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Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
2002 Biennial Regulatory Review – Review)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act of)	
1996)	
)	MM Docket No. 01-235
Cross-Ownership of Broadcast Stations and)	
Newspapers)	
)	MM Docket No. 01-317
Rules and Policies Concerning Multiple)	
Ownership of Radio Broadcast Stations)	
in Local Markets)	
)	MM Docket No. 00-244
Definition of Radio Markets)	

**A RESPONSE TO THE FEDERAL COMMUNICATIONS COMMISSION
MEDIA OWNERSHIP WORKING GROUP PAPER NUMBER 5**

‘PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS’

Submitted by

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Introduction

Since it was first founded in 1934, the Federal Communications Commission has been charged with the task of securing the public interest by regulating the mass media marketplace. The goal of that regulation has been to insure that the marketplace of ideas is not trampled by sheer power of consolidated media monopoly. Consistent with its duty to promote “public interest, convenience and necessity”, the Commission has repeatedly held competition and diversity to be the bedrock of Federal media policy.

Recently, in anticipation of the statutory mandate to review media ownership rules, the Commission established the Media Ownership Working Group. At the request of that Group, Dr. Mara Einstein has submitted an analysis of program diversity that seeks to determine whether Federal regulation of mass media has served to promote program diversity.

An Inadequate Definition of Diversity

In seeking to determine an appropriate taxonomy for the evaluation of content, Dr. Einstein has stated that classification of programs by genre can serve as the primary marker of diversity. The study of content diversity prepared by Dr. Einstein assumes that diversity is present when the dominant entertainment services provide an even mix of program genres and, conversely, it concludes that diversity is diminished when one or two genres dominate the program schedule. The genres identified by Dr. Einstein are specifically drama, comedy, variety, motion pictures, news and quiz/game shows.

The Caucus of Television Producers, Writers & Directors (The Caucus) believes that Dr. Einstein’s analysis is critically flawed. Measuring program diversity by genre is like measuring racial diversity by dress size. The protean challenge of identifying diversity has been reduced to a statistical exercise of quantifying program genres. Dr. Einstein has elected a simplification that trivializes the meaning of diversity.

Nowhere in the Einstein study is consideration given to diversity of individual creative style or point of view. The primitive use of genre as the principal measurement of diversity lumps ground-breaking dramas like “Hill Street Blues” in the same category as “CHIPS”, and regards breakthrough comedies like “All in the Family” as the functional equivalent of “The Beverly Hillbillies”. In the same manner, original made-for-television movies and miniseries like “Brian’s Song” or “Roots” are lumped together with theatrical acquisition like “Smoky and the Bandit” or “Dumb and Dumber”.

Dr. Einstein’s study rests on the assumption that diversity is equivalent to proportionality. But the public has no inherent interest in a balanced diet of comedies

and dramas, of game shows and variety specials. Program content cannot be measured as if it were the five basic food groups.

The FCC Charter assumes that meaningful diversity is achieved when a competitive marketplace provides the public access to an array of differing styles and supports the presentation of contrasting points of view. On the other hand, Dr. Einstein concludes that diversity is achieved when the primetime schedule is populated by an equal number of homogenized comedies and dramas or an even mix of game shows and variety specials. That conclusion defies both common sense and reasoned analysis.

The Caucus applauds the Commission for its effort to understand the effect that regulatory policy has had on program diversity. But the study currently under submission is an example of statistical reductionism at its insidious worst. The author has substituted category for content and the result is a flawed, internally inconsistent and seriously misleading analysis.

Critical Information Omitted

The Einstein study is limited not only by the statistics that it includes, but by the information that it ignores. The real world experience of professional writers, producers, directors and actors was considered only anecdotally, and then only in regard to the scheduling of programs, not in respect to their creation. There was no inquiry directed at the Writers Guild, the Directors Guild, the Producers Guild or the Screen Actors Guild.

Equally troubling is Dr. Einstein's decision to exclude critical information contained in the extensive record established by the FCC in the two years leading up to and including the 1990 En Banc that was devoted to the Financial Interest and Syndication Rules (Fin/Syn). It is noteworthy that in preparing her doctoral thesis, Dr. Einstein carefully studied those proceedings, yet in the current report she makes no reference to the extensive record amassed during that landmark event.

There are also glaring inconsistencies in Dr. Einstein's scholarship. Despite the fact that most of the information presented in the paper prepared for the Media Ownership Working Group is directly lifted from the dissertation Dr. Einstein published two years ago (e.g. pages 266-82 of the dissertation appears on pages 5-20 of the current study), the conclusions are surprisingly different. In the "new" study, Dr. Einstein contradicts the most basic insights contained in her dissertation.

Dr. Einstein's dissertation argues that since the repeal of Fin/Syn "The changed economic structure of the television industry has limited diversity. There are now a limited number, and therefore a limited variety of providers in the marketplace. This concentration of power denies access to communication channels of viewpoints that communicate a different perspective of the world".¹ In support of this conclusion, Dr. Einstein quotes Gary David Goldberg, the creator of "Spin City" and "Family Ties", who notes "The more interesting, innovative shows won't come from the big (vertically

integrated) groups ... you will see blandness and similarity...”² This insight is curiously omitted from the study Dr. Einstein submitted to the MOWG.

In April 1999, Dr. Einstein drew on her doctoral research to participate on a panel at the New Jersey Communication Association. The panel was titled “Media, Regulation and Democracy.” Dr. Einstein’s remarks were summarized in the syllabus under the heading “The Death of Diversity: How Eliminating Fin-Syn Concentrated Voices in the Television Industry”. The remarks delivered that day conveyed a very different impression than those conveyed by the study submitted to the Commission.

In her dissertation, published in 2000, Dr. Einstein asserts “I would hesitate to attribute an increase in diversity to repeal of the rules”.³ Yet in the current study, dated September 2002, Dr. Einstein asserts “The bottom line is this: diversity increased after the repeal of fin-syn”.⁴ Dr. Einstein’s chameleon tendencies are disquieting.

Paucity of Credible Testimony

Also of note is the fact that in her “new” study Dr. Einstein cites first hand interviews with only seven individuals. These individuals were, in order of appearance, Warren Littlefield, Flody Suarez, Matt Williams, Stephen McPherson, Ted Harbert, Paul Haggis, and Rob Burnett. No doubt, these are all important players. Warren, Flody, Matt, Steve, Paul and Rob – but where are Marcy, Diane, Susan, Marian and Marta? By any measure - credits, Emmys, longevity, even financial success - Marcy Carsey, Diane English, Susan Harris, Marian Rees and Marta Kaufman have established bono fides that eclipse the credits of the small sampling of men upon whom Dr. Einstein relied. If the issue at hand is diversity, how can the author fail to include the observations of even one woman?

The interviews conducted by Dr. Einstein not only ignored input from the most significant women in the industry, not one of the interviewees was a person of color, nor was anyone over sixty years old nor under forty. Moreover, all of the interviews that Dr. Einstein conducted involved an individual who is currently either employed by one of the networks or financially tied to one of the media conglomerates that are militating for an end to federal regulation. In preparing the current study, Dr. Einstein failed to interview even one true, independent producer or entrepreneur.

Likewise, it is disconcerting to note that Dr. Einstein chose to ignore the wisdom that might have been provided by those individuals whose contributions to the medium have placed them in the Television Academy Hall of Fame. Is it far-fetched to think that Grant Tinker, Norman Lear, Fred Silverman, Steven Bochco, James Brooks, Dick Wolf, Bill Link, Steve Cannell or Bill Cosby might provide insight that was untainted by the desire to placate the owners of the very companies who seek the right to monopolize the media marketplace?

Perhaps the exclusion of so many qualified experts from the study that Dr. Einstein has undertaken at the request of the Media Ownership Working Group can be explained by the haste with which the study was done. The interviews with Littlefield, Harbert and

Suarez were actually done in 1999, three years before Dr. Einstein was commissioned by the FCC to do her study. They were included in her doctoral dissertation. Apparently, only four interviews were undertaken for the current study. Clearly a degree candidate is not afforded the same access as is available to a representative of the FCC, but apparently Dr. Einstein failed to press this advantage.

Lack of Historical Perspective

On page 34 of her FCC study, Dr. Einstein concludes that “As the industry has become more consolidated, program diversity has increased”.⁵ If there is any truth to that conclusion then, by extension, further consolidation would only lead to even greater diversity. The head of Viacom, Mel Karmazin, has already stated that he sees nothing wrong with his company owing CBS, UPN and NBC. Dr. Einstein goes one step further. Her research suggests that if Viacom controlled all the networks there would be a corresponding increase in diversity. Such a suggestion defies common sense and historical analysis.

As was demonstrated during the 1990 En Banc, the promulgation of the Financial Interest and Syndication Rules led to the proliferation of independent television stations and independent production companies. Even the Networks conceded in those hearings that independent companies, owned and controlled by creative talent, were the primary drivers of diversity. The President of ABC, Robert Iger, assured the FCC that “If the rules were repealed, ABC could flexibly support new creative talent, and then the public would benefit through more innovative and diverse programming – programming that could be produced without the big-studio trademark associated with it”.⁶

Mr. Iger got his wish. The Rules were repealed. And since their elimination, the networks have merged with the big studios and now everything carries the very stamp of uniformity that Bob Iger rightfully warned us against. Dr. Einstein has made no effort to square the testimony of the networks in 1990 with their real world behavior in the ensuing twelve years.

The elimination of the Rules has decimated the independent station community and virtually eliminated the entrepreneurial production entity. The Einstein report makes passing mention of this crippling effect. She even acknowledges that vertical integration is “...detrimental to the overall quality of network programming”.⁷ But while admitting the rise of self-dealing and lack of objectivity⁸, Dr. Einstein fails to admit the disconnect between these facts and the conclusions presented in the first part of her paper.

Regulations denying the networks the ability to condition access to the airwaves on the willingness of producers to surrender ownership of their creations once supported a vital marketplace of ideas. When Norman Lear first conceived of “All in the Family” he sold the pilot to ABC. When ABC wanted to mute Archie Bunker, Mr. Lear sold the show to CBS. Likewise, Marcy Carsey first pitched the Cosby Show to ABC but, when that network expressed something less than enthusiasm for the direction of the series, Ms.

Carsey took it to NBC. Had the networks been able to extract underlying rights, as they do today, these landmark series would have been stillborn.

Since regulations have vanished, the ability of producers, writers, directors and actors to challenge network hegemony has evaporated. Producers are held captive to studios owned or controlled by networks. Disney programs virtually all of ABC yet sells none of their shows to competing networks. The situation is no different at NBC or CBS. As Brian Lowry, media critic for the Los Angeles Times, notes, "... those networks that own studios don't trust studios that own competing networks to treat them squarely..."⁹ Ideas are now held hostage within the narrow corridors of vertically integrated media chains. Producers either submit to network directives or disappear.

New Trends in the Manipulation of News and Entertainment

It is not merely producers and writers who have been held hostage to the power of self-dealing conglomerates. The new media barons have manipulated their own news and public affairs departments to serve the interests of entertainment. Breaking news stories are regularly created to conform to the promotional needs of primetime.

The behavior of Disney/ABC with respect to the Pennsylvania miners who were trapped underground is indicative of this trend. As Los Angeles Times staff writer Elizabeth Jenson noted, "Disney, which paid \$1.5 million to the miners for their rights to the story, went to great lengths to protect its property by shutting out fact-based accounts of the ordeal in the news media."¹⁰ The willingness to embargo a news story as part of an entertainment marketing plan is standard operating procedure for the newly integrated media empires.

Not content to merely embargo ideas and news stories, the vertically integrated media empires have transformed programming into self-congratulatory advertising. The recent HBO broadcast of the movie "Live from Baghdad" was a shameless two hour commercial for CNN. Not surprisingly, both HBO and CNN are owned and controlled by AOL/Time/Warner. The objectivity that once characterized television docudrama has been skewed by corporate convenience. Both diversity and accuracy have suffered, but, given Dr. Einstein's myopic methodology, this fact is not noted in the current study.

A Failure to Identify Independent Suppliers

Dr. Einstein purports to test the FCC's contention that "...there is a correlation between who the suppliers of programming are and the diversity of programming that they produce."¹¹ Yet in her analysis of the suppliers of prime time programming, Dr. Einstein has failed to distinguish between independent suppliers and network controlled entities. Her conclusion that by the 1990s the number of program suppliers had been drastically diminished¹² says more about Dr. Einstein's methodology than it does about diversity and competition.

In erroneously concluding that the number of program suppliers had shrunk dramatically during the period when the Financial Interest Rules were in place, Dr. Einstein employs flawed statistics. Her raw data ignores the scores of independent companies who had chosen to enter financing deals with studios. As these studios did not own networks, the producers had enormous autonomy. Vital independent suppliers like Witt-Thomas-Harris and Shukovsky-English (based at Warner Bros.) or Bellisarius and UBU (based at Paramount) or Miller-Boyett and Patchett-Tarses (based at Lorimar) or Glen Larsen (based at Fox) were completely overlooked in the Einstein statistics.

It is myopic to presume that an independent production entity ceases to exist simply because it elects to establish a time-limited deal with a studio. The independence that defines a production company is lost only when the studio that has been the producer's fiduciary is married to the network that broadcasts the producer's creations. There is a huge difference between a show like "Murphy Brown" produced by Shukovsky-English Productions in association with Warner Bros. and sold to CBS and "Smallville" produced by Tollin/Robbins under a deal at Warner Bros. for the WB. In the former case, the producer has elected a financing partner that has no creative veto and has an affirmative obligation to promote the profitability of the program on behalf of the creators. In the later case, the producer is subject to the creative whim of the studio and the studio is incentivized to consider the profits of the network over the rewards that would benefit the creator.

Competitive Markets Undermined by Preferential Treatment

The pattern of anti-competitive self-dealing that has emerged since the elimination of Fin/Syn is startlingly transparent. In 1992 there were 16 new series that were produced independent of network financial and creative control. This year there was only one. Ten years ago, only 15 per cent of the network series were produced by an entity affiliated with a network. This year the percentage of shows produced "in-house" has risen to 77 per cent. Dr. Einstein does not dispute these facts, but she fails to understand how they correlate to a loss of competition and a corresponding decrease in diversity.

In her study, Dr. Einstein cites what she terms "...the infamous "ER" license renewal"¹³. The characterization of the deal as "infamous" is an indication of Dr. Einstein's bias. Certainly the writers, actors and producers of the hit series did not regard the deal with such evident contempt. While it is true that NBC paid a huge premium for the renewal of "ER", it is also true that the size of the premium is testimony to both fair market value and to the shortsighted decision made by NBC not to extend the license until the last moment. In negotiating with NBC on behalf of John Wells Productions, Warner Bros. properly engaged the dynamics of the free market. Those dynamics are the foundation of democratic capitalism. Deregulation has deprived the creators of content of the reasonable protections of free market negotiations and, absent federal constraints, network profits can now be enhanced at the expense of creative talent.

Regrettably, the competitive market that was in operation when “ER” was created has been dismantled by the elimination of Fin/Syn. The overt favoritism that the deregulated networks are now able to show to their in-house productions has left independent producers in the proverbial outhouse. MTM, The Cannell Studios, Lorimar, Rysher, and a host of lesser entities have either been devoured by the entities that control access to the airwaves or have simply disappeared. Even powerhouse entities like Columbia Pictures Television and Artists Television Group have been forced to abandon the business of supplying primetime programs by the overt, anti-competitive practices that the networks have engineered since the lifting of regulatory constraints.

The loss of competition among a community of vital independent production companies has reduced the support that had previously been available to new and emerging talent. The development deals that have historically served to incubate new writers and producers have been drastically curtailed over the last five years. The cancellation of development deals has bolstered the bottom line of the media conglomerates in the short run, but it will tax the public interest in the final analysis.

Ultimately, the television business is not all that different from other American enterprise. Absent the creative spark of entrepreneurially driven small business owners, the engine of American democracy will sputter.

Extraction of Rights as a Condition of Access

The pattern of self-dealing is in stark contrast to the sworn testimony the network presidents gave to the FCC during the 1990 En Banc. In those hearings Robert Wright, President of NBC, stated that “... The natural incentives of the networks are the best guarantee that independent program suppliers will flourish”.¹⁴ The President of CBS pledged that “...with repeal of the rules, we will be able to support new ventures and help vitalize the independent community... we want to help new talent set up their own businesses”.¹⁵ Speaking for ABC, Robert Iger argued that it was unfair that the networks were “... denied the opportunity to offer ourselves as an alternative source of support for independent producers...”.¹⁶ “I am not asking for a preferred position in our dealings with creative talent”, Iger stressed as he implored the Commission to allow the networks the freedom “... to make a competitive, arms-length offers to participate in ownership...”¹⁷

Since being granted the freedom to operate without the constraints imposed by Fin/Syn, the networks have made a mockery of their sworn testimony. They now routinely condition access and extract rights. New and ever more onerous financial conditions, imposed in conspicuously parallel practice, are a clear contradiction of the pledges the networks made before the Commission. Today the network position is not simply preferred, it is exclusive. Their offers to creative talent are not at arms length, unless thumbs to the throat can be viewed as fair play.

Dr. Einstein is well aware of this deceit. In her dissertation she observes “Due to vertical integration, more and more companies are selling programs within their own

company rather than going out into the marketplace... which means that the profit participants are cheated out of their rightfully earned money.”¹⁸ Nowhere in the “new” study does Dr. Einstein comment on the implications of such misappropriation or the consequences of such blatantly anti-competitive practices on the creative community.

Self-dealing among the various related entities of the five dominant media titans has drastically diminished the economic advantages that talent would otherwise receive. Deprived of both economic rewards and artistic independence, many of the most accomplished creators have simply left the business. There is inherently less diversity when there is less incentive for the best writers to fight for the integrity of their creations. Deregulation has sanctioned the extraction of rights and promoted predatory practices that reward corporations and their stockholders at the expense of creators and the general public.

New Predatory Practices

Of the plethora of predatory practices instituted by the networks since deregulation, few have been as destructive to diversity as the gambit known as “repurposing”. Dr. Einstein blithely ignores the implications of this practice. She merely notes that “Repurposing began ... as a way for producers to more quickly recoup their investment.”¹⁹ The reality is that repurposing is a counterfeit term that integrated media entities have coined to excuse the transfer of programs to their related cable entities for virtually no consideration.

It is noteworthy that repurposed shows are generally sold to related entities. They are seldom offered on the open market. These transfers build great value for the cable subsidiaries but deprive the creators of content of their just compensation as determined by the dynamics of the free market. The implications of repurposing on the creative community might have been evident to Dr. Einstein had she taken the time to have so much as a cursory discussion with any of the guilds that represent writers, actors, directors or producers.

Repurposing has also resulted in a glut of program reruns. Where previously a series’ episode would have a second network run usually six months after the first run and then a syndicated exposure some years later, the same episodes now appear on network and cable almost simultaneously. ABC has just announced that the new sitcom, “Life with Bonnie”, will be repurposed on the Disney owned Family Channel just four days after the network premiere. Certainly the acceleration and proliferation of reruns cannot be seen as contributing to diversity, no matter how that term is defined.

Repurposing may add value to the cable channels controlled by the network’s parent company, but it significantly erodes the value of the underlying program. Independent stations have long depended on the ability to exploit the off-network rights of primetime series. Repurposing not only delays the availability of off-network rights, it necessarily diminishes the value of the episodes that have had multiple exposures prior to being

offered on the open market. Repurposing has become a substitute for the old and altogether anti-competitive practice, of warehousing.

Not surprisingly, repurposing has had a devastating effect on the creative community. The minimum basic agreements under which writers, actors and directors work are premised on the assumption that off-network rights will be sold for the highest and best value. Residuals are calculated as a percentage of the cable sale. But the self-dealing that is the essence of repurposing has allowed consolidated media entities to gift off-network rights to related cable entities and thus avoid, or at least grossly understate, the obligations that are the basis of all guild agreements.

Other, more subtle, predatory practices have accelerated as regulations have been abandoned and networks have been allowed to engage in unlimited self-supply. The array of creative approvals that the network chieftains feel entitled to exercise has expanded greatly. Where once the networks were only involved in approving the two lead actors or the director of a given program, they now demand that producers submit virtually the entire crew list for network vetting. Casting directors, cinematographers, editors, composers and designers need to get the network stamp of approval. As this stamp resides in only a few offices, the funnel through which talent must pass is exceedingly constricted. As producers' authority has been usurped by network approvals, there has been a corresponding loss of diversity.

Deregulation has elevated broadcasting executives to the role of cultural commissars. The once dynamic tension between supplier and broadcaster has snapped. Creative control now rests in the hands of a few powerful corporate executives. And while certain of those executives may have exquisite taste, the concentration of authority certainly cannot be seen as the author of diversity.

The Growth of Ingrained Conflicts-of-Interest

Loosening regulation of broadcasting has caused a cancerous growth in conflict-of-interest. Robust competition has been choked off by the intertwined tentacles of merged media empires. If there is any lesson learned from the events surrounding Arthur Andersen and Enron, it is that no good comes of ingrained conflicts.

The strength of our nation is rooted in deep distrust for consolidated power. Our constitutional system of checks and balances restrains each branch of government. The founding fathers took great care to protect the authority of states and localities. That precious lesson should not be lost on the FCC. Deregulation that allows those who control the means of distribution to also control the means of production undermines the integrity of both the content and the pricing of the marketplace of ideas.

In Conclusion

It is necessary and appropriate for the Commission to determine the correlation between regulation and the diversity of programs available on television. Unfortunately,

the study of program diversity commissioned by the Media Ownership Working Group and repurposed by Dr. Einstein, is both superficial and misleading. The correlation of program category to content diversity has the same bonding as lightning to the lightning bug.

The First Amendment to the Constitution insists that the government do nothing to abridge freedom of speech. This Amendment rests on the assumption, clearly articulated by the Supreme Court, “that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...”²⁰ The commandment that government not impede the free expression of ideas should not be read to allow a few media conglomerates to impose their self-serving constraints on our most fundamental freedom. As stated by the Court, “Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression by private interests.”²¹

A multiplicity of voices expressing divergent opinions is the bedrock of our Democracy. A vital, competitive marketplace of ideas can only be secured by regulations crafted to restrain those who have, through spectrum allocation, cable exclusivity or other regulatory grant, enjoyed the benefit of regulatory privilege. Absent strong, content-neutral rules, the windows of opportunity that technology has opened will slam shut.

Government regulation is often reviled for being inefficient and unpredictable, but it is an indispensable tool for securing the public’s interest against the private plunder of our common wealth. It is in the public interest, convenience and necessity that the Federal Communications Commission undertakes to guarantee diversity of content in our mass media through carefully crafted and uniformly enforced regulation.

SOURCES:

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- ³ *ibid.*, p. 274
- ⁴ Einstein, Mara (2002): “Program Diversity and the Program Selection Process on Broadcast Network Television”, FCC Media Ownership Working Group report, Part 1, p. 17
- ⁵ *ibid.*, p. 34
- ⁶ Iger, Robert (December 14, 1990): FCC En Banc Hearing on the Financial Interest and Syndication Rules (MM Docket 90-162), Testimony of Robert Iger, p. 3
- ⁷ Einstein, FCC Report: Part 2, p. 29
- ⁸ *ibid.*, Part 2, p. 30
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- ¹⁵ Sagansky, Jeffrey F., (December 14, 1990) FCC En Banc Hearing on the Financial Interest and Syndication Rules (MM Docket 90-162), Testimony of Jeffrey F. Sagansky, p. 5
- ¹⁶ Iger, FCC Testimony, p. 2
- ¹⁷ *ibid.*
- ¹⁸ Einstein, “Prime Time Power and Politics”, p. 330
- ¹⁹ Einstein, FCC Report, Part 1, p. 13
- ²⁰ Associated Press v. United States, 326 U.S. 1, 20 (1945)
- ²¹ *ibid.*