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Cross-Ownershipís Last Stand? The Federal Communication Commissionís Proposal Concerning the Repeal of the Newspaper/Broadcast Cross- Ownership Rule

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NOTE

Cross-Ownership's Last Stand? The Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule

Judith C. Aarons*

INTRODUCTION

On September 13, 2001, the Federal Communications Commission (hereinafter the "FCC" or "Commission") adopted an Order and Notice of Proposed Rule Making to consider revision of its newspaper/broadcast cross-ownership (NBCO) rule.[1] The review of the rule occurs within a wider debate on the role of media ownership restrictions in preserving content diversity and protecting against mass media consolidation.[2] A recent federal appeals court decision, repealing the cable/television cross-ownership rule, illustrates the strong feelings on both sides.[3] Some argued that the decision would produce "an explosion of mergers the likes of which this country has never seen."[4] Others embraced it because the rule at issue had "become an anachronism that did not serve the public interest."[5] The FCC's current review of the

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1 Order and Notice of Proposed Rule Making, In the Matter of Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235, and Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 96-197, 16 F.C.C.R. 17,283 (Sept. 20, 2001) [hereinafter *2001 Order*]. This Note will focus solely on the NBCO matter (MM Docket No. 01-235).

2 *See* Yochi J. Dreazen & Joe Flint, *Court Rejects Curbs on Media Ownership*, WALL ST. J., Feb. 20, 2002, at A3.

3 *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. Feb. 19, 2002) (repealing FCC rules barring common ownership of cable and broadcast stations in the same market).

4 Dreazen & Flint, *supra* note 2 (quoting Gene Kimmelman, co-director, Consumers Union's Washington office).

5 *Id*. (quoting Paul T. Cappuccio, General Counsel, America Online).

NBCO rule signals a willingness to consider whether the same is true for all other cross-ownership rules.[6]

Promulgated by the FCC in 1975, the NBCO rule bars common ownership of a broadcast station and a daily newspaper in the same community.[7] In order to comply with the rule (thereby ensuring broadcast station license renewal by the FCC), a co-owner has to divest, within five years, either its daily newspaper or broadcast station holdings.[8] The regulation mirrors similar rules that prohibit ownership of more than one radio or television station in the same community,[9] institutes ownership caps on the number of broadcast stations an entity can control,[10] and prohibits common ownership of VHF TV stations and radio stations in the same market.[11]

The rule is the result of a perceived lack of diversity in the marketplace. Driving the rulemaking decision were "studies showing the dominant role of television stations and daily newspapers as sources of local news and other information."[12] Although there were no specific patterns of anti-competitive abuses by existing cross-owners, the FCC felt that the rule was warranted.[13] It would preserve an "uninhibited marketplace of ideas," while preventing domination of the market by one or a few entities.[14]

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6 Stuart Shorenstein & Andrew Fisher, *Media Concentration Rules Are on Shaky Ground*, N.Y.L.J., Oct. 17, 2001, at 1, col. 1.

7 FCC Broadcast Radio Services, 47 C.F.R. §§ 73.35, .240, .636 (1976); *see also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (upholding the FCC's promulgation of the NBCO rule).

8 In the Matter of Amendment of §§ 73.34, 73.240, and 73.636 of the Comm'ns Rules Relating to Multiple Ownership of Standard, FM, and Television Broad. Stations, 50 F.C.C.2d 1046, 1047 (1975) [hereinafter *1975 Order*].

9 *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 780 n.1 (referring to broadcast ownership rules dating from the 1940s).

10 *Id.* at 781 n.2 (citing *Multiple Ownership of AM, FM and Television Broad. Stations*, 18 F.C.C. 288 (1953)); s*ee also* FCC Broadcast Radio Services, 47 C.F.R. § 73.3555 (2001).

11 *Nat'l Citizens Comm. for Broad.*, 436 U.S at 781 (citing Multiple Ownership of Standard, FM and Television Broad. Stations, 22 F.C.C.2d 306 (1970), *as modified*, 28 F.C.C.2d 662 (1971)); *see also* 47 C.F.R. § 73.3555(c).

12 *Nat'l Citizens Comm. for Broad.*, 436 U.S at 783–84.

13 *Id.* at 786 (citing *1975 Order*, at 1047).

14 *1975 Order*, at 1048 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

The newspaper industry challenged the NBCO rule immediately after its promulgation. In *FCC v. National Citizens Committee for Broadcasting*,[15] the Supreme Court held that the regulation was a rational and permissible exercise of FCC authority.[16] The Court agreed with the FCC that "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."[17]

The purpose of this Note is to review the NBCO rule along with the changes in the media market since the mid-1970s. This Note takes the position that maintaining the rule is not necessary to preserve diversity or to ensure economic competition within the industry. Deregulation has led to a dramatic increase in media outlets, ensuring that diverse viewpoints are aired. Furthermore, government regulation is not the sole response to mass media consolidation.[18]

Part I discusses the historical background of broadcast regulation, including its early concerns with signal interference and spectrum scarcity, considers the various broadcasting doctrines, and briefly compares the treatment given to the print media. It also looks at the trend toward deregulation, including the effect of the Telecommunications Act of 1996.[19] Part II looks at the public interest and economic arguments for maintaining the NBCO rule. It presents the proponents of the rule's beliefs that diversity of viewpoint and economic competition would be threatened by repeal of the rule. The proponents further believe that the likely

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15 436 U.S. 775 (1978).

16 *Id.* at 796 (holding that the regulations were based on permissible goals and, "so long as [they] are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority [of the FCC]").

17 *Id.* at 780.

18 NEWSPAPER ASSOCIATION OF AMERICA [NAA], COMMENTS OF THE NAA IN THE MATTER OF CROSS-OWNERSHIP OF BROADCAST STATIONS AND NEWSPAPERS, MM DOCKET NO. 01-235, at 77–78 (Dec. 3, 2001) (arguing that the application of antitrust law would be a better answer to anti-competitive behavior), *available at* http://www.naa.org/ppolicy/NAA_ Comments.pdf.

19 The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151–161 (2000)) [hereinafter 1996 Telecom Act].

result of its repeal would be the domination of the nation's political discourse by a powerful minority.

Part III concludes that the proponents of the rule do not take into consideration the changed media environment. The NBCO rule is unnecessary as the growth and variety of new media outlets ensure the airing of diverse viewpoints. It has become unnecessary at a time when cable television, weekly newspapers, direct broadcast satellite television, and the Internet are popular sources of information.

Further, the doctrines justifying broadcasting regulation serve only as a means of artificially separating broadcasting and print media.[20] In fact, both media are the same and should be treated as such under First Amendment jurisprudence.[21] Any anticompetitive threats from media oligopolies may be properly dealt with through the application of antitrust law.[22] The FCC should lift the NBCO rule because it threatens diversity by limiting the industry's ability to respond to the decline of network television and the economic difficulties being faced by daily newspapers.

I. BROADCAST MEDIA REGULATION

A. Historical Background

1. Broadcasting Chaos and the Legislative Response

The FCC's broadcast regulation policy has its roots in concerns regarding signal interference and spectrum scarcity.[23] While the

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[20] Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 15–16 (1976) (discussing the viability of the special impact and scarcity doctrines).

[21] *Id.* at 16.

[22] Comments of the Newspaper Association of America, In the Matter of Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235, 77–78 (Dec. 3, 2001), *available at* http://www.naa.org/ppolicy/NAA_Comments.pdf.

[23] FCC v. Nat'l Citizens Comm'n. for Broad., 436 U.S. 775, 795 (1978) (stating that "the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the 'public interest'"). *See also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 637–38 (1994); FCC v. League of Women Voters, 468 U.S. 364, 377

first broadcast legislation was concerned with saving lives at sea,[24] a pressing need to protect against interference from amateur radio operators emerged shortly thereafter.[25] This protection came in the form of the Radio Act of 1912,[26] which forbade operating a radio without a grant from the Secretary of Commerce and Labor and allocated certain frequencies for government use.[27]

After the Radio Act of 1912's passage, there were rarely any problems with interference since enough frequencies were available to serve existing stations.[28] The First World War, however, fueled the growth of radio so that in a nine-month period the number of stations grew from 60 to over 500.[29] The rapid growth of radio stations, coupled with the dearth of available frequencies, created a signal interference crisis that the federal government could not handle.[30] When two federal courts upheld

(1984); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

24 Wireless Ship Act of June 14, 1910, Pub. L. No. 61-262, 36 Stat. 629 (1911) (codifed at 46 U.S.C. §§ 484–487 (2000)) (repealed 1934) (requiring steamers with a capacity of fifty persons or more to have radio equipment and a skilled operator on board).

25 R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 2 (1959) (citing a letter from the Department of the Navy that demanded regulation because "each radio station 'considers itself independent and claims the right to send forth its electric waves through the ether at any time that it may desire, with the result that there exists in many places a state of chaos . . . . Calls of distress from vessels in peril on the sea go unheeded or are drowned out in the etheric bedlam produced by numerous stations all trying to communicate at once. Mischievous and irresponsible operators seem to take great delight in impersonating other stations and in sending out false calls. It is not putting the case too strongly to state that the situation is intolerable, and is continually growing worse.'").

26 Pub. L. No. 62-264, § 4, 37 Stat. 302, 307 (1912), *amended by* Radio Act of 1927, Pub. L. No. 69-632, §§ 1–41, 44 Stat. 1162 (1927) (codified at 47 U.S.C. §§ 81–121 (2000) (repealed 1934)).

27 NBC v. United States, 319 U.S. 190, 210 (1943).

28 *Id.*

29 *Id.* at 210–11 (1943); *see also* Coase, *supra* note 25, at 4 ("On March 1, 1922, there were 60 broadcasting stations in the United States. By November 1, the number was 564.").

30 *NBC*, 319 U.S. at 210–11 (stating that the Secretary's actions of selecting two frequencies for use by private broadcast stations, assigning specified frequencies to particular stations, and then allowing stations to share the same frequencies by determining the power and hours of operation, was not enough to cope with the rapid growth in the number of stations).

challenges to the Secretary of Commerce's regulatory authority,[31] the Secretary announced that he would no longer interfere and would instead encourage stations to self-regulate.[32] Stations, however, ignored his plea and chaos ensued.[33] Between July 1926, when the Secretary abandoned all efforts at regulation, and February 1927, almost 200 new stations began broadcasting.[34] The broadcast interference crisis led many, including radio station owners, to advocate government regulation to manage the growth of radio.

Legislation was also necessary because technology had not advanced far enough to provide a solution to spectrum scarcity. The radio spectrum was viewed as a valuable public resource and, unlike the printed page, a limited one.[35] Even so, commentators have criticized allocating frequencies through government regulation rather than through a property rights scheme.[36] In a 1959 law review article,[37] R.H. Coase argued that "it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in [number] and scarce."[38] Coase would instead "employ [a] price mechanism" to allocate use of the spectrum to

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31 GLEN O. ROBINSON, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose, in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 8–9 (Max D. Paglin ed., 1989); *see also NBC*, 319 U.S. at 212 (discussing Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923) (holding that the Secretary could not withhold radio licenses even to prevent interference with private or Government stations) and United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926) (holding that the Secretary could not restrict a station's frequency, power, or hours of operation and that a station's use of an unassigned frequency did not violate the Radio Act of 1912)).

32 *NBC*, 319 U.S. at 212.

33 *Id.*

34 *See id.*

35 WILLIAM E. FRANCOIS, MASS MEDIA LAW AND REGULATION 540 (3d ed. 1982).

36 *See* ROBINSON, *supra* note 31, at 10. Robinson proposed a market scheme where:

> As a means of distributing frequency use right within a particular defined class of users (say, among television broadcasters), the property rights scheme comes down essentially to a fairly simple proposal to eliminate administrative hearings on license applications; the 'property' could be transferred by auction or by lot and thereafter would be freely transferable from one user to another in ordinary market transactions.

Id.

37 Coase, *supra* note 25.

38 *Id.* at 14.

those willing to pay for its use, thereby avoiding government regulation.[39] In the end, the great demand for broadcasting licenses, the inability of private industry to self-regulate, the concern that interference was destroying a useful resource, and the desire to guard the public interest all contributed to the 1927 Radio Act.[40]

The 1927 Radio Act created the Federal Radio Commission (FRC) and endowed it with expansive licensing and regulatory powers.[41] The FRC's creation enabled the U.S. government to "assign rights to use [a frequency] on short term lease bases."[42] Frequencies were allocated among applicants in the best interest of the public "convenience, interest or necessity."[43] This phrase, deemed among the "most powerful words in the history of regulation,"[44] was transferred wholesale, along with parts of the 1927 Act into the Communications Act of 1934.[45]

The Communications Act of 1934 was a legislative response to the continuing growth of communications technology. The Act created the FCC,[46] which was empowered to regulate "all foreign and interstate communications, including radio, telegraph and telephone, with provisions for any new technologies that might be related."[47] It would also streamline "the various statutes by which Congress had supervised the different modes of communication."[48] The Commission had "exclusive authority to regulate the broadcasting industry."[49] This regulation occurs through the

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39 *Id.*

40 Radio Act of 1927, Pub. L. No. 69-632, §§ 1–41, 44 Stat. 1162 (1927) (codified at 47 U.S.C. §§ 81–121 (2000) (repealed 1934)).

41 NBC v. United States, 319 U.S. 190, 213 (1943).

42 STUART N. BROTMAN, COMMUNICATIONS LAW AND PRACTICE § 1.01[4], at 1-10 (7th ed. 2001).

43 *Id.*

44 Benjamin M. Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755, 758 (1995) (stating that the phrase embodies "the encompassing principles which account for and justify much radio and television policy and regulation").

45 47 U.S.C. §§ 151–161.

46 *See* BROTMAN, *supra* note 42, § 1.02, at 1-11.

47 *Id.*

48 FCC v. Pottsville Broad. Co., 309 U.S. 134, 137 (1940).

49 JOSEPH J. HEMMER, JR., COMMUNICATION LAW: THE SUPREME COURT AND THE FIRST AMENDMENT 327 (2000).

FCC's "power to grant, renew, and revoke licenses."[50] The FCC uses several guidelines including "economic, programming and procedural factors" to make licensing decisions.[51]

2. Justifications for Government Regulation

There have been several rationales put forward for government regulation of broadcast technology. They include: "(1) public ownership of the airwaves; (2) scarcity of over-the-air frequencies, hence the need to license and regulate; (3) the 'media differences' argument; and (4) the fiduciary concept."[52] These justifications are unique to broadcast communications and are built around the nature of the technology and its perceived impact on viewers.

Legislation guarding public ownership of the airwaves has been around almost since the inception of broadcasting.[53] In the mid-1920s, Congress prohibited licensees from "establishing property rights in frequencies" because "the ether and the use thereof" were the "inalienable possession of the people of the United States."[54] This maxim justified government oversight, thereby guarding the public interest.[55]

The scarcity and signal interference doctrines are used to justify the lower First Amendment standard applied in broadcast jurisprudence.[56] The scarcity doctrine regards the broadcast spectrum as a scarce resource that must be allocated by the government to its users, and it, although questioned, has been affirmed by the Supreme Court.[57]

50 *Id.* at 335.

51 *Id.*

52 FRANCOIS, *supra* note 35, at 540.

53 *See* HEMMER, *supra* note 49, at 323.

54 Coase, *supra* note 25, at 6.

55 *See* FRANCOIS, *supra* note 35, at 540.

56 *See* Compaine, *supra* note 44, at 765–66 (stating that federal courts "have been consistent in upholding the basic premise that content regulation for broadcasting may be held to a less rigorous First Amendment standard than the print press").

57 *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 376 n.11 (1984)*;* TBS v. FCC, 512 U.S. 622, 638 (1994) ("[W]e have declined to question [the scarcity doctrine's] continuing validity as support for our broadcast jurisprudence, *see FCC v. League of Women Voters of Cal.*, [468 U.S. at] 376 n.11, and see no reason to do so here.").

The media differences theory focuses on the way broadcast messages are transmitted over the air to audiences.[58] A radio listener or television viewer, unlike a newspaper reader, is considered part of a captive audience;[59] television is the most powerful means of mass communications and should, therefore, be subject to greater regulation.[60]

The fiduciary rationale, discussed in *Red Lion Broadcasting Co. v. FCC*,[61] argues that the "licensee is only a trustee, a fiduciary, for the public."[62] Because of this status, the licensee must do certain things.[63] Licensees, for example, "can be obligated to give suitable time and attention to matters of public interest without the First Amendment standing in the way."[64] Whether the station served the public interest (by reporting the local news, for example) is a factor in the FCC's decision to grant, deny, modify, or revoke the station's license.[65]

3. Mass Media Regulation and the First Amendment

The Communications Act of 1934 does not define the phrase "public interest, convenience and necessity,"[66] so courts have provided a workable limit of the standard. In *FCC v. National Citizens Committee for Broadcasting*,[67] the Supreme Court determined that the policy of promoting the "widest possible dissemination of information from diverse and antagonistic sources" is consistent with both the public interest standard and the First Amendment.[68] Allocating licenses to a variety of owners was

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[58] *See* FRANCOIS, *supra* note 35, at 541.
[59] *Id.*
[60] *Id.*
[61] 395 U.S. 367 (1969).
[62] FRANCOIS, *supra* note 35, at 542 (emphasis omitted).
[63] *See id.*
[64] *Id.*
[65] *See* FCC v. Pottsville Broad. Co., 309 U.S. 134, 137–38 (1940); *Red Lion Broad.*, 395 U.S. at 379–80 ("The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, renewing them, and modifying them.") (citations omitted).
[66] FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).
[67] 436 U.S. 775 (1978).
[68] *Id.* at 785 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

seen as a way to structure the industry to meet this First Amendment goal.

The Supreme Court has held that structural regulation promotes viewpoint diversification because different points of view are more likely to be found in antagonistically run, rather than commonly owned, stations.[69] It is, therefore, important to increase "the number of individual owners" so that different "voices" are broadcast in both the local and national markets.[70] The FCC had admitted, during the NBCO's promulgation, that it was unclear how common newspaper and broadcast ownership affected competition and station performance.[71] The FCC's "policy of promoting diversification of ownership" meant, however, that "even a small gain in diversity" was worthwhile.[72]

In contrast, the print media enjoys almost complete freedom from government regulation. A privately owned newspaper can "advance its own political, social, and economic views" as long as it has the economic support of advertisers to enable it to continue operation and "the journalistic integrity of its editors and publishers."[73] While broadcast licensees have "a large measure of journalistic freedom," they must also consider their responsibilities as "public trustee[s]."[74] This additional responsibility imposed on broadcasters that justifies government regulation of television programming would violate the First Amendment if applied to newspapers.

An illustration of the different treatment under First Amendment jurisprudence can clearly be seen in two cases dealing with government-mandated press access. In *Red Lion Broadcasting Co. v. FCC*,[75] the Supreme Court dismissed a challenge to the constitutional and statutory bases of the FCC's (now defunct) "fairness doctrine."[76] The fairness doctrine required

[69] *See id.*
[70] *See* Compaine, *supra* note 44, at 770.
[71] *Nat'l Citizens Comm. Broad.*, 436 U.S. at 786 (quoting *1975 Order*, at 1076).
[72] *Id.*
[73] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).
[74] *Id.* at 117–18.
[75] 395 U.S. 367 (1969).
[76] *See id.* at 369–79 (discussing § 315 of the Communications Act of 1934, Tit. III, 48 Stat. 1081 (codified at 47 U.S.C. § 315 (2000)).

"that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."[77] The Court reasoned that "the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in this limited medium."[78] The broadcaster's compliance with the fairness doctrine helped determine whether the station met its public interest obligations.[79]

Almost five years later, in *Miami Herald Publishing Co. v. Tornillo*,[80] the Supreme Court considered a challenge to "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record."[81] In this case, the Court struck down the statute, reasoning that it violated the newspaper's First Amendment rights.[82] The Court did this even though it had held an almost identical statute constitutional in *Red Lion Broadcasting Co.*

Not everyone agreed with unique treatment of broadcasters under the First Amendment. In *CBS v. Democratic National Committee*, Justice Douglas argued that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines."[83] While conceding the limitations of the broadcast spectrum[84] and that the FCC had "to encourage a multitude of voices,"[85] Justice Douglas rejected the need for regulation. Instead, he argued that the government could only encourage viewpoint diversity "by preventing monopolistic practices and by promoting technological developments that will open up new channels."[86] Any censorship or government

[77] *Id.* at 369.
[78] FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969)).
[79] *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973) (citing Report on Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1251–52 (1949)).
[80] 418 U.S. 241 (1974).
[81] *Id.* at 243.
[82] *See id.*
[83] *CBS*, 412 U.S. at 148 (Douglas, J., concurring).
[84] *See id.* at 157 (citing Red Lion Broad. Co. v FCC, 395 U.S. 367, 388 (1969)).
[85] *Id.* at 157–58.
[86] *Id.*

oversight of broadcast programming content "goes against the grain of the First Amendment."[87]

B. Broadcast Deregulation and the Telecommunications Act of 1996

1. Expanding the Marketplace of Ideas

In the 1980s, the FCC adopted a policy of competition and deregulation to encourage the development of new media outlets.[88] It wanted to "create a vast marketplace of viewing options, thereby reducing the need for governmental intervention in order to protect the public interest."[89] Some steps the FCC took included raising ownership caps to seven TV stations, seven AM radio stations, and seven FM radio stations per owner and then later to twelve of each.[90] With the enactment of the Telecommunications Act of 1996 (hereinafter the "1996 Telecom Act"), deregulation was more aggressively pursued.

The 1996 Telecom Act is a major amendment to the Communications Act of 1934.[91] It grants the FCC "broad powers over the development of competitive telecommunications markets."[92] The new law intended to encourage competition among "network broadcasters, cable systems, telephone companies, and other corporations that offer communications services."[93] The law also lifted many established regulations and restrictions. For example, the 1996 Telecom Act repealed telephone/cable and cable/broadcast cross-ownership rules, and also lifted the remaining limits on cable/network cross-ownership.[94] It eliminated national and local caps on radio ownership and eased the "dual network" rule.[95] The 1996 Telecom

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87 *Id.* at 158.
88 *See* HEMMER, *supra* note 49, at 333.
89 *Id.*
90 *See id.*
91 *See id.* at 334.
92 BROTMAN, *supra* note 42, § 1.03, at 1-17.
93 HEMMER, *supra* note 49, at 333.
94 *E.g.*, Fox Television Stations v. FCC, 280 F.3d 1027, 1033 (D.C. Cir. Feb. 19, 2002).
95 *Id.; see also* BROTMAN, *supra* note 42, § 3.03[3][a], at 3-17–18 ("[T]he duopoly rules generally prohibited ownership of more than one television station in the same market.").

Act also authorized the FCC to eliminate the cap on "the number of television stations any one entity may own, and to increase to 35 from 25 the maximum percentage of American households a single broadcaster may reach."[96] An important part of the 1996 Telecom Act was a provision ordering the Commission to conduct a biennial review of the FCC's ownership rules "in order to continue the process of deregulation . . . ."[97]

Even with its focus on competition and deregulation, the 1996 Telecom Act retained the public interest concerns of the Communications Act of 1934, stating that "the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technical advancement and the promotion of the *public interest, convenience and necessity*."[98]

2. Media Consolidation and Concentration

Since the enactment of the NBCO rule, local media outlets have grown substantially.[99] There are now many more broadcasting stations, radio stations, cable television systems, and satellite carriers. For example, in contrast to the three broadcasting stations in 1975, there are currently seven national commercial broadcast network stations on the air.[100] The growth of cable and new media has given rise to impatience with the NBCO's restrictions and added to the argument that it places unnecessary regulatory burdens on the industry. The explosion of media outlets ensures that the rule's goals of diversity and competition are being served.[101]

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96 *Fox Television Stations*, 280 F.3d at 1033.

97 *Id.*

98 DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY 20 (1998) (emphasis added).

99 *2001 Order*, 16 F.C.C.R. at 17,288.

100 Press Release, FCC, FCC Initiates Proceeding to Review Newspaper-Broadcast Cross-Ownership Rule, MM Docket No. 01-235, 2001 WL 1053068 (Sep. 13, 2001).

101 *See* NAA, *supra* note 18, at 3. The NAA, a nonprofit organization of more than 2,000 newspapers in the United States and Canada, spearheads the opposition to the rule. According to the NAA, a number of its members held broadcast station licenses, either in a different market in the United States or before the NBCO ban was implemented. *See id.*

The growth in media outlets has not decreased concentration of ownership. In fact, the Commission's relaxation or elimination of multiple ownership limits has accelerated concentration so that "while in 1975 a single entity could not own more than fourteen radio stations nationwide, today one entity owns more than 1,000 radio stations nationwide."[102]

Along with media concentration, comes the concern that powerful entities will hinder fair competition and engage in anticompetitive acts. To determine whether an entity is guilty of such acts, the government must first establish, under antitrust law, the relevant market being affected.[103] In *United States v. E.I. du Pont de Nemours & Co.*,[104] the Supreme Court explained that the relevant market is "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."[105] "[R]easonable interchangeability" depends on whether a product could substitute for another such that even a small increase in the price for one would result in an increased demand for the other.[106] The market in which both broadcast media and newspapers are competitors is the advertising market. Allowing common ownership of newspapers and broadcast stations could raise problems of higher prices for advertisers and, ultimately, consumers.

C. Why the Newspaper/Broadcast Cross-Ownership Rule Is Being Reviewed

Section 202(h)[107] of the 1996 Telecom Act requires the Commission to review ownership rules biennially to determine

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[102] *2001 Order*, 16 F.C.C.R. at 17, 289.
[103] S. CHESTERFIELD OPPENHEIM & CARRINGTON SHIELDS, NEWSPAPERS AND THE ANTITRUST LAWS § 4, at 7 (1981).
[104] 351 U.S. 377 (1956) (reviewing charges that du Pont controlled prices and competition in violation of § 2 of the Sherman Act).
[105] *Id.* at 404.
[106] *See* OPPENHEIM & SHIELDS, *supra* note 102, § 4, at 7.
[107] Pub. L. No. 104-104, § 202(h) reads:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition.

whether the rules are "necessary in the public interest as a result of competition" and to repeal or modify rules it finds no longer serve the public interest.[108]

As part of the review process, the FCC issued a Notice of Proposed Rulemaking.[109] The FCC requested comments on, among other things:

> [W]hether the rule continues to be necessary to protect a diversity of viewpoints; what impact new media outlets, including the Internet, have on the sources consumers use for local news and information; [and] . . . what public benefits accrue from efficiencies and synergies of joint operation of a broadcast station and a newspaper.[110]

The Commission also requested comments on how a decision of the U.S. Court of Appeals for the D.C. Circuit, *Time Warner Entertainment Co. v. FCC* (*Time Warner II*),[111] affected the "competition goals that inform [the agency's] newspaper/broadcast cross-ownership policies."[112] The case concerned a challenge to a provision in the Cable Television Consumer Protection and Competition Act of 1992[113] that set structural and vertical limits on cable operators.[114] Applying intermediate scrutiny, the court affirmed that the interests of diversity of ideas and preservation of

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> The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

47 U.S.C. § 161 (2000).

108 *2001 Order*, 16 F.C.C.R. at 17,286.

109 *Id.* at 17,305.

110 FCC Initiates Proceeding to Review Newspaper-Broadcast Cross-Ownership Rule, 2001 WL 1053068 (Sept. 13, 2001).

111 240 F.3d 1126 (D.C. Cir. 2001).

112 *2001 Order*, 16 F.C.C.R. at 17,296.

113 Pub. L. No. 102-385, 106 Stat. 1460 (amending 47 U.S.C. § 533 (2000)).

114 *See* Time Warner Entm't Co., L.P. v. FCC, 240 F.3d 1126, 1128 (D.C. Cir. 2001) (The horizontal limit addressed the cable operator's size and placed a 30 percent limit on "the number of cable subscribers a person is authorized to reach through cable systems owned by such a person, or in which such person has an attributable interest" (quoting 47 U.S.C. § 533(f)(1)(A)). The vertical limit addressed the cable operator's combination with cable programmers and put "limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." (quoting 47 U.S.C. § 533(f)(1)(B))).

competition were important government interests.[115] However, the court also said that "the FCC must still justify the limits that it has chosen as not burdening substantially more speech than necessary."[116]

More recently, the same court vacated the cable/broadcast cross-ownership rule.[117] The D.C. Circuit held that the FCC's retention of the cable/broadcast cross-ownership rule was arbitrary and capricious.[118] Reading Section 202(h) strictly, the court held that the rule could be retained only if "*necessary* in, not merely consonant with, the public interest."[119]

II. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE MUST BE RETAINED TO PROMOTE CIVIC DISCOURSE AND COMPETITION

In promulgating the NBCO rule, the FCC acted on the theory that structural regulations "promote free speech, not . . . restrict it."[120] By allocating ownership among many, rather than a few, the rule ensures "the widest possible dissemination of information from diverse and antagonistic sources."[121] Even with the current growth in media sources, the NBCO rule remains necessary to implement this First Amendment principle. First, regulating to ensure information flow from "diverse and antagonistic sources"

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115 *See id.* at 1130.
116 *Id.*
117 *See* Fox Television Stations v. FCC, 280 F.3d 1027 (D.C. Cir. Feb. 19, 2002).
118 *See id.* at 1049.
119 *Id.* at 1050 (emphasis added). The court has since amended its February 19, 2002 opinion. *See* Fox Television Station, Inc. v. FCC, 293 F.3d 537 (D.C. Cir. June 21, 2002). The FCC argued that the court's February ruling construed § 202(h) to "impose a standard of true necessity rather than mere utility." *Id.* at 539. The FCC argued that this would conflict with other rulings which interpreted "necessary" as useful, not indispensable. *See id.* Further, the FCC argued that the court's new construction would "hold the Commission to a 'higher standard in deciding whether to retain an existing rule in a biennial review proceeding than in deciding whether to adopt a rule in the first place.'" *Id.* Noting that the disputed phrase was not vital to its prior decision, the court agreed that the opinion should be modified. *See id.* at 540. However the court declined to determine the meaning of the term "necessary in the public interest" as it is stated in § 202(h). *See id.* Instead, the court agreed to modify its opinion to leave that question for another day. *See id.*
120 FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 801 (1978).
121 *Id.* at 799 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

allows a range of viewpoints to be heard. It is important that such information comes from independently owned media outlets since "requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."[122] Second, such ownership restrictions do not violate the First Amendment prohibition against government interference with the press. And, although criticized, the scarcity doctrine is as relevant to the FCC's broadcasting jurisprudence as when the FCC first promulgated the NBCO rule.[123]

Third, the relaxation of other ownership restrictions has meant a dangerous increase in media concentration. Although antitrust principles "may properly be considered by the Commission in determining where the public interest lies,"[124] it is not a complete answer to the problem of media concentration. Instead, the FCC's primary focus, as stated in its 1975 Order, should remain the enhancement of programming diversity.[125]

A. The Importance of Viewpoint Diversity

As early as the 1920s, the FRC expressed the view that the airing of opposing views on important issues of the day served the public interest.[126] A functioning democracy needs information source diversity because it "fuels political participation and debate about policy, social norms, cultural values, individual aspirations

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[122] *1975 Order*, at 1049.

[123] *See* TBS v. FCC, 512 U.S. 622, 637 (1994) (holding that the scarcity rationale is based upon the limited physical capacity of the broadcast spectrum, which limited capacity means that "there are more would-be broadcasters than frequencies available"); *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 799; Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251 (1974) ("The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers have made entry into the marketplace of ideas served by the print media almost impossible.") (footnote omitted).

[124] *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 795.

[125] *See 1975 Order*, at 1079.

[126] *See* Great Lakes Broad. Co. v. Fed. Radio Comm., 3 Fed. Radio Comm. Ann. Rep. 32, 33 (1929) (holding that "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public").

and community needs in our society . . . ."[127] This principle guides the FCC in its licensing policies.[128]

Since open debate is an important part of our democracy, the media play a vital role in society. As a daily part of American families' lives, it is not an overstatement that "print and broadcast media serve as the largest forum for the open, democratic debate about ideas, and this is the essence of the American model of government."[129] The need for a diversity of information sources, first espoused in *Associated Press v. United States*, "is essential to the welfare of the public."[130]

Separately directed media outlets are better able to offer diverse ideas, opinions, and information.[131] Such organizations would be "institutionally able, unfettered, and inclined to thoroughly challenge the news, information and opinion coming from other media organizations in the field or geographic area."[132] These different institutions offer unique perspectives that are important sources of information to the public.[133]

The FCC's regulation of the broadcast industry does not conflict with the First Amendment prohibition against government interference with the press. In *Red Lion Broadcasting, Inc. v. FCC*, the Court established that, because of spectrum scarcity, broadcast license applicants could not expect "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[134]

This lower standard allows the FCC to promulgate regulations that require licensees to "present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[135] Although regulation

[127] CONSUMERS UNION ET AL., IN THE MATTER OF CROSS-OWNERSHIP OF BROADCAST STATIONS AND NEWSPAPER, MM DOCKET NO. 01-235, at 2–3 (2001), *available at* http://www.mediaaccess.org/filings/ consumers_union_et_al_nbco_comments.pdf.
[128] *See 1975 Order* at 1056, 1079.
[129] *See* CONSUMERS UNION ET AL., *supra* note 127, at 5–6.
[130] Associated Press v. United States, 326 U.S. 1, 20 (1945).
[131] *See* CONSUMERS UNION ET AL., supra note 127, at 54.
[132] *Id.*
[133] CONSUMERS UNION ET AL., *supra* note 127, at 14.
[134] Red Lion Broad., Inc. v. FCC, 395 U.S. 367, 388 (1969).
[135] *Id.* at 389.

requiring coverage of public issues would not be upheld if applied to print media, the unique nature of broadcasting makes such regulation permissible.[136] In the end, speech is enhanced, not restricted.[137] Further, ownership restrictions are not content related.[138] Instead, they organize the industry's structure to protect the public against dangerous oligopolies without taking the applicant's "political, economic or social views" into consideration.[139]

Although there has been growth in new media outlets, the scarcity doctrine is still very relevant. In fact, the doctrine was recently affirmed by the Supreme Court.[140] Even assuming that physical scarcity was no longer a problem, economic scarcity is a great barrier to diversity.[141] Therefore, the promulgation of ownership rules is important to minimize media concentration and monopolization.

B. *The Dangerous Trend Toward Media Concentration*

The weakening of ownership restrictions has meant more industry mergers and the creation of media giants.[142] These media giants are then able "to dominate markets and thereby gain bargaining power over advertisers."[143] Keeping ownership rules strong ensures that broadcasters and the print media cannot take illegal, anticompetitive actions.[144] The trend toward media

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[136] FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 (1978).

[137] *Id.* at 801.

[138] *Id.*

[139] Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. Feb. 19, 2002) (quoting NBC v. United States, 319 U.S. 190, 226–27 (1943)).

[140] TBS v. FCC, 512 U.S. 622, 638 (1994) [hereinafter *Turner I*] ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence . . . and see no reason to do so here.").

[141] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251 (1974) (stating that the economic factors that have caused the decline of newspapers make entry into the newspaper business "almost impossible").

[142] Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violation of Equal Protection*, 5 COMMLAW CONSPECTUS 269, 277 (1997).

[143] *Id.*

[144] *Id.*

concentration has affected the industry in many ways.[145] Each segment of the media is "becoming dominated by a small number of large, vertically integrated corporations . . . ."[146] At the same time, because of economies of scale, it is difficult for business people to enter into the media industry "particularly in the provision of network facilities."[147]

Furthermore, media concentration may affect how reporters handle their jobs. "In moderately or highly concentrated media and communications markets, vertical integration—the combined ownership of content and distribution channels—can skew incentives to undermine journalistic independence."[148] For example, it is unlikely that a local broadcast station will aggressively cover its parent (a large media conglomerate) if there is a conflict of interest.[149] If there are no other independently-owned media in the market, negative stories concerning the parent company would probably go unreported.[150]

Separation of ownership between the print and broadcast media is important; otherwise it is unlikely that they will continue to act as a check and balance against each other.[151] The problem with the movement toward media concentration is that it has led to placing "in a few hands the power to inform the American people and shape public opinion."[152] An illustration of the effect of concentration is the sameness in editorial opinion, commentary, and interpretive analysis on national and world issues that can be seen in nationally syndicated columnists.[153] An example of this homogeneity in programming can be illustrated in the radio context. Clear Channel, a radio network which underwent rapid growth soon after Congress repealed the radio ownership restriction, now owns or operates 1,165 radio stations in the United

145 CONSUMERS UNION ET AL., *supra* note 127, at 20.
146 *Id.*
147 *Id.*
148 *Id.* at 114.
149 *Id.*
150 *Id.*
151 *See id.* at 16.
152 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 250 (1974).
153 *Id.* at 249–50.

States.[154] Since entering the San Diego market, Clear Channel has been accused, by its critics, of substituting local flavor and creating clones of radio formats from elsewhere: A San Diego rock station called "mix" can be found in a dozen other Clear Channel stations nationwide and shares the same nicknames, logos, and similar play lists.[155]

Along with increasing industry concentration is a concurrent decline in the number of available media sources, particularly daily newspapers. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court took note of studies showing far fewer newspapers serving a larger literate population.[156] The Court also noted that "[t]he elimination of competing newspapers . . . and the concentration of control of media" are important parts of a trend toward concentration of information sources.[157] The result of this decline is that important local voices are being lost. If the NBCO rule is repealed, similar loss of local viewpoints and identity could be repeated in print and broadcasting outlets throughout the country.

Proponents of the rule's repeal have raised the argument that allowing print and broadcast combinations would enable both media to reduce expenses. Admittedly, a concentrated industry may yield cost savings because it operates more efficiently than one with a larger number of owners.[158] However, "Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency—including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy."[159] Also, licensees cannot expect government to structure regulatory rules to benefit their private interests. As the Commission stated, "the First

154 Randy Dotinga, *Clear-Cutting the Radio Forest*, Wired News (Aug. 5, 2002) *at* http://wired.com/ news/business/0,1367,54036,00.html.
155 *Id.*
156 *Miami Herald Publ'g*, 418 U.S. at 249 (citing COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATIONS: NEWSPAPERS, RADIO, MOTION PICTURES, NEWSPAPERS, AND BOOKS 15 (Robert Leigh ed., 1947)).
157 *Id.*
158 Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1047 (D.C. Cir. Feb. 19, 2002).
159 *Id.*

Amendment does not protect business relations that are . . . not in the public interest."[160] What is important is whether the regulations benefit the public.[161] What is at stake may be summed up as follows: "[I]f a few megamedia corporations control most of the major print, broadcast, cable, and other media that most of the public relies on as their main sources of information, opinion, and creative expression, then this fundamental pillar of democracy is likely to be seriously weakened."[162]

III. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE MUST BE REPEALED AS INEFFECTIVE IN ENSURING DIVERSITY AND AS A RESTRAINT ON THE GROWTH OF THE MEDIA INDUSTRY

When the FCC promulgated the NBCO rule, sources for local information were limited. Three networks dominated the airwaves and neither the Internet nor cable television were options for users. The concern was that the free flow of communication would be "effectively controlled by a few interests," and that "many important voices [would] be excluded."[163] The rule was necessary to ensure that the networks would not grab too large a share of the media market.[164] Now, however, the Commission must recognize changes that have taken place and tailor the rules to meet the situation as it is, not as it was.[165] "This suggests something of the difficulty and delicacy of administering the Communications Act—a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs."[166] The review of the NBCO rule ordered by the FCC is an appropriate response to the changing media environment.

First, the explosive growth in media sources allows for greater diversity without regulation. Doctrines concerning "media differences" and spectrum scarcity are outdated in this changing

160 *1975 Order*, at 1050 (1975).
161 Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969) (stating that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount").
162 *See* ALGER, *supra* note 98, at 20.
163 Bollinger, *supra* note 20, at 6.
164 *1975 Order*, at 1074.
165 *Id.*
166 CBS. v. Democratic Nat'l. Comm., 412 U.S. 94, 118 (1973).

media environment. Second, a concentrated media industry is not incompatible with the First Amendment goal of the "widest possible dissemination of information from diverse and antagonistic sources."[167] Third, if concentration is found to stand in the way of diversity and competition, there are other mechanisms, such as the application of antitrust law, which would be more effective than government regulation. Finally, network television is in serious decline and in need of relief from the NBCO rule. To protect this valuable source of local news, it is in the public's best interest for the NBCO rule to be repealed.

Americans now have a wide range of information sources. According to a Census Bureau study on Internet usage, more than half of Americans are online.[168] Four new networks—Fox, UPN, WB, and PaxTV—have greatly diversified over the air content.[169] In addition, the growth in Spanish language television, cable television, and digital satellite television have presented previously unavailable options to consumers.[170] Cable television has become an important source of news and information. "The widespread adoption of cable, the growing channel capacity of cable, and the proliferation of programming services have all promoted the promise of greater diversity of content, increased segmentation of audience interests, and, therefore, heightened competition for the traditional players."[171] Cable viewers have a choice of over twenty-five nationally available channels, including "Cable News Network (CNN), Black Entertainment Television (BET), Nickelodeon, ESPN, MTV, C-SPAN, QVC, Discovery Channel, Arts and Entertainment Channel, CNBC, USA, and the Family Channel."[172] Viewers may also receive eleven pay cable channels such as "HBO, The Disney Channel, and Galavision."[173]

167 Associated Press v. United States, 326 U.S. 1, 20 (1945).

168 *See* Press Release from Sec'y of Commerce Don Evans, Census Data Show America is Online: Internet Usage Promising for Economic Viability, *at* http://www.commerce.gov/opa/press/Evans-Census-Online.html (last visited Nov. 24, 2002).

169 NAA, *supra* note 18, at 11.

170 *See id.* at 12.

171 Compaine, *supra* note 44, at 768.

172 *Id.*

173 *Id.* at 769.

Furthermore, the "must-carry" rules upheld in *Turner II*[174] require cable television to retransmit local broadcast stations. This ensures that viewers are exposed to a wider variety of general interest and specialized programming.

There have been changes within the newspaper industry as well. In 1975, weekly newspapers were considered a "relatively unimportant fraction of the media mix in a particular area."[175] They have now emerged as a source of local information and news with a circulation topping 70 million.[176] The expansion of the media is the best argument against fears that any one organization could dominate the media marketplace.

This growth in media outlets calls into question a few of broadcasting's long-held doctrines. For example, *Red Lion*'s comparison of broadcasting to a "noisy" "sound truck," which needed restriction with regard to the times and places of operation, was problematic then and is unpersuasive now.[177] This "special impact" theory "provides no clear limits to official authority and invites censorship as well as affirmative regulation."[178] Further, modern technology allows viewers to mute sound, tape television programs, and skip over commercials during replays. The medium can no longer "thrust information and ideas onto the audience"[179] without the audience's consent.

Further, scarcity is not a valid argument for the application of different First Amendment standards. The newspaper industry is as scarce and as difficult a venture to enter as broadcasting, yet it does not merit government regulation.[180] The decline in the number of daily newspapers, from 1,756 in 1975 to 1,422 in 2000,[181] makes it less likely that the public will have ready access to a multiplicity of voices. In addition, "total circulation of

174 520 U.S. 180 (1997).
175 *2001 Order*, 16 F.C.C.R. at 17,283 (rel. Sept. 20, 2001).
176 *Id.* at 17,288.
177 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387 (1969).
178 Bollinger, *supra* note 20, at 15.
179 *Id.* at 14.
180 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 249–50 (1974); *see also* Bollinger, *supra* note 20, at 11.
181 *2001 Order*, 16 F.C.C.R. at 17,288 (citing Standard Rate and Data Service, Circulation 2001, at 1038).

morning and evening daily newspapers has declined by about 8% from 60.6 million in 1975 to 55.8 million in 2000."[182] Neither Congress nor the courts, however, has imposed fiduciary responsibilities on the print media.[183]

Another problematic theory is *Red Lion*'s characterization of broadcasting as a concentrated medium needing government oversight. The characterization suggests that, without such regulation, "the objectives of the First Amendment [would] be frustrated."[184] Media concentration, the *Red Lion* Court held, is a defect because it excludes important voices from the marketplace of ideas.[185] Diversity of ownership, however, will not necessarily increase diversity of content.[186] It is more likely that "competing parties in a market [would] have a commercial incentive to air 'greatest common denominator' programming, while a single party that owns all stations in a market has a commercial incentive to appeal to all substantial interests."[187] This principle is illustrated as follows: if three television stations under separate ownership had the choice of airing different programs, all would gravitate to the program with the highest audience appeal.[188] In contrast, a single owner of three television stations would maximize profit by diversifying programming. It would run the highest-rated program on one station while placing other programming on the other stations.[189] Therefore, it does not follow that an owner of a newspaper and a television station, in the same market, would place the same content on both media.

One of the FCC's concerns when it first implemented the NBCO rule was the preservation of competition in the media marketplace.[190] The rule's proponents argue that repealing the ban would enable former competitors to set advertising rates and

182 *Id.*
183 *See Miami Herald Publ'g*, 418 U.S. at 241.
184 Bollinger, *supra* note 20, at 6 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).
185 *See id.*
186 Compaine, *supra* note 44, at 761.
187 *2001 Order*, 16 F.C.C.R. at 17,291.
188 Compaine, *supra* note 44, at 762.
189 *Id.*
190 *2001 Order*, 16 F.C.C.R. at 17,297.

restrict outside competition.[191] While there is a concern involving such acts on the part of any organization that controls a large portion of the market, it is not clear that newspapers and broadcasters compete in the same market. Establishing the product market is the first step in any competition analysis.[192] In this case, the product market at issue is the advertising market.[193] One way of determining this is by examining "whether newspapers and broadcast stations are interchangeable substitutes for advertisers."[194] Substitutability indicates whether different products are part of the same market.[195] If so, then they can be used by consumers—in this case advertisers—for the same purposes.[196] Newspapers and broadcasters, however, are not completely interchangeable.[197] This is because the degree to which they compete in a single product market depends upon the target audience of the advertiser.[198] The characteristics of print and broadcast media allow advertisers to use both in different ways. Most advertisers use different media as part of an advertising campaign because of the unique characteristics of different media and the audiences they reach.[199] Action-based campaigns, for example, are used more frequently in television, while newspapers allow for more complex material to be presented to audiences in greater detail.[200]

Further, the views of the agencies charged with overseeing the antitrust laws have changed. When the FCC first adopted the NBCO rule, the Department of Justice argued that "although they were not perfect substitutes, newspapers and broadcast stations were competitors for advertising revenue."[201] Now, however, the agencies that oversee compliance with antitrust laws do not regard the print and broadcast media as competing in a single advertising

[191] *See* CONSUMERS UNION ET AL., *supra* note 127.
[192] *2001 Order*, 16 F.C.C.R. at 17,293.
[193] NAA, *supra* note 18.
[194] *Id.* at 60.
[195] *Id.*
[196] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956).
[197] NAA, *supra* note 18.
[198] *Id.*
[199] *Id.* at 63.
[200] *Id.*
[201] *Id.* at 59 (citing *1975 Order*, at 1056).

market.[202] In implementing the NBCO rule, the FCC examined how much of a role antitrust law should play in their ultimate decision.[203] In the end, the Commission determined that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility."[204] Whether the media had fixing advertising rates was less of a concern than the perceived lack of diversity.[205] Instead, the Commission decided that allegations of economic monopolization should be examined on an ad hoc basis in the future.[206] Then, as now, the proper response to fears regarding a media monopoly is a resort to antitrust laws (as needed), instead of regulation.

Publishers and broadcasters need immediate relief from the NBCO ban, as they are struggling to remain competitive in today's marketplace. An indicator of network television's struggle is its decline in viewership.[207] By way of illustration:

> The prime time audience share of the three major broadcast networks (ABC, NBC, CBS) was 95% in 1975; [as of 1995], the prime time audience share of all commercial television stations (affiliates of ABC, CBS, Fox, NBC, PaxNet, UPN, WB and independent stations) is only 61%. In addition, cable is now actively competing with broadcast television for a share of advertising expenditures for television.[208]

In addition, cable is now actively competing with broadcast television for a share of advertising expenditures for television.[209] The medium has faced serious financial difficulty in the past and will continue to do so in the future unless some action is taken.[210]

[202] *Id.*
[203] *1975 Order* para. 11.
[204] *Id.* at 111.
[205] *See id.* at 111–12.
[206] *Id.* at 111 n.29.
[207] Bill Carter, *New Life for Networks: Ruling on Ownership is Most Recent Gain for Industry Seen as Doomed 10 Years Ago*, N.Y. TIMES, Feb. 21, 2002, at A1.
[208] *2001 Order*, 16 F.C.C.R. at 17,288.
[209] Compaine, *supra* note 44, at 769.
[210] Carter, *supra* note 207.

Newspapers have also long faced serious economic difficulties.[211] In 1970, Congress, recognizing that newspapers needed to pool their resources to survive, enacted the Newspaper Preservation Act,[212] which allowed newspapers "[to cooperate] in their commercial operations with limited exemption from the threat of antitrust prosecution."[213] Its purpose was to preserve independent and competitive newspapers facing economic difficulties.[214] This helped the public interest by saving an independent voice "when one of two or more competing newspapers in a locality is threatened by 'economic distress.'"[215] Similarly, repeal of the NBCO ban would allow for the continuing growth and vitality of broadcast TV and newspapers. This serves the public interest because it preserves the range of sources where people can get news.

Allowing a newspaper and broadcast station combination would enable both to deliver news in a more economic fashion.[216] Splitting the cost of newsgathering by sharing certain facilities would reduce costs to advertisers and, eventually, consumers. This is important because broadcast TV is one of the few free sources of local news and information. There are several advantages to allowing print and broadcast stations to share resources. Newspapers and broadcast stations can operate more cost-effectively by "(i) sharing staff members in various aspects of their business, including newsgathering, news reporting, advertising sales, technical services, administrative/business functions, and

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[211] OPPENHEIM & SHIELDS, *supra* note 103, at 187 (stating that increased competition and costs had caused the disappearance of competing daily newspapers since the 1930s).

[212] Pub. L. 91-353 (codified at 15 U.S.C. §§ 1801–1804 (2000)).

[213] OPPENHEIM & SHIELDS, *supra* note 103, at 189.

[214] *Id.* at 190.

[215] *Id.* (quoting 15 U.S.C. § 1801).

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with provisions of this chapter.

15 U.S.C. § 1801.

[216] *See* NAA, *supra* note 18.

human resources; (ii) sharing physical facilities and thus reducing rent and overhead costs; and/or (iii) sharing newsgathering resources such as news bureaus, wire services, cameras, vehicles, and helicopters."[217] Also, newspapers and broadcast stations would be better able to respond to the needs of their local communities while increasing overall programming diversity.[218]

CONCLUSION

It is difficult to relinquish long held but outdated beliefs, especially if they are considered useful. However, structural rules like the NBCO are not just outdated, they hinder the growth of the media. If broadcasting is to serve the goals of the First Amendment, then the idea that the industry needs remediation must be discarded. The industry must be allowed to develop into its role as a member of the press that deserves full protection under the First Amendment.

[217] *Id.* at 27.
[218] *See id.* at 16.