THE IMPACT OF OWNERSHIP ON CONTENT: DOES IT MATTER?

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We all agree that the pervasiveness of television, with its power as an audio-visual medium, with the immediacy it can convey, and with the entertainment it generates, has earned it weighty consideration as a social, political, economic, and cultural phenomenon. From its earliest days in its audio-only radio incarnation, broadcasting has been recognized as a powerful medium over which government must maintain control. The courts, Congress, and the Federal Communications Commission ("FCC") have made twists and turns to reconcile the clear proscription of the First Amendment with the overpowering desire to keep control over the content of the airwaves.

For its first three decades as a commercial medium, "television" was a term with a widely understood meaning.[1] It referred to the video segment of the broadcast industry. Television was used interchangeably as the name of the receiver that sat in living rooms, recreation rooms, bedrooms, and kitchens of residences, and as a reference to a technology that used terrestrial towers to broadcast signals to end users. This was the television industry. If one was watching television, one was watching a VHF (or maybe UHF) signal captured by an antenna. A manufacturer or merchant that advertised on television did business with one of a handful of local television stations or one of three national television networks.

With the growth of cable-delivered programming to sixty percent of homes in the United States,[2] and the widespread adoption of videocassette recorders in about ninety percent of homes,[3] and direct broadcast satellite to more than three percent of homes,[4] television must be given an expanded meaning. It must be applied to any of the technologies that put a video signal into a standard

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1 The industry professional, of course, often used the term broadcasting. But that is a technical term rarely used by viewers. And even those in the industry might have to differentiate their work in television from the "other" broadcasting, radio.

2 THE KAGAN MEDIA INDEX, No. 90, Aug. 31, 1994.

3 *Id.*

4 *Id.*

television set.[5]

Virtually everything we know about the relationship between ownership of television outlets and programming is outdated. The assumptions that have governed FCC regulations and researchers were formed in an era of broadcast oligopoly.

Television today has become as diverse as the magazine rack. There are, of course, as in the print world, mass audience programs that continue to get large audiences, but, at any given moment of any given day, one third or more television sets are tuned to programs that are as special interest as the journals of opinion, hobbies, and entertainment.

For this paper, television, as a market, as a medium, and as an industry encompasses all popularly available video delivery technologies, including broadcasting, cable, DBS, videocassette and disk, and other broadband wired or wireless. Thus, all that was written in the past about the need for regulation to foster diversity and competition on television because of limited spectrum is irrelevant. All of the policies, court decisions, and laws, justified in the "public interest," that were in conflict with First Amendment proscriptions against content regulation, are becoming moot.

I. What This Paper is About

The first part of the question posed in the title is vague enough so that probably any answer could be defended. That is because ownership of content could have a broad range of interpretation: Public corporation or privately held? Public as in government-owned or private sector? Ownership of over-the-air broadcast stations or local cable operations? Ownership of program sources, such as studios, or of distribution facilities, such as cable or broadcast networks or video retail outlets?

We could further seek to define the main question. Are we talking about ownership effects at the local level or on a national or international basis? And by ownership do we really mean control or, literally, ownership? We could ask whether ownership of any combinations of the above yields different results than ownership of only one component. Does cross ownership with another medium, such as newspapers, make a difference?

The second part of the title's question is similarly open to interpretation and nuance. Does it matter to whom: the mass audience; small, segmented interests; advertisers, stockholders,

[5] At least for now this excludes television-like content that is starting to become available on CD-ROM, or even online, to those who have personal computers.

government policymakers? Does it matter in a political sense, as in furthering or inhibiting one form of governance over another? Does it matter in a social sense, as in promoting or reducing societal issues (such as violence or teenage pregnancy)? Does it matter culturally, in either lessening cultural divides or increasing them, in providing material for focused cultural identifies or a common national identity? Does it matter in an economic sense, to potential advertisers, to consumers who use—or avoid—advertising as a source of information, and to the effect, if any, of advertisers on the content?

The simple and probably self-evident answer to at least any one of these questions is simply, yes. We assume ownership matters in some way to some things. It is similarly easy to say that the difficulty is setting the priorities and establishing the direction of the effects of some definition of ownership.

The subtext to the question is really: Are there *patterns* of ownership that matter? Can we say that stations owned by public corporations, as a group, program differently than those that are privately held? Do stations owned by racial minorities carry measurably different content than other stations? Does programming on cable networks controlled by cable operators have different types or slants on content than networks owned by broadcasters, Hollywood studios, or independent producers?

A rigorous response to any one of these questions could make a fine, resource-consuming research topic. Many of these questions have not even been addressed by researchers or may be almost impossible to measure reliably. This paper clearly cannot address all of these interpretations. What it will do is review some relevant areas of what we know about ownership and content effects and then provide one person's interpretation of what this means for a variety of players and stakeholders in the video arena.

The scope of this paper is to treat ownership in a generalized manner. That is, ownership means whatever individual or entity controls the programming available on any of the mass audience video delivery pipelines, including broadcast stations, cable systems, or networks. Within the context of ownership is the closely associated role of competition faced by an owner in the relevant market.

II. Short Review of Current Laws and Regulation on Ownership

The substance of what has historically been broadcast is closely

associated with the regulatory regime that has grown up for the industry. One could imagine that a broadcast industry that had been subjected to the same First Amendment standards as the print media would have sounded and looked very different.

By far the most powerful six words in the history of regulation must be "the public interest, convenience, and necessity."[6] They were written into the Radio Act of 1927[7] and were incorporated without alteration in the Communications Act of 1934.[8] They are the encompassing principles which account for and justify much radio and television policy and regulation.

This vague mandate has been the legal underpinning to such practices, generally upheld by the courts, as limitations on the number of licenses under a single ownership, limitations on the number of licenses that a single owner may have in any market, restrictions on cross ownership of broadcasting and newspapers or broadcasting and cable, and of network ownership of cable.[9] It has been cited to support the Fairness Doctrine for many years,[10] for restricting content under various definitions of indecency and obscenity over the airwaves, and as justification for rules on the responsibilities of license holders to provide programming of specified types, such as public affairs, news, children's, and public service.[11]

The widely accepted truism that broadcasting needed to be regulated differently than the print media of the time grew out of the twin concerns of interference between frequencies and the scarcity of electromagnetic spectrum that needed to be allocated. Ithiel de Sola Pool, among others, has proposed that other policies could have been implemented for broadcasting that would have avoided the involvement of the political process in media content.

[6] 47 U.S.C. § 302a (1988).

[7] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-610).

[8] Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-610 (1988 & Supp. V 1993)).

[9] The tone was set early in KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931). *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (discussing Chain Broadcasting Rules); *see also* Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958). For the broad range of FCC and court rulings stemming from the public interest standard, see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 143-74 (1994).

[10] The most famous and definitive case on the Fairness Doctrine is Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1965).

[11] *See* Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382 (1970). In 1975, a court said that the only way to fulfill its obligations under the Communications Act was to provide content that met "somebody's view of what constitutes the 'public interest'." National Ass'n of Indep. Television Producers & Distribs. v. FCC, 516 F.2d 526, 536 (2d Cir. 1975).

"The scheme of granting free licenses for use of a frequency band . . . was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity. . . . Clearly it was policy, not physics, that led to the scarcity of frequencies."[12]

The notion of broadcasters' having a public interest responsibility was initially articulated in 1922 at the First National Radio Conference by then Commerce and Labor Secretary Herbert Hoover.[13] Although the Navy made an attempt to control the airwaves immediately after World War I, government policy from the start was that wireless would be kept in the private sector, but as "trustees" for the public.[14] Senator Clarence Dill, one of the architects of the 1927 Act, wrote that "[t]he one principle regarding radio that must always be adhered to, as basic and fundamental, is that the government must always retain complete and absolute control of the right to use the air."[15] Thus, those entities awarded licenses held them, in theory, for a finite period. This period was initially three years; now it is five years. To win renewal of the license they must show that they adhered to standards of content and behavior that the Federal Radio Commission ("FRC") and later the FCC promulgated from time to time.[16]

Over the years the FCC has fought an internal battle regarding how far it could or should go in directing content. In 1931 the Court of Appeals for the D.C. Circuit upheld the FRC's right to consider past programming as the basis for denying license renewal.[17] Although the government has never mandated specific programs, its tight reins on licenses, and the ensuing climate of license challenges by contending groups that could result in expensive legal battles for license renewal, gave both Congress and the FCC a very potent "raised eyebrow" poker to keep broadcasters within the current limits of broadcasting in the public interest.

Still, the FCC invoked this power sparingly. For the most part it tried to find content-neutral standards for licensing and renewal: the financial capacity of applicants, their character, and their de-

[12] ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 141 (1983).

[13] Herbert Hoover, Speech to then first National Radio Conference (Feb. 27, 1922), *in* KRATTENMAKER & POWE, *supra* note 9, at 8.

[14] KRATTENMAKER & POWE, *supra* note 9, at 17.

[15] Clarence Dill, *A Traffic Cop for the Air*, 75 AM. REV. REVS. 181, 184 (1927).

[16] From the start, the Federal Radio Commission was faced with setting criteria on who among competing applicants should get and renew licenses. In a series of statements in 1928, 2 FRC ANN. REP. 166, app. F at 170 (1928), and 1929, 3 FRC ANN. REP. 32, 34 (1929), the FRC began shaping those criteria. It rejected the renewal for KGEF based on the content of the programming. *See* KRATTENMAKER & POWE, *supra* note 9, at 24-25.

[17] *KFKB Broadcasting*, 47 F.2d at 670.

gree of previous broadcast experience.[18] In 1941 the Commission did go so far as to ban advocacy and editorializing by broadcasters in the *Mayflower* decision.[19] But by 1949, the Commission reversed direction, *requiring* editorializing on public or controversial issues, so long as they were balanced.[20] This became the basis for the Fairness Doctrine.

For a long time there lurked what critics of the FCC's attempt to influence policies might call its "fluid sense" of what acceptable and even desirable programming should be. In 1946 it released a document known as the "Blue Book."[21] Although never accepted as an official FCC ruling or regulation, the "Blue Book" did lay out what at least some faction of the FCC had in mind as programming in the public interest.[22] This included the obligation to carry non-advertiser supported programming, with an emphasis on balanced programming; to carry live local programs; to carry programs devoted to the discussion of public issues; and to eliminate advertising excess.[23]

The Blue Book created a huge controversy for many reasons, not the least of which was the heavy handed attempt to direct program content under the public interest rubric. It did lead broadcasters to incorporate some of its message into its voluntary Code of Practices.

Other attempts over the years to affect content include the Avco Rule on transferring licenses;[24] requirements to "ascertain" tastes, needs, and desires of the community as a criteria for license renewal;[25] a 1963 inquiry to mandate limitations on advertising time;[26] less formal proposals advanced to spread out public affairs programming among the networks;[27] and a daily hour of educational children's programming.[28] More recently, the Prime Time Access Rule restricted prime time network entertainment program-

[18] *See* ROBERT B. HORWITZ, THE IRONY OF REGULATORY REFORM 166 (1989).
[19] The Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940).
[20] Editorializing by Broadcast Licensees, Report, 13 F.C.C. 1246 (1949).
[21] The Blue Book (formally "Public Service Responsibilities of Broadcast Licensees"), issued by the FCC in 1946 but never formally adopted, was probably the high (or low) point in the use of the public interest as the justification for "guidelines" for broadcast programming. FCC, *Public Service Responsibilities of Broadcast Licensees*, at 55 (Mar. 7, 1946), *cited in* HORWITZ, *supra* note 18, at 161 n.18 [hereinafter Blue Book] (principal author was FCC economist Dallas Smythe).
[22] *See* KRATTENMAKER & POWE, *supra* note 9, at 70-76.
[23] Blue Book, *supra* note 21.
[24] Powel Crosley, Jr., 11 F.C.C. 3 (1945).
[25] Enbanc Programming Inquiry, Report and Policy Statement, 44 F.C.C. 2303 (1960).
[26] Commercial Advertising, Report and Order, 36 F.C.C. 45 (1964).
[27] *See* HORWITZ, *supra* note 18, at 163.
[28] *See id.*

ming to three hours every night but Sunday.[29]

In the nearly seventy years since the Federal Radio Act, several axioms have emerged that have guided FCC regulation of the structure and programming of broadcast licensees. These are essentially how the FCC has come to define broadcasting in the public interest:

- competition
- diversity
- localism

III. COMPETITION AND DIVERSITY

The FCC has considered promoting diversity of voices in broadcasting since the 1940s. In 1941 it required NBC to divest one of its two networks. And shortly thereafter it promulgated a series of rulings barring common ownership of two same-type broadcast stations in a market.[30] Indeed, the FCC has been very clear about the lengths it thought it must go to promote diversity. "A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50."[31]

The principles of competition, diversity, and localism have been central to the FCC's interpretation of the regulation of broadcasting, and the courts have frequently agreed to use these criteria in the decision making process.[32] There has been an assumption that promoting competition—by limiting multiple ownership of stations within a market—will lead to diversity of content. There is, at least, a theoretical argument that questions this assumption as applied to broadcasting as it has been structured in the United States.[33] It runs like this:

Under a system of advertising-supported programming, advertisers are most interested in maximizing their audience. They will pay broadcasters proportionally more for a larger audience than a smaller audience. As the cost of programming is fixed, regardless of audience size, broadcasters may maximize profit finding pro-

[29] Network Television Broadcasting, Report and Order, 23 F.C.C.2d at 384-87 ¶¶ 5-7.
[30] *See* Christopher Sterling, *Television and Radio Broadcasting*, *in* BENJAMIN M. COMPAINE ET AL., WHO OWNS THE MEDIA? 316-17 (2d ed. 1982).
[31] Multiple Ownership of Standard, FM and TV Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, 311 ¶ 21 (1970).
[32] For extensive coverage of these issues, see KRATTENMAKER & POWE, *supra* note 9, at 59-141.
[33] *See id.* at 42-43.

grams that have the broadcast appeal. In a marketplace characterized by a small number of providers, each will seek to provide such programming.

For example,[34] suppose a market has three television stations. There are 10,000 television households that are on during a particular time period, program cost is $300 and advertisers will pay for commercial time at the rate of $1.00 per viewer. Assume that program A is the choice of 7500 viewers, program B 2000 viewers and program C 500 viewers. If they are operated competitively, all three would gravitate toward program A. If each gets an equal audience share of the 7500 households who choose program A, they would each earn $2200 ($2500 less $300), much better than they would do by running programs B or C.

On the other hand, a monopolist owning all three stations would also seek to maximize profit. If it used the same strategy as the three independently owned stations, total profit would be $6600. But if it put program A on one channel and programs B and C or the other channels, total profit would be $9100 ($7200 plus $1700 plus $200). So at least in theory, "it may be that, in some ranges, monopolists will offer more choices than a number of separately owned firms."[35]

This possibility is particularly relevant to cable television. Although there are thousands of cable operators throughout the country, very few households today have the option of choosing who will provide them with cable television. To the individual household, the cable operator is a monopolist (ignoring for the moment the substitutes and indirect options that exist). Clearly if all the cable operator offered was retransmitting broadcast stations there would be few takers where broadcast signals are reasonably strong. To attract its next customer the cable operator has an incentive to offer some programming that current nonsubscribers do not have and is presumably different from the package that it already offers. For some people, that may be the addition of Court TV, for others, the History Channel, for others Black Entertainment Network, and for others the Comedy Central. So long as the marginal revenue of adding a programming type different from

[34] The following example is taken from Krattenmaker & Powe. *Id.* at 42-43.

[35] *Id.* at 43. There is at least a piece of anecdotal real world evidence of this theory in the newspaper business. In Philadelphia, where I teach, Knight-Ridder owns the only two daily newspapers. The two newspapers, the *Inquirer*, a broadsheet, and the *Daily News*, a tabloid, have been maintained as very different products, with distinctive editorial voices and audience niches.

one already carried exceeds its marginal cost, a cable operator is satisfied and consumer welfare is enhanced.

The FCC has tried to influence diversity in broadcast television programming through regulations limiting or restricting broadcast outlet ownership. These include:

1) Standards for awarding licenses that give added weight to ownership by racial minorities;

2) Limits on the number of outlets that may be controlled by a single entity in a local market;

3) A limit on the number of licenses that may be owned nationwide by a single entity or the aggregate audience share that a single entity may have access to.

There is no evidence that any of these policies on ownership has in fact resulted in greater (or less) diversity of content.

The assumption behind granting preference to racial minorities is that minority owners are more likely to provide programming aimed at minority audiences than white owners. The racial preference has resulted in a small net gain in the number of stations owned by minorities, but there has been much churn in ownership. There is suspicion that in some cases minority owners are a front for white ownership, and after the required year of minority ownership control returns to a white-owned entity.[36] One study from the Department of Commerce found that between 1991 and 1993 minorities gained ownership of thirty-eight stations (television and radio) but gave up control of forty-two.[37]

Moreover, Congress has specifically forbidden the FCC from undertaking any research into whether minority-owned stations did indeed provide any programming that was substantially different from that of other stations.[38] The lack of government data has hindered academic research as well.

The FCC's limits on multiple local ownership ("duopoly") were also imposed with the assumption that more different voices could result in greater programming diversity. There has never been substantiation that joint ownership would affect broadcasters' programming choices in local markets. Nor has the FCC ever conducted empirical research on single versus joint ownership opera-

[36] *See* David A. Vise & Paul Farhi, *FCC Minority Program Spurs Deals—and Questions*, WASH. POST, June 3, 1993, at A1.

[37] U.S. Department of Commerce, *Analysis and Compilation by States of Minority-Owned Commercial Broadcast Stations* (Oct. 1993), *in* KRATTENMAKER & POWE, *supra* note 9, at 94 n.164.

[38] A provision in the Omnibus Budget Reconciliation Act of 1987 forbade the FCC from either repealing or continuing to examine minority ownership policies. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329 (1987).

tions. We do, however, have some evidence that newspapers under common ownership in a single city do differentiate themselves.[39]

Under current rules, no single entity may control more than twelve television stations—fourteen under some limited circumstances—or reach more than twenty-five percent of the national audience.[40] However, the television networks, through which most of the population gets its programming, have no limits on the number of affiliates. Given the economics of broadcast programming, therefore, the dominance of three (now four) networks undermines the intention of fostering content diversity through ownership limits.

Only the "right kind" of diversity. Attempts of broadcasters to break out of the programming mainstream have been dealt with harshly by the FCC and the courts when the programming ventures too far afield. The Commission made its displeasure known in 1970 when a college radio station broadcast an interview with Jerry Garcia of the Grateful Dead that included some four letter words.[41] A few years later, WGLD, a group-owned station in the Chicago market became the highest-rated station with a so-called topless radio live call in format. The FCC ruled it obscene, fined the owner $2,000, and the format was dropped.[42] Perhaps the most well-known case in this area is *FCC v. Pacifica Foundation.*[43] Here, New York station WBAI-FM aired a program about contemporary attitudes toward language. In this context it played a routine by comedian George Carlin in which he says the "words you couldn't say on the public airwaves."[44] Upon a complaint from a listener, the FCC ruled that, while not legally obscene, this language could not be broadcast at times when children might be listening (later judged variously to be after 10 p.m. or midnight).[45]

Note that each of these cases, all from the radio world, involved an educational station owned by a college, a group-owned commercial station, and a non-profit foundation-owned station. All three encountered trouble in their attempts to be "diverse."

39 *See* Ronald G. Hicks & James S. Featherstone, *Duplication of Newspaper Content in Contrasting Ownership Situations*, 55 JOURNALISM Q. 549 (1978).

40 Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, Report and Order, 100 F.C.C.2d 17 (1984), *reconsideration granted in part*, Memorandum Opinion and Order, 100 F.C.C.2d 74 (1984). These limits were expected to be raised following legislation proposed in Congress in late 1995.

41 Eastern Education Radio, Notice of Apparent Liability, 24 F.C.C.2d 408 (1970).

42 Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P&F) 285 (1973).

43 FCC v. Pacifica Found., 438 U.S. 726 (1978).

44 *Id.* at 726.

45 *Id.*

IV. NETWORK RESTRICTIONS

The FCC has ruled on the relationship of the networks with their affiliates, presumably to help ensure some latitude among local stations to provide local programming, and to reduce the financial clout of the networks.[46] For example, in 1970 the FCC adopted rules relating to syndication and subsidiary rights in independently produced network programs.[47] These prevented the dominant networks from holding a financial interest in the programs provided to it by independent producers. Similarly, they were forbidden to engage in domestic or international program syndication. The Commission's objective was primarily to strengthen the negotiating position of independent television program producers with the networks, and perhaps to prevent networks from favoring programs in which they had a financial interest.[48] The rule, phased out in 1993, had no discernable effect on program diversity.

A more focused attempt to promote diversity was the Prime Time Access Rule ("PTAR"),[49] implemented in 1970. The rule effectively prevented the three older networks from programming more than three hours during prime time. By limiting the amount of network programming, it was assumed that local stations would have greater latitude in providing more locally based programming and expanding the opportunities for independent producers of quality first run programming. The PTAR has created new opportunities for producers and syndicators of game shows and off network re-runs. A few quality local programs can be attributed to the actions of the PTAR. One such program is "Chronicle" on Boston's WCVB (surviving even a change in the station's ownership). However, there is little evidence, scientific or observable, that the PTAR has fundamentally affected the type of quality programming available.

V. JUDICIAL RESPONSES TO CONTENT REGULATION

The federal courts have not always upheld FCC rulings and regulations.[50] However, they have been consistent in upholding the basic premise that content regulation for broadcasting may be held to a less rigorous First Amendment standard than the print

46 Network Television Broadcasting, Report and Order, 23 F.C.C.2d at 388 ¶ 9.

47 *Id.* at 383.

48 KRATTENMAKER & POWE, *supra* note 9, at 98 n.181.

49 47 C.F.R. § 73.658(k) (1993).

50 *See, e.g.*, Miami Herald v. Tornillo, 418 U.S. 241 (1974) (finding FCC regulation unconstitutional as applied to print media).

press.[51] This remains true despite the reality that there are far more broadcast television stations in most markets than there are daily and weekly newspapers.

In 1943, the Supreme Court upheld FCC regulations limiting how radio stations could contract with networks.[52] In the 1969 landmark *Red Lion* case,[53] the Supreme Court upheld the personal attack portion of the Fairness Doctrine by requiring a broadcaster to give air time to a journalist so he could reply to an aired attack by a radio preacher.[54] This case is frequently juxtaposed with *Miami Herald v. Tornillo*,[55] a case decided a few years later with the opposite conclusion, based on First Amendment principles as applied to the print media.[56] In 1978 the Court upheld the FCC's *Pacifica Foundation* ruling.[57]

VI. Research on Video and Ownership

Having covered the general case of television content and regulation, we can now move ahead to the narrower issues of specific programming and ownership. Questions include the extent to which the number of local competitors effects content; the degree to which group-owned stations might behave differently than independently owned stations; and differentiation between network-owned stations and others, or between stations owned by programmers, by cable companies, or any other pattern of variables. For example, do minority-owned stations program differently than others?

In order to determine whether there are differences in programming, researchers generally use one or more of the same factors that the FCC uses in evaluating programming efforts. The most prominent of these is the amount of local programming, primarily its news and its diversity of content. These factors are, of course, meaningful only if one buys into the FCC's assumptions. Or, looking at it another way, what is good is what the FCC says is good, so that is what we should measure. There has been precious little questioning in the academic literature on whether we are evaluating broadcasters on the right basis. For example, a market-

51 *Compare Miami Herald*, 418 U.S. 241 (print media) *with National Broadcasting Co.*, 319 U.S. at 190 *and Red Lion*, 395 U.S. at 367 (upholding FCC regulations for broadcasting).

52 *National Broadcasting Co.*, 319 U.S. at 190.

53 *Red Lion*, 395 U.S. at 367.

54 *Id.*

55 *Miami Herald*, 418 U.S at 241.

56 *Id.*

57 *Pacifica*, 438 U.S. at 726. Ironically, the Court reprinted Carlin's entire monologue in an appendix to its decision. *Id.* at 751-55.

place approach would be simply to base quality on what viewers wish to watch when they have a choice. Perhaps the license renewal criteria should have been to consider whether the ratings of a particular station, over a multiple year period, are within so many points of the average for a station of that size. The argument could probably be made that any licensee that consistently reports low ratings is clearly not performing in the public interest and therefore should surrender its license to another who is willing to program for the public.

Much of the richest literature on the effects of ownership on content actually comes from the newspaper business.[58] Like broadcasting, newspapers are locally based, may be owned by a group or independently, and are almost as dependent on advertising revenue as are broadcasters.[59] Unlike television and radio, however, few newspapers have any direct local competition. This serves as grist for studies of the effects of competition on content. In general, the findings that have emerged in recent years indicate that intense local competition between two newspapers, at the very least, has led to increases in the amount of money the papers spend on the news-editorial budget.[60]

The literature on the effect of group ownership on content has been largely inconclusive. In what is probably the most definitive of a long line of studies,[61] there were some small differences between group and independent newspapers. Group papers had slightly less space devoted to news and editorial copy, but had larger news staffs who had to write less copy for a given amount of total "newshole."[62] Group papers devoted more space to the editorial page and to editorials about the city in which the paper was located.[63] The typical story in group owned papers was shorter.[64] The author concluded, "[t]he differences [in the group-owned pa-

58 *See, e.g.*, Benjamin M. Compaine, The Newspaper Industry in the 1980s 85-112 (1978); Ben H. Bagdikian, The Media Monopoly (4th ed. 1992); Press Concentration and Monopoly: New Perspectives on Newspaper Ownership and Operation (R.G. Picard et al. eds., 1988).

59 Large city newspapers get about eighty percent of their income from advertising, smaller papers a lower proportion. Robert G. Picard, *Economics of the Daily Newspaper Industry*, *in* Media Economics: Theory and Practice 192 (Alison Alexander et al. eds., 1993).

60 *See* Barry Litman & James Bridges, *An Economic Analysis of Daily Newspaper Performance*, 7 Newspaper Res. J. 9 (1986); Stephen Lacy, *The Effect of Intracity Competition on Daily Newspaper Content*, 64 Journalism Q. 281 (1987); Stephen Lacy, *Newspaper Competition and Number of Press Services Carried: A Replication*, 67 Journalism Q. 79 (1990).

61 *See* Stephen Lacy, *Effects of Group Ownership on Daily Newspaper Content*, 4 J. Media Econ. 35 (1991).

62 *Id.* at 43-44.

63 *Id.* at 44.

64 *Id.*

pers] found in this national sample might improve the group newspaper from the reader's point of view."[65]

VII. Competitive Effects and Television Content

In television as with newspapers, more of the research effort has looked at the impact of competition in the local market than on the type of ownership. There has been some work, however, with significance for ownership questions.

One study looked at the relationship between news competition of television stations in the local market, and the impact on financial commitment to news, as measured by the number of news employees and news budgets. Competition was measured by how close two stations were in the ratings for their early evening newscasts. In this study, stations that were very close in the ratings spent more and had larger staffs (holding size of the market constant) than did stations that either had a large lead or were far behind in the local news ratings.[66]

New Video Competition. As noted at the outset, competition today covers more than local broadcast television stations. The widespread adoption of cable, the growing channel capacity of cable, and the proliferation of programming services have all promoted the promise of greater diversity of content, increased segmentation of audience interests, and, therefore, heightened competition for the traditional players. Evidence is mounting that these expectations are indeed being realized.

Cable is available to more than ninety percent of households in the United States, and nearly sixty-five percent of those choose to subscribe to cable service.[67] Besides retransmitting broadcast channels—network affiliates, independent stations, and public stations—cable carries an increasing array of general interest and specialized channels. There are more than twenty-five basic nationally available programming services with significant distribution, among them Cable News Network ("CNN"), Black Entertainment Television ("BET"), Nickelodeon, ESPN, MTV, C-SPAN, QVC, Discovery Channel, Arts and Entertainment Channel, CNBC, USA, and the Family Channel. Some of these have ownership affiliations

[65] *Id.*

[66] Stephen Lacy et al., *Competition and the Allocation of Resources for Local Television News*, 2 J. Media Econ. 3 (1989). On the other hand, a study that looked at differentiation among the three major broadcast networks found that, by one measure, at least, the network newscasts were becoming less differentiated, despite ratings competition over the fourteen year time span of the study. *Cf.* Joseph R. Dominick & E. Albert Moffett, *Economic Influences on Long-Form Network News Stories*, 6 J. Media Econ. 37 (1993).

[67] The Kagan Media Index, No. 90, Aug. 31, 1994.

with broadcast networks (ESPN with ABC, CNBC with NBC). More of them are either independent or are related to the cable companies themselves. In addition, there are eleven major pay cable services available, including HBO, The Disney Channel, and Galavision. Plus, one-third of television households have access to pay-per-view programming, often showing special events.

The rise of cable has seen a loss of market share by the traditional television networks and local stations. The market share of the networks has declined from ninety percent or more to the current mid-sixty percent range.[68] To an increasing extent in recent years, cable has also become a significant competitor to broadcast television for a share of advertising expenditures for television.[69]

The impact of cable has been noticeable and measurable in providing increased diversity to viewers and economical marketing opportunities to advertisers. Researchers have substantiated that the increase in cable programming has gone beyond "just more of the same." There has been an increase in the diversity of program types as well as in the programs available at any given time of the day.[70] The same study suggests (with some qualifications) that "many of the objectives of public television are being met by cable television." Indeed, "virtually every type of programming offered on public television is not only available on cable television but in greater quantity as well."[71]

Videocassettes are another source of competition for viewer time, and another opportunity for expansion of content for the video tube. Projections have been made that by 1995 more than ninety percent of homes with television sets would have at least one VCR.[72] This has translated into a booming business for cassette sales and rentals. Cassette sales growth has been particularly significant. Whereas in 1983 cassette rental revenue was about five times cassette sales, the ratio in 1994 was about two to one.[73]

This change is significant in light of research indicating that the sell-through market is where the more substantial impact of

[68] All commercial broadcast stations (network plus independents) account for about seventy-three percent of prime time audiences. *See* Richard Mahler, *A Look at Cable, 1994: Are We Really Close to This?*, L.A. Times, Dec. 31, 1993, at F1; *see also* Shelly Schwab, *Revolution or Confusion?*, 61 Vital Speeches 21 (Oct. 15, 1994).

[69] *See* Ronald Hawkins, *The CAB: Defender of the Faith*, Cable Television Bus., Apr. 15, 1989, at 22-23. (Ad Sales Success table by Paul Kagan Associates).

[70] *See generally* August E. Grant, *The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television*, 7(1) J. Media Econ. 51 (1994).

[71] *Id.* at 63.

[72] The Kagan Media Index, No. 90, Aug. 31, 1994.

[73] *Id.*

diverse programming has been.[74] Whereas the major studios continue to dominate the rental market, a second tier of independent video programmers and distributors have concentrated their efforts in providing content for special interest markets.[75] Cassette sales have "increased the supply for minority tastes (e.g., new nontheatrical audience segments like children and housewives) together with narrow appeal programming (i.e., nontheatrical content categories like how-to and music videos)."[76]

VIII. Television Content and Ownership

Unlike the print media, the structure of broadcast media has been restricted almost since the start of modern industry. In particular, there have been stipulations on the number of radio and television stations that may be owned by a single entity, by the mix of AM/FM and VHF/UHF stations, by a limitation on multiple ownership in any market, and, eventually, on the cross-ownership of a newspaper and television station in any market.[77] The rationale for these policies has been to promote diversity through maximizing the number of individual owners, and therefore "voices," in each local market as well as nationally.[78]

However, the data in recent years has not sustained this position. Differences in programming based on ownership, as in measuring the effects of competition, can be based on surrogate measures for quality, such as time allocated for local news or other local programming types (again, using the FCC's standard for desirable effects), or diversity of viewpoints held by viewers (presumably the desired outcome of FCC policy).

Multiple studies have concurred that programming differences related to group ownership are mixed and, even at that, are quite small.[79] For example, stations owned by larger groups broadcast slightly fewer minutes per week of all local programming but more minutes of both local news and public affairs programming.[80] Regression analysis studies of many of the ownership variables that might affect news staff size (such as size of the market,

[74] Heikki Hellman & Martti Soramäki, *Competition and Content in the U.S. Video Market*, 7(1) J. Media Econ. 29, 46 (1994).
[75] *Id.*
[76] *Id.*
[77] *See* Sterling, *supra* note 30, at 299.
[78] *See, e.g.*, Henry Geller, *FCC Media Ownership Rules: The Case for Regulation*, 32 J. Comm. 148 (1982).
[79] *See, e.g.*, John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. Media Econ. 63, 67 (1988).
[80] *Id.*

UHF, or VHF signals) found that all variables *except* ownership had relevance.[81]

Measuring diversity is more difficult than tracking differences in programming, but presumably more to the point of concerns about ownership. Ultimately the objective is to promote content diversity: of ideas or attention to issues. Using this issue measure, a regression model testing issue diversity against multiple variables again found mixed and statistically insignificant relationships with cross-ownership of television and newspapers. That is, factors such as greater occupational mix in a market or greater racial diversity were strongly related to issue diversity, while newspaper/television cross-ownership was not.[82]

The traditional commercial broadcasters in the United States have been buffeted by new competition from players who have benefitted from new technologies. But there are other sources of change in ownership and industry structure in the television business that may impact content. Public television in the United States has long been a controversial "also-ran" in the broadcast industry. In a study that may have implications for state-owned or controlled broadcast authorities outside the United States, a researcher studied a form of ownership change in public television.[83] This study found that executive turnover and the changes in administration policies over the years have resulted in programming that is "tried and true as well as bland and elitist."[84] While commercial broadcasters may be criticized for having to program with one eye on the needs of their advertisers, public television has to gear its programming to the upscale audience that constitutes its donors. The managers of public television, at least in the United States, have "routinely traded off creative, innovative, and diverse programming in favor of secure federal, corporate, and subscription funding."[85]

Denmark, typical of many Western European nations, has liberalized its broadcasting environment in recent years by adding commercial networks to the previously restricted government broadcasting monopoly.[86] In 1988, a commercially funded private

[81] *Id.*
[82] *Id.* at 68-72.
[83] Marilyn E. Lashley, *Even in Public Television, Ownership Changes Matter*, 19 Comm. Res. 770 (1992). "In public broadcasting . . . ownership change is accomplished by means of executive and legislative turnover." *Id.* at 771.
[84] *Id.* at 783.
[85] *Id.* at 784.
[86] *See* Angela Powers et al., *Competition in Danish Television News*, 7(4) J. Media Econ. 21 (1994).

network went on the air in competition with a government-funded public network. The government had been concerned that permitting commercial competition would have a negative effect on television content.[87] The result may have been the opposite. In a short time, the evening newscast of the private station had achieved near parity in viewership with the government station.[88] The news station did this by differentiating its newscast from the more established one. Its stories were longer, used more sources and sound bites, and sought a human interest angle in the news. Some Danish journalists believe this has led to the government station's improving its newscast by covering stories that are of greater interest to the general audience.[89]

IX. Entering the New World of Television Content

It has already been pointed out that regulation, research, and the conventional wisdom about television have been made largely irrelevant by the expanded viewer and programmer options. These increased options have been made possible by the widespread availability of cable, videocassettes, and other broadband wireless distribution methods. However, the new frontier that has been opened with the arrival of these conduits has created opportunities for new vertical integration of program creators and carriers.

Figure 1 charts the overlapping holdings of the many players in the cable programming arena. Table 1 highlights some of the same data by showing the holdings of some of the major cable operators in some of the more popular cable networks. And Table 2 presents the data in yet another format, providing a breakdown by percentage of ownership of the major program holdings by some of the major players.

[87] *Id.* at 22.
[88] *Id.* at 29.
[89] *Id.*

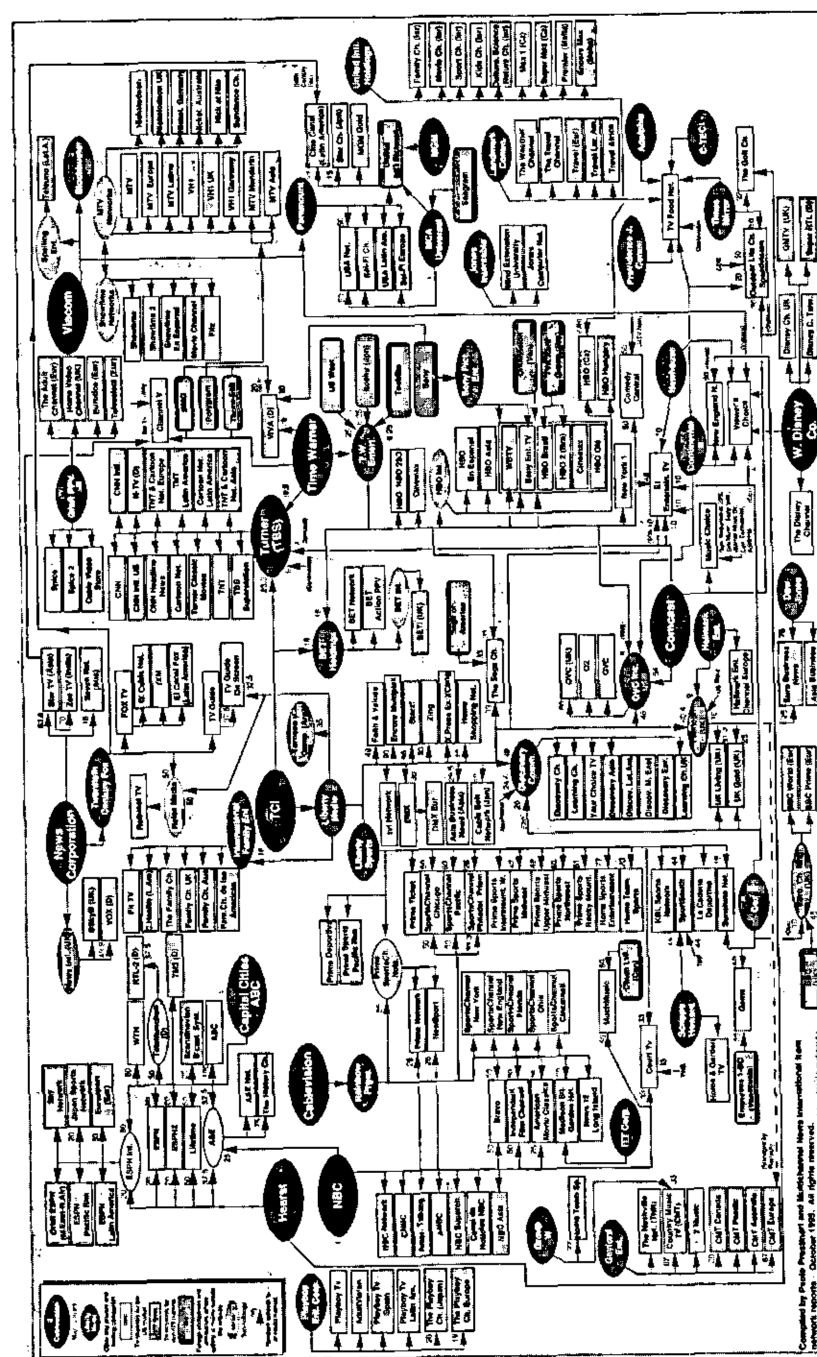

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TABLE 1
CABLE PROGRAMMER OWNERSHIP, BY MSO

Cablevision
- Court TV
- Prime Sportchannel
- Bravo
- American Movie Classics
- Madison Sq. Garden Ch.

Capital Cities/ABC
- Arts & Entertainment
- ESPN
- Lifetime

Comcast
- QVC
- Turner Broadcasting
- Golf Channel
- Music Choice

Continental Cable
- New England News
- Viewer's Choice
- TV Food Net

Gaylord Entertainment
- Nashville Network
- Country Music TV

Hearst
- Arts & Entertainment
- ESPN
- Lifetime
- New England News

Jones Intercable
- Mind Extension University
- Health Network
- Language Network
- Jones Computer Net

Landmark Comm
- Weather Channel
- Travel Channel

NBC (General Electric)
- NBC Network
- CNBC
- Court TV
- Arts & Entertainment

Newhouse
- E! Entertainment Channel
- Viewer's Choice

TCI
- Discovery Channel
- The Family Channel
- Turner Broadcasting
- BET Network
- TV Guide On Screen
- Request TV
- Prime Sportschannel
- Home Shopping Network
- QVC
- Sega Channel
- Court TV

Time Warner
- HBO
- Cinemax
- BET Network
- Turner Broadcasting
- Comedy Central
- The Sega Channel
- E! Entertainment Channel

Times Mirror
- Outdoor Life Channel
- Golf Channel

Twentieth Century Fox
- Fox TV
- FX Cable Network
- TV Guide On Screen

Turner Broadcasting
- CNN
- CNN Headline News
- Cartoon Network
- TNT
- TBS Superstation
- Turner Classic Movies

Viacom
- Showtime
- MTV
- VH-1
- Nickelodeon
- Viewer's Choice
- USA Network
- Sci-Fi Channel

TABLE 2
OWNERSHIP OF CABLE NETWORKS
(Numbers are % of Ownership)[1]

	Cable -vision	Cap Cities/ ABC	Com- cast	Contin- ental Cable	Hearst	NBC	TCI	Time- Warner	Turner	Viacom
A & E		37.5			37.5	25				
CNN (Turner)			9				24	24	43	
CourtTV	17					17	33	33		
Discovery							49			
Disney Channel										
ESPN		80			20					
Family Channel							18			
HBO								62.5		
Lifetime		50			50					
Madison Square Garden	75(?)					25				
MTV										100
Nickelodeon										100
QVC			57				43			
USA Network										100

[1] Based on data in MULTICHANNEL NEWS INT'L, Oct. 3, 1994, at 20-21.

The cable companies in particular have been actively involved in creating or purchasing interests in the networks and producers of the programming they carry. The television networks, which until recently had been precluded from creating their own prime time programming by the financial interest and syndication rules, have also invested in programming for cable. Among the most prolific acquirers of programming sources have been the largest cable Multiple System Operators ("MSO"s): Tele-Communications, Inc. ("TCI"), Comcast, Time Warner, Continental, and Cablevision.

This trend has at least some stakeholders concerned. The most visible source of their apprehension is TCI. TCI has sizeable

investments in companies that run CNN, BET, The Discovery Channel, Court TV, Home Shopping Network, and its rival QVC. The United States Justice Department is looking into TCI's vertical involvement. The concern is that it might soon have the power to block new programmers from getting established. This is because TCI controls cable systems which reach about twenty percent of cable households nationwide (and approaching thirty percent if major TCI investments in other cable companies are included).[90] Channels that are advertiser-supported need to be carried on TCI cable systems to have the prospect of reaching a reasonably sized audience. Viacom, which has far smaller cable holdings but is a major programmer (MTV, Showtime) told the FCC that without TCI's base, a new channel would need to be carried "by nearly every other cable system in the United States in order . . . to succeed."[91]

Another potential bottleneck could be that cable-owned programmers will refuse to provide their fare to their DBS or telephone broadband rivals. Indeed, all the spectrum capacity of broadband telephone carriers, DBS and the like would not amount to much if the most popular programming was controlled by a small number of dominant cable companies that refused to sell to competing delivery modes (or, more realistically, set prices that were not economical).

This issue was addressed in the 1992 congressional action that reversed some of the deregulation of the 1984 Cable Act.[92] The 1992 Cable Act[93] specifically prevented cable programmers from denying programs to competitors.[94] Meanwhile, the potential new players, the regional telephone companies who have several overlapping plans for providing their own broadband video services, have apparently recognized the importance of guaranteeing themselves an independent source of original programming. One consortium, consisting of Pacific Telesis, Bell Atlantic, and Nynex, has joined with Creative Artists, a large Hollywood talent agency, to develop jointly programming as well as delivery technology.[95] With thirty million households in the service

[90] *See* Del Jones, *Cable King Malone Stays Involved*, USA TODAY, July 22, 1994, at 2B.

[91] David Lieberman, *Has TCI Staked Too Big a Claim on Multimedia Frontier?*, USA TODAY, Aug. 26, 1994, at 1B.

[92] Cable Communications Policy Act of 1984, 98 Stat. 2779 (1984) (codified at 47 U.S.C. § 553 (1988 & Supp. V 1993)).

[93] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

[94] *Id.*

[95] *See* Amy Harmon, *Company Town 3 Baby Bells, CAA Promise Results From Joint Venture Media: Michael S. Ovitz Will Advise the Firm, Developing a Marketing Strategy for New Programming*, L.A. TIMES, Nov. 1, 1994, at D4.

area of the three telcos, programming produced by this group would be guaranteed a potentially sizeable distribution even without TCI's cooperation.

Other former Bell telephone companies are in discussions with other Hollywood programmers. With the growing channel capacity, the appetite for programming likely will provide opportunities for additional programming sources for a wider audience. Assuming the 1992 Cable Act is not repealed or subverted, then whether or not TCI agrees to carry a cable network it does not have a stake in may not matter, so long as there are sufficient alternative carriers, such as DBS or telephone.[96]

X. HIERARCHY OF EFFECTS OF REGULATION ON BROADCASTING CONTENT

From its inception, the FCC (encouraged, limited, or abetted by Congress and the courts) has attempted to influence the programming type and content of broadcasting. With few exceptions, the motivation of the FCC has been positive; it wanted to promote programming that many educated, right-minded people would agree was of greater cultural, literary, and educational value than the largely entertainment and middle-brow programming that has dominated television.

Table 3 proposes a hierarchy of effects of regulation on broadcasting content. It starts with the least important factors and moves toward increasingly more significant determinants. It may reasonably be argued that despite all their tinkering with rules and regulations, the factors that most shaped content were those least controllable by the FCC. For example, perhaps the most significant factors of all were the initial spectrum allocations, for AM radio, and later for a mixture of VHF and UHF television in the same market. Although the initial allocation policy was established by the FCC, once set in motion, the spectrum allocation settled on made a truly diverse, competitive television industry almost impossible until the widespread implementation of cable.

On the other hand, given the predominance of the networks in shaping the programming available to most viewers most of the

[96] There have been examples of both aural and video programming sent via the Internet as well. One college radio station was actually "broadcasting" to the Internet. There is a cadre of experimenters who have tied video cameras into their computers and are providing live, though not full motion, video to anyone who wants to access their "URLs" (World Wide Web address) via dial-up modem. It remains to be seen whether the Internet can develop the bandwidth to maintain this avenue as Everyman's access point.

time, individual station ownership and management (and regulation that tries to shape who owns stations) have had relatively little impact on programming.

TABLE 3
HIERARCHY OF FACTORS AFFECTING BROADCAST CONTENT
From least important factors to most important.

I. Owners of individual stations (group or independent)
Because bulk of content is provided by networks
Driven by similar motives

II. FCC policies and regulation aimed at structure
Content neutral factors on license awards: financial stability, experience in broadcasting, limits on number of stations under a group, cross ownership, duopoly, ascertainment, and similar

III. FCC policies and regulations aimed specifically at content
—Blue Book
—Fairness Doctrine
—Prime Times Access Rule
—Financial interest and syndication rules
—Children's programming
—Public Affairs

IV. Antitrust law
—Prevented large national combinations
—Prevented vertical integration
—Split NBC Red and Blue into NBC and ABC

V. Spectrum Allocation Rules
—Created original scarcity and maintained it in AM, VHF/UHF decisions
—Providing it for free

VI. Original fundamental decision in 1920s to put radio in the private sector as a commercial vehicle
—Only piece not tinkered with over the years
—See Europe or PBS for what content may have been like if public all along

XI. DISCUSSION AND CONCLUSIONS

We can say very little with certainty about what effects the content of television has had on societies, although we can feel certain that they have been extensive and varied from society to society. Even areas in which there has been considerable research, such as the effect of violence on television, have failed to produce clear causes and effects. Neither this selective review nor an exhaustive review of the literature will yield a definitive resolution to the question of what effect forms of ownership have on what types and amounts of content. This is true for no other reason than that the bulk of the research to date, worldwide, has been undertaken in an environment of limited video options.

There is much room for speculation and for reasoned assumptions about how television content has affected societies. We hear discussions of a "sound bite" political process, or the MTV generation. We learn about the global village. It is reasonable to assume that bringing war into our living rooms on the nightly news has changed the way nations make war—or perhaps go to greater lengths to avoid it. We can speculate that if Russia's broadcasters had been as closely controlled by the state as they had been under the Soviet Union, the battles in Chechnya would have been waged differently.

To return to the original question of this paper, ownership certainly has an effect on content. The content of public television, with its different "ownership" and strategic charge from its board of directors, is distinct from the content of commercial television. We know that the state-owned or controlled broadcasters in Europe created programming that is distinctive from the United States model. However, within the commercial sectors of the United States broadcasting industry, it is very difficult to point to how ownership has been the cause of specific programming. We cannot say that group-owned stations are programmed differently than independently owned stations. We cannot say that stations owned by racial minorities, by specific ethnic groups, or by a specific gender behave, in aggregate, differently from one another.

We *do* know that historically, programming types have fallen into a rather narrow range. And when broadcasters have deviated dramatically, often due to out-of-the-mainstream content such as extreme politics or social mores, they have been reined in by the FCC and the courts. Diversity has been mandated, but only a mainstream sort of diversity. That too is changing in the new video world.

We also know that all of our experiences, and therefore our assumptions about television, must be re-evaluated. Technology has provided what the FCC never could—almost unlimited bandwidth. Industry, ever motivated by the marketplace above all else, has responded with a wealth of programming choices that now have a segment of the critic community worrying about over-

load. While much of the programming is more of the same (or is the same) as broadcasters have provided for years, there is a surfeit of programming, ranging from all-news to all-comedy, that should please virtually any audience. For those who do not find what they want by wire or air, independent producers of specialized programming now have the critical mass of videocassette households to aggregate an economical audience for almost any subject.

Perhaps most encouraging is that the old fear of bottlenecks has receded as serious efforts to find alternatives to the semi-monopoly of the local cable provider are coming to fruition. Video dialtone, while not generally available in 1995, most certainly will be widely available in some form by the end of this decade. Affordable DBS services most certainly are here already.

Finally, current tools are in place should either programmers or distributors merge into an unhealthy concentration (wherever that level is set). Antitrust law has been used and can continue to be used. But for the foreseeable future, the movement continues to be toward more of everything.

There has always been, and will likely continue to be, a narrow range of mass interest content that accounts for the bulk of what people watch at any point in time. In 1995, the trial of O.J. Simpson riveted mass audience attention. What differed in 1995 from say, the Watergate hearings of 1974, was that 1995 viewers had multiple video options to follow (or avoid) that story in much the same way they have had that latitude in print. The Simpson trial could be followed on Court TV or on CNN. Or, it could be tracked less intensely on regular news shows. Junkies could get their fix on talk shows throughout the cable/broadcast spectrum, while those who wanted to get away from it had plenty of choices. The major networks did not feel compelled (often as a pack) to provide gavel-to-gavel coverage and preempt their regular schedules (and upsetting those who still want to watch their regular soaps).

If Congress and the FCC wanted diversity of content, they have it. And so will the rest of the world.