# THE RETURN OF THE GUILD?
# NETWORK RELATIONS IN HISTORICAL PERSPECTIVE

Centre for Business Research, University Of Cambridge
Working Paper No. 322

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March 2006

This working paper forms part of the CBR Research Programme on Corporate Governance.

**Abstract**
Prior to the industrial revolution, the predominant form of economic organization in western Europe and north America was the guild. Guilds were network forms, loose associations of independent producers, with strong local and regional identities, in which cooperation and competition were combined. The decline of the guild was brought about in large part by legal changes which privileged the emerging conjunction of the vertically integrated enterprise and mass consumer market. If present-day network forms are not be consigned to the margins of capitalism as their predecessors were, we need a set of legal concepts and techniques which can underpin and protect network relations, most importantly in the context of competition law.

**JEL Classification**: K21, L14, L22

**Keywords**: networks, guilds, vertical integration, industrialisation, competition law.

**Acknowledgements**
I am grateful for comments received from Ana Lourenço, Steve Pratten and Frank Wilkinson, and from the participants at the conference 'Contractual networks: legal issues of multilateral cooperation', held at Fribourg, 6-9 October 2005, in particular Poul Kjaer.

# The Return of the Guild?
# Network Relations in Historical Perspective

## Introduction

As Marc Amstutz and Gunther Teubner put it,[1] one of the challenges posed by the rise of the network form in the final decades of the twentieth century was its incompatibility with the legal categories of *contract* and *association*, corresponding roughly to the division between *market* and *enterprise*, which had been predominant since the industrial revolution. This chapter seeks to take up the challenge of more precisely locating network forms in relation to the long-run process of industrialization and in assessing the relevance, in this context, of the legal framework of enterprise. How would we view the network phenomenon if, instead of seeing it as a manifestation of the 'post-industrial society' of the late-twentieth century, as argued by Manuel Castells,[2] we recognized that network forms also *preceded* the emergence of the modern industrial enterprise?

Prior to the industrial revolution, the predominant form of economic organization in western Europe and north America was the corporate guild. Guilds possessed many of the features now associated with networks. Guilds were neither firms not markets, but loose associations of independent producers, with strong local or regional identities, in which cooperation and competition were combined, and the benefits of innovation shared by the trade as a whole. The values expressed by guild forms were those of communitarianism, producer solidarity, and the defence of the collective property of the trade as an 'intellectual commons'. These same values could also be interpreted as collusion, restriction and exclusion – literally, as the English judges put it in the seventeenth and eighteenth centuries, a 'conspiracy' against consumers and the interests of wider society. At the same time as the common law was reshaping the boundaries of criminal and civil liability for unlawful 'combinations' and developing the doctrine of 'restraint of trade', guild forms were also being condemned by the legislation of the French Revolution and by the post-revolutionary codes on the continent of Europe. But while the decline of the guilds paved the way for the emergence of the integrated business enterprise, the transition was far from seamless; and elements of the guild lived on under conditions of industrial capitalism, albeit in niches and segments which were continuously under threat of encroachment.

The guild and the network are not synonymous; but the guild does represent a particular subdivision of the network form, based as it is on 'lateral or horizontal patterns of exchange, interdependent flows of resources, and reciprocal lines of communication'.[3] Using an historical perspective, the fate of the guild may be particularly instructive. This chapter will argue that if present-day network forms are not be consigned to the margins of (post-) industrial capitalism as their predecessors were, we need, if not necessarily a legal analogue to the network form, then at the very least a set of legal concepts and techniques which can underpin and protect network relations, in the same way that the law permits the organization of firms and markets.

With that end in view, the argument in this chapter unfolds as follows. The next section considers some issues concerning the economic and legal definitions of the network form, and the relationship between networks, markets and firms. Then the focus shifts to an historical analysis of the legal changes which, firstly, underpinned guild relations, and then accompanied their decline. This is followed by an outline of the role played by competition law and policy in reshaping organizational boundaries in a prototypical 'post-industrial' sector, the cultural industries. This is followed by the concluding section.

## 'Market', 'Firm' and 'Network' as Economic and Legal Concepts

A key question is whether markets, firms and networks are mutually exclusive categories. Transaction cost economics in the tradition of R.H. Coase[4] and Oliver Williamson[5] portrays firms and markets as alternative modes of economic organization. However, it has not been convincingly shown that networks form a distinctive form of governance in this sense. Jeffrey Bradach and Robert Eccles,[6] having identified 'price, authority and trust' as potentially alternative mechanisms of coordination for the market, firm and network respectively, in the end have to accept that these are no more than ideal types which are useful in model-building, and do not represent the reality of industrial organization. As control mechanisms, while they may be 'separate', they are also, in practice, 'overlapping, embedded, intertwined, juxtaposed and nested'. The assumption of mutual exclusivity, these authors conclude, 'obscures rather than clarifies our understanding'.[7]

Walter Powell, likewise, sets off with the aim of identifying 'a coherent set of factors that make it meaningful to talk about networks as a distinctive form of coordinating economic activity'.[8] Networks, in his presentation, are 'more social – that is, more dependent on relationships, mutual interests and reputations'[9] than markets, while 'less guided by a formal structure of

authority'[10] than hierarchies. As distinct from markets, networks embody mechanisms for social learning and information transfer, while, by contrast with hierarchies, they depend on a 'mutual orientation' and norms of reciprocity.[11] The difficulty with this analysis is that the characteristics described by Powell as belonging specifically to networks can convincingly be ascribed to the other two forms as well. Markets, as F.A. Hayek has shown,[12] function to mobilize and encode knowledge; while Hayek's account perhaps overplays the extent to which this is a *necessary* or *universal* feature of market-based activity, but it is unquestionably present in many market settings. Conversely, many enterprises, if clearly not all, exhibit a high degree of trust and cooperation between workers and managers, without losing their character as hierarchical modes of organization.

Despite all this, there is a case for regarding networks as possessing distinctive features. The problem with the existing accounts is that they start with the Coasean assumption that firms and markets are alternatives; the firm displaces the market as the costs of organizing transactions through external exchange increase. This is, essentially, a static presentation, offering at best, as Coase put it, a 'moving equilibrium'.[13] From an evolutionary or historical perspective, the firm and the market have to be seen not as alternatives, but as *complements* to one another. The rise of the vertically integrated enterprise, and the related organizational techniques of mass production, went hand in hand with the emergence of markets based on mass consumption of standardized goods. In the language of modern systems theory, we might say that they 'co-evolved'.[14] The process was spelled out – although without using this particular terminology – in J.R. Commons's classic and, latterly, unduly neglected account of industrial evolution, which appeared in 1909 (in the now unlikely setting of the *Quarterly Journal of Economics*).[15] Commons's highly detailed, 'micro-institutional' analysis tracks the evolution of the footwear industry in America, from the guilds of the early colonial period, through to the factory labour of the age of mass production. As Commons recognized, the original or 'primitive'[16] guild 'represented the union in one person of the later separated classes of merchant, master and journeyman'.[17] Its principal function was to exclude 'bad ware',[18] which often amounted in practice to shifting contractual risk on to the consumer. The subsequent fragmentation of the guild was simply not the result, Commons argued, of changes in the technological or organizational forms of production, although these played a part; it was the consequence above all of the development or 'widening out' of product markets.[19] This led to the separation of wholesale and retail product markets and thereby to a decisive shift in economic power from producers to consumers: 'thus it is that the ever-widening market from the custom-order stage, through the retail shop and wholesale-order to the wholesale-speculative stage, removes

the journeyman more and more from his market, diverts attention to price rather than quality and shifts the advantage in the series of bargains from the journeymen to the consumers and their intermediaries'.[20] These changes occurred without a major shift in the techniques of production and prior to the emergence of the factory, which in Commons's account is simply the accompaniment to the final stage in the extension of the market, which he saw, in the age of mass production, as encompassing 'the world'. [21]

To identify vertical integration with the extension of markets to a global level jars with the more recent association of globalisation with a 'flexible', post-industrial and, fundamentally, fragmented economic structure.[22] But what Commons was describing was a process which contemporary commentators understood as disempowering labour. In the early years of the twentieth century, vertical integration was resisted by craft-based unions and small producers alike, aware that it signaled a threat to their independence.[23] The legal category of the 'contract of employment' was emerging at this time in large part as a consequence of a desire by employers for a unitary status which embodied the 'subordination' of all waged and salaried workers to the authority of management.[24] We have since become used to thinking of the large, vertically integrated corporation, and the 'permanent' or indeterminate contract of employment, as institutions protective of the interests of labour, which have been placed under threat by the fragmentation of the firm; but this is not how they began, and not how Commons, writing in 1909, would have seen them.

In stressing the coevolution of firms and markets as a consequence of the extension of competition, Commons's account also points to the marginalisation of network forms. If the firm and the market were complementary, their joint rise pushed network relations to the fringes. This was the consequence, on the one hand, of the incorporation of independent units into the firm, and, on the other, of the eclipse of customized production by mass consumer markets. Networks survived, but in isolated contexts, segments and niches, which struggled to survive when placed into direct competition with integrated industrial forms.

To sum up this part of the argument: networks are indeed a distinctive form, but they provide an alternative mode of economic organization not to firms on the one hand and markets on the other, but to the *conjunction* of the vertically integrated firm and mass consumer markets. As part of the unfolding of industrial capitalism, networks were for the most part marginalized by the firm-market conjunction. They never disappeared altogether, and in some contexts they thrived, but these situations were the exception.

What was the role of the legal-institutional framework in this process? The next section considers the role of changes in the legal framework in England which accompanied the transition to industrial capitalism.

## The Legal Structure of Guild Production and the Transition to Industrial Capitalism in England

Guild production in early modern England was not a hold-over or relic of the medieval period. Historical research has recently re-evaluated the role of the guilds, suggesting that they were far from being the obstructive force portrayed by the political economy of the time. They appear to have played a significant role in sustaining the 'proto-industrial' forms of production, based on complex chains of contractual relations between merchants, wholesalers and producers, which characterized industry before the coming of the factory.[26] Guilds were underpinned at this time by an elaborate and extensive legal structure.[27] As late as the mid-eighteenth century, it was still necessary to serve a seven year apprenticeship in order to again entry to certain artisanal trades. The status of apprenticeship was only partially integrated into the cash economy – it involved payment in kind and living in as part of the master's household. Journeymen were those who had completed their apprenticeships in the relevant trade; they were generally paid wages at a daily rate, although they were normally hired for longer than this. A journeyman could be admitted to the group of masters not simply on showing that he had the resources and qualifications to be an independent trader, but also according to the rules of the guild which placed strict limits on the numbers of masters. At this stage the terms 'master' and 'employer' were not synonymous.[28] The 'master' was one who had the right to direct the apprentices and journeymen he employed by virtue of his knowledge of the trade, and in many instances his status as a freeman of the relevant guild or city corporation. The master could, in turn, be 'employed' as an independent contractor on either a regular or intermittent basis by third parties such as merchants or wealthy clients.

The artisanal system can be distinguished from the capitalist forms of employment which developed later by the preservation of control over the form and pace of work by the 'trade', in other words, the collectivity of producers who were subject to the rules of guild membership. The master's relationship with his suppliers and customers, even when regular and stable, was never that of an employee (as that term later came to be understood), while a journeyman, although paid wages which were calculated by the day or by the piece, could only be directed to work within the limits of his apprenticed trade, while at the same time being protected from low wage competition by restrictions on the numbers

of apprenticeships numbers and by the general controls on entry into the trade. Thus the 'artisan wage relationship' was one in which the journeyman 'worked with, nor for, his master, and during slack times he was likely to be kept on for as long as the master could manage', while the guild rules gave the master a 'protective independence ... [which] existed within a body of custom and law which prevented competition and encouraged solidarity between producers of the same trade'.[29]

The rules of the guilds were underpinned by the Statute of Artificers of 1562, a legislative measure which, to a large degree, codified laws going back to the fourteenth century and local practice with an even longer lineage. The apprenticeship sections of the Statute of 1562 were to some extent a liberalizing influence: they made earlier property qualifications applying to parents of apprentices less onerous, and they introduced a number of exemptions to the rules on entry as concessions to some of the larger corporate guilds.[30] In other respects, however, the Statute confirmed the guild model. Under the Statute it was an offence punishable by repeated fines of forty shillings for each month for any person to 'set up, occupy, use or exercise any craft, mystery or occupation now used or occupied within the realm of England and Wales, except he shall have been brought up therein seven years at the least as an apprentice'.[31] The Statute also made it an offence to employ persons who had not been properly apprenticed in these occupations and to employ more than three apprentices for each journeyman.[32] In addition, in certain cities, including the major urban centres of London and Norwich, there was regulation in the form of by-laws made by the local guilds and city corporations. Numerous corporations and guilds which had been established by royal charter had the power to exercise legal controls over local trade and conditions of employment, subject to minimal supervision by local justices.[33]

The effect of these provisions was that the emerging capitalist forms of industrial organisation, based around the vertically integrated enterprise, were, in effect, unlawful. No employer could operate in an industry for which he had not served an apprenticeship. The Act could also be interpreted as preventing an employer from hiring workmen from different trades to work alongside each other, since the effect would be that he was then exercising a number of trades in addition to his own.[34]

The regulatory scope of Act was tested in the King's Bench in *Hobbs* v. *Young* (1689).[35] Even at early stage in industrialisation, it is possible to see the pressures to which the Act was being subjected by the new model of economic organisation. A merchant-capitalist who had employed journeymen clothworkers in his house

for a month to make goods up for export was successfully prosecuted for a breach of the Act. The argument of the prosecuting Counsel was that

> 'he who cannot use a mystery himself, is prohibited to employ any other men in that trade; for if this should be allowed, then the care which has been taken to keep up mysteries, by erecting guilds or fraternities, would signify little'.

The majority of the court agreed:

> 'the exercise of [the trade] by journeymen and master workmen, or an overseer for hire, is not an exercise of it by them, but by him that employs them; he provided them materials and tools, and paid them wages: by law, he is esteemed the trader who is to run the loss and hazard; the whole managery was to be for his profit, and the workmen are to have no advantage but their wages'.

Even then, one of the three judges dissented on the grounds that

> 'no encouragement was ever given to prosecutions upon this Statute ... it would be for the common good if it were repealed, for no greater punishment can be to the seller than to expose goods for sale, ill wrought, for by such means he will never sell more'.

By the early nineteenth century this view had become the new orthodoxy. However, the demise of the extensive regulatory framework of the 1563 Act was not a sudden event. There was no equivalent to the peremptory prohibition of the guilds which was embodied in the relevant legislation of the French Revolution, the decret Allarde and loi Le Chapelier. In England, the process of change was more gradual, but highly contested over a century or more. Thus the statute of 1814[36] which finally abolished the apprenticeship provisions of the Statute of Artificers brought about a change which more than purely symbolic. The 1814 Act was passed precisely because there had been a vigorous and concerted attempt to uphold the Act of 1562 by its supporters in the urban guilds, a campaign which involved extensive strike action as well as parliamentary petitions and litigation aimed at enforcing the Act's provisions.[37]

The Act of 1562 received a hostile interpretation from the courts almost from the very start. Looking back on this process in a 1792 judgment, Lord Kenyon commented:

> 'When [the Act] was made, those who framed it might find it beneficial, but the ink with which it was written was scarce dry, ere the inconvenience of it was perceived; and Judges falling in with the sentiments of policy entertained by others have lent their assistance to repeal this law as much as it was in their power'.[38]

The principal weapon used by the courts was the doctrine of restraint of trade. Under this legal doctrine, 'at common law, no man could be prohibited from working in any lawful trade ... and therefore the common law abhors all monopolies'.[39] Such restraints required either 'ancient custom' or an Act of Parliament: thus 'without an Act of Parliament, none can be in any manner restrained from working in any lawful trade… ordinances for the good order and government of men of trades and mysteries are good, but not to restrain anyone in his lawful mystery'.[40] On this basis, courts struck down rules imposing additional entry requirements on apprentices and seeking to limit guild numbers.[41] Then the courts went further, ruling that the 1562 Act only applied even in the case of a pre-1562 trade trades if, in the court's view, 'an apprenticeship could possibly be expedient', since the Act could only govern 'such trades as imply mystery and craft, and that require skill and experience'.[42]

The second technique used by the courts was the restrictive interpretation of statutes deemed to have carved out an exception from the general common law. In was on this basis that the courts ruled that the Act of 1562 had no application to trades or techniques which had not existed at the time of its passage.[43] This doctrine was used in the eighteenth century to remove from the scope of the Act several of the emerging industrial trades including cotton spinning, coach building, and framework knitting. In *The Wealth of Nations* Adam Smith caught the prevailing view, arguing that 'the manufactures of Manchester, Birmingham and Wolverhampton, are many of them, upon this account, not being within the statute, not having been exercised in England before the 5th. of Elizabeth',[44] 'the pretence that corporations [i.e. guilds] are necessary for the better government of the trade', he went on, 'is without any foundation', since 'the real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers'.[45]

*Hobbs* v. *Young* was decisively circumvented ten years before the publication of *The Wealth of Nations*, in a judgment of Lord Mansfield in *Raynard* v. *Chase* in 1756.[50] This ruling decided that a non-apprenticed merchant or financier could be

the owner of a business and employ others in it without infringing the Act if he acted in a partnership with one who was qualified in the relevant trade. By these means the courts relaxed the prohibition on workers from different trades being employed alongside one another.[51] In other cases the courts took a loose view of the entry requirements themselves. in *Smith* v. *Company of Armourers* (1792)[52] the Court of King's Bench ordered the defendant company to admit to membership the manager of an iron foundry, on the grounds that, although he had not served an apprenticeship and 'did not know how to manufacture the commodity by his own personal labour', he had been employed in the business for seven years 'during the greatest part of which time he conducted the whole of their extensive works, received all the orders, gave directions to the workmen etc. ... he knew how to conduct the business as well as any master in London'.[53] Finally, just prior to the repeal of the Act, in *Kent* v. *Dormay* (1811)[54] Lord Ellenborough CJ simply refused to convict an unapprenticed textile mill owner, on the grounds that

> the valuable mills at Wakefield, Leeds etc., the property of several persons of the first families in this kingdom; but who would be liable to informations, or would be required to serve regular apprenticeships as millers, if the defendant could be considered as within the meaning of the Statute.

Underlying the repeal of the apprenticeship provisions in 1814 was the political economy of the time, which argued for the desirability of unhindered competition. Joseph Chitty's textbook on *Apprenticeship*, which had appeared in 1812 in response to the demand caused by 'numerous recent prosecutions' under the Act of 1562, drew on Adam Smith, T.R. Malthus and Wiliam Paley to advocate the Statute's repeal. The efforts to see the law enforced 'have been uniformly instituted, not with a view to any advantage that might result to the public, but purely on behalf of *journeymen*, in order to keep up the *high price of wages*'; repeal would bring about that 'competition incident to the freedom of employment' which Adam Smith had argued for, with benefits for all:

> 'Where there is free competition, the labour and capital of every individual will always be directed by him into the channel most conducive to his own ultimate interest; of that interest *each is himself*, from a thousand circumstances, the best possible judge; and the interests of the whole community must in general be most effectually insured, when that of each individual is most judicially consulted'.[59]

Lord Kenyon had earlier asserted that the 'natural reason' of the market, rather than guild controls, was the appropriate solution for the manufacture of poor quality goods: '[t]he reason for making [the Act] was that bad commodities might not be spread abroad; but natural reason tells us, that if the manufacture is not good, there is no danger of its having a favourable reception in the world, or answering the tradesman's purpose'.[60]

The social upheaveal which accompanied the defence of the Act 1562 can be seen as a last effort to shore up a decaying legal and economic order. Yet, this was never simply a matter of resistance to technological change. The violent Luddite protests in Nottinghamshire in 1811-12 began when local magistrates refused to convict hosiery employers who were acknowledged to have flouted local norms governing the use of non-apprenticed labour and respect for customary wage levels. Machine-breaking was the response to the spread of these 'illegal' terms and conditions of employment. As E.P. Thompson suggested, Luddism arose 'at the crisis-point in the abrogation of paternalist legislation…a violent eruption of feeling against unrestrained industrial capitalism, harking back to an obsolescent paternalist code'.[61] But for the defenders of the guild model, the refusal of the courts to enforce trade controls was also an 'unconstitutional' expropriation of the 'mystery' or property of the trade. Machine breaking was simply the traditional sanction for breach of the customary rules of guild production. As Martin Daunton has more recently put it:

> 'The response of workers should not be interpreted in terms of disorder and ineffectuality, but as part of a well-developed and articulate 'corporate discourse' which stressed stability, regulation, and the need to observe strict limits to innovation which threatened independence and accountability. Workers threatened by the rise of 'dishonourable trades' appealed for the state to protect their property in skill in the same way as other property, and to recognize their social value. The rejection of legislative support for this set of assumptions was political, and workers continued to press for its restoration. Luddites who continued to urge the implementation of laws which no longer existed were, according to some historians, not adjusting to new realities. This fails to comprehend their attitudes and assumptions, and gives priority to the ideology of their opponents'.[62]

The upheaval which accompanied the demise of the guilds arguably had long-standing consequences for British industrialization. On the continent, the post-revolutionary codes repeated the condemnation of the 'corporations' of the ancien regime which had been embodied in the loi Le Chapelier of 1791. But beneath

this sweeping legal prohibition, certain aspects of guild production were carried over into emerging forms of industrial organization. A combination of competition and cooperation, and the preservation of solidaristic ties between independent producers, came to characterize the 'industrial districts' of Italy and their equivalents in France, Germany and Japan, which economists rediscovered in the final decades of the twentieth century.[63] In Britain, organizational ties across independent production units were much more tenuous than on the continent, a reflection, to some degree, of common law values which were hostile to 'restraint of trade', but also a legacy of a particular pattern of industrial development. In Britain, although guild relations persisted in the craft-based trade unionism, centred on the institution of the closed shop, collectivism on the employer side was weak and reactive. Industrial concentration and an increasing trend towards vertical integration were the predominant tendencies of the twentieth century.[64]

Recently, this trend has been reversed. Is it possible to see in the vertical disintegration of production and the growth of network forms of economic organisation, a revival of the guild?

## Contracting in Today's 'Network Economy': Vertical Disintegration in Broadcasting

According to the thesis influentially advanced by Manuel Castells,[65] a combination of technological and organisational changes produced, at the end of the twentieth century, a reconfiguration of capitalism, which saw the rise of a 'network society'. In Castells's model, the 'network' infuses both the market and the firm, displacing the (by now) traditional vertically integrated firm with more loosely-coupled organizational units, and dividing mass consumption markets into distinctive segments. Product market deregulation, the liberalisation of trade flows and the growing role of the capital markets in restructuring firms play their part in ushering in a globalised economic system. In this account, it is however technology, above all, which is driving social and economic change, as it was (according to Castells) in the original industrial revolution. The 'networking' logic of new information technology and the life sciences is reproduced in the flexible social structures of the 'new economy': 'the "spirit of informationalism" is the culture of "creative destruction" accelerated to the speed of the opto-electronic circuits that process its signals'. Schumpeter meets Weber in the cyberspace of the network enterprise'.[66] Within this new frame, the basic economic unit is neither the individual subject, nor a collectivity such as the corporation or the state, but the network itself, 'made up of a variety of subjects

and organizations, relentlessly modified as networks adapt to supportive environments and market structures'.[67]

The essential question in assessing Castells's thesis is whether the trends he describes amount to a genuinely new phenomenon, or simply another phase in the familiar dynamic of industrial capitalism, with its conjunction of the enterprise and the market. In the spirit of Commons's 'micro-institutionalism', a study of industrial evolution in the context of a particular industrial sector may help. The cultural industries, and television production in particular, are an appropriate sector to choose, since there we find all the elements of the 'new economy': a prominent role for information technology (represented here above all by the shift to digital broadcasting), the vertical disintegration of established firms, the seeming reconstruction of economic relations in the form of malleable network forms. Above all, we find an element which while not completely absent from Castells's account, is not especially prominent either: a role for competition law a catalyst for economic change.[68]

Broadcasting in the UK is a particularly interesting case since we can see there two parallel attempts to foster network relations in place of vertically integrated organisational structures: on the one hand, government encouragement for the growth of an independent production sector, supported by quotas for subcontracting and a specialised set of contractual terms of trade; on the other, an 'internal market' within the main terrestrial broadcaster, the BBC, 'mimicking' contractual relations within an organisational frame. The entire structure continues to be supported directly or indirectly by a substantial degree of public funding, and is heavily regulated.

The process of institutional change began in the mid-1980s with the government-commissioned Peacock Report which set out a vision for broadcasting of 'a sophisticated system based on consumer sovereignty' in which it was recognised that 'viewers and listeners are the best ultimate judges of their own interests, which they can best satisfy if they have the option of purchasing the broadcasting services they require from as many alternative sources of supply as possible'.[69] The full application of this logic would have led to a system based on pay-per-view since this was the 'only system' under which viewers could 'register their preferences directly' for particular types of programming. On the supply side, liberalisation implied 'freedom of entry for any programme maker who can cover his costs or otherwise finance his or her production' and the imposition of public utility-style common carrier obligation upon operators of transmission equipment.[70]

This did not happen; instead the Peacock report also found a place for the concept of public service broadcasting, arguing that consumers were willing to fund television production 'in their capacity as voting taxpayers' in order to achieve greater diversity and quality of programme production, and that 'public support of programmes of this type can be accepted by those who believe that viewers and listeners are in the last analysis the best judges of their own interest'.[71] The White Paper of 1988 and the Broadcasting Act 1990 therefore stopped short of imposing complete liberalisation. However, a key part of the new structure was a requirement that the BBC and ITV should contract out 25% of their programme making by volume to independent producers; as the White Paper put it, 'independent producers constitute an important source of originality and talent which must be exploited and have brought new pressures for efficiency and flexibility in production procedures'.[72]

Vertical disintegration within the BBC took the complementary form of internal administrative arrangements under which a series of producer-provider splits were implemented.[73] The context for these reforms was a perception by senior management, and in particular the then Director-General John Birt, of the limitations of the traditional organisational structure of the corporation, which saw the BBC as 'a vast command economy; a series of entangled, integrated baronies, each providing internally most of its needs; all the many faceted inputs to the complex business of programme making; programme departments, resource facilities and support services, all separately and directly funded'.[74] With this diagnosis of the problems facing it, the BBC entered into a two-phase programme of reform. The first stage, known as Producer Choice, was introduced in April 1993. It essentially took the form of a purchaser-provider split at the level of the relationship between programme makers and suppliers of production resources. The purpose was two-fold: to enable the BBC's management to obtain information on the indirect, overhead costs of its programmes, in particular accommodation and capital depreciation, and to benchmark the costs of internal resource provision against those of external providers, so making it possible to carry out market testing. By these means, potential inefficiencies would be identified and costs brought under control. The second stage involved the introduction of a number of separate internal units or 'directorates' in the autumn of 1996. Programme makers were allocated to the Production directorate and commissioners to the Broadcast directorate. An internal commissioning system for television production was then put in place, to operate in addition to the 25% external quota which had been imposed by legislation. The imposition of the external quota was one of the principal factors behind the decision of BBC managers to introduce an internal market of their own.

To critics of the pre-reform BBC, the absence of choice and competition implied that producers had the power to set their own agenda for programme content and quality:

> 'British broadcasting was effectively run by producer elites, while the economic rewards went disproportionately to the workforce. This unusual arrangement arose from the twin features of monopoly funding and a Reithian ethos - television should be good for you. The definition of what was good for you was left to the programme departments of the BBC and ITV companies, self perpetuating oligarchies which shared a common value system, supported by managements and regulators who themselves started their careers in the broadcasting organisations'.[75]

At the same time, this 'common value system' sustained production capabilities of a certain kind. These can be understood not simply in terms of the extensive training system which the BBC operated during these years, but also in the shared knowledge and values which it perpetuated. The advent of Producer Choice, the producer-broadcaster split and, more generally, regulatory encouragement of the independent sector, marked a fundamental challenge to these established values.

Paradoxically, it was the apparently monolithic BBC which had provided the setting for a latter-day guild-like culture to flourish. The sociologist Tom Burn's longitudinal studies of the BBC, carried out in the 1960s and 1970s, stressed the degree to which BBC staff during this period 'seemed to be devoting themselves - and consciously so - to individual ends and values which were consistent with those of public service broadcasting without being necessarily derived from them', thereby creating what a personnel manager of that earlier era called 'an increment you don't pay for'.[76] The nature of the issues involved here can be gauged by this comment on the 1990s reforms, made by an employee representative: 'when the independent quota came in, and outsourcing of cleaning, catering and security began, most employees, far from saying "what an opportunity", were fighting to hold on to their jobs,' with the result that 'it was like working for any other broadcasting organisation; it didn't matter to the staff that it was the BBC any more'.[77]

As the quotation we referred to earlier from John Birt makes abundantly clear, the reorganisation of the BBC which began with Producer Choice was viewed by its proponents in terms of a shift away from this producer-led, bureaucratically-driven production process, which was said to be stifling creativity. The introduction of market-like processes and flexible organisational

forms would, it was hoped, release creative abilities and enhance innovation. The same perspective was at work in the efforts made to promote the growth of the independent sector. In this context, one of the other public service broadcasters, Channel 4 – which had always relied on external producers to supply its programmes – was held out as an example of what could be achieved in terms of innovative production through reliance on externally sourced production.

In each case, however, there was more at stake than a straightforward move 'from firm to market'. Peacock's proposal to empower the ultimate consumer would have implied complete 'unbundling' of production from distribution, the break up of the BBC and the ITV companies, and a move to individualized pay-per-view. This was rejected as a series of steps too far, on grounds that included the ill-defined but nevertheless still powerful notion of 'public service broadcasting'. Instead, what emerged was a 'quasi market' in which separate production and commissioning stages were established within organisational boundaries in the case of the BBC, and beyond them in the case of outsourcing to the independent sector. In the late 1990s the internal market of the BBC was stabilised through the use of guaranteed output deals, which protected in-house suppliers while limiting the scope for influence on the part of the independents.[78] But more recently, in part as a consequence of government pressure for reform of the BBC, there has been a renewed emphasis on externalisation of production functions, leading to a further increase in the share of production available to the independent sector,[79] and downsizing within the organisation.

Within the independent sector, at the same time, there has been a move away from guaranteed supply contracts, in favour of a reallocation of property rights under the terms of trade governing broadcaster-supplier contracts. The effect of this to ensure that intellectual property rights to the re-use of television programmes vest in the programme makers and not the broadcasters. This has enabled a small segment of the independent sector to build up a valuable economic resource in the form of secondary and tertiary rights to sell on the right to broadcast the programmes they make, and this has led, in turn, to an increase in the external financing of the industry by venture capital and private equity firms.[80]

According to a review of independent sector carried out by the industry regulator, the Independent Television Commission (ITC) in the early 2000s, 'a healthy and competitive TV programme supply market is a vital part of our creative economy',[81] and this in turn requires an independent sector which is 'viable and sustainable in its own right, rather than reliant on the quota for its

existence'.[82] Pointing to the successes of the reform process, the review claimed that the UK has 'strong production capabilities' in part due to the role firstly of Channel 4 and then of the independent production quota in '[opening] up the programme supply market to many hundreds of independent producers, responsible for adding to the creative and innovative programming available to viewers'.[83]

But the review was also required to acknowledge that, in many respects, the current industry structure was less than ideal:

> 'the independent production sector remains fragile – producers lack the scale to diversify their risk, and lack the rights base which would allow them to attract external finance – only a few independents have been able to grow sizeable and sustainable businesses at home; and fewer still have made inroads in the international marketplace'.[84]

Worse still, the 25% quota, while 'a success in its original terms', was becoming part of the sector's problems:

> 'it addresses only some of the issues that are required for a healthy programme supply market, and has its own disadvantages as well as advantages. Some broadcasters use it as a ceiling not a floor, and many have said that it risks creating a "welfare culture" of small independents who depend on the quota, rather than their own competitive strengths, for their continuing existence'.[85]

The solution advanced by the ITC was one based on the further intensification of competition: by limiting perceived abuses of market power by the BBC, moving to terms of trade previously used by the ITV companies, and attempting to disembed the commissioning processes, the independent sector would be released from the forces holding it back. The expectation was that as old-style 'cottage industry' firms were sidelined, the survivors, now able to assert control over secondary and tertiary rights, would be better equipped to attract external capital.

But there is a rival narrative running through the recent experience of the television production sector. The model of cost-plus financing which was introduced in the wake of the Broadcasting Act 1990, while making it difficult for some of the smaller independents to grow, also protected them from the downside risks of cost shortfalls which are a common feature of television production and which only the larger suppliers have the scale and reserves to deal with. A fully level playing field for the independents would probably require the formal unbundling of the broadcasting and production functions of

the BBC; but as the ITC was compelled to recognise, 'structural separation of the BBC's broadcasting and production businesses might have the effect of creating a more level playing field between the BBC's own producers and independents, but would likely impose significant costs on the Corporation'.[86] The BBC's own evolution since the late 1990s, which has seen a significant modification of the internal market put in place by John Birt's reforms, further points to the potentially disruptive impact of organisational fragmentation upon production capabilities.[87]

If we observe here a role for network-type relations, with a web of contracts centred on the 'nodes' of the main broadcasting organisations, and a wide variety of organisational forms springing up to meet demands for diversified quality production, then we also see the potential limits to the process of network construction in a highly deregulated environment. The push to marketise the sector has very quickly led to concerns about the quality of production, in an environment where existing conventions of quality are proving fragile. The effect of the reforms has been to undermine a 'guild-like' autonomy for producers which previously served as a guarantor of quality standards.

## Conclusions

At the outset of the debate over new forms of economic organisation in the 1980s, Michael Piore and Charles Sabel[89] argued that vertical integration of production was not an historical inevitability, but rather a contingent outcome of a particular phase of industrial capitalism; in predicting the re-emergence of network forms, they pointed to the possible revival of types of regulation which predated the first great 'industrial divide' of the nineteenth century. Twenty years on, there is little sign of this regulatory revival becoming a reality. The considerable promise held out by network forms is in danger of being displaced by a neo-Schumpeterian view of industry and society, in which technological determinism leaves little or no scope for institutional variety. The crucial issue here is the nature of competition policy. Policy must be capable of recognising the multiplicity of forms which competition can take, and the necessity for regulatory measures to foster the mechanisms which traditionally underpinned producer autonomy in the face of hierarchical control on the one hand and the homogenising force of mass markets on the other. This is the case for the return of the guild.

**Notes**

[1] 'Contractual networks: legal issues of multilateral cooperation', conference held at Fribourg, 6-9 October 2005, home page: http://www.unifr.ch/obligations/conference/home.htm.

[2] M. Castells, *The Information Age: Economy, Society and Culture. Volume 1 The Rise of the Network Society* (Blackwell, Oxford, 1999).

[3] W. Powell, 'Neither market nor hierarchy: network forms of organisation' (1990) 12 *Research in Organizational Behavior* 295-336, reprinted in G. Thompson, J. Frances, R. Levačic and Jeremy Mitchell (eds.) *Markets, Hiearchies and Networks: The Coordination of Social Life*, Sage, London, 1991, pp. 265-275, at p 265.

[4] R.H. Coase, 'The nature of the firm' (1937) 4 *Economica* (NS) 386-405.

[5] O. Williamson, *The Economic Institutions of Capitalism* (Free Press, New York, 1986).

[6] J. Bradach and R. Eccles, 'Price, authority and trust: from ideal types to plural forms' (1989) 15 *Annual Review of Sociology* 97-118.

[7] Ibid, at p 116.

[8] Powell, 'Neither market nor hierarchy', n 3 above, at p 268.

[9] Ibid.

[10] Ibid.

[11] Ibid, at p 272.

[12] Above all in F.A. Hayek, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge, London, 1982).

[13] 'The nature of the firm', op cit, n 4 above.

[14] On co-evolution and systems theory with regard to the evolution of legal form, see generally G. Teubner, *Law as an Autopoietic System* (Blackwell, Oxford, 1993); M.T. Fögen, 'Legal history – history of the evolution of a social system. A proposal' [2002] *Rechtsgeschichte* September, English version available on line at:

http://www.mpier.uni-frankfurt.de/Forschung/Mitarbeiter_Forschung/foegen-legal-history.htm.

[15] J.R. Commons, 'American shoemakers, 1648-1895: a sketch of industrial evolution' (1909) 24 *Quarterly Journal of Economics* 39-84.

[16] Ibid, at p 43.

[17] Ibid, at pp 42-43.

[18] Ibid, at p 43.

[19] Ibid, at p 50.

[20] Ibid, at p 67.

[21] Ibid ,at p 84 ('Appendix II. Shoemakers – Industrial Stages, Causes, and Organizations', column 1 ('Extent of Market'), final row.

[22] Castells, *The Rise of the Network Economy*, op cit, n 2.

[23] See S. Jacoby, *Employing Bureaucracy: Managers, Unions, and the Transformation of Work in American Industry 1900-1945* (Columbia University Press, New York, 1985); D. Marsden, *A Theory of Employment Systems: Micro-Foundations of Societal Diversity* (Oxford University Press, Oxford, 1999); P. Cappelli, 'Market-mediated employment: the historical context', in M. Blair and T. Kochan (eds.) *The New Relationship. Human Capital in the American Corporation* (Brookings Institution, Washington DC, 2002) 66-90.

[24] S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialisation, Employment, and Legal Evolution* (Oxford University Press, Oxford, 2005).

[26] See M. Daunton, *Progress and Poverty: An Economic and Social History of Britain 1700-1850* (Oxford University Press, Oxford, 1995), at pp 155-158.

[27] See S. Deakin and F. Wilkinson, *The Law of the Labour Market*, op cit, n 24, for a fuller account of this, on which the present section draws.

[28] R.A. Leeson, *Travelling Brothers: The Six Centuries' Road from Craft Fellowship to Trade Unionism* (Allen & Unwin, London, 1979), at p 30.

[29] J. Smail, 'New languages for labour and capital: the transformation of discourse in the early years of the industrial revolution' (1987) 12 *Social History* 54-61, at p 55.

[30] D. Woodward, 'The background to the Statute of Artificers: the genesis of labour policy, 1558-63' (1980) 33 *Economic History Review (NS)* 32-44.

[31] 5 Eliz. I, c. 4, s. 21.

[32] Ibid, ss 21, 23.

[33] See generally Leeson, *Travelling Brothers*, op cit, n 27; C. Dobson, *Masters and Journeymen: A Pre-History of Industrial Relations* (Croom Helm, London, 1980).

[34.] See *Re. Statute of 5 Eliz., Apprentices* (1591) 4 Leon 9, and the discussion of this case law by Lord Mansfield CJ in *Raynard* v. *Chase* (1756) 1 Burr. 6.

[35.] 1 Show KB 266.

[36] 54 Geo. III, c. 96.

[37] See generally I. Prothero, *Artisans and Politics in Early Nineteenth Century London: John Gast and His Times* (Dawson, Folkestone, 1979).

[38] *Smith* v. *Company of Armourers and Braziers of the City of London* (1792) Peake 199.

[39] *Case of the Tailors of Ipswich* (1615) 11 Co Rep 53a.

[40] See also *Case of Monopolies* (1602) 11 Co Rep 84b at 87b: only Parliament, under 5 Eliz. I, c. 4, could restrain a person from exercising any trade.

[41] *Case of the Tailors of Ipswich*, above (striking down a rule that no person should exercise any of the specified trades until he had appeared before the master and wardens of the society to prove that he had served his seven years as an apprentice); *R.* v. *Coopers' Company, Newcastle* (1768) 7 Term Rep 544 (a case of a by-law restricting numbers of indentured apprentices: 'a prohibition not to take more than a certain number of apprentices is a bye-law in restraint of trade', per Kenyon CJ.).

[42.] *R.* v. *Fredland* (1637) Cro Car 499.

[43] See *Tolley's Case* (1615) Calthrop 9; *R.*. v. *Housden* (1665) 1 Keble 848; *R.* v. *Paris Slaughter* (1700) 2 Salk. 611; R. v. *Harper* (1706) 2 Salk. 611; *Pride* v. *Stubbs* (1810) 6 Esp. 131.

[44] Smith, A. (1886) *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. with an introduction by J. S. Nicholson (T. Nelson and Sons, London, 1886; originally published 1776), Vol. I, Ch. 10, at p 50.

[45] Ibid, at p 55.

[50.] 1 Burr. 6.

[51.] *Coward* v. *Maberly* (1809) 2 Camp. 127, where it was held that a coachmaker could directly employ a blacksmith to manufacture coach wheels; per Lord Ellenborough CJ: 'blacksmith's work may be required in building a bridge; but the builder who employs a journeyman properly qualified to do that work, is not himself to be considered as carrying on the trade of a blacksmith'.

[52.] Peake 199.

[53.] On this basis 'serving an apprenticeship' became simply a matter of time serving, as anyone who worked for seven years without interruption as master, servant or apprentice could now qualify under the Act.

[54.] Kingston Assizes, August 14, 1811; see J. Chitty, *A Practical Treatise on the Law Relating to Apprentices and Journeymen, and to Exercising Trades* (W. Clarke & Sons, London, 1812) at p 122.

[59] Ibid, at p 2.

[60.] *Smith* v. *Company of Armourers* (1799) Peake 199, 201.

[61] E.P. Thompson, *The Making of the English Working Class* (Penguin, Harmondsworth, 1968), at p 555.

[62] *Progress and Poverty*, op cit, n 26, at p 499.

[63] See generally M. Piore and C. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (Basic Books, New York, 1984).

[64] See Deakin and Wilkinson, *The Law of Labour Market*, op cit, n 24, chs 2 (on vertical integration and the rise of the employment model) and 4 (on the retention of guild-like features of control of the trade in modern British trade unionism).

[65] *The Rise of the Network Economy*, op cit, n 2.

[66] Ibid, at p 199.

[67] Ibid, at p 198.

[68] This part of the paper draws on ideas developed in joint work with Steve Pratten and Ana Lourenço; see S. Deakin and S. Pratten, 'Reinventing the market? Competition and regulatory change in broadcasting' (1999) 26 *Journal of Law and Society* 323-50, and S. Deakin, S. Pratten and A. Lourenço, 'No third way for economic organisation? Networks and quasi-markets in broadcasting', working paper, Centre for Business Research, University of Cambridge, 2006, for a more complete account of the institutional background to vertical disintegration in broadcasting.

[69] A. Peacock (Chairman), *Report of the Committee on Financing the BBC* Cmnd 9824 (Home Office, London, 1986), at para. 592.

[70] Ibid, at paras 547-8.

[71] Ibid, at paras 550-551.

[72] Home Office, *Broadcasting in the '90s: Competition, Choice and Quality* Cm. 517 (HMSO, London, 1988), at para 41.

[73] See Deakin and Pratten, 'Reinventing the market?', op cit, n 68.

[74] J. Birt cited in J. Spangenberg, *The BBC in Transition: Reasons, Results and Consequences* (Deutscher Univeritäts Verlag, Frankfurt, 1998), at p 103.

[75] Cox, B., 'Two tiers for TV', *Prospect*, March 1997: 21-25.

[76] Burns, T. *Description, Explanation and Understanding* (Edinburgh University Press, Edinburgh, 1994), at p 91.

[77] Cited from interview notes, Deakin, Pratten and Lourenço, 'No third way for economic organisation?', op cit, n 68.

[78] Deakin and Pratten, 'Reinventing the market', op cit, n 68.

[79] The so-called 'window of creative competition' announced in 2004, which is intended to come into effect upon the renewal of the BBC's Charter in 2006, opens up an additional 25% of the BBC's programme expenditure to competition between the BBC's in house producers and the independent sector, on top of the 25% already guaranteed for outsourcing. For discussion of the implications of the BBC's move to ever greater use of the independent sector,

see W. Hutton, Á O. Keefe and N. Turner, *The Tipping Point: How Much is Broadcast Creativity at Risk? An Independent Report commissioned by the BBC* (The Work Foundation, London, 2005).

[80] Deakin, Lourenço and Pratten, 'No third way for economic organisation?', op cit, n 68.

[81] Independent Television Commission, *A Review of the UK Programme Supply Market* (ITC, London, 2002), at para 9. The ITC was subsumed into the current industry regulator, Ofcom, in 2003.

[82] Ibid, at para 10.

[83] Ibid, at para 12.

[84] Ibid, at para 13.

[85] Ibid, at para 18.

[86] Ibid, at para 31.

[87] See generally G. Born, *Uncertain Vision: Birt, Dyke and the Reinvention of the BBC* (Vintage, London, 2005); W. Hutton, Á O. Keefe and N. Turner, *The Tipping Point*, op cit, n 79, above.

[89] In *The Second Industrial Divide*, op cit, n 63.

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