4-9-91

Separate Statement of Commissioner James H. Quello
dissenting to the overall result, and concurring in part.*

In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.

The majority plan in some ways relaxes the financial interest and syndication ("finsyn") rules that for 21 years have restricted the networks, but it would be a mistake to characterize the new rules as deregulatory. Calling the majority plan "deregulation" is like telling an inmate at the end of his jail term that he may leave his cell — so long as he does not venture beyond the prison walls. But in the case of finsyn, the networks have done their time; they deserve to be set free.

I concur in part with the Report and Order because it will provide the networks some measure of flexibility to respond to the challenges of the new media environment. Consequently, I agree that the rules should be eliminated entirely for the non-prime time part of the schedule, that networks should be permitted to own and syndicate in-house productions (including foreign and domestic co-productions), that networks should be able to engage in foreign syndication, and that networks should be permitted to bargain for financial interest and syndication rights in all the programs they air.

On the other hand, the majority plan of the Report and Order retains significant limitations on network participation in the programming market, and imposes complex and, in some cases, redundant "safeguards." Although the Report and Order is being promoted by some as a significant deregulatory step, today's decision will impose onerous new burdens on the networks that had never been part of the FCC's rules and that go far beyond the antitrust consent decrees affecting the three established networks.

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So in this proceeding the FCC giveth and the FCC taketh away. This is acting in a bit too mysterious a way for me to accept completely, particularly given the record before us. Consequently, I dissent to the overall result and concur in part.

* This statement is being issued concurrently with the Commission's adoption of the Report & Order. It is subject to revision when the text of the decision is released.

The Record Supports Virtual Repeal of the Rules

The new and continuing limitations on network activity simply are not supported by the record. Far from re-regulation, the facts presented to this agency overwhelmingly support substantial, if not total repeal of the rules. The Report and Order clearly should be subjected to some kind of reality test.

Of course, it is possible for reasonable people to read the record differently. Certainly there is no shortage of assertions in the myriad pleadings that can be cited to support the new rules. There is little to suggest, however, that the record citations advocating limits on network participation would withstand critical analysis. Here is where a reality test would have helped. As the Department of Justice noted, in a marvel of understatement, "[t]he willingness of producers to spend large amounts of money to keep the rules suggests that significant wealth transfers may be involved" in explaining the studios' position.[1] There is no doubt that all of the parties, including the networks, faithfully advocated positions that serve their own economic interests. To the extent this is true, it is possible for people read the same record yet reach different conclusions. But there is one fact, not fully appreciated by the majority, that makes this record different. It is this: virtually every credible party without a direct financial interest who filed comments in this proceeding supported substantial repeal of the finsyn rules:

— Both the Department of Justice and the Bureau of Economics of the Federal Trade Commission argue that the rules should be repealed. The National Telecommunications and Information Administration also supported substantial modifications with some safeguards.[2]

— Henry Geller, the Commission's General Counsel when the rules were adopted, filed comments and appeared at the *en banc* hearing in support of repeal. He represented various parties, including Action for Children's Television, Black Citizens for a Fair Media and Dr. Everett Parker, widely considered to be the founder of the citizens' movement in FCC matters.[3]

— Various unions, including communications unions, several AFL-CIO affiliates, and the National Education Association support total repeal of the

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[1] *Comments of the United States Department of Justice*, filed June 14, 1990 at 27.

[2] Although NTIA supported the so-called "two-step" negotiation process, a form of which was adopted by the majority, it did not advocate new restrictions on networks, such as limits on in-house production.

[3] *See Further Comments of Action for Children's Television, et al.*, November 19, 1990; Testimony of Henry Geller, FCC *En Banc* Hearing, December 14, 1990.

rules.[4] In addition to matters of international competitiveness, these commenters voiced the very real concern that their members will be deprived of the benefits of free over-the-air television if the networks' decline is not counterbalanced by the relaxation of regulations.[5]

— The Media Institute, an independent Washington media think tank advocated total repeal of the rules, as did the Heritage Foundation and Citizens for a Sound Economy Foundation.[6]

Outside commentators, similarly lacking any economic incentive, largely reached the same conclusion. As columnists Rowland Evans and Robert Novak noted, "the preponderance of objective opinion would let [the networks] share in the rerun business."[7] For example, the NEW YORK TIMES, the WASHINGTON POST, the WALL STREET JOURNAL, and the DETROIT NEWS all have editorialized in favor of eliminating the finsyn rules.[8] Many syndicated columnists have reached the same conclusion.[9]

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[4]Many of these parties previously supported the rules. In fact, the National Education Association wrote to the Commission to clarify that it was not supporting retention of the rules, as other commenters had claimed. *Compare* Letter from Kenneth F. Melley, NEA, to Chairman Alfred Sikes, March 9, 1990 with *Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, filed March 5, 1990, Attachment A. *See also* Letter from Barbara J. Easterling, Communications Workers of America, to Frances Seghers, MPAA, November 16, 1990 (expressly withdrawing from the Coalition to Preserve the Financial Interest and Syndication Rule).

[5]Those entities advocating repeal of the rules included: the International Brotherhood of Electrical Workers, the Amalgamated Clothing and Textile Workers Union, the National Council of Senior Citizens, the National Education Association, the United Food and Commercial Workers International Union, the American Federation of Television and Radio Artists, the Communications Workers of America, the International Ladies' Garment Workers Union, Service Employees International Union, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, the United Brotherhood of Carpenters and Joiners of America, the International Longshoremen's and Warehousemen's Union, the Coalition of Labor Union Women, the Oil, Chemical & Atomic Workers International Union, the American Federation of Grain Millers, the Aluminum, Brick and Glass Workers International Union, the Glass, Moulders, Pottery, Plastics & Allied Workers International Union, and the Air Line Pilots Association.

[6]*See* The Media Institute, PRIME TIME FOR REPEAL (1990) (filed as comments); *Comments of the Heritage Foundation*, March 25, 1991; *Comments of the Citizens for a Sound Economy Foundation*, March 25, 1991.

[7]Evans & Novak, *The Battle Over Television Reruns*, WASHINGTON POST, March 18, 1991 at A11. Press accounts of the issues surrounding broadcast television provide a useful gauge by which to evaluate the comments. Most news stories simply report on the state of the industry, without taking a position on the issue of finsyn (although some do). In any event, most of the articles cited in this statement were filed by commenters and are part of the record. Where articles were not filed by the parties, we may take official notice of the facts reported.

[8]*See The Stale Rules That Stifle TV*, NEW YORK TIMES, November 30, 1990; *Macho King vs. Andre the Giant*, WALL STREET JOURNAL, December 14, 1990; *The F.C.C. Goes Hollywood*, NEW YORK TIMES, March 12, 1991 at A22; *Television's Pot of Gold*, WASHINGTON POST, March 13, 1991 at A16; *Is the FCC Obsolete?* DETROIT NEWS, February 19, 1991.

Once you get beyond the rhetoric in this proceeding, all the parties must admit one undeniable truth: We do not live in the same media environment as existed in 1970. This key fact changes everything.

The Commission originally adopted the finsyn rules because the three networks were the dominant distributors of original programing to the American public and, consequently, the dominant purchasers of that programming.[10] Neither is the case today. The networks face increasingly successful competition from other conventional broadcasters as well as from a growing array of alternative video technologies. As a result, the networks' significance in the program acquisition market is declining.

Consider the following:

— In 1970, there were 600 network affiliates and 82 independent television stations; by 1989, affiliates numbered 656 and independents (including Fox stations) totalled 339.[11]

— In 1970, there were three national television networks; by 1990, a fourth network was becoming established and industry rumors suggested more might emerge.

— In 1970, the three networks enjoyed more than a 90 percent audience share; by 1990, prime time viewing of the three networks was 57 percent and headed downward.[12]

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[9]*See, e.g.*, Samuelson, *The Networks vs. Hollywood*, WASHINGTON POST, December 12, 1990; Prestowitz, *U.S. Rules, Not Japanese Money, Lost MCA*, WALL STREET JOURNAL, December 3, 1990; Shales, *FCC Syndication Rule Relic of a Bygone Era*, THE HOUSTON POST, December 20, 1990 at E-2; Stern, *How U.S. Squeezes the Networks*, CHICAGO TRIBUNE, February 19, 1991 at 14; Evans & Novak, *The Battle Over Television Reruns*, WASHINGTON POST, March 18, 1991 p. A11; Passell, *Syndication Trek: Journey Continues*, NEW YORK TIMES, December 5, 1990 at D2.

[10]*Competition and Responsibility in Network Broadcasting, Docket No. 12782*, 23 F.C.C.2d 382 (1970) ("*1970 Report & Order*"), *recon. denied*, 25 F.C.C.2d 318 (1970) ("*1970 Reconsideration Order*"), *aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971).

[11]See Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at 18.

[12]*See Reply Comments of the National Telecommunications and Information Administration*, filed August 3, 1990 at 8-11; *Reply Comments of NBC*, filed December 20, 1990 at 7-8. Average network prime time share is expected to be below 55 percent in 1991. For affiliates in the top ten markets, the share already is at 45 percent. *Id.* Independent analyses suggest that affiliates will drop a share point each year and will reach a 48 total day share by 1998. Paul Kagan Associates, *TV Program Investor*, December 22, 1989. *See also Where the Viewers Are*, ELECTRONIC MEDIA, March 25, 1991 at 10 ("The only provider of programming that has shown clear, substantial viewing gains is basic cable. . . . There is no way a single broadcast network can match the breadth and diversity of so many different programming outlets, and the result gets clearer after every sweeps month.")

— The networks' share of national television advertising revenue decreased from more than 60 percent in the late 1970s to less than 50 percent in 1989. During this same period, the network share of total broadcast and cable advertising revenue decreased from 48 percent to 32 percent.[13]

— In 1970, the average television viewer received 6.8 video channels, by 1989, the average viewer received 30.5 channels.[14]

— In 1970, off network syndicated programming captured over 64 percent of the audience for syndicated programming; by 1990, the off-network audience declined to about 30 percent, while first run programming became increasingly popular.[15]

— In 1970, 2,490 cable television systems had 4.5 million subscribers; by 1990, 10,823 cable systems had about 54 million basic subscribers.

— In 1970, pay cable channels (such as HBO) did not exist; by 1990, such channels had approximately 27 million subscribers.

— In 1970, cable "networks" were virtually nonexistent; by 1990, there were 80 basic cable networks and 17 pay movie channels.[16]

— In 1970, VCRs did not exist as a consumer product; by 1990, they were installed in 66 million households. This represents about 72 percent of all television households.

Given these vast changes, it should surprise no one that the program acquisition market today is far different than it was in 1970. In the current syndication marketplace, 14 of the top 15 syndicated shows are first-run and not off-network; off-network fare accounts for only 30 percent of viewing of all syndicated programs.[17] Nor is over-the-air television the only outlet for original programming. For the 1990-91 television season, for example, about as many original entertainment series were

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[13]*Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, September 5, 1990 at 18.

[14]The Media Institute, PRIME TIME FOR REPEAL 51 (1990).

[15]*Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, September 5, 1990, Appendix, Table A2.

[16]*Joint Networks Comments*, June 14, 1990, Vol. 1, pp. 77-78.

[17]BROADCASTING, July 23, 1990 at 60. *See Reply Comments of NBC, Inc.*, August 1, 1990 at 6-7; Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at 17.

shown on alternative outlets as appeared on the three networks.[18] The President and co-CEO of Time-Warner has said that "Warner Bros. and Lorimar will be producing more and more for cable. . . . We hope we're not producing less and less for the commercial broadcast networks. *But a good show will always get on somewhere.*"[19] Original programming is increasingly considered to be the "signature" by which cable channels are identified. Cable networks last year spent almost $700 million on original programming, and by 1995, analysts predict that half of all programming expenditures on cable — over $1 billion — will be for original shows.[20] One basic cable channel, Lifetime, has fifteen new series in development, and plans to offer two nights of original prime time programming by early 1992.[21]

Because of the growing number of choices, program producers are becoming increasingly flexible about which "conduit" to use to reach an audience. Series have moved both to first run and to cable after leaving networks, while some cable series are also available to the television syndication market.[22] As many made-for-television movies (known in the industry as MOWs) are produced for cable and other sources as for the networks. For the 1990-91 season, it was anticipated that cable networks would air 108 MOWs compared to between 103 and 108 (including mini-series) on the three networks.[23] Understandably, then, the three networks' share of

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[18]In 1990-91, there were 26 original entertainment series distributed as first-run programs, 26 series on cable and 15 series on the Fox network. *Reply Comments of NBC*, December 20, 1990 at 9. *NBC Reply Comments*, August 1, 1990, Appendix A.

[19]ELECTRONIC MEDIA, June 4, 1990 at 20 (Interview with Nicholas J. Nicholas, Jr.) (emphasis added) quoted in *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 7 n.13.

[20]Goldman, *Cable-TV Networks Strive to Stand Out From the Crowd With Original Programs*, WALL STREET JOURNAL, December 17, 1990 at B1. *See also* Fabrikant, *Channels Seek Identity In Made-for-Cable Films*, NEW YORK TIMES, April 1, 1991 at D8 (In 1991, five cable networks have budgeted approximately $600 million for original programming.).

[21]Walley, *Lifetime Plans Original Prime-Time Block*, ELECTRONIC MEDIA, March 25, 1991 at 3.

[22]*21 Jump Street*, previously shown on the Fox Network, was moved to first run syndication following its network run. *The Days and Nights of Molly Dodd*, previously an NBC series, had a post-network three year run on Lifetime. *1st and Ten* and *Dream On*, two HBO original series, also are produced for syndication. *Star Trek: The Next Generation* is a first run series that is essentially a sequel to the NBC program *Star Trek*. *See generally*, *NBC Reply Comments*, December 20, 1990 at 8-10; BROADCASTING, December 17, 1990; Goldman, *Cable-TV Networks Strive to Stand Out From the Crowd With Original Programs*, WALL STREET JOURNAL, December 17, 1990 at B1, 5.

[23]*Ex parte letter from Jeff Sagansky to Commissioner Ervin S. Duggan*, March 4, 1991. Budgets for MOWs on cable channels (such as HBO, TNT and Showtime) are often twice that of similar network productions, and, in the aggregate, cable networks spend about the same amount — $322 million — as broadcast networks. *Id.* Goldman, *Cable-TV Networks Strive to Stand Out From the Crowd With Original Programs*, WALL STREET JOURNAL, December 17, 1990 at B5. The number of MOWs purchased by cable networks doubled during the past three years. Fabrikant, *Channels Seek Identity In Made-for-Cable Films*, NEW YORK TIMES, April 1, 1991 at D8. *See also* Marich, *Hybrid 'Telefeature' Movies Emerging As Global TV Force*, THE HOLLYWOOD REPORTER, April 23, 1990 at 1; Bruno, *Original Programs Booming on Cable*, VARIETY, May 16, 1990 at S-1.

overall program purchasing plummeted from about 74 percent in 1970 to 21 percent in 1989.[24] In addition to original entertainment programming, it also cannot be ignored that cable networks spent almost $2 billion to acquire sports rights in 1989-90.[25]

Given the extent to which the video marketplace has changed already, and without considering the magnitude of change anticipated in years to come, I find it difficult to believe that the majority is not more disposed toward total elimination of the finsyn rules. Indeed, the same three Commissioners that today constitute the majority insisted that the Commission conclude in last year's Report to Congress on Cable Television that "[t]he video marketplace continues to be a highly dynamic sector in the midst of transition."[26] As a result of "existing and potential multichannel competitors," the Report concluded that "we are unwilling to endorse or recommend any drastic or long-term re-regulation." The Report took a broad perspective, noting that "robust competition will more efficiently provide both a better safeguard . . . and a greater diversity of choice that any web of rules and regulations designed to mimic competition or otherwise compensate for its absence."[27]

Needless to say, it is difficult to reconcile the regulatory philosophy of the Cable Report with that embodied in today's Report and Order. There, the Commission found in the face of de facto monopoly cable franchises that regulation is inappropriate because "the degree of market power cannot be quantified precisely," but in the current proceeding the majority imposes a complex scheme of regulation, including some new controls out of some vague notions regarding network market power.[28] Last July, we found that "horizontal concentration and vertical integration produces significant benefits for cable subscribers" because they help provide the financial support for programming,[29] but today, the majority concludes that potential vertical integration by networks is an anticompetitive mechanism that must be limited.

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[24]*Reply Comments of the National Telecommunications and Information Administration*, August 3, 1990 at 10.

[25]Presentation of Robert C. Wright to Commissioner James Quello, January 17, 1991.

[26]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 13 (1990).

[27]*Id.* at ¶¶ 8, 9.

[28]The Commission's conclusions in this regard are particularly underwhelming in light of the fact that the government agencies responsible for enforcement of the antitrust laws have concluded that the networks lack market power. *See Comments of the United States Department of Justice*, June 14, 1990 at 20-29; *Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, September 5, 1990 at 18; *Further Comments of the United States Department of Justice*, December 21, 1990 at 3; *Additional Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, March 25, 1991 at 2.

[29]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962 (1990) [¶¶ 82-84].

It is particularly striking that the majority urged regulatory restraint in the cable proceeding because of the promise of *potential* competition, yet resists greater deregulation of the networks in the face of real and potentially overwhelming competition. Moreover, the competition the networks face today is particularly unfair since the government's thumb is placed squarely on the Hollywood side of the scale. The majority would keep it there.

The rules' proponents rationalize their regulatory approach by describing the networks as gatekeepers to the mass audience. The ability to control access to the nationwide audience gives the networks unique power, the argument goes, so that government intervention is justified. But "[t]he idea that network power now has to be curbed by the FCC is absurd. It's already been curbed to smithereens."[30]

The majority's analysis of network dominance fails to see the handwriting on the wall, much less read it. The growth of alternatives makes it less than clear that the future of any mass medium is guaranteed. An increasing number of observers have suggested that the networks, at least in their current form, may not survive the decade.[31] WASHINGTON POST television critic Tom Shales recently reported:

> If the '80s saw the decline of the networks, the '90s may well see the fall. It is a common assumption in broadcasting now that at least one of the three broadcasting networks will not live to see the end of the century. The question is whether that network will succumb to pressures from outside or just wither and die on its own.[32]

But Shales also has noted, "If the networks are doomed to fade away according to the natural laws of the economic jungle that is one thing. But there is nothing natural about the Fin-Syn rule. It's a relic of another era, an idea whose time has gone."[33]

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[30]Shales, *The FCC and the Threat to Free TV*, WASHINGTON POST, April 8, 1991 at C2.

[31]Some advertising executives have suggested that perhaps within five years the networks' "days as a mass medium will be over." Levine, *The Last Gasp of Mass Media?* FORBES, September 17, 1990 at 9. *See also* Zoglin, Goodbye to the Mass Audience, Time, November 19, 1990 ("The era of the mass TV audience may be ending . . . "); Carter, *Little Improvement in Sight As Networks End Bad Year*, NEW YORK TIMES, December 24, 1990 ("a senior network executive, who insisted on remaining anonymous [stated,] 'We're presiding over networks as they head out of business.'"); Werts, *Look Who's Watching*, NEWSDAY, December 23, 1990 ("the networks are dying, and single-interest cable channels are premiering monthly"); Mahoney, *Network Woes Are Barter's Gain*, ELECTRONIC MEDIA, March 25, 1991 at 16 (According to Tim Duncan, executive director of the Advertiser Syndicated Television Association, the networks' ability "to deliver 99 percent of the nation at the flip of a switch . . . isn't the case in many network dayparts anymore. That doesn't exist outside of prime time and shortly will not exist in prime time.").

[32]Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B2.

[33]Shales, *FCC Syndication Rule Relic of a Bygone Era*, THE HOUSTON POST, December 20, 1990 at E-2.

The "mass audience" is no longer what it once was. As declining network revenues attest, advertisers are becoming less inclined to spend large sums of money to reach a generalized audience. Rather, they are interested in targeting a selected group of viewers — hopefully those most disposed toward buying the product. They increasingly do so by purchasing "bundled media" campaigns, which utilize a variety of media (*e.g.*, magazines, specialized television channels and books) to aggregate a selected group of consumers.[34] This fact helps explain why the cable television advertising market has remained strong at the same time the networks experienced sharp declines.[35] And, although you would not know it by their comments in this proceeding, it is a point that has not been lost on the studios. In 1990 some major studios reduced their expenditures for network advertising and increased their spending on cable channels.[36] It is a potent indicator of where the studios believe they will find the viewers.[37] Now *there* is a reality test for you.

The upshot of this is that free over-the-air television is threatened unless sources of revenue other than advertising can be tapped. The theme of many of the comments in this proceeding and of a startling number of press accounts is that 1990 was the networks' worst year ever.[38] This fact is not an aberration. It cannot be

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[34]Levine, *The Last Gasp of Mass Media?* FORBES, September 17, 1990 at 8-10. *See also Group W To Offer 'One Stop Shop' To Advertisers*, BROADCASTING, September 24, 1990 at 72; King, *Gannett Will Take Another Shot At Selling Cross-Media Packages*, WALL STREET JOURNAL, September 28, 1990 at B6.

[35]For example, the USA Network (which is jointly owned by Paramount Communications, Inc. and MCA, Inc.) enjoyed a 1990 increase in ad revenues of 33 percent. Over all, basic cable advertising billings rose more than 20 percent. *See* Goldman, *Cable TV's Ratings and Ad Revenue Grow*, WALL STREET JOURNAL, November 5, 1990. *See also* Walley, *Cable Bounds as Networks Stumble*, ADVERTISING AGE, January 28, 1991; Greenstein, *Cable Programers Expect Bullish Year*, ELECTRONIC MEDIA, January 14, 1991; Gerard, *Industry Outlook Viewed as Gloomy*, NEW YORK TIMES, December 11, 1990; Dempsey, *Growth of Basic Cable's Steady*, VARIETY, September 17, 1990; Fowles, *The Upheavals in the Media*, NEW YORK TIMES, January 6, 1991.

[36]Whatever the studios tell this Commission in their role as entertainment producers, it must be remembered that they also are consumers of advertising time to promote their theatrical releases. During the past year, Columbia Pictures reduced its network advertising budget by 8 percent, while increasing spending in syndication by 195 percent and on cable networks by 31 percent. MCA cut its network budget by 10 percent while boosting syndication spending by 69 percent and cable advertising by nearly 11 percent. Paramount increased cable expenditures by 30 percent and syndication purchases by more than 18 percent, while network media buys rose by only 10.7 percent. Twentieth Century Fox increased its purchases of cable ads by almost 100 percent. *See Movie Advertising: Enough to Go Around?*, BROADCASTING, April 1, 1991 at 61.

[37]*See Where the Viewers Are*, ELECTRONIC MEDIA, March 25, 1991 at 10 ("The only provider of programming that has shown clear, substantial viewing gains is basic cable.")

[38]*See Comments of CBS, Inc.*, June 14, 1990 at 31-36; *Reply Comments of NBC, Inc.*, August 1, 1990 at 8-14; *See, e.g.*, Lippman, *CBS Cutbacks Expected to Include 400 Layoffs*, LOS ANGELES TIMES, March 30, 1991 at D3; Carter, *Little Improvement in Sight As Networks End Bad Year*, NEW YORK TIMES, December 24, 1990; Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 20; Mermigas, *Analyst Predicts Record Loss for CBS*, ELECTRONIC MEDIA, January

explained away by the recession, the cost of Persian Gulf War coverage or by the prices some networks paid for sports packages. The networks' decline is more accurately understood as part of a fundamental change in the environment in which they operate.[39] As audiences for the national networks continue to decline, so will their revenues; as cable channels with dual revenue streams pay large sums for the rights to sports events, networks will be forced to pay higher prices to compete; and as news events occur in an increasingly complex world, networks will need the financial wherewithal to provide comprehensive news coverage on par with that available on cable television.

Unlike the theoretical and intangible loss of programming diversity feared by the studios should the networks be freed from regulatory restraints, the loss to diversity from the networks' decline is both real and direct. CBS lost more than $200 million in 1990 and recently announced a first quarter 1991 operating loss of $54.6 million. This prompted the network to layoff 400 employees, including up to 140 in the news division. It is anticipated that the network will shut down domestic news bureaus in Dallas and Atlanta, as well as foreign bureaus in Johannesburg, Rome and Beijing.[40] Even as the top-rated network, NBC's profits have slipped by a reported two-thirds, and it, too has experienced layoffs.[41] NBC has announced the closure of some domestic news bureaus and there has been speculation that the network might eliminate its news division.[42] Similarly, the economics of network broadcasting has forced Capital Cities/ABC to make cuts reported to be in the hundreds of millions of dollars.[43] ABC is closing three domestic news bureaus, may reduce staff in others, and has delayed the introduction of a five-hour overnight newscast that was scheduled to begin last January.[44] In addition to network cuts, CBS announced a reduction in

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28, 1991; *Profits Fall at Capital Cities/ABC*, NEW YORK TIMES, February 5, 1991; Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B1; *NBC Reports Revenue Decline and Earnings Drop for 1990*, BROADCASTING, January 28, 1991.

[39]Shales, *CBS Posts Huge Loss, Eliminates 400 Jobs*, WASHINGTON POST, April 6, 1991 at D4 ("With increased competition from cable, pay TV and VCRs, network ratings and profits began declining in the '80s, and all three continue to undergo radical downsizing as they face sobering new economic realities.").

[40]*Id.* at D1; Carmody, *The TV Column*, WASHINGTON POST, April 4, 1991 at D6; Lippman, *CBS Cutbacks Expected to Include 400 Layoffs*, LOS ANGELES TIMES, March 30, 1991 at D3.

[41]Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B2.

[42]Gay, *Will Network News Ever Be The Same?*, NEWSDAY, January 30, 1991.

[43]Mermigas, *Cost-Cutting Won't Save Networks*, ELECTRONIC MEDIA, November 26, 1990.

[44]*Capital Cities/ABC Third-Quarter Net Declined 11%, Reflecting Slump in Ads*, WALL STREET JOURNAL, October 24, 1990.

affiliate compensation of 20 percent for 1991, and NBC has announced a 10 percent cut.[45]

This is not to say that the Commission is obligated to ensure the financial health of the networks. By the same token, the public interest does not require that we create or maintain a regulatory subsidy for Hollywood producers.[46] But to ignore the fact that our regulations make the over-the-air broadcast industry less competitive at a time when it is facing its greatest threat is to be blind to our mandate to make available "a rapid, efficient, Nation-wide, and world-wide . . . communication service."[47]

Needless to say, as network news cutbacks demonstrate, reducing the profitability of networks has had the effect of hampering their ability to serve the public through diverse programming. The same is true of entertainment fare. For example, the networks have essentially withdrawn from programming during the morning daytime period "because the return on investment is no longer there."[48] Generally, the networks' flexibility in programming choices has been constrained by the economic outlook.[49] One consequence of this is a greater reliance by the networks on the less expensive "reality-based" programming.[50] In the roster of shows currently under development, all three networks have announced plans for "a larger dose of reality programing than usual."[51] This is not to suggest that reality-based programming is contrary to the public interest. Some may indeed be fine programs. But it is not a healthy thing for our national networks to base prime time programming decisions on their ability to get a few shows on the cheap. Such a climate hardly contributes to

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[45]Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 28.

[46]*See National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 534 (2d Cir. 1975) ("[W]hile a purpose of PTAR[ ] was to encourage independent production for access time, it was not to improve the position of the producers against the networks. Nor was there any intention to make the networks poorer. What is prohibited is that these be the goals.").

[47]47 U.S.C. § 151.

[48]*Syndication's Growing Clout*, BROADCASTING, March 25, 1991 at 92.

[49]Carter, *In TV Ratings Battle, NBC Finds Constraints*, NEW YORK TIMES, January 8, 1991.

[50]*Goodbye to the Mass Audience*, TIME, November 19, 1990 ("To avert such a disaster, the networks are looking for ways to reduce programming costs. Reality shows like NBC's *Unsolved Mysteries* and CBS's *Top Cops* are becoming more common, partly because they are cheaper to produce."); Carter, *TV's Mid-Season: Modest Ambitions*, NEW YORK TIMES, January 16, 1991 ("Cost considerations also account for the prevalence of programs appearing in prime time solely because they are cheap.").

[51]Tyrer, *Networks Boost Pilot List by 25%*, ELECTRONIC MEDIA, March 25, 1991 at 1; *Networks Unveil Pilot List for Fall Season*, ELECTRONIC MEDIA, March 25, 1991 at 108 (CBS announced four reality-based shows under development, while ABC and NBC each listed six.).

diversity. Nor does it help local affiliates that depend on a strong network schedule to maintain their ability to serve their communities.[52]

It is interesting to note that over the seemingly endless course of this proceeding, as the commenters have come to realize that some modification in the rules is inevitable, all have acknowledged that change is necessary to help the networks.[53] But they propose varying levels of network involvement, all — of course — in the name of the public interest. Perhaps it is too cynical to suggest that where the commenters draw the line on network entry depends on their line of business. But whatever may be the origin of the parties' concern, my question is this: Can any commenters demonstrate that their fears or speculations about how the networks might behave if allowed to compete fully match what already is happening to network television? Can the majority do so? The answer to this question is critical because the future of free over-the-air television is at stake.

The Public Interest Does Not Support Meddling in the Contracting Process

The Report and Order adopts a complex set of rules designed to protect suppliers of network entertainment programming and buyers in the off-network and first run syndication market. With respect to program suppliers, the majority has fashioned complicated anti-"extraction" safeguards. The intent is to prevent the networks from taking financial interests or syndication rights without compensating the producers.

Contrary to the majority's inclinations, the record simply will not support such an overbearing governmental presence in the contracting process. There is little evidence to suggest that extraction was a major problem twenty one years ago. If anything, once you get beyond the anecdotes, the evidence goes the other way.[54] The recollections of former network executives who now work for studios cannot be

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[52]The reduction of affiliate compensation also hurts local broadcasters, many of whom depend on network payments as a major source of income. This is particularly true in smaller markets. *See* Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 28.

[53]*See, e.g., INTV Comments in Response to Order Requesting Further Comment*, March 25, 1991 at 1; *Further Comments of Westinghouse Broadcasting Company, Inc.*, March 25, 1991 at 1-2; *Supplemental Further Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, March 25, 1991 at 2-3; *Program Producers and Distributors Committee Response to Order Requesting Further Comment*, March 25, 1991 at 3.

[54]The Network Inquiry Special Staff found that "like any other property right, [syndication rights or interests] were available for a fee and the networks obtained them by paying compensation to the suppliers." NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION (Vol. 2, 1980) at 729; Second Interim Report by the Office of Network Study, Part I, *reprinted in* H. REP. NO. 281, 88th Cong., 1st Sess. 65 (1963) ; Second Interim Report by the Office of Network Study, Part II, 211 (1965). *See* Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at 8-12; *Ex Parte Letter from Capital Cities/ABC, Inc. to Donna R. Searcy*, April 1, 1991; Crandall, *FCC Regulation, Monopsony, and Network Television Program Costs*, 3 BELL J. ECON. & MANAGEMENT SCIENCE, 483 (1972).

considered the best evidence, even if their prior experience is thought to be relevant today.[55] The fact that the Justice Department charged in the mid-70s that extraction took place is not probative, since those charges were never tested in court.[56] In any event, the Justice Department's position *today* is that the networks lack the market power to extract financial interests and syndication rights.[57] The extraction argument simply is not credible in today's competitive market. The networks compete aggressively for hit shows. If one demands too much from a producer, that person may go to another buyer.[58]

If this record contains evidence of extraction, it is in the studios' practices when a hit series is up for renewal. In perhaps the most publicized examples, demands were placed on NBC that it pay bonuses of $100 million and $120 million to renew *The Bill Cosby Show* and *Cheers*.[59] Studios do not always wait for renewal. When a show becomes a hit, networks are often asked to increase the license fee before the end of the option period.[60] Studios also will use the leverage they command by virtue of having a hit program to obtain network concessions involving less popular shows or to obtain future commitments. According to one studio executive quoted in VARIETY, "[t]he combined clout of Lorimar and its sister company Warner . . . lets the studios bulldoze iffy product onto the air."[61] As a network programmer told the Commission last December:

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[55]FCC *En Banc* Hearing, December 14, 1990 (Testimony Robert Daly and Barry Meyer). If anything, the emphatic statements by studio executives that they used to take rights from producers without compensating them should do little to calm the nerves of independent producers, who must turn to the studios for financing.

[56]The allegations of extraction were made in an identification of evidence in *United States v. CBS, Inc.*, Civ. No. 74-3599-RJK (C.D. Cal). However, the Commission has found that "Justice Department pre-trial pleadings . . . lack any probity since these allegations have never been established in a court." *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 85 (1985).

[57]*Justice Department Comments*, June 14, 1990 at 20-24; *Further Comments of the Department of Justice*, December 21, 1990 at 7.

[58]The record contains numerous examples of this phenomenon. *E.g.*, Testimony of Thomas Carter, Jeff Sagansky and John Agolia, FCC *En Banc* Hearing, December 14, 1990; *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 7-8.

[59]NBC reportedly settled on a per-episode price of $3 million for *Cosby*. Variety, April 4, 1990 at 50; HOLLYWOOD REPORTER, March 30, 1990 at 1, 66. The demand of $120 million to renew *Cheers* represented more than half of NBC's 1990 profits. Carmody, *The TV Column*, WASHINGTON POST, February 11, 1991 at C6.

[60]*See, e.g., Comments of CBS, Inc.*, June 14, 1990 at 22-24; Affidavit of Jeffrey Sagansky at 6-7 (describing increase demanded for series *Murphy Brown*).

[61]VARIETY, June 27, 1990 at 49.

> At some point, I think someone should take my blood pressure after I leave Mr. Daly's office, knowing that through the Warner-Lorimar connection, he controls nine of our prime time shows. Nine. That's what I call market power or leverage or intimidation or coercion.[62]

Each of the networks has provided examples of this. To renew *Murder, She Wrote,* CBS had to accept a 60 percent increase in the license fee, agreed to purchase 39 episodes of yet-to-be-developed shows from Universal Television, and agreed to buy an undeveloped series and two MOWs from a company owned by Angela Lansbury (the star of *Murder, She Wrote*).[63] CBS also claims that renewals of *Dallas, Falcon Crest* and *Knots Landing* were tied together by Lorimar. Consequently, the network was effectively blocked from cancelling *Falcon Crest* or from renewing the other two series for a single year.[64] NBC reported that to obtain a two year renewal from Disney for *The Golden Girls*, it had to guarantee a favorable time slot for the show, purchase three blind series, and renew another show, *Empty Nest*, at an higher license fee.[65] NBC agreed to buy two blind series from Paramount in exchange for the renewal of *Family Ties*, and one blind series from Warner to obtain the renewal of *Night Court.*[66]

If I ignore this evidence and accept the majority's assumption that the networks have the power to extract valuable rights for nothing, I doubt the safeguards in the Report and Order will have much effect. As the Department of Justice concluded, "[i]f networks have the power to 'take' these financial interests from producers as a price for putting their programs on the air, it is reasonable to expect that producers would 'offer' these rights to the networks when they begin negotiations with the networks."[67] Thus, if producers must initiate co-productions for in-house arrangements, they will do so. If networks may acquire backend rights only in the second stage of a negotiation, studios that fear network programming decisions will make sure that there are some rights left to give up.

As is more likely, Commission intervention will screw up the contracting process, probably to the detriment of the networks. "Regulation of the contracting process is difficult under any circumstances, but it is particularly difficult when the

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62Testimony of Robert Iger, FCC *En Banc* Hearing, December 14, 1990. *See also* Testimony of John Agolia ("I can think of six shows right now on the schedule of the three networks that were forced to be renewed despite low ratings and the audience rejection.").

63*Comments of CBS, Inc.*, June 14, 1990 at 27; Affidavit of Jeffrey Sagansky at 8.

64*Id.* (Affidavit of Jeffrey Sagansky) (*Dallas* and *Knots Landing* were each given two year renewals).

65*Reply Comments of NBC, Inc.*, August 1, 1990 at 26.

66*Id.*

67*Further Comments of the Department of Justice*, December 21, 1990 at 8-9.

subject products are highly individualistic and suppliers have differing resources and needs."[68] In the case of program acquisition, there is ample information in the record that a two-step negotiation process will effectively preclude the networks from bidding for backend rights.[69] By the time the network and the producer have reached a licensing agreement, whatever rights there are to be sold probably already have been.[70] Moreover, the Department of Justice noted that regulating the bargaining process is likely to be "extremely difficult and costly to administer."[71]

In light of these considerations, I must question why the Commission would ever get involved in assessing the relative bargaining power of Hollywood versus the networks. We simply have no statutory mandate to serve as a referee between these two powerful interests. The only conceivable jurisdictional rationale is that by intervening in the contracting process, the Commission will somehow stimulate the production of more "creative" or "diverse" programming for the viewing public. But I simply am at a loss to understand how we, as policymakers, are to assess such intangibles. One thing is clear, however. The current record does not support governmental intervention in this area.

The Creativity Debate

One of the studios' primary arguments in support of the rules' retention is the notion that network ownership must be avoided in order to foster creativity in program production. Yet I have never been entirely clear on what this means. I asked one

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[68]*Id.* at 9.

[69]*Id.* at 10. *See Comments of Capital Cities/ABC, Inc.*, November 21, 1990 at 8-16, 22; *Further Comments of CBS, Inc.*, November 21, 1990 at 13-18 (and Appendix C, Affidavit of William B. Klein); *Comments of NBC, Inc.*, November 21, 1990 at 24-28.

[70]*Further Comments of CBS, Inc.*, November 21, 1990 at 16-17 ("Thus, *over 94 percent* of CBS's outside-supplied pilots and series from 1987 to the present were licensed from producers who (1) had their own in-house syndication organizations or (2) were parties to 'pre-sale' financing deals with a major studio or other large distributor. CBS knows of only four instances (less than three percent of all outside-supplied pilots and series) during the entire 1987-1990 period in which the license fees *might* have been negotiated, and the series ordered, prior to the packager having acquired full financing through the sale of backend rights.") (citations omitted, emphasis in original).

[71]*Further Comments of the Department of Justice*, December 21, 1990 at 11. As the Department pointed out:

> The same type of detailed regulatory oversight would also be required if the Commission were to implement a regulation requiring that all negotiations over network acquisition of financial interests and/or syndication rights be initiated by the program producer. The Commission would be forced to decide, in the context of a complex negotiating process, which party "really" initiated the subject.

Id. at 10.

executive from an independent production company, who had been urging me to preserve creativity and quality in television, exactly how network involvement would have changed his company's most successful show — *The A Team.* He was stuck for an answer. Yet even if he had been able to describe the particular ways in which barring a network financial interest improved *The A Team,* I am not at all certain I would want my public interest calculus in this proceeding to turn on that answer.

Neither the parties nor the majority has been able to explain to me why program quality or diversity might be threatened by elimination of the financial interest and syndication rules. Is television that much improved, after two decades of limitations on the networks? Critic Tom Shales recently pointed out:

> In the 1973-74 season, for instance, this was the CBS Saturday night lineup: "All in the Family," "M*A*S*H," "The Mary Tyler Moore Show," "The Bob Newhart Show" and "The Carol Burnett Show." Incredible! Networks today are lucky to have that many good shows in their entire week's offerings.[72]

It is particularly revealing that most of the programs on this list were developed before the rules went into effect. Are we really better off today?

The confusion surrounding the "creativity debate" most likely stems from the fact that the parties have shifted the meaning of this issue since the rules were adopted in 1970. When it promulgated the Report and Order, the Commission was concerned about the evolution of the programming market toward licensing arrangements and away from single company sponsorship. The reviewing court described this shift away from sole sponsorship as "the single most essential fact" that demonstrated network control. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 482 (2d Cir. 1971). It pointed out that the networks "directly controlled" programming either by in-house production or by "'spot' advertising" in which the program is supported by "many sponsors" as opposed to "one or two advertisers."[73]

There is one significant problem with this reasoning: I am not at all certain that the "good old days" of single sponsorship were the high point of creative freedom for producers. During what is commonly referred to as the Golden Age of Television,

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[72]Shales, *The Mary Memory Tour*, WASHINGTON POST, February 18, 1991 at C1.

[73]442 F.2d at 482. The network consent decrees are based on the same premise. *See, e.g., United States v. NBC*, 41 Fed. Reg. 51992, 52018-19 (1976) (Competitive Impact Statement). The focus on sponsorship in the 1970 proceeding has led to some confusion in the record before us. Some parties to the current proceeding assert that the networks acquired backend rights in 97 percent of the time before the rules were adopted. *E.g., Supplemental Further Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, March 25, 1991 at 7. This figure, however, relates to programs produced in-house or supported by spot advertising. With respect to financial interests, the networks held profit participations in approximately 60 percent of their shows in the years preceding the rules. Generally the networks would own an approximate 25 percent interest in a given show. With respect to distribution rights, the networks obtained foreign or domestic distribution rights in between 25 and 30 percent of the programs on their schedules. *See generally* Arthur D. Little, Inc., TELEVISION PROGRAM PRODUCTION, PROCUREMENT, DISTRIBUTION AND SCHEDULING (1969).

"anthology writers and directors found sponsors and their agencies increasingly intent on interfering with script matters, dictating changes, vetoing plot details."[74] According to television historian Erik Barnouw, sponsors exerted "a choke-hold on anthology drama" that drove the most talented writers and directors out of the television business and into theatrical films and other endeavors.[75]

Quite often, sponsors would intervene in the creative process simply to avoid controversy, but there were other motivations as well. In one early television series, *Man Against Crime*, the writers received mimeographed instructions from the sponsor — Camel cigarettes. The writers were told, for example, that characters should smoke cigarettes gracefully, not "puff[ ] nervously" and that a cigarette should not be given to a character to "calm his nerves" since that might suggest a narcotic effect.[76] The instructions were quite extensive: "Do not have the heavy or any disreputable person smoking a cigarette. Do not associate the smoking of cigarettes with undesirable scenes or situations plot-wise."[77] The writers were also given advice on plot elements:

> It has been found that we retain audience interest best when our story is concerned with murder. Therefore, although other crimes may be introduced, somebody must be murdered, preferably early, and with the threat of more violence to come.[78]

But the writers were not permitted to introduce just any "other crime." Arson was to be avoided because it could remind the audience of fires caused by cigarettes.[79]

When it adopted the finsyn rules, the Commission apparently did not appreciate these effects of single sponsorship. Instead, it saw spot advertising as a consolidation of network control and predicted that with the new rules, "the trend toward multi-sponsored programs can be reversed." *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d at 482-83. This prediction was wrong in that spot advertising continues to be the industry norm. It also was incorrect with respect to small independent producers, who typically depend on major studios for production facilities and financing. In exchange for this support, independent producers often give up the

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[74]E. Barnouw, TUBE OF PLENTY 165 (1977).

[75]*Id.* at 165-66.

[76]*Id.* at 132.

[77]*Id.*

[78]*Id.*

[79]*Id.*

copyright to the program being produced, as well as other aspects of creative control.[80]

The bottom line is, if you are an independent producer, *somebody* is always going to acquire a degree of creative control over the production. The question is whether it is better from a public interest perspective to encourage such control by advertisers, major studios or networks. As noted above, I have my doubts about the level of creative freedom that existed under the single sponsorship regime before the rules were adopted. And currently there are some indications that the degree of creative freedom may be diminished as major studios increasingly come under foreign control.

Within a few hours of the announcement that MCA was being acquired, the president of Matsushita told the press that "Japan bashing" films should "not emerge" from Universal or anywhere else.[81] The statement caused such uneasiness in Hollywood "about having an occupying army in our cultural front yard, Variety blared a Japanese headline, translated 'Buyer Beware.'"[82] As one outside observer noted, "it will be one more step in the process where some movies don't get made."[83] Indeed, there are reports that screenwriters for an upcoming Universal film about an American baseball player in Japan are taking "unusual pains" to avoid offending Asian sensibilities.[84]

This is not to suggest that foreign ownership of major studios will decimate the creative freedom of producers. There is not sufficient information in the record to resolve this issue one way or the other. But it raises a question about whether network ownership of some backend rights is necessarily worse by comparison. Certainly no one in this proceeding has asserted that the networks might impose any kind of uniform cultural outlook.

As a matter of fact, the evidence before us tends to suggest that network involvement does not restrict the creativity of producers. Contemplating a significant

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[80]*See Reply Comments of the Writers Guild of America, West*, August 10, 1990 at 28-31; *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 14; Further Comments of CBS, Inc., November 21, 1990 (Appendix C, Affidavit of William B. Klein) ("the studio/syndicator typically acquires *all* ownership and distribution rights to a program . . . including the right to license the program to the networks"). *See also* remark of Marcy Carsey, quoted in J. Gerard, *Producers Carsey and Werner: What Have They Done For Us Lately?*, NEW YORK TIMES MAGAZINE, November 25, 1990 at 80 ("When you share your financial risk with a studio, you give away part of your creative control, too.").

[81]Cieply and Citron, *Universal's 'Diamond' in the Rough*, LOS ANGELES TIMES CALENDAR, February 5, 1991 at F1.

[82]Dutka and Easton, *Japan is Hollywood's Brave New World*, LOS ANGELES TIMES CALENDAR, December, 23, 1990 at 3.

[83]*Id.*

[84]Cieply and Citron, *Universal's 'Diamond' in the Rough*, LOS ANGELES TIMES CALENDAR, February 5, 1991 at F1.

change in the finsyn rules, producer Steven Bochco was quoted as saying, "All it's going to change is who participates in the financial pie, and you'll see the same people doing the same stuff they always have."[85] Producer Barney Rosenzweig made the point another way: "Most producers have been so abused by the studios that I can't see how having the networks count the money will be any worse. . . . [T]heir accounting methods can't be any less honest than the major studios."[86]

These points were confirmed, if a bit indirectly, during the Commission's *en banc* hearing last December. Thomas Carter, producer of the ABC series *Equal Justice*, urged the Commission to retain the finsyn rules to ensure that independent producers would not be stifled. He noted that the series was given the "green light" only because he threatened to take the project to another network. Mr. Carter concluded:

> If ABC had owned my project we would not have been able to take that position and my show might never have made it to the screen.
>
> Putting all the decision-making in the hands of monolithic committees and like-minded monopolies will kill diversity, stifle innovation, and stagnate quality. This must not be allowed to happen. You must ensure the survival of competition in programming or our TV sets will surely become windows to the "vast wasteland" that Newton Minow wrote of some twenty years ago.[87]

The ironic counterpoint to this impassioned statement is that ABC *does* own the copyright to *Equal Justice*, having acquired ownership from Orion Pictures.[88] Apparently the heavy hand of network domination is not so ominous if the producer is unaware of its grasp. As Mr. Carter noted in response to a question, "anything that was entered into with those companies, which I am not aware of, had no effect on the position that I have as a producer."[89]

Realistically, the networks must maximize the creative freedom of the producers of its product. They have a powerful financial incentive to obtain the best programming possible since each prime time rating point equates to $100 million in advertising

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[85]Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 20.

[86]Kissinger, *FCC Fuels Indie Fears as Finsyn Nears Finale*,VARIETY, March 4, 1991.

[87]Statement of Thomas Carter, FCC *En Banc* Hearing, December 14, 1990.

[88]*Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 13. Apparently, the original holder of the copyright to *Equal Justice* was Orion Pictures, the studio that provided financing for the series. When the studio experienced financial difficulties with the show, it sold the ownership rights to ABC, making it an "in-house" production.

[89]Statement of Thomas Carter, FCC *En Banc* Hearing, December 14, 1990.

revenue over the course of a season.[90] The three networks bid aggressively against one another, as well as against the studios, to obtain the services of top-line producers with proven track records. To obtain an edge, the networks often must make series commitments without ever having seen a pilot or a script.[91] As competition for viewers has increased, the networks have offered increasing amounts of creative freedom, often to attract successful producers in other media, such as theatrical film.[92]

Regardless of the position one takes in this debate over creativity, it does not seem as though the majority plan will maximize the number of options for independent producers. By allowing the networks to acquire active syndication capability only for in-house programming, the Report and Order creates an economic incentive for the networks to choose that alternative. This is not to suggest that networks will coerce producers into making in-house deals or that such deals are "bad" for producers. It is simply that the new rules will distort the market and encourage the networks to channel investments in backend rights toward in-house arrangements (up to the permitted limit). Yet this is precisely what independent producers said they wanted to avoid.[93] They do not want to become network employees. But by requiring that the network own 100 percent of the copyright for "solely produced" programs, producers will be reduced to just that — work for hire employees.

It is true that the in-house definition has been expanded to include co-productions (when initiated by the producer, subject to a 30-day cooling off period). To an extent this may resolve producers' concerns about becoming network employees. But this leaves me with another question: Why is the Commission limiting this alternative to less than half the prime time entertainment schedule? To the extent the safeguards can prevent even the theoretical possibility of extraction of rights, why should the Commission intervene in the types of contractual arrangements that networks and producers may enter? If, as I suspect, the two-step negotiation process will impede the networks' ability to invest in programming in the remaining 60 percent of the schedule, then the rules will simply keep most of prime time as a preserve for the major studios. The regulatory structure is itself creative, but I do not think it will do much for the programming.

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[90]*Comments of CBS, Inc.*, June 14, 1990 (Appendix A, Affidavit of Jeffrey F. Sagansky).

[91]*Id.*

[92]*Id.* at 19-22; *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 8 n.16; Testimony of Brandon Stoddard and Jeffrey Sagansky, FCC *En Banc* Hearing, December 14, 1990.

[93]*See* Testimony of Steven J. Cannell, FCC *En Banc* Hearing, December 14, 1990 ("I think that the fact that we have, right now, spirited disagreements about programming [is] based on the fact that they do not own my contract, that I do not work for them, I do not have to park in the garage where they say. . . . And I am really concerned about the idea of too many people working in the network production company."). *See also Further Reply Comments of Capital Cities/ABC*, December 21, 1990 at 11 n.24; Testimony of Thomas Carter, FCC *En Banc* Hearing, December 14, 1990.

Diversity of Programming Sources

Another indicator of programming diversity — one that is not so elusive as the concept of creativity — is the number of producers who provide programs to the networks. Proponents of the finsyn rules claim that the rules have served their purpose because the number of producers has increased since 1970. The Coalition to Preserve the Financial Interest and Syndication Rule asserted that independent sources of programming multiplied after the rules were adopted, and that there were more than 100 suppliers of prime time programming for the 1987-88 broadcast season.[94]

The networks, however, tell a far different story. They provided evidence that the number of prime time program suppliers dropped by 40 percent, from 55 entities in the 1969-70 season to 33 in the 1988-89 season. Eight firms (primarily MPAA studios) supplied 65 percent of prime time entertainment series in 1988-89, compared to 49 percent in 1969-70.[95] By the fall of 1990, the major studios' share of prime time programming had reached 72 percent.[96] Quite naturally, the studios dispute these figures, and argue that the number of independent producers "actually selling" programs to the networks increased by 200 percent since 1970, from 61 to 123. However, a review of copyright records revealed that generally the major studio — and not the affiliated "independent" producer — had ownership of the program as well as contractual responsibility for dealing with the networks.[97] By this measure, the major studios control the overriding majority of prime time programming.[98]

Given the trend toward increasing concentration of network program suppliers, it is clear that the finsyn rules did not increase diversity. Consequently, there is no

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[94]*Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, June 14, 1990 (Appendix M).

[95]*Joint Network Comments*, June 14, 1990 (Crandall Volume, Appendix E).

[96]*Reply Comments of NBC, Inc.*, August 1, 1990 at 21; *Comments of CBS, Inc.*, June 14, 1990 at 29; *Joint Network Comments*, June 14, 1990 at 128.

[97]*Network Reply Comments*, August 1, 1990 (Joint Economic Appendix, Appendix C); *Reply Comments of NBC, Inc.*, August 1, 1990 at 21-23. The Coalition apparently was counting any person that had a production credit on a network program. Actual ownership and control appears to be a more realistic measure.

[98]Independent producers do not seem to have flourished under the rules. NBC submitted that it received prime time programming from 3 independent producers in 1990, down from 9 in 1979; CBS noted that it purchased programming from 22 independent producers in 1970, but only 9 in the 1981-82 season. Of the 22 independent suppliers in 1970, CBS reported that six merged with or were acquired by a major studio and 14 became "inactive." At most, only two of the 22 independent producers are still both independent and active. Of the 9 independent producers providing programming to CBS in 1981-82, four were acquired by major studios and one was acquired by a foreign interest. *Comments of CBS, Inc.*, June 14, 1990 at 29-30.

justification for the Commission to preserve a regulatory subsidy for Hollywood on the theory that the rules will do so.

<u>The Commission Should Not Limit Network Syndication Activities</u>

The second major category of safeguards adopted by the majority relates to the syndication market. If networks are free to distribute directly off-network and first run syndicated programs, according to the majority, they will favor their affiliates and otherwise dominate the market for programming. In order to curb potential abuse, the <u>Report and Order</u> prohibits networks from distributing (1) in-house productions aired on another network; (2) programming licensed from outside producers; and (3) first run programming. In addition, the <u>Report and Order</u> prohibits affiliate favoritism and establishes a rebuttable presumption that such favoritism has occurred if a network sells a program to its affiliates in more than 30 percent of the markets in which the show is cleared. The new rules further impose elaborate semi-annual reporting requirements on the networks' program acquisition and syndication activities.

I have long been concerned with issues involving the syndication market, particularly as they relate to independent television stations. For that reason, I advocated safeguards to protect against the theoretical possibility of affiliate favoritism by the networks. I use the term "theoretical" advisedly, since the Commission lacked evidence of affiliate favoritism even in 1970, when "off-network programs constitute[d] a principal staple of the nonnetwork program market."[99] But certain parties argued strongly and sincerely that they feared network favoritism, and I thought it best to adopt protective regulations during the transition to a post-rule environment. The <u>Report and Order</u>, however, goes far beyond any legitimate concern about favoritism. By imposing reporting conditions *and* anti-favoritism rules *and* passive syndication requirements, the majority creates layers of redundant and burdensome regulations that most likely will prevent networks from getting into the business.

I can think of no public policy justification for anti-favoritism requirements *and* a rule that domestic syndication (of most non-in-house programming) be handled by a separate entity. To the extent distribution actually is insulated from the network, what is the point of prohibiting favoritism? And why would the Commission presume anticompetitive activities if 30 percent or more of the network's affiliates end up buying a program in which the network owns an interest if the network lacks distribution power? It simply makes no sense and will involve the Commission in endless amounts of record-keeping and dispute resolution.

Finally, other than a possible desire to keep networks out of syndication altogether, I can discern no rational pattern to the majority's cut on which programs

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[99] *1970 Report & Order*, 23 F.C.C. 2d at 389. As the Commission noted in the *1970 Reconsideration Order*, "this rule will remove the *possibility* of the networks taking advantage in syndication distribution of their existing relationships with their affiliates. As stated earlier, *there is no evidence that the latter has been the case.* But the rule will eliminate the *potential* for competitive restraint in these areas." 25 F.C.C.2d at 331 (emphasis added). Of course, there has been no opportunity to test the favoritism hypothesis in the 21 years since the rules were adopted.

can be syndicated directly and which cannot. Under the Report and Order, a network may syndicate directly (1) in-house programming presented on the network in prime time (subject to the 40 percent limit); (2) all non-entertainment programming; and (3) all non-prime time programming. Everything else must be syndicated through a third party. I should point out that the passivity requirement is no small penalty — it deprives the network of a substantial percentage of the syndication revenues.[100] Also, to the extent the restrictions prohibit a network from building up inventory, it could prevent the formation of the "critical mass" needed to create a syndication business. Additionally, the definition of "in-house" programming for purposes of engaging in first run syndication is far more restrictive than the definition of in-house network programming.[101]

While the Report and Order purports to promote competition in syndication, it serves only to limit the number of competitors in an increasingly concentrated market. It should be kept in mind that television program syndicators primarily are vertically-integrated companies that are involved in various aspects of the communications business. Of the top ten first run syndication companies, five are MPAA studios and three others include the Tribune Company, Multimedia and King World.[102] These entities do not need government protection. Moreover, the market share of these firms has been increasing. For example, the MPAA-syndicators' share of the off-network syndication market has grown from 31.5 percent in 1971 to 58.5 percent in 1989.[103] Despite this expansion of concentration, the majority would prevent active syndication for most of its programs any entity that has 15 hours of prime time programming that is distributed to 75 percent of U.S. television households. Yet, syndicators such as Paramount distribute 20 hours per week and Disney's Buena Vista company distributes 17.5 hours per week.[104] Moreover, their method of distribution is functionally equivalent of that used by entities the majority would define as "networks."[105] Given these facts, I do not understand how singling out the networks for unfavorable treatment serves to make the market less concentrated.[106]

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[100]"As a general rule, a domestic syndicator keeps about 30-35% of the gross U.S. syndication revenues, plus all distribution expenses, from the product it controls." *Further Comments of CBS, Inc.*, November 21, 1990 (Appendix C, Affidavit of William B. Klein).

[101]The majority would permit network first run involvement only for programs that are "solely produced" by a network. Foreign and domestic co-productions would not be permitted.

[102]*Comments of NBC, Inc.*, November 21, 1990 at 44; Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at Appendix A.

[103]*Comments of NBC, Inc.*, November 21, 1990 at 42.

[104]*See Comments of Fox Broadcasting Co.*, March 25, 1991 at 11-12.

[105]*Further Comments of Pappas Telecasting Companies*, November 21, 1990 at 9-10 ("[V]irtually all programming is distributed to stations via satellite. The national networks provide direct, continuous, and simultaneous satellite delivery 'feeds' to their owned and affiliated stations of programming to be exhibited that day by the time specified by the networks. Syndicated programming is distributed via

Indeed, the behavior of current syndicators suggests to me that the market would benefit from having a larger number of competitors. For example, Paramount Domestic Television, which distributes the *Arsenio Hall Show*, imposes a substantial liquidated damages penalty for any station that fails to broadcast the program at the time specified in the contract. Buena Vista Television has contract provisions that prohibit a broadcast station from exhibiting non-Disney animated children's programs adjacent to Disney-produced shows, and which prevent head to head competition between Disney shows on different TV stations in the same market.[107] Any of these provisions would be illegal if a network attempted to impose them on its affiliates.[108]

Finally, when taken as a whole, the limitations of the Report and Order do not limit syndication activities in any consistent way. If a network developed another *Oprah Winfrey Show*, for example, there would be absolutely no limit on a network's ability to run the program as part of its daytime schedule and then syndicate it. On the other hand, if the network developed the show at its owned and operated stations and wanted to introduce it in first run syndication, the rules bar direct syndication. By the same token, an in-house program that is aired on a network may be syndicated directly, while an in-house program aired on a competitive network may not be.[109] What possible rationale can support these distinctions, other than protecting established syndicators from competition?

The Commission Should Not Limit In-House Production

As previously noted, the record in this proceeding does not support retention of the current rules, much less impose significant new regulations. Yet the Report and Order limits in-house productions to 40 percent of a network's prime time

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satellite on a so-called 'day-and-date' basis, *i.e.*, the simultaneous distribution of the same program episode to all broadcast stations that have acquired rights to exhibit the program, for exhibition during a specified day and day-part that is acceptable to the syndicator.").

[106]Nor does the fact that networks generally own stations in major markets necessarily set them apart. Tribune Broadcasting Company, for example, owns television stations in New York, Chicago, Los Angeles, Denver, New Orleans and Atlanta and has an active syndication arm. Group W, which also syndicates programming, owns stations in Boston, Philadelphia, San Francisco, Pittsburgh and Baltimore. TELEVISION & CABLE FACTBOOK (Stations Volume, 1990) at A-1378, 1384.

[107]*Id.* at 4-5.

[108]*See* 47 C.F.R. § 73.658 (1990).

[109]For example, Fox produces *LA Law* for NBC. If Fox were to become a network or the three established networks began producing programs for one another, the new rules would prevent programs in this category to be syndicated directly by their network producers. As Fox noted in its comments, "[t]here is absolutely no economic or policy basis for a prohibition on [producing for other networks] which, in effect, *reduces* the number of studios producing programs for the networks." *Comments of Fox Broadcasting Co.*, March 25, 1991 at 10 n.13 (emphasis in original).

entertainment schedule.[110] But other than the studios' understandable desire to limit competition, absolutely nothing in the comments filed suggests any danger to the public interest by allowing the networks to make their own programs.[111] As the Justice Department pointed out, the in-house limitation "is not directed to any potential abuse by the networks."[112]

In fact, this has been one of the few areas where the networks already have had some latitude. The Commission's rules never limited in-house production. And the now-expired consent decree limits were not predicated on any continuing concern regarding network behavior in this area.[113] As the Department of Justice emphasized in this proceeding, the consent decree limits "were intended to be temporary limitations on the activities of the networks, and there has been no showing in this proceeding that these limits should be extended by Commission regulation."[114]

The networks' ability to engage in limited amounts of in-house production under the former consent decree limits proved neither to affect the choices of programs run in prime time or the renewal of series to enhance future syndication value. Before the in-house limits expired in 1990, none of the three networks produced the four hours per week permitted by the decrees. Indeed, network programming executives routinely reject in-house series proposals because of the need to develop a strong schedule. As NBC's President and CEO said in a 1988 speech before the Hollywood Radio and Television Society, "We went outside for every new series we needed, because in the judgment of Brandon [Tartikoff] and his people, the shows we licensed had more potential than the shows we produced. . . . Putting on weaker programs simply because we happen to produce them would be the way to bankruptcy."[115] With respect to renewal of in-house programming, NBC's President pointed out that since the 1950s, when NBC Productions was created, "only three prime time series that it

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[110]It is unclear how this production cap will operate in practice. Each network's prime time schedule is composed of a mix of entertainment, sports and news programming. The amount of in house production permissible under the rules presumably will shift as a network alters the make-up of its schedule, which could occur weekly. Moreover, it is uncertain how the Commission will classify certain reality-based programs, such as *Top Cops* or *America's Most Wanted*, that may be considered either news or entertainment.

[111]*See Further Reply Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, December 21, 1990 at 8. As these comments make clear, an in-house limit is not based on any actual abuse by the networks, but on "the *threat* of unlimited in-house production." *Id.* (emphasis in original).

[112]*Further Comments of the United States Department of Justice*, (filed March 25, 1991) at 3.

[113]Under the consent decrees, the networks were permitted to produce unlimited amounts of in-house programming after November 1990.

[114]*Further Comments of the United States Department of Justice*, December 21, 1990 at 12.

[115]*Wright Goes Back to the Programing Drawing Board*, BROADCASTING, April 18, 1988. *See Comments of NBC, Inc.*, November 21, 1990 at 35.

has produced have reached syndication: *Bonanza, Little House on the Prairie* and *Punky Brewster*, two of which had horses in them."[116]

I can imagine no public interest justification for imposing limits on network production of in-house programming. Neither can the Justice Department, as it made clear on the record:

> Regulations imposing limitations on how much any firm can produce internally are extreme, and, unless fully justified by competitive considerations, are inherently anticompetitive. They should not be imposed without strong theoretical and evidentiary support for the conclusion that anticompetitive effects are quite likely in their absence. As our previous comments have shown, that support is wholly lacking. The changes in the television marketplace since the FISR were imposed, notably the explosive growth of cable television and the emergence of a fourth broadcast network, point strongly in the direction of removing existing regulations, not imposing new ones.

Further Comments of the United States Department of Justice, December 21, 1990 at 12.

The New Network Definition Will Not Encourage Competition

By retaining an hours-based network definition, the majority undermines the Commission's longstanding goal of encouraging network competition. To be sure, the Commission chose such a standard when it adopted the finsyn rules in 1970. But as noted in the reconsideration order:

> Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of the Commission. Hence we have redefined the term "network". . . to apply only to major national television networks. This will remove any doubt that our actions are intended to encourage the competitive development of additional networks as well as other alternate program sources.[117]

At that time, the reasons for imposing a 15-hour standard "were not discussed" in the rulemaking "and are unclear as a result."[118] What was clear, however, was that the rules were "written only with the goal of changing the behavior of those already identified as engaged in the practice to be corrected." In other words, because of the

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[116] BROADCASTING, April 18, 1988.

[117] *1970 Reconsideration Order*, 25 F.C.C.2d at 333.

[118] *Christian Broadcasting Network, Inc.*, 87 F.C.C.2d 1076, 1077 (1983).

"desire to encourage the development of additional networks," the "scope of the . . . rules [was] limited to the existing national networks."[119]

I think it is fair to say that then, as now, the 15-hour standard was plucked out of the air. There is no reasoning that ties the number of hours programmed to the types of network practices that led to the adoption of the rules. In 1970 such arbitrary decisionmaking could be excused. The emergence of additional national networks was not viewed as imminent. But the Commission's experience in the intervening years has demonstrated that the hours-based definition "may well function, in practice, to curtail the very activities the rule was intended to encourage."[120] Consequently, the Commission has been forced to waive the definition when it threatened to snuff out fledgling networks.[121] By now, we should know better.

Nevertheless, the majority sets a standard of 15 prime time hours for the network definition, a rule that will serve as a *de facto* limit on those entities striving to develop new competition. Fox has indicated that sound business judgment will force it to "dive under" whatever hours-based limit the Commission sets, and I cannot blame it. Thus, an hours based definition not only ill-serves the public interest, it is easily evaded. As one observer pointed out, the Commission's new network definition "means the Fox network . . . could air 14 hours and 59 minutes a week of prime time programming, plus unlimited amounts of daytime and Saturday-morning fare, and still remain merrily regulation free."[122] There are other ways to avoid the definition, as well. For example, an emerging entity could transmit 14-plus hours of "network" prime time programming and distribute the balance of its programs as first run syndication. I am certain that the creative minds at the networks and studios can fashion many ways around an hours-based definition.

To the extent the Commission intends to impose some residual or transitional finsyn rules, it is incumbent upon us to develop a new network definition. This was true under either the majority or minority approaches. I had hoped that we could devise some definition that measured market power or at least market presence. Unfortunately, there was insufficient interest in creating such a measure. I only hope that it does not take the loss of a fledgling network to teach the Commission a lesson.

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[119]Network Inquiry Special Staff, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION (Vol. 1, 1980) at 458, 462. As I make clear elsewhere, I believe the time has come to phase out the finsyn rules, so the reasons for the original definition are, for my purposes, academic.

[120]*Christian Broadcasting Network, Inc.*, 87 F.C.C.2d at 1078.

[121]*Fox Broadcasting Company*, 5 FCC Rcd. 3211 (1990); *Home Shopping Network, Inc.*, 4 FCC Rcd. 2422 (1989); *Christian Broadcasting Network, Inc.*, 87 F.C.C.2d at 1078.

[122]Shales, *The FCC and the Threat to Free TV*, WASHINGTON POST, April 8, 1991 at C2.

The New Rules Violate the First Amendment

When the majority acts to foster greater business opportunities for Hollywood producers at the expense of the networks, it runs headlong into the bedrock principle that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The Report and Order assumes that the speech of studios or of independent producers is more worthy of protection than that of the networks even though "speech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16 (1986). *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). But the First Amendment cannot be reconciled with the majority's premise that the government may set aside a portion of the facilities of a corporate speaker in order to propagate a range of views deemed to be socially desirable. *See, e.g., Pacific Gas & Electric Co.*, 475 U.S. at 20; *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 544 (1980).

Perhaps we should be reminded periodically that the President appointed us to be FCC Commissioners, not philosopher kings. The Commission has no overriding mandate to improve American culture through enforced "diversity" of media voices, nor would the Constitution permit such a mission. Contrary to the assertions of pro-Hollywood commenters in this proceeding, the First Amendment does not empower the government affirmatively to compel diverse speech. The source of this confusion appears to be some language in *Associated Press v. United States*, in which the Supreme Court stated:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[123]

Although this little bit of dictum has become quite well known through repetition, it stands only for the unremarkable proposition that the First Amendment does not immunize the press from Sherman Act prosecutions. It does not support the majority's apparent assumption, that the First Amendment empowers bureaucrats to pick winners and losers in the marketplace to serve some hazy notions of diversity. Indeed, the Court has made clear that the government lacks such a mandate.

For example, in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the government brought Sherman Act charges against major Hollywood studios,

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[123] 326 U.S. 1, 20 (1945).

including Paramount, Warner Brothers Pictures, Twentieth Century-Fox Film Corp., Columbia Pictures Corp., Universal Corp. and United Artists Corp. The government charged that the studios had conspired to restrain trade in the interstate exhibition of motion pictures by price fixing, pooling agreements, formula deals, block booking and discrimination against small independent exhibitors. The government further suggested that the studios' practices gave it a First Amendment claim, independent of the antitrust allegations. But the Court rejected such a reading of the First Amendment. Like the majority's focus on the prime time entertainment market in this proceeding, the *Paramount Pictures* Court noted that the government's case pinpointed the narrow category of first run theatres, "the cream of the exhibition business." It found that the case "has important aspects under the Sherman Act," but "it bears only remotely, if at all, on any question of freedom of the press." 334 U.S. at 167. That is, the government had no First Amendment mandate to promote diversity, but had to content itself with enforcing the antitrust laws.[124]

If there is anything that is clear from this proceeding, it is that it does not involve any antitrust issues.[125] There has been no Sherman Act claim. This record contains no evidence that the networks have perpetrated an antitrust violation and the majority makes no such finding. Even if it did, the Commission is not empowered to enforce the antitrust laws. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *NBC v. United States*, 319 U.S. 190, 223-24 (1943). Finally, to whatever extent antitrust remedies and their constitutionality are relevant, the networks have already paid their debt to society. The in-house limits at issue have expired; the agency responsible for enforcement has informed this Commission that the restrictions "were intended to be temporary limitations on the activities of the networks, and there has been no showing in this proceeding that these limits should be extended by Commission regulation." *Further Comments of the United States Department of Justice*, December 21, 1990 at 12.

Thus, there is no "antitrust/diversity" justification for the restrictions in the Report and Order. And traditional justifications for broadcast regulation are equally unavailing.

To be sure, broadcasters historically have received more limited First Amendment protection than traditional speakers. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But this fact does not give the Commission carte blanche to intervene in the marketplace in an open-ended and speculative quest to

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[124]The Supreme Court also has made clear that the Commission has no affirmative First Amendment power to dictate licensees' entertainment programming in order to protect the diversity of program formats. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981). Referring to *Red Lion*, the Court noted that "we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs." *Id.*.

[125]Consequently, prior cases involving the network consent decrees cannot be read as approving an in-house production limitation imposed as part of a rulemaking. The district court in *United States v. NBC* merely upheld the textbook-law proposition that "the First Amendment does not shield NBC nor any other television network from the proscriptions of the Sherman Act." 449 F. Supp. 1127, 1140 (C.D. Cal. 1978). There is no Sherman Act claim here.

enhance diversity.[126] Although the Supreme Court has observed that "[e]ach method [of communication] tends to present its own peculiar problems.," it has stressed that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952).

A broadcaster's public trustee obligations notwithstanding, freedom of expression is the rule for Commission licensees since "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic National Committee,* 412 U.S. 94, 122 (1973); *Syracuse Peace Council v. FCC,* 867 F.2d 654, 659 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 717 (1990). Broadcasters, after all, "are engaged in a vital and independent form of communicative activity." *FCC v. League of Women Voters of California,* 468 U.S. 364, 378 (1984). "As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *Id.* Although the scarcity rationale for broadcast regulation has resulted in "some adjustment in First Amendment analysis," *id.* at 377, decisions of the Supreme Court and of lower courts consistently make clear that any limitations on broadcasters' rights "ha[ve] been construed narrowly." *Community Service Broadcasting of Mid-America, Inc. v. FCC,*

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126 The Supreme Court's decision in *Metro Broadcasting v. FCC,* 110 S. Ct. 2997 (1990) is not to the contrary. In that case, the Court upheld the Commission's minority preference policies in which the racial identity of an applicant is one of a number of non-decisive factors to be considered in awarding broadcast licenses. *Id.* at 3026 & n.50. It also upheld the Commission's distress sale policies, which have been applied to "a tiny fraction — less than four-tenths of one percent — of all broadcast sales since 1979." *Id.* at 3027. Even with such an extremely limited (and expressly structural) intrusion, a sharply divided Court upheld the Commission only because the "policies bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity." *Id.* at 3027-28. But the Court's majority emphasized that preferential policies are limited in extent and duration "subject to reassessment and reevaluation by the Congress prior to any extension or reenactment" based on annual reports from the Commission, and that "there will be no need for further minority preferences once sufficient diversity has been achieved." *Id.* at 3024-25. Where the Court acknowledged that "the growth of traditional broadcast facilities" and "the development of new electronic information technologies" had rendered certain other diversity-enhancing policies unnecessary, the Commission had made no such finding with respect to minority ownership. *Id.* at 3022 n.41.

The limited holding of *Metro Broadcasting* is strikingly inapplicable to the finsyn rules, which will directly limit the programming choices of whole segments of the broadcasting industry. Moreover, unlike the minority preference policies, the new finsyn rules are not a product of longstanding congressional policy and are not subject to annual review. Nor can there be a finding that the changes in the broadcast and video marketplace have not undermined the rules' rationale. With respect to regulations, like finsyn, that affect programming, the Court in *Metro Broadcasting* made clear that any FCC policy that "denied a broadcaster the ability to 'carry a particular program or to publish its own views,'" would raise "'serious First Amendment issues.'" *Id.* at 3019 n.36 quoting *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 396 (969). The Court also stressed that it "would not 'hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity' to equal protection principles." *Metro Broadcasting, Inc.,* 110 S. Ct. at 3011 quoting *CBS, Inc. v. Democratic National Committee,* 412 U.S. 94, 103 (1973).

593 F.2d 1102, 1111 n.21 (D.C. Cir. 1978) (*en banc*).[127] Consequently, any restrictions on the selection of programs by the networks must be "narrowly tailored to further a substantial governmental interest." *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988); *FCC v. League of Women Voters of California*, 468 U.S. at 380. Under this standard, "the Government [has] the burden of justifying any practice which restricts free decisionmaking" affecting "the content *or selection* of programs to be broadcast." *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110 (emphasis added).[128]

Under the narrow constitutional leeway accorded the government in matters affecting broadcasting, courts never determined that the finsyn rules are consistent with the First Amendment.[129] Even if the finsyn rules had received constitutional scrutiny when they were adopted, it must be remembered that such review would have been relevant to the media environment of 1970. But the constitutionality of broadcast regulation is not an immutable fact; it is based on "'the present state of commercially acceptable technology' as of 1969." *News America Publishing, Inc.*, 844

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[127]*Compare, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (broadcasters may be required to provide balanced presentations of controversial issues), with *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (broadcasters may not be compelled to provide a generalized right of access to discuss controversial issues); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (First Amendment permits a "limited right of 'reasonable' access that pertains only to legally qualified federal candidates [that] may be invoked by them only for the purpose of advancing their candidacies") with *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987) (candidates do not have a right of access to televised debates); *FCC v. National Citizens' Committee for Broadcasting*, 436 U.S. 775 (1978) (First Amendment allows newspaper-broadcast cross-ownership restriction) with *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (discriminatory application of newspaper-broadcast cross-ownership restriction is unconstitutional). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) ("It is appropriate, in conclusion, to emphasize the narrowness of our holding."); *Bolger v. Youngs Drug Products, Corp.*, 463 U.S. 60, 74 (1983).

[128]The government's burden is particularly daunting where, as here, the restrictions on network speech are content-based. See *FCC v. League of Women Voters of California*, 468 U.S. at 383-84 (ban on editorials by noncommercial licensees invalidated); *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1111-12 (statute requiring that programs related to issues of public importance be recorded "on its face is *not* content neutral."). Content-based restrictions "must be strictly scrutinized," 593 F.2d at 1110 n.17, and a rule "that denies one group of persons the right to address a selected audience . . . is plainly such a regulation." *FCC v. League of Women Voters of California*, 468 U.S. at 384 quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 546 (Stevens, J., concurring). The majority's rules impose a direct limit on the networks' ability to produce prime time entertainment programming. As the Commission acknowledged when it adopted the finsyn rules, "control [of] the production" of syndicated programming equates to control of "the form and content." 1970 Report and Order, 23 F.C.C.2d at 389.

[129]The financial interest and syndication rules have never before been subjected to First Amendment scrutiny. Previous decisions focused only on the constitutionality of the Prime Time Access Rule, which has a far less extensive effect on network speech. *See Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). Yet even if the finsyn rules had been upheld pursuant to the First Amendment, it would be of little help to the majority's plan. The new rules impose restrictions on in-house production and create economic penalties for taking financial interests that had never been contemplated under the former regulations.

F.2d at 811, quoting *Red Lion*, 395 U.S. at 389-90. *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987). The Supreme Court has reminded us that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 102. Thus, the constitutionality of any reaffirmation of the finsyn rules depends on whether the underlying premise of the scarcity rationale is still valid,[130] and whether the networks dominate the television programming market to the extent that there is a governmental interest sufficient to overcome their First Amendment rights.[131]

If the current record makes one thing clear, it is that the constitutional balance has shifted over the past two decades. In 1971, the United States Court of Appeals for the Second Circuit described the Prime Time Access Rule as "a very real restraint" on licensees' choice of programming, but concluded that the restriction could be justified by the goal of enhancing diversity.[132] The court struck this balance, however, on the assumption that "only three organizations control access to the crucial prime time evening television schedule" and that the networks "determine in large measure what the American people may see and hear." *Mt. Mansfield Television, Inc.*, 442 F.2d at 474, 477. The court specifically premised its holding on the assumption that there were no realistic alternatives to network programming. It noted, for example, that "[i]ndependent stations are not adequate by themselves, in light of the fact that only fourteen of these [top 50] markets have one or more independent VHF stations." *Id.* at 483. The court also focused on contemporary business practices, such as "the increase in 'spot' advertising by many sponsors and

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[130] Fortunately, we do not need to resolve this issue in this proceeding. It is important to note, however, that the Commission has concluded that "there is no longer a scarcity in the number of broadcast outlets." *Syracuse Peace Council*, 2 FCC Rcd. 5043, ¶ 75 (1987), *aff'd on narrower grounds sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). *See also* Statement of then-General Counsel Diane Killory, Open Meeting, August 4, 1987 ("We agree that it is time to revisit and revise [the First Amendment standard for broadcasting]; and [we] urge[] the Supreme Court to do so."). Moreover, both the courts and commentators have questioned the continuing validity of the scarcity rationale for the constitutionality of regulating broadcast content. *E.g.*, *FCC v. League of Women Voters of California*, 468 U.S. at 376-77 n.11; *News America Publishing, Inc.*, 844 F.2d at 811 ("The Supreme Court . . . has recognized that technology may render the [scarcity] doctrine obsolete — indeed, may have already done so."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1984). *See* L. Tribe, AMERICAN CONSTITUTIONAL LAW 1005-06 (2d ed. 1988) ("reconsideration [of the scarcity argument for broadcast regulation] seems long overdue").

[131] Irrespective of these two issues, there also is the question of whether the means chosen by the majority demonstrably advances the First Amendment goal of diverse programming. The Supreme Court has made clear that the Commission's experience with a given rule will determine its ongoing constitutionality. *Red Lion*, 395 U.S. at 393; *FCC v. League of Women Voters of California*, 468 U.S. at 378-78 n.12. As noted earlier, the Commission's experience with the finsyn rules does not show that this regulatory intrusion has contributed significantly to diversity.

[132] *Mt. Mansfield Television, Inc.* , 442 F.2d at 477-78. As noted previously, the court did not address the First Amendment status of the finsyn rules. But the decision reveals the constitutional assumptions that would have been part of any such analysis.

the concomitant decrease in programs sponsored entirely by one or two advertisers." *Id.* at 482. It saw this trend as consolidating "network control of the creative process" and noted that the Commission predicted — incorrectly, as we now know — that "the trend toward multi-sponsored programs can be reversed." *Id.* at 482-83. Of course, cable television networks, VCRs and other new technologies are not mentioned in the decision because they did not exist in 1971.

In short, all of the key assumptions about the programming market that were central to the 1970 Report and Order, and that are essential to sustaining its constitutionality, have changed completely. If the Commission in 1991 set out to adopt finsyn rules for the first time, I find it inconceivable that anyone would consider doing so. Yet the Commission is constitutionally obligated to justify retaining any portion of the finsyn rules, and, in doing so, account for changing technology.[133] This, the majority has not done. Indeed, it cannot do so given the record in this proceeding and the reality of the current television marketplace.

But the majority has gone beyond merely keeping some significant finsyn limits. The new rules impose intrusive new burdens on the networks. The 40 percent in-house production limit directly restricts the networks' ability to engage in speech over their own facilities. Moreover, because it is content based, the rule creates a perverse incentive for networks to run more entertainment programming in prime time and less news and public affairs programming. With respect to the prime time schedule, the majority plan gives networks the greatest ability to profit from programming produced in-house.[134] But by capping this category at 40 percent of the prime time *entertainment* series, it creates a powerful inducement for networks to expand the size of the universe. Unfortunately, for each hour of the prime time schedule that is devoted to non-entertainment programming, the networks' ability to engage in direct syndication of entertainment shows is reduced by 24 minutes. To the extent the networks already are basing some programming decisions on the cost of prime time programming, I am afraid that the Report and Order will simply encourage networks to avoid news and public affairs programming. There simply is no justification for the Commission to structure the programming market in ways that affect the content of network schedules.

Nor is there support for imposing significant penalties on the networks' ability to get involved in significant areas of programming. To the extent a network wants to engage in the first run syndication market or in program production for another network (both of which would increase the number of program suppliers) it may do so only if it

[133]Some have suggested that the present rules enjoy a presumption of validity. With respect to their First Amendment impact, however, such a presumption is invalid. *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110.

[134]In-house programs need not be distributed through a third-party syndicator, thus giving the networks a greater profit margin.

forfeits a third or more of its potential syndication revenues.[135] Penalizing broadcasters for engaging in speech is inconsistent with the First Amendment. A rule that imposes "some financial burden" on licensees clearly is a "First Amendment restraint." *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1114 & n.26. In this case, it is no answer to argue that networks may gain access, if for a price, to markets that previously were denied to them. The government bears the burden of justifying any restraints on speech, and "the First Amendment does not permit us to tolerate even minimal burdens on protected rights where no legitimate government interest is truly being served." *Id.* at 1122.

Taken as a whole, the majority plan simply lacks the prècision necessary to pass constitutional muster. The First Amendment will tolerate neither over- nor underinclusive regulations. *FCC v. League of Women Voters of California*, 468 U.S. at 392. Yet the Report and Order safeguards are excessively broad. In particular, the requirement that networks be limited to passive syndication rights is unnecessary where there are anti-favoritism rules. Overinclusiveness also infects the network definition. The Report and Order applies restrictive finsyn rules to any entity that meets its arbitrary trip-wire, regardless of the absence of market power or past abuses. The syndication rules are underinclusive to the extent non-network group owners and syndicators may exert market power and coerce licensees' programming choices. Some of the provisions of the Report and Order are both over- and underinclusive. For example, the 40 percent cap on in-house production is overinclusive because there is no evidence of network abuse in this area. However, to the extent the majority's theories regarding network market power are credible, allowing the networks to produce 40 percent of the prime time entertainment market is underinclusive. In this regard, it is not sufficient to say that the rules address one problem at a time. "[C]ourts reject the facile one-bite-at-a-time explanation for rules affecting important First Amendment values." *News America Publishing, Inc. v. FCC*, 844 F.2d at 815.

Finally, the Report and Order will not withstand constitutional scrutiny unless the majority can demonstrate that the problems addressed by the rules are real and the solutions effective. The Supreme Court has made clear that the government lacks the authority to "deny . . . broadcasters the right to [engage in speech] on the basis of speculative fears." *FCC v. League of Women Voters of California*, 468 U.S. at 399. Yet in this case, the networks are hobbled because they *might* abuse their in-house production capability and because of the *potential* for affiliate favoritism. The First Amendment requires more from this agency than nebulous and unsubstantiated references to "diversity." Moreover, there is nothing to suggest that the new rules will result in more diversity or creativity. In fact, there are powerful reasons to believe the majority plan will lead to further concentration and a reduction of programming choices. Given such a possibility, courts will not tolerate even minimal burdens on speech.[136]

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[135]*Further Comments of CBS, Inc.*, November 21, 1990 (Appendix C, Affidavit of William B. Klein).

[136]*Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1122.

Conclusion

The record before us is plain. The media marketplace of 1991 bears so little resemblance to the one that existed in 1970 that the perpetuation of financial interest and syndication rules is almost inconceivable. Although for transitional purposes, I would have voted to phase out the rules and impose appropriate safeguards, I cannot support the indefinite continuation of restrictions. To the extent today's Report and Order is deregulatory, I can concur. But I dissent from the overall result, because it imposes a burdensome and unnecessary scheme of regulation that could threaten the future of free television.