Finsyn Proponents Distort the Evidence
Regarding "Independent" Versus "Network" Productions. In Fact, a Correct Analysis of the Data Shows Significant Involvement of "Independent" Producers and Production Entities in Network Prime Time Programming

Commenters who advocate the adoption of new financial interest and syndication ("finsyn") rules, such as the Coalition for Program Diversity ("Coalition"), assert that the four major broadcast networks dominate the programming market as never before when just the opposite is true. The pro-finsyn advocates reach these conclusions through creative definitions that fail to reveal a significant number of independent producers and through inaccurate calculations that grossly inflate the proportion of "network-affiliated" programming.

The Coalition Relies on Distorted Definitions of "Network Affiliated" and "Independent Producer" To Support its Erroneous Claim of Network "Dominance"

- Finsyn advocates classify shows as "network affiliated" when a producer receives financial backing from a Top 4 network or its affiliated studio, but as "independent" when a producer receives such backing from a major studio that is not affiliated with a Top 4 network, even if the studio owns an "emerging" network (as is the case with Warner Brothers and the WB Network).

- The Coalition classifies programs produced by a studio affiliated with a Top 4 network as "network affiliated" even when the program appears on a different network. Thus, a program produced by 20th Century Fox for CBS is counted by the Coalition as "network affiliated" even though the producing entity is entirely independent from the exhibiting network.

- The Coalition treats as "network affiliated" programs that a Top 4 network co-produces or produces in association with an "independent" producer, thus completely ignoring the involvement of writer/producers and "independent" production companies in the vast majority of prime time programs.

- The Coalition counts news and sports programs as "network productions," thereby inflating the percentage of "network affiliated" programs in prime time. News and sports programming were never covered by the finsyn rules since there is no syndication market for these programs.

- FOX, which was part of the solution to Big Three Network "dominance" a decade ago, now appears to be part of the Coalition's "problem." FOX became a successful fourth network, resulting in more, not less, diversity to the video programming marketplace.

The Coalition Vastly Overstates the Amount of "Network Affiliated" Prime Time Programming.

- Simply by removing news and sports from the Coalition's tally and by deleting programs produced by a Top 4 network or its affiliated studio that air on a

different Top 4 network, the proportion of "network affiliated" productions for the 2002-2003 television season (using the Coalition's own data) drops from 76 percent to 60 percent.

- When co-productions between a Top 4 Network and an "independent" producer are excluded from Coalition statistics, only 35 percent of the Top 4 network prime time programs broadcast during the 2002-2003 season are produced solely by a network or its affiliated studio.

The Coalition Data Grossly Undercount the Current Level of "Independent" Production

- Dozens of "independent" producers were involved in the production of prime time scripted series and reality programs aired by the Top 4 broadcast networks during the 2002-2003 season.

- Coalition data fail to list a single independent production company that produces programs for emerging broadcast networks (WB, UPN, PAX). Yet a significant number of "independent" producers were involved in the production of prime time programs aired by emerging networks.

- Coalition data do not include the significant and expanding amount of independent production for cable television networks, which offers a substantial opportunity for new entrants.

- Coalition data overstate the percentage of shows produced by what the FCC considered "independent producers" when the finsyn rules were in effect – and thereby inflate any decline in the number of independents – by counting as "independent" production companies owned by or associated with one of the major Hollywood studios. Thus, the Coalition's 1992-93 data count Lorimar, one of the largest suppliers of network prime time programming during the 1992-93 season, as "independent" even though Lorimar was a subsidiary of Warner Bros. at that time. But neither the Commission nor the Court of Appeals ever considered production companies owned by major studios to be "independent producers."

By Any Measure, Diversity in Television Programming Has Expanded Significantly While the Level of Concentration Has Diminished.

- Viewers now have access to nine broadcast networks and over 300 cable television networks. These broadcast and cable outlets have also vastly expanded the number of purchasers of original programming. The top-rated broadcast networks are no longer the only viable option for independent program producers.

- The market trends that led the FCC to eliminate the finsyn rules in 1995 have only accelerated. With the advent of additional broadcast networks and the continued growth of cable and DBS, the original three broadcast networks face even greater competition from an array of programming alternatives, and their audience share continues to decline.

- Even focusing solely on producers of programming for prime time on the Top 4 networks, however, the level of concentration has *declined* since finsyn rules were repealed. The Coalition's own data shows that 60 percent of programs on the Top 4 networks were supplied by or in affiliation with a major studio during the 1992-93 season (excluding news and sports) compared with 57 percent in 2002-03. In addition, the Coalition's data is significantly incomplete, and fails to include any data for true independent productions on emerging networks.

Coalition Arguments That the Law Supports the Adoption of New Finsyn Rules Are Absurd.

- The Coalition characterizes *Schurz Communications, Inc. v. FCC* as giving a "judicial green light" to a quota on non-network productions" when in fact the case thoroughly repudiated the finsyn rules, including a 40 percent cap on network productions.

- Contrary to the Coalition's description of *Schurz Communications*, the Seventh Circuit found that the finsyn rules "appear to harm rather than to help outside producers *as a whole* (a vital qualification) by reducing their bargaining options." It found that "[t]he ranks of the outside producers of prime time programming have been thinned under the regime of financial interest and syndication rules. The survivors are the beneficiaries of the thinning." It also found that the rules retard the growth of emerging networks. The court concluded: "how all this promotes programming diversity is mysterious."

- After remand, the same Seventh Circuit panel affirmed the Commission's decision to repeal the finsyn rules and expressed doubt that the rules "ever had much basis." The Court praised the Commission for not merely repeating "the same dreary, argumentative, repetitive, canned, self-serving submissions that were in the original record" (as the Coalition does now). Instead, the FCC "threw out the rules, convinced that the objections to them were unanswerable."

> Significantly, the Court warned that if the FCC ever wanted to change its mind and re-regulate the television programming market "*it had better have an excellent, compelling reason. The three original networks are even weaker today than they were …when the decision to deregulate was made, and no doubt they will be weaker still next year…*"

To reimpose finsyn restrictions, the Commission must be able to demonstrate that the market conditions that justified the rules in 1970 still exist. This cannot be done.