 2011, I published a book on television journalism, including a chapter devoted to impartiality and another to 24 hour news channels.<sup>1</sup>
  - In 2012, I was invited to give oral evidence to the Leveson Inquiry on two occasions, the second specifically on media plurality. My fourth written submission, at the request of Sir Brian Leveson, was a new framework for media plurality.<sup>2</sup>
  - In 2013/14, I directed an 18 month project supported by the Arts and Humanities Research Council titled *Plurality and Media Power: new policy approaches to protecting the public interest in the 21st century*.<sup>3</sup>
  - In 2015, I co-authored an edited collection of essays titled *Media, Power and Plurality*, arising out of that project.<sup>4</sup>
  - My next book, *Media Ownership, Journalism and Diversity*, will be published by Bloomsbury Academic in Spring 2019.
  
2. I made two separate submissions to Ofcom for the first stage enquiry on this proposed merger (referenced several times in their June report to the Secretary of State), and understand that those will have been forwarded to the CMA as part of the second stage<sup>5</sup>. This submission therefore refers to but does not seek to replicate those submissions. My submissions to Ofcom, in particular my critique of Ofcom's Share of References schema and their inadequate approach to measuring impact on public opinion, also engaged with the second theory of harm and should be read in that context.

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<sup>1</sup> Steven Barnett, *The Rise and Fall of Television Journalism: Just Wires and Lights in a Box?*, Bloomsbury Academic, 2011.

<sup>2</sup> <http://webarchive.nationalarchives.gov.uk/20140122194503/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Submission-from-Professor-Steven-Barnett-on-plurality.pdf>

<sup>3</sup> Funded under the AHRC Fellowship scheme (grant number AH/K002864/1)

<sup>4</sup> *Media Power and Plurality: From Hyperlocal to High-Level Policy* (with Judith Townend). Basingstoke: Palgrave Macmillan, 2015.

<sup>5</sup> The first, co-authored with Dr Martin Moore and Dr Damian Tambini, was also published by LSE: *Media plurality, the Fox-Sky bid, and the case for referral to Ofcom*, London School of Economics, 2017:

<http://blogs.lse.ac.uk/mediapolicyproject/files/2013/09/LSE-MPP-Policy-Brief-18-Media-Plurality.pdf>

The second was under my own name.

3. This evidence is divided into five parts, each addressing questions either explicitly raised or implied in the CMA's Issues Statement: influence over public opinion; influence over the political agenda; influence over competition and media policy; mitigating factors through regulatory constraints; and possible remedies. It therefore engages with the second and third of the CMA theories of harm.
4. I would welcome the opportunity to elaborate on my evidence to the CMA in person.

### **A. Influence over public opinion**

5. My critique of Ofcom's approach to analysing "impact" centred on its reiteration of the four quantifiable "proxies" which it used for measurement: perceived impartiality, reliability, trust, and "the extent to which sources help people make up their minds about the news". I argued that no empirical evidence was adduced to justify these proxies which – as for their Share of References metric – served only to exaggerate the importance of the television medium, and particularly the role of the BBC, at the expense of an online and newspaper environment which had far greater capacity for partisanship, persuasion and agenda-setting. I said that it was now incumbent on Ofcom to justify these proxies with empirical evidence; and to invest more time in imaginative research approaches for assessing the components of communicative power.
6. Ofcom's only response was to restate as fact that "a news provider considered important and trustworthy by its users is likely to be able to influence the opinions of its immediate audience more than other news providers" without any further justification beyond its own assertion.<sup>6</sup> On agenda-setting, where research is more easily executed without great expenditure, Ofcom was again dismissive, arguing that "While this type of content analysis may offer some limited additional insight, it would not in itself be a definitive measure of agenda setting, and would require detailed scoping, which has not been feasible in a first stage assessment."<sup>7</sup> I find it difficult to reconcile Ofcom's statutory responsibility to promote the needs of citizens and its reputation for evidence-based research with this unconvincing statement of faith on such a critical issue of public interest. At the very least, its conclusions on Share of Reference and relative impact of different media need to be treated with great caution.
7. I note that 21<sup>st</sup> Century Fox attempts to argue in its submission for a "consensus that the influence of newspapers is waning", in particular in light of the 2017 general election. No such consensus exists. This was a single electoral event which, it could be argued, contradicted alternative conventional wisdoms about press power following the 2015 general election and the 2016 EU referendum. I have argued elsewhere that assumptions about declining press power are simplistic and that, while social media clearly played a vital role in the most recent election, there are good reasons for believing that "Britain's press still exerts considerable power over the UK's national conversation and its political direction – and will remain a powerful force at the next election."<sup>8</sup> Given the MFT's high concentration of market share in our press, its own influence will therefore remain highly significant.

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<sup>6</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0012/103620/public-interest-test-report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf), p71.

<sup>7</sup> Ibid, p83

<sup>8</sup> Steven Barnett, "Is our national press a fading dinosaur? Don't bank on it" in Einar Thorsen, Dan Jackson and Darren Lilleker (eds). *UK Election Analysis 2017: Media, Voters and the Campaign*, Political Studies Association, June 2017. <http://www.electionanalysis.uk/uk-election-analysis-2017/section-3-news-and-journalism/is-our-national-press-a-fading-dinosaur-dont-bank-on-it/>

## B. Influence over the political agenda

8. Evidence in this respect is overwhelming, both from senior politicians themselves and from those journalists and biographers who have examined the MFT's involvement in the political arena across several continents.
9. In his evidence to the Leveson Inquiry on his initial involvement as Business Secretary, in referring the 2010 bid by News Corporation for the whole of Sky to Ofcom, Vince Cable described the political as well as legal context for his decision: "In my opinion as a politician, I also believed that the Murdochs' political influence exercised through their newspapers had become disproportionate. The accusation that leading political figures in the Conservative Party and the Labour Party had offered disproportionate access to the Murdochs was widely made, as was the perception that both parties had shown excessive deference to their views (as expressed through News International newspapers)."<sup>9</sup>
10. He also referred in his evidence to News Corp representatives' "inappropriate" approaches to his colleagues, saying that "These colleagues expressed some alarm about whether this whole affair was going to lead to retribution against the Liberal Democrats through News International newspapers". Subsequent reports suggested that these were not exaggerated fears, and that threats to persecute the party through News International's newspapers if the bid was referred had indeed been made to senior party members.<sup>10</sup>
11. At around the same time, on 4 October 2010, the journalist Peter Osborne presented a prescient *Dispatches* programme on Channel 4 which portrayed a disturbing picture of blatant intimidation by a burgeoning media empire which included overt threats of tabloid revelations to secure compliance. On the programme, *Guardian* journalist Nick Davies quoted his own sources from within Scotland Yard: "they will tell you that there was a constant and articulated fear that if we pursue this [phone hacking] investigation too hard. . . we are going to alienate the most powerful newspaper group in this country and we don't want to do that".
12. Amongst other interviewees, Plaid Cymru MP Adam Price — a member of the Culture Select Committee which investigated phone hacking allegations in 2009 — told Osborne that committee members did not compel News International chief executive Rebekah Brooks to give evidence because of fears that journalists would delve into their personal lives. Osborne concluded that Parliament and government were supine in tackling an issue of manifest public interest because of the unchecked power and influence of News Corporation. It wasn't until the Milly Dowler story broke nine months later that the furious denials and cover ups were finally exposed.<sup>11</sup>
13. At Prime Minister's Questions on 25 April 2012, David Cameron made a confession from which no former serving politician or former Prime Minister appears to have demurred in the intervening five years: "I think on all sides of the House there's a bit of a need for a hand on heart. We all did too much cosyng up to Rupert Murdoch".

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9 Written evidence to the Leveson Inquiry, located at:

<http://webarchive.nationalarchives.gov.uk/20140122190654/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf>

10 H. Porter and T. Helm, 'News International "bullied Liberal Democrats over BSkyB bid"', *The Observer*, 23 July 2011, <http://www.theguardian.com/media/2011/jul/23/news-international-liberal-democrats-bskyb>

<sup>11</sup> *Tabloids, Tories and Telephone Hacking*, Channel 4, TX 4 October 2010: <http://www.bfi.org.uk/films-tv-people/4ce2b8e087631>

14. Similar charges have been made in the US where one of Murdoch's biographers, Michael Wolff, detailed a number of occasions on which media power was leveraged to promote favoured political candidates or secure commercial advantage. Wolff concludes: "One of the severest charges against Murdoch is that he runs a pitiless attack machine whose primary purpose is not journalism but the defense of his own interests – that not since the heyday of the Hearst organization, with his vendettas and passionately vindictive columnists, has there been a major American news organization so willing to prosecute its opponents as Fox News"<sup>12</sup>.
15. This kind of leverage over the political environment will inevitably impact on the political agenda, albeit through a fairly subtle processes of osmosis. From major policy issue such as Europe (where former Prime Minister John Major testified to Rupert Murdoch's political pressure) to smaller domestic issues such as the unfair dismissal of a local council Director of Children's Services by the Secretary of State (where the malign influence of a relentless campaign orchestrated by the Sun's editor has been well chronicled<sup>13</sup>), the MFT's influence over the political agenda is undeniable. To allow that leverage to increase further through this acquisition, given the cross-party consensus on the right course of action just five years ago, would be irrational.

### C. Influence over competition and media policy

16. While the high quality and impartiality requirements of the Communications Act can ensure that certain basic obligations within broadcast news are met, they cannot legislate against the more subtle effects of an owner's influence in pursuing their own commercial and corporate interests. Such influence rarely – even in the unregulated press – takes the form of direct intervention about what news stories to cover, with what prominence, in what style and in what order. The interests of owners are many and various and, as with political bias, the means of influencing news output are equally diverse and often as much to do with omission as commission.
17. In the US, it is acknowledged practice for the news divisions of broadcasters to steer away from awkward stories about their ultimate owners (ABC executives, for example, abandoned an embarrassing story about Disney theme parks).<sup>14</sup> Within Sky News, this raises the question of how full ownership by Fox would impact on stories about, for example, TV sports rights or further phone-hacking allegations in News Corp newspapers or other Fox/News Corp takeover attempts. In the current benign climate of Sky News, executives can be expected to dismiss the prospect of any such influence. Once the new ownership structure has bedded in, history tells us that various forms of informal influence can be expected to increase.
18. Such influence can extend beyond news to current affairs and other factual programming – and arguably even drama. As editors and creative directors make difficult decisions on competing offers (whether stories on a news channel or programme pitches elsewhere), it becomes far more appealing to make choices that are less liable to create internal tensions with an organisation's owner. When shareholding is diluted and ownership is more dispersed, such "line of least resistance" becomes much less significant in the decision-making process.

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<sup>12</sup> Michael Wolff, *The Man Who Owns the News: Inside the Secret World of Rupert Murdoch*, London, Vintage Books, 2010, p341.

<sup>13</sup> See in particular Ray Jones, *The Story of Baby P: Setting the Record Straight*, Policy Press, 2014.

<sup>14</sup> For a comment on this and other US examples, see Steven Barnett, "Impartiality redefined: protecting news on commercial television in Britain" in Damian Tambini and Jamie Cowling, eds, *New News? Impartial broadcasting in the digital age*. London, IPPR, 2002. Chapter 4, pp51-64.

19. In my evidence to Ofcom, I provided examples of several occasions when editorial decisions were clearly taken in pursuit of commercial and competitive advantage, from aggressive promotion of Sky through News Corp newspapers in 1989/90 to promoting Fox Studio movies at the expense of rivals. To this day, both the Sun and Times continue to be intent on undermining the BBC. Just within the last fortnight, an absurd “investigation” by the Sun claimed that the Andrew Marr show featured “four times more pro-Europe guests than Brexit fans” in the year since the referendum, thus demonstrating the BBC’s anti-Brexit bias<sup>15</sup>. This spurious story followed several attempts during the BBC’s charter renewal period to argue for huge cuts in the Corporation’s funding, and furious attacks on the BBC by both Rupert and James Murdoch in their respective MacTaggart lectures.

#### **D. Editorial influence, regulatory protection and broadcasting standards**

20. It is frequently argued, as it is by the Parties in their preliminary submissions, that the statutory and regulatory controls imposed on broadcast news in the UK insulate broadcasters from any attempted editorial interference, even if owners wished to do so.

21. This is not a credible argument, and has previously been dismissed by Ofcom. The MFT has a long and well established track record both in direct intervention and in exercising indirect influence over media properties. While impartiality rules which govern licensed broadcast services militate against blatant promotion of partisan political views, they cannot cater for stories or for programmes that are marginalised or excluded, nor for more subtle instances of editorial influence. A news channel, for example, might choose to pursue an agenda which concentrates on the “growing problems” of crime, immigration or welfare dependency without breaching statutory impartiality rules.

22. The limitations of impartiality rules have been recognised by Ofcom. In its 2007 Report to the Secretary of State on BSkyB’s acquisition of ITV shares, Ofcom stated: “These regulatory provisions, while they represent important controls on impartiality and quality, are not directly concerned with or a substitute for regulatory provisions aimed at ensuring sufficient plurality. They are not designed to remove the ability of broadcasters to set the agenda by selecting the issues and events that are covered in news broadcasting or by determining the relevant importance that are given to each of these”.<sup>16</sup>

23. In other words, editorial influence can be achieved as much through acts of omission as commission. It can also be exercised through the appointment of like-minded senior editorial staff who are trusted to pursue styles or news agendas which are more acceptable to the owner: one of Rupert Murdoch’s editors once described him as running his empire “by phone and by clone”<sup>17</sup>.

24. Given Sky News’ well-regarded professional reputation, there is some scepticism about whether there would be any desire to intervene in its output. In fact, Rupert Murdoch has already demonstrated his appetite for change. When asked by the *New York Times* in 2003 whether Sky News had begun imitating Fox, Murdoch’s reported response was: “I wish. I think that Sky News is very popular and they are doing well, but they don’t have the entertaining talk shows - it is just a rolling half-hour of hard news all the time.” The paper also reported that he had described Sky to

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<sup>15</sup> The figures counted the Prime Minister and other cabinet members’ appearances as “anti-Brexit”. Full story and BBC rebuttal here: <http://www.pressgazette.co.uk/bbc-hits-back-at-suns-claim-of-anti-brexit-bias-on-andrew-marr-and-sunday-politics-shows/>

<sup>16</sup> Ofcom, *Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc’s acquisition of 17.9% shareholding in ITV plc*, 27 April 2007, p19, Par 4.39

<sup>17</sup> William Shawcross, 1992, *Rupert Murdoch: Ringmaster of the Information Circus*, Chatto & Windus, p244.

others as "BBC light", with staid presentation and a liberal bias.<sup>18</sup>

25. In 2008, he told a visiting delegation from the House of Lords Communications committee (of which I was a member, as the committee's specialist adviser) that "Sky News would be more popular if it were more like the Fox News Channel". When explicitly asked why, if this was his preference, Sky News was not moving in that direction, he replied that "nobody at Sky listens to me".<sup>19</sup>
26. It might be argued that the context of that discussion involved presentational issues rather than political bias (though his reported quote to the New York Times suggests both). There are two responses: first, that he was expressing a clear preference for Sky News to change its overall approach, as he had on at least one previously recorded occasion; and second, that he felt unable to insist on such changes in a manner that would be unthinkable in other MFT media properties. It would clearly have been nonsensical if had suggested, for example, that "nobody listens" at his papers where he has complete control and routinely picks up the phone to editors.
27. Moreover, the views of Sky's chairman James Murdoch on impartiality regulation have been publicly rehearsed. In his 2009 MacTaggart lecture at the Edinburgh Television Festival, James Murdoch called for a "radical reorientation of the regulatory approach", including abolition of impartiality requirements which represented "an impingement on freedom of speech and on the right of people to choose what kind of news to watch".<sup>20</sup>
28. It was noticeable that these views appeared to have been moderated at the Royal Television Society convention last month when, in response to questioning by Sarah Sands, he said that "Impartiality is about balance, it is the law, and it is the right way for Sky News to operate."<sup>21</sup> Even the most trusting observer is entitled to ask which James Murdoch we should believe – the one who felt no inhibitions in expressing his opinions in 2009, or the one who clearly recognised that every public utterance was being carefully scrutinised during the inquiry process in 2017?
29. It does not require heavy-handed intervention to shift the centre of gravity of a broadcaster's output, nor does it require an overt shift towards a clearly identifiable political agenda. In that sense, notions of "Foxification" of Sky News are far-fetched. But corporate influence can be exercised in myriad ways throughout a media company's output, and a news organisation's culture can be shifted gradually to reflect better the worldview of an interventionist owner without breaching any statutes on impartiality.
30. We should also be concerned about the Fox record on accuracy, a core element of the broadcasting standards objectives. While there may be little read across from the Fox News' approach to impartiality, given the absence of such requirements in the US, its corporate approach to accuracy should be a cause for concern. In particular, a recent Fox News story attempted to claim that Seth Rich, a murdered Democratic staffer, was targeted by his party because he was the source of leaked emails from the Democratic National Committee. It was a conspiracy theory which was designed to distract attention from accusations being levelled at Russia, which had been actively encouraged by

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<sup>18</sup> David D. Kirkpatrick, 2003, "Mr Murdoch's War" in *New York Times*, April 10<sup>th</sup>, <http://www.reclaimthemedias.org/stories.php?story=03/04/09/5598256>

<sup>19</sup> "The Ownership of the News", Report of the House of Lords Select Committee on Communications, Volume 1, HL Paper 122-I, 2008, p119.

<sup>20</sup> J. Murdoch, 'The Absence of Trust', 2009 Edinburgh International Television Festival MacTaggart Lecture, 28 August 2009.

<sup>21</sup> "Sky Higher", report by Maggie Brown of speech and Q&A in *Television*, October 2017, p24.

the White House, and which caused enormous distress to the victim's family. While Fox News retracted the story, they have never explained why it was broadcast, what internal enquiries have been pursued, or what disciplinary action has been taken as a result.<sup>22</sup> There are many other examples of Fox News' determination to prioritise ideological commitment over journalistic integrity, with no effective governance mechanisms for correcting egregious errors.

31. A culture which has such scant regard for basic journalistic tenets of impartiality and accuracy, imported into the UK, would potentially have a major impact on our television news ecology which still represents the most trusted medium in the UK. One commentator observed ten years ago that the Fox News approach had significantly influenced other players with more serious intent, arguing that it had "almost entirely rewritten the rules of US television news coverage ... with its penchant for presenting politics as a gladiatorial sport, all sound, fury and popular entertainment, in which fact and reasoned analysis are ditched in favour of outrage, anger and patriotic pride".<sup>23</sup> It is precisely that sort of presentational (as well as a more subtle editorial) shift which could prove highly toxic for television news in Britain.

### **E. Possible undertakings and protection of Sky News**

32. Given that Sky News is the main focus of plurality and standards concerns, remedies that insulate it wholly from proprietorial influence might be sufficient to mitigate the core issues (subject to the caveats in pars 35-7 below). However, guarantees that have been proposed around "independent" editorial boards and an "independent" editor are wholly inadequate.
33. As the Murdoch family has demonstrated with similar guarantees when acquiring Times Newspapers and subsequently the Wall Street Journal, such undertakings are at best easily subverted and at worst systematically ignored.<sup>24</sup> When a family has a long track history of both exerting editorial interference over every media property they own, and of undermining commitments designed to constrain such interference, it would be reckless to believe that the leopard has suddenly changed its corporate spots. Any separation of Sky News must be structural and must provide bullet-proof detachment from MFT influence to prevent both the plurality and standards problems emerging – as they most certainly would.
34. If undertakings are being sought which are both sustainable and effective in deterring MFT influence, I would propose that Sky News be protected by a Trust or Foundation which is financially guaranteed but over which the MFT has absolutely no influence beyond a single board member. The constitution of this body must establish transparent and independent means for appointing board members<sup>25</sup>, and incorporate either the Ofcom or BBC code of editorial conduct as its guiding mission. The process of selecting senior editorial figures must be conducted without any involvement of the MFT. And the funding should be guaranteed for a minimum of 20 years, with appropriate checks on expenditure to ensure operational efficiency.

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<sup>22</sup> David Folkenflik, the NPR media correspondent who broke the story, made comparisons with the phone hacking revelations around Milly Dowler in the UK. Full story here: <https://www.theguardian.com/media/2017/aug/07/seth-rich-trump-white-house-fox-news>

<sup>23</sup> Andrew Gumbel, "All sound, fury, and popular entertainment one decade on, Fox is top dog in the ratings", *Independent*, 7 October 2006, <http://www.independent.co.uk/news/world/americas/all-sound-fury-and-popular-entertainment-one-decade-on-fox-is-top-dog-in-the-ratings-418998.html>

<sup>24</sup> See for example Wolff, *op cit*, p232.

<sup>25</sup> A good model might be the process for appointing the Press Recognition Panel.

35. Even were Sky News thus insulated, and therefore the most obvious plurality and standards risks mitigated, I would urge caution on both counts in other areas of the transaction. In particular, an unfettered ability to cross-promote across a fully owned ISP as well as TV, radio, press and online will allow for significantly greater commercial and corporate as well as political power. Full access to the second largest ISP in the country will enable 21<sup>st</sup> Century Fox to exploit user data from subscriber bases which could both distort the market and influence public opinion.
36. This is particularly significant given that online political advertising remains unregulated and, as Lord Puttnam along with five other peers have noted in a letter, “the temptations and opportunities for misuse become very great indeed” when such data are in the hands of an owner “with an appetite for political leverage”.<sup>26</sup> I note that the CMA explicitly acknowledges in footnote 24 that influence over public opinion includes “the ability to target content to influence political opinion”. These concerns about politically inspired exploitation of data should also engage the second theory of harm relating to plurality.
37. Nor would this remedy insulate the rest of Sky from any of the corporate governance failings manifested during and after the phone hacking scandal at News International in the UK or the more recent sexual harassment scandal at Fox News in the US. I note that the CMA expressly includes in footnote 33 the need to consider a commitment to broadcasting standards in all licences held by Sky. I would suggest that, even with Sky News wholly insulated, recent MFT evidence on compliance and governance issues should make us very wary of assuming that standards of accuracy and impartiality can be safeguarded on, for example, any current affairs, documentaries or other programmes of a factual nature throughout the Sky suite of channels. If this is the case, it may be that there is no feasible remedy and that this acquisition should simply not proceed.
38. As I concluded in my evidence to Ofcom, the MFT has demonstrated over the years that it routinely exploits unqualified control of its media properties to promote both its own corporate interests and its political worldview, and cannot be trusted to uphold the standards of impartiality and accuracy which are integral to the 2003 Communications Act. As long as there are independent directors, as there have been for some time at Sky, such tendencies are tempered. Full, unfettered control will result in both an inevitable diminution of overall plurality, and a degradation of editorial standards and integrity in Sky News. Both will be contrary to the public interest.

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<sup>26</sup> The Observer, 16 July 2017: <https://www.theguardian.com/business/2017/jul/15/sky-fox-rupert-murdoch-david-puttnam-database>