

3-2005

Time for Change on Media Cross-Ownership Regulation

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Recommended Citation

Sturm, John F. (2005) "Time for Change on Media Cross-Ownership Regulation," *Federal Communications Law Journal*: Vol. 57 : Iss. 2 , Article 6.

Available at: <https://www.repository.law.indiana.edu/fclj/vol57/iss2/6>

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Time for Change on Media Cross-Ownership Regulation

John F. Sturm*

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I. INTRODUCTION

In June 2004, the U.S. Court of Appeals for the Third Circuit remanded to the Federal Communications Commission (“FCC”) a long overdue and much needed decision to relax its nearly thirty-year-old absolute ban on newspaper/broadcast cross-ownership.¹ Adopted by the Commission back in 1975, the FCC’s so-called newspaper/broadcast cross-ownership ban prohibits the joint ownership of a daily newspaper and either a TV or a radio station in the same local market.

While total repeal of the blanket ban would have been preferable and fully justified, the modifications adopted by the FCC retained calibrated limitations on cross-ownership in all but the nation’s largest markets. The revised rules would have fostered substantial public interest benefits

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1. See 2002 Biennial Regulatory Review, *Report and Order*, 18 F.C.C.R. 13,620 (2003), *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

without any serious countervailing harms. Most notably, by permitting newspaper publishers to combine their extensive newsgathering resources with those of broadcasters, the revised rules would have enabled TV and radio stations to provide audiences nationwide with improved news and informational services.

Although the Third Circuit fully affirmed the Commission's finding that a flat ban on cross-ownership no longer served the public interest, the court decided to remand the new rules based on a misunderstanding of the significance of an analytical tool used by the FCC. The decision represents an unnecessary and counterproductive throwback to an era when consumers had far fewer choices for news and information than they have today. Because the effect of the decision was to put the preexisting cross-ownership ban back in place pending the outcome of the Commission's remand proceeding, the court's decision will needlessly delay important benefits to consumers and impede the ability of newspaper publishers and broadcasters to keep pace with their ever-more-formidable multimedia competitors.

In order to preserve the ability of daily newspapers and broadcasters to remain competitive in today's environment, the new administration should move quickly and decisively to remedy this situation. Specifically, the new administration should aggressively pursue Supreme Court review of the Third Circuit decision. If the Supreme Court does not provide a prompt remedy, the administration should accelerate the Commission's remand proceeding with respect to the modified cross-media limits so that the outdated and thoroughly discredited ban on newspaper/broadcast cross-ownership finally can be laid to rest.

II. THE REVISED CROSS-MEDIA RULES

After several unfulfilled promises to reevaluate the outdated restriction, the FCC issued its decision to relax the flat ban on newspaper/broadcast cross-ownership in June 2003. Specifically, as part of a biennial review of all of its broadcast ownership regulations mandated by Congress in the Telecommunications Act of 1996 ("1996 Act"), the FCC replaced the ban with a series of cross-media limits permitting varying levels of cross-ownership depending on the size of the local market at issue. Under the new rules, newspaper/broadcast cross-ownership would have remained prohibited in markets with three or fewer TV stations. In mid-sized markets, limited cross-ownership would have been permitted, and in markets with at least nine TV stations, the Commission decided to eliminate restrictions on cross-ownership. Instead, the FCC would have relied on its separate local television and radio ownership prohibitions to

ensure adequate levels of competition, diversity, and localism among media outlets.

III. TODAY'S MEDIA MARKETPLACE

The FCC's decision to enact the newspaper/broadcast cross-ownership ban in the first place was strongly influenced by the limited media options that existed in 1975. Back then, the "Big Three" dominated the TV landscape; cable and satellite TV were in their infancy; and the Internet did not even exist. As the FCC properly acknowledged in its 2003 decision to relax the ban, those options since have expanded in ways that simply were unimaginable in 1975.

Since the rule was adopted, the number of traditional broadcast outlets has grown dramatically: there are now over 75 percent more television stations and nearly 70 percent more radio outlets than there were in the mid-1970s. In 1975, we could not have predicted that TV broadcasters would soon be vigorously competing with the hundreds of channels that cable and satellite services now deliver to the vast majority of American households. In addition to thousands of local daily and weekly newspapers, three major national papers—*The New York Times*, *The Wall Street Journal*, and *USA Today*—are now available across the country. Also, of course, the Internet has developed into a new breed of media, unfathomable in the 1970s, providing consumers with instantaneous access to information and opinion on any conceivable topic.

With all of these changes has come a huge increase in the diversity of the provision of news and information to the American home. Much of this diversity has come from local TV stations, which have doubled their local news output since 1960. All-news radio stations, the huge proliferation of cable channels as well as weekly and national newspapers, and, of course, the Internet provide diversity of sources and viewpoints never dreamed of when the cross ownership rules were adopted in 1975.

IV. A LEVEL PLAYING FIELD

The newspaper/broadcast ban is the last vestige of a series of "one outlet per customer" local media ownership restrictions adopted by the Commission in the 1960s and 1970s. In light of the skyrocketing growth that has occurred in the nation's local media markets since these rules were put in place, virtually every other restriction on media ownership has been either substantially relaxed or eliminated in recent years. For example, the Commission's restriction on so-called television duopolies, or the joint ownership of two TV stations within the same local market, was significantly relaxed in 1999. Similarly, parties now can jointly own up to

eight radio stations in some markets, while restrictions on cable/television cross-ownership have been completely eliminated.

In sharp contrast, the newspaper/broadcast ban has been inflexibly enforced. Over the past thirty years, the FCC has granted only four permanent waivers of the rule, each of which was granted only because an ailing newspaper or station would have gone under without the ability to benefit from cross-ownership. Aside from these rare situations and the newspaper/broadcast combinations that were grandfathered when the rule was adopted, newspaper publishers have been completely barred from participating in the broadcast markets of their local communities. Because of the Third Circuit's ill-considered decision, that unfortunate legacy has been unnecessarily perpetuated. Newspaper publishers and broadcasters continue to be at a significant disadvantage in comparison to their multimedia competitors, who are generally free to enter into ever-larger and more efficient combinations.

V. PUBLIC INTEREST BENEFITS

Based on the extensive empirical and real-world evidence before it, the FCC recognized in its decision to relax the newspaper ban that broadcast stations jointly owned with local daily newspapers provide greatly superior news and informational services in comparison to stand alone stations. For example, a study commissioned by the FCC in 2002 concluded that newspaper-owned TV stations aired significantly more local news and public affairs programming than other stations—providing an average of *50 percent more* weekly hours of such programming—and substantially outperformed other stations in news ratings and receipt of industry awards.²

The most powerful evidence on this issue, however, was provided by the existing newspaper/broadcast combinations. There currently are approximately forty such combinations in existence, most of which were grandfathered back in 1975. These combinations operate in the full gamut of market sizes, from New York, New York to Cedar Rapids, Iowa, all the way down to Bowling Green, Kentucky—the 181st largest market. Cross-ownership has enabled these combinations to: (1) respond more quickly and effectively to breaking news; (2) provide more in-depth coverage of individual stories and cover a wider range of stories; (3) offer more hours of (as well as more popular) traditional news programming; (4) add significant features, such as political commentary, to existing newscasts;

2. Thomas C. Spavins et al., *The Measurement of Local Television News and Public Affairs Programs*, FCC MB Dkt. No. 02-277 (Sept. 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf.

and (5) even create entirely new informational outlets, such as local all-news cable channels or innovative online services.

As the FCC recognized in its decision, it makes perfect sense that this would be the case. Daily newspapers are by their very nature more deeply involved in and aware of the activities, concerns, and issues affecting their communities than other media. With the ability to draw on local ties and journalistic expertise—as well as the extensive newsgathering resources—of a daily newspaper, co-owned stations are naturally able to provide superior news and informational coverage.

In addition to acknowledging these impressive public interest benefits, the Commission properly rejected arguments that greater levels of cross-ownership were likely to harm competition or diversity in the vast majority of local media markets. Because most advertisers do not view daily newspapers, television stations, and radio stations as close substitutes, the FCC correctly concluded that greater levels of cross-ownership would not pose a threat to competition. The Commission also recognized that the record before it provided scant evidence that jointly owned media outlets are likely to express monolithic viewpoints or uniform bias. More fundamentally, the FCC found that, even to the extent isolated incidents of viewpoint coordination may occur between commonly owned newspaper and broadcast outlets, the wealth of diversity in today's media marketplace renders any such incidents irrelevant. Thus, even *if* the coverage of a particular story is self-interested or biased, the public simply will not be left uninformed.

Thus, all told, the unambiguous and remarkably extensive record before the Commission would have supported complete repeal of the ban. Certainly, the more limited deregulatory steps taken by the FCC were amply justified and should have been left in place by the Third Circuit.

VI. THE THIRD CIRCUIT'S DECISION

Ironically, in remanding the modified cross-ownership rules to the Commission for further review, the court recognized that the agency was fully justified in eliminating its flat ban on newspaper/broadcast cross-ownership. Specifically, the court agreed that: (1) the blanket ban is not necessary to promote competition in local markets because most advertisers do not view newspapers and broadcast stations as close substitutes; (2) there is not enough evidence to conclude that ownership influences viewpoint sufficiently to warrant a blanket cross-ownership ban, thus making it unjustifiable on diversity grounds; and (3) the ban undermines the FCC's localism objective by preventing efficient combinations that would allow for the production of high-quality news.

Despite these findings, the court sent the modified cross-media limits back to the FCC for further consideration because of perceived flaws in the so-called Diversity Index ("DI"), a metric the agency devised to help it assess the levels of diversity in individual media markets. As the FCC explained in its decision, the DI was used only as an analytical tool to "inform" its judgment with respect to the new cross-media limits. The Commission's decision to adopt the new rules ultimately was based on its own expertise as well as the mountain of evidence before it demonstrating that greater levels of newspaper/broadcast cross-ownership would benefit the public in the form of enhanced news and information, without threatening marketplace diversity. Because any number of news and informational sources can play a role in informing or persuading a particular citizen on a specific issue, any metric designed to weigh the influence of any particular outlet, as the DI attempted to do, will necessarily be inexact and paint an incomplete picture of today's incredibly abundant media marketplace. Given the amorphous and, indeed, unquantifiable nature of diversity in the information sector, there can be little doubt that the Commission's longstanding expertise with respect to this issue played a key role in the lines it ultimately chose to draw.

The court misunderstood this, however. Finding—notwithstanding the FCC's clear statements to the contrary—that the DI was the sole basis of the agency's cross-ownership decision, the court determined that the existence of perceived flaws in the DI provided grounds for forcing the agency to go back to the drawing board and fully reconsider the cross-media limits. In so doing, the court ignored the high level of deference due to the FCC's line-drawing determinations, particularly those involving elusive and not easily defined concepts such as diversity, under the long-established *Chevron* doctrine. Moreover, the court disregarded the constitutional implications of singling out newspaper publishers for disparate regulatory treatment and misinterpreted the deregulatory mandate that Congress established in directing the Commission to periodically review its ownership regulations and eliminate those that are no longer necessary in light of competition.

VII. STEPS FOR THE NEW ADMINISTRATION

The court's misdirected second-guessing of the FCC's decision has come at a great and needless expense to newspaper publishers and broadcasters who, once again, have been unnecessarily left at a regulatory disadvantage. It also has needlessly delayed the significant public interest benefits that consumers would reap from greater levels of cross-ownership. This situation must be remedied as expeditiously as possible. It is certainly

possible that this issue will be resolved through the petitions for certiorari currently pending at the Supreme Court. However, such a judicial remedy, even if ultimately provided, easily could take well over a year. This is an inordinately long period of time for newspaper publishers and broadcasters, for whom regulatory relief is already so long overdue.

In the interim, the Bush administration should employ its resources to help provide such relief through any other means available. If this issue ultimately must be resolved at the Commission, it should be done quickly—ideally through a narrowly focused rulemaking that is not delayed by the issues surrounding the other local media rules on remand from the Third Circuit. Certainly, any efforts by the new administration to advance either outcome would be time well spent and well deserved by newspaper publishers, broadcasters, and consumers.

