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Structural Regulation of the Media and the Diversity Rationale

Jerome A. Barron*

Structural regulations of the media—such as the multiple ownership rules—play a useful role in media governance in the United States. Under Chairman William E. Kennard, the Federal Communications Commission (FCC) has struggled, in a climate unsympathetic to regulation, to keep the basic core of the multiple ownership rules while substantially modifying their specific applications. Their modification recognizes the emergence of new technologies and new channel capacity, but their basic retention also recognizes the need for diversity in all its meanings. In this paper, I shall argue that the case for structural regulation of the media is stronger now than it has ever been.

On August 5, 1999, the FCC relaxed its duopoly rule. Under the original duopoly rule, the FCC did not permit the grant of a license to anyone already holding a license for the same type of facility in the same community. The FCC has modified this rule and declared that it now permits common ownership of two stations in the same market if eight independently owned and operated television stations remain in the same market post merger. One of the merged stations cannot be among the top four ranked stations in the designated market area.¹

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1. See Review of the Comm'n's Regulations Governing Television Broadcasting, *Report and Order*, 14 F.C.C.R. 12,903, 17 Comm. Reg. (P & F) 1 (1999) [hereafter *Revised Duopoly Report*]. In its revised duopoly rule report, the FCC stated that a principal rationale

The role of media structure in our society has, in view of the revision of the duopoly rule and the subsequent Viacom-CBS merger proven to be a timely choice of topic. On September 7, 1999, Viacom Inc. announced that it would buy CBS in a deal valued at approximately forty billion dollars. At the time of the merger, Viacom properties included nineteen television stations and a controlling interest in a TV network, UPN. Viacom owns cable channels such as MTV, Nickelodeon, VH1, and Showtime pay movie channels.

CBS provides programming to its television (and radio) affiliates throughout the nation. CBS itself owns and operates fifteen television stations in major markets and the dominant interest in Infinity Broadcasting, which owns one hundred sixty radio outlets. CBS owns the cable channels, The Nashville Network (TNN) and Country Music Television (CMT), as well as the TV syndication, King World. CBS also has a presence on the Internet.²

The deal between Sumner Redstone, Viacom's chief executive, and Mel Karmazin, CBS's chief executive, was announced shortly after the FCC relaxed its television duopoly rule. The Viacom-CBS mergers results in television duopolies in six markets.³

Some regulatory obstacles remain. Presently, a single entity may not operate two broadcast networks. Since Viacom already owns fifty percent of UPN (Paramount Pictures) and now would own CBS as well, technically, it would have to divest itself of UPN. The television stations that will be operated by the merged company exceed the rule that no entity may own television stations whose audience reach is greater than thirty-five percent of the national audience. The merged Viacom-CBS entity would reach forty-one percent of all households nationwide.⁴

The concentration of ownership within the communications media that the Viacom-CBS merger represents is amazing. Yet, these developments only seem to whet the appetite of the participants for more. Recently, when asked how Viacom-CBS hoped to meet the 35% TV audience reach cap, Mr. Karmazin stated: "We believe that the 35% cap is a very antiquated rule. We believe that the rule will go away."⁵ What

for multiple ownership rules such as the duopoly rule is to encourage diversity in the ownership of broadcast stations in order to encourage the expression of a variety of viewpoints on broadcasting.

2. See Paul Farhi, *Viacom to Buy CBS, Uniting Multimedia Heavyweights*, WASH. POST, Sept. 8, 1999, at A1, A7.

3. See John M. Higgins, *One Thing Leads to Another*, BRDCST. & CABLE, Sept. 13, 1999, at 14.

4. See Farhi, *supra* note 2, at A1, A7.

5. *The Viacom Vision*, BRDCST. & CABLE, Nov. 15, 1999, at 30.

should the television audience reach TV cap be for a single entity? Mr. Karmazin responded: "a realistic move that politically could make sense is that it would be 50%."⁶ A week later, Mr. Karmazin said that the cap has to be at least 49% for the network television business to be viable.⁷

An almost centrifugal force now impels media to combine. What motivates this quest to accumulate ever more media power? Does it reflect a desire to control the engines of opinion to spread a particular social or political doctrine? Long-time media critic Ken Auletta responds trenchantly to these questions: "When [Viacom Chairman] Sumner Redstone and [CBS President] Mel Karmazin sat down to discuss this deal, do you think a major point of discussion was 'How do you improve the quality of CBS news?' . . . These are not men who consume the product they produce. They are businessmen, business engineers."⁸

Economics, not politics, energizes this relentless accumulation of media properties by a few corporate media. The incidental effect is the accumulation of media power by an ever-smaller number of media companies. Vertical integration is the theme of the Viacom-CBS merger. Viacom is strong on content since it owns UPN. CBS has been stronger on distribution than content. Mr. Karmazin commented on the synergy between the two companies: "As [Redstone] said 'content is king' and we believe distribution is king."⁹

In the revised duopoly rule report, we encounter three diversity rationales for multiple ownership rules. The *first* is to encourage greater gender, ethnic, and racial diversity in the ownership of broadcast stations. The *second* is to limit multiple ownership of the media in order to maximize diversity of viewpoint in programming. The *third* is based on the idea that media deconcentration rules will prevent "undue concentration of economic power contrary to the public interest."¹⁰ Limiting concentration minimizes the ability of a small group of corporate media to dominate the local opinion process.¹¹

6. *Id.* at 32.

7. See Steve McClellan, *Viacom-CBS Wants Two Years to Divest*, BRDCST. & CABLE, Nov. 22, 1999, at 10.

8. Howard Kurtz, *Good News for CBS? Observers Split on Merger*, WASH. POST, Sept. 8, 1999, at E1 (alteration in original).

9. Farhi, *supra* note 2, at A7.

10. *Revised Duopoly Report*, 14 F.C.C.R. 12,903, para. 15, 17 Comm. Reg. (P & F) 1 (1999) (quoting Amendment of Sections 73.35, 73.240, and 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM, and TV Brdcst. Stations, *Report and Order*, 45 F.C.C. 1476, 1476-77 (1964) [hereinafter *Multiple Ownership Order*]).

11. "[T]he greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.'" *Multiple Ownership*

With regard to the racial and gender diversity rationale, clearly, the goal is to encourage minority and gender-oriented programming by increasing participation of minorities and women in broadcast ownership.¹²

The second diversity rationale is viewpoint diversity. The FCC sees viewpoint diversity as a causal effect of media deconcentration.¹³ The entire diversity rationale is presently under attack. Diversity of viewpoint as a justification for multiple ownership rules is especially under siege. For those who believe, as do I, that there is a relationship between ownership diversity and diversity in ideas, the attack is misguided. The personal attack rules are under assault as well. The FCC has abolished the fairness doctrine. If policies to stimulate diversity of viewpoint in broadcasting remain, the duopoly rule and the audience reach cap, etc. are the only ones.

In the duopoly report, the FCC reasoned that the identity and viewpoint of the station's owner can shape the station's programming. Suppose the merged ownership has no viewpoint. Many defend the deal between Viacom and CBS on grounds of synergy: Viacom is strong on distribution, CBS on content. When Redstone said that content was king, the implication is that content is a kind of filler. Certainly, a justification for rules restricting multiple ownership is they tend to prevent the shrinking of the total number of media owners. The hope is that the larger the number of media owners, the greater the possibility that there will be some for whom content is not filler.

The third diversity rationale for multiple ownership rules is to limit the control a small number of individuals or companies can exercise over the opinion process through media ownership. Chairman Kennard says that the remaining revised multiple ownership rules reflect "core values of competition, diversity, and localism."¹⁴ The remaining multiple ownership rules, he argues, strike an "appropriate balance, by relaxing rules but maintaining a diversity floor."¹⁵

What is the impact of a merger like Viacom-CBS on the world of ideas and on the discourse and debate that the First Amendment is supposed to protect and encourage? In his dissent to the revised duopoly rule, Commissioner Furchtgott-Roth argues that the multiple ownership

Order, 45 F.C.C. 1476, para. 3 (footnote omitted).

12. *See Revised Duopoly Report*, 14 F.C.C.R. 12,903, para. 13, 17 Comm. Reg. (P & F) 1.

13. "One of the most important purposes of our multiple ownership rules is to encourage diversity in the ownership of broadcast stations so as to foster a diversity of viewpoints in the material presented over the airwaves." *Id.* at para. 17.

14. *Id.* app. c at 12,981-82 (Chairman William E. Kennard, Remarks at the Aug. 5, 1999 Meeting on Broadcast Ownership Items).

15. *Id.*

rules should not have been relaxed; they should have been abolished. Diversity, he contends, has no measure nor meaning. Additionally, no evidence of harm or abuse flowing from common ownership support these rules. For these reasons, they fail to meet the strict scrutiny standard that should be applied to them.

What does diversity mean? Does it mean numerosity of outlets? Does it mean numerosity of owners? Does it signify an abundance of formats? Is diversity just news and information? Is diversity ethnically and racially oriented programming? Is diversity defined by programming on controversial issues seeking to cover the range of opinion on such issues?¹⁶ Furchtcott-Roth suggests that if we provide a specific answer to any of these questions, First Amendment tensions are inevitable.¹⁷ Diversity as a goal for media governance is, in this view, at odds with the First Amendment. If diversity is simply a generalized goal, it is impermissibly vague. If diversity is framed in specific terms to encourage a particular kind of expression, then it is a content-based violation of the First Amendment.

I reject this attack. Criticism of multiple ownership rules on First Amendment grounds is not new. More than twenty years ago, the Supreme Court upheld the FCC's prohibition on cross-ownership on First Amendment grounds.¹⁸ The Court deemed the policy reasonable because "it promot[ed] the 'public interest' in diversification of the mass communications media" and it furthered rather than contravened the system of free expression.¹⁹

Should the advent of new media technologies with their abundant channel capacity change this conclusion? Certainly, the number of electronic media outlets has vastly increased since the cross ownership case but so has the degree of concentration of ownership.

The diversity rationale is particularly responsive to First Amendment values. In the cross-ownership case, the Supreme Court accepted the FCC's

16. *See id.* app. c at 12,993-13,002 (dissenting statement of Comm'r Furchtgott-Roth).

17. *See id.*

18. *See FCC v. National Citizens Comm. for Brdcast.*, 436 U.S. 775 (1978). However, government intervention in media concentration is not always an unalloyed good. Professor Ed Baker has wisely observed:

The [contrary] argument here would be that the constitutional decision is to prohibit intervention because allowing the press to remain untouched best protects its democratic role.

. . . The perceived merits of permitted intervention necessarily reflects an understanding of what democracy requires, an evaluation of the dangers of misguided intervention, and an assessment of the market.

C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 389-90 (1998).

19. *National Citizens Comm. for Brdcast.*, 436 U.S. at 799.

assumption that one could not expect divergence in viewpoint from commonly owned media entities to be the same as if these entities were antagonistically owned.²⁰ This was so, even though diversity resists both definition and quantification. Accordingly, the Court upheld the FCC's judgment that "it is unrealistic to expect true diversity from commonly owned station-newspaper combination."²¹

In a hard-hitting new book, Robert McChesney contends that the future will see a global media oligopoly dominated by six firms: Time Warner, Disney, Viacom, News Corporation, Sony, and Seagram.²² Professor McChesney concludes: "by any known theory of democracy, such a concentration of economic, cultural, and political power into so few hands—and mostly unaccountable hands at that—is absurd and unacceptable."²³ This is undoubtedly true. Yet it is increasingly difficult for our society to come to grips with it. At a certain level and scale, concentration of media ownership constitutes a social harm in and of itself. Government should not dominate or control the opinion process, but a handful of media corporations should not be allowed to do so either.

The regulatory structure of a less commercial age still exists in part, but its rigor is constantly being weakened. In part, this is due to what Professor McChesney correctly calls the rise of a new First Amendment theology. A dogma or myth in this new theology is that the First Amendment "authorizes the corporate control and hyper-commercialization of media and communication."²⁴ Another dogma in this theology is that the First Amendment belongs to the media and, therefore, that interference with the organization and structure of the media somehow violates the First Amendment. To date, the Court has not accepted these contentions and, indeed, on several recent occasions has been resistant to them. But a constant media campaign praises and publicizes this new First Amendment theology. The result is that the need for, and the justice of, some regulation of the media consolidation that is now occurring all about us is obscured. For a democratic society, the justice of rules designed to make sure that a few people or a few entities do not run away with the opinion process should not be suspect. If diversification of ownership policies have no more justification than limiting such domination, then the case for their validity is established.

20. *See id.* at 797.

21. *Id.*

22. *See* ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 27-28 (1999) (quoting Capital Research Mutual Fund Director, Gordon Crawford).

23. *Id.* at 30.

24. *Id.* at 257.