

# MEDIA DIVERSITY AND SUBSTITUTABILITY: PROBLEMS WITH THE FCC'S DIVERSITY INDEX

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## Introduction

In 2003, as part of the Federal Communications Commission's biennial review of its media ownership regulations,<sup>2</sup> it proposed, among other things, to eliminate the existing cross-ownership rules (limiting ownership by a single entity of one or more radio stations, television stations, and newspapers in a single market) in favor of new Cross-Media Limits.<sup>3</sup> This was partly justified by the belief that the Internet provides a substitute source of local news.<sup>4</sup> The FCC's proposed rulemaking (the "Order")<sup>5</sup> was challenged and, in *Prometheus Broadcasting v. FCC*, the Third Circuit Court of Appeals ruled that although "the Commission gave too much weight to the Internet in deriving the Cross-Media Limits," it was acceptable for the Commission to find that the Internet contributes to viewpoint diversity.<sup>6</sup> This paper makes a more thorough analysis of whether the Internet is a substitute for broadcast media, particularly for the purpose of local news, and concludes that it is not currently a substitute and is not likely to soon be a substitute. For that reason, the Internet should not be used as pretense to further increase media ownership limits, which have already been shown to result in less local news on TV and radio.

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<sup>2</sup> Telecommunications Act of 1996 § 202(h), 47 U.S.C. § 161 (2004).

<sup>3</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (3rd Cir. 2004).

<sup>4</sup> Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620 (2003) [hereinafter Order].

<sup>5</sup> *Id.* note 4.

<sup>6</sup> *Prometheus*, 373 F.3d at 400.

The FCC used local news and current affairs as the basis for the relative weights used in the Diversity Index (the formula by which the new Cross-Media Limits were derived).<sup>7</sup> Local news is also one of the two measures used to evaluate localism – “the selection of programming responsive to local needs and interests, and local news quantity and quality.”<sup>8</sup> This paper also uses local news as the frame of analysis for comparing the Internet to broadcast media. This is in part because the elimination of ascertainment requirements makes it difficult to evaluate whether broadcast stations select programming appropriate for their audiences, and also because local news is more suited for comparisons across different media outlets.<sup>9</sup> While the Internet may be vastly superior to broadcasting for one-to-one and small group communications, local news is entirely different.

Curiously, the surveys and reports cited by the FCC do not give a clear definition for the term “local news.” A simple definition is news of events that are geographically near the viewer or listener.<sup>10</sup> Although this definition includes local sports, weather, and traffic, news is more than merely facts. According to the Project for Excellence in Journalism, “The central purpose of journalism is to

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<sup>7</sup> *Id.* ¶ 406.

<sup>8</sup> *Id.* ¶ 78.

<sup>9</sup> Throughout the Order the term “media outlet” is used interchangeably to refer to different media types (e.g., radio and television), and individual outlets (e.g., two particular radio stations). This paper follows the same convention when the context makes clear which definition is intended.

<sup>10</sup> The dictionary defines “news” as a report of recent events, previously unknown information (“I’ve got *news* for you”), material reported in a newspaper or news periodical or on a newscast, or matter that is newsworthy. Merriam-Webster OnLine, <http://www.m-w.com/> (last visited Jan. 7, 2006). One definition of “local news” is that it is news coverage of events in a local context which would not normally be of interest to those of other localities, or otherwise be of national or international scope. Wikipedia, Local News (Jan. 15, 2006), [http://en.wikipedia.org/wiki/Local\\_news](http://en.wikipedia.org/wiki/Local_news).

provide citizens with accurate and reliable information they need to function in a free society.”<sup>11</sup> Three of the principles of journalism are that it should be transparent about sources, represent all constituent groups, and relevant.<sup>12</sup> The Project’s annual State of the News Media report evaluated news reporting in light of these principles by analyzing the number of sources cited for each story, the number of those sources that were identified, and the presence of ten different contextual elements that a story might contain.<sup>13</sup> These contextual elements were background information, future implications, the impact of the story on citizens, a human face to the story, some separation of fact and conjecture, potential action someone could take as a citizen, potential action to take as a consumer, contact information for the journalist or news outlet, the underlying principles at play, and where to go for additional information.<sup>14</sup>

### Broadcast Ownership Rules Should Not Be Based on Other Media

The FCC’s cross-ownership rules rely on the “reasonable probability” that, to use the FCC’s example, “if ... the local newspaper refused to cover a particular story, citizens would be exposed to that story via independently-owned other

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<sup>11</sup> Principles of Journalism, Project for Excellence in Journalism, <http://www.journalism.org/resources/principles> (last viewed Sept. 30, 2006).

<sup>12</sup> *Id.*

<sup>13</sup> The State of the News Media 2006: Methodology, Project for Excellence in Journalism, <http://www.stateofthenewsmedia.org/2006/methodology.asp> (last viewed Sept. 30, 2006).

<sup>14</sup> The State of the News Media 2006: Footnotes, Project for Excellence in Journalism, [http://www.stateofthenewsmedia.org/2006/footnotes/narrative\\_networktv\\_contentanalysis.html](http://www.stateofthenewsmedia.org/2006/footnotes/narrative_networktv_contentanalysis.html) (last viewed Sept. 30, 2006).

media.”<sup>15</sup> But the FCC also acknowledges that “we have no reason to believe that all media are of equal importance.”<sup>16</sup> “[T]he overall impact of a medium is substantially determined by the physical attributes of its distribution technology, along with user preferences.”<sup>17</sup> Studies have shown that people use different media outlets for different types of news and use media outlets differently at different times of the day.<sup>18</sup>

There is no conclusive evidence that people use the Internet as a substitute for broadcast media for the purpose of obtaining local news. The FCC itself concluded that streaming Internet audio is not a substitute for broadcast radio because a significant portion of audio listening occurs while listeners are mobile and most people do not access the Internet from mobile locations.<sup>19</sup> By the same logic, the Internet can not be a substitute for television for users with dial-up connections. Although one FCC study found that consumers generally view Internet news sources as substitutes for daily newspapers and broadcast news,<sup>20</sup> the Order recognized that this is likely due to the fact that many television stations and newspapers have their own websites.<sup>21</sup> There is also evidence suggesting there is no

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<sup>15</sup> Order, *supra* note 4, ¶ 419.

<sup>16</sup> *Id.* ¶ 409.

<sup>17</sup> *Id.* ¶ 422.

<sup>18</sup> Radio and Television News Directors Foundation, The American Radio News Audience Survey Charts 14 and 15, <http://www.rtnda.org/radio> (on file with the Internet Archive Wayback Machine, at <http://www.archive.org/> (last visited Jan. 10, 2006)) [hereinafter RTNDF Survey].

<sup>19</sup> Order, *supra* note 4, ¶ 245.

<sup>20</sup> *Id.* ¶ 365.

<sup>21</sup> *Id.* n.834.

substitutability between television and radio. One FCC study found “either weak or no substitution” between the two.<sup>22</sup> Another study used advertising to define the product market for television (because broadcasters must be able to compete for advertising dollars to remain “vibrant”)<sup>23</sup> and concluded that most advertisers do not view broadcasters and newspapers as close substitutes.<sup>24</sup>

The FCC’s assumption that the Internet is a substitute for other media types also ignores the digital divide. The 28% of Americans that did not go online during 2005 are not likely to go online in the future.<sup>25</sup> It is one thing to assume that news not heard on television will be heard on the radio and vice versa. Radios and televisions are widely available, inexpensive to purchase, do not break easily, and impose no recurring fees. But the financial and time investment necessary to own a computer is significantly higher.

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<sup>22</sup> *Id.* n.874 (citing Waldfogel, *infra* note 121). *See also* Order, *supra* note 4, ¶ 381 (“[T]elevision and radio stations neither compete in the same product market nor do they bear any vertical relation to one another.”), and Order, *supra* note 4, n.909 (“The average respondent uses 2.93 different media for local and 2.71 different media for national news and current affairs.”)

<sup>23</sup> Order, *supra* note 4, ¶ 331.

<sup>24</sup> *Id.* ¶ 332.

<sup>25</sup> *See* Susannah Fox, Pew Internet & American Life Project, Digital Divisions 3 (Oct. 5, 2005), [http://www.pewinternet.org/pdfs/PIP\\_Digital\\_Divisions\\_Oct\\_5\\_2005.pdf](http://www.pewinternet.org/pdfs/PIP_Digital_Divisions_Oct_5_2005.pdf). The Order itself acknowledges that 28% of Americans are not online. Order, *supra* note 4, ¶ 365.

# The Market Forces Model of Media Regulation Has Resulted in Less Local News

FCC regulations can be classified into one of three models: scarcity, trusteeship, and market forces.<sup>26</sup> Current media ownership regulations are based primarily on the market forces model. Under this model, licensees must exercise “good faith discretion” in ascertaining the needs of their communities,<sup>27</sup> to be “responsive to the issues facing their community,”<sup>28</sup> and to continue to adhere to the fairness doctrine,<sup>29</sup> but there are no real regulatory or statutory requirements to air news or public affairs programming.<sup>30</sup> The belief was that stations would continue to provide news and public affairs programming in response to “market forces.”<sup>31</sup>

The real result of the market forces approach to broadcast regulation has been that the number of minutes of news programming per hour has decreased,<sup>32</sup> stations have cut their news staffs or eliminated them entirely and outsourced the news to wire services.<sup>33</sup> The news that is aired has shifted from serious

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<sup>26</sup> Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach To Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982).

<sup>27</sup> Marc Sophos, Comment, *The Public Interest, Convenience, Or Necessity: A Dead Standard In The Era Of Broadcast Deregulation?*, 10 Pace L. Rev. 661, n.68 (1990).

<sup>28</sup> *Id.* at 687, citing *Deregulation of Radio*, 84 F.C.C.2d at 978 (1981).

<sup>29</sup> *Id.* at 687, citing *Deregulation of Radio*, 84 F.C.C.2d at 979 (1981).

<sup>30</sup> *Id.* at 687.

<sup>31</sup> *Id.* at 680.

<sup>32</sup> Kathryn S. Wenner, *Bang, Bang, Bang*, 24 Am. Journalism Rev. 32 (Nov. 1, 2002).

<sup>33</sup> *Id.*

investigations and series to entertainment, sports, and consumer-related items.<sup>34</sup> Although the switch to the market forces approach did make it possible for Fox to emerge as a fourth national broadcast network, it also made it essentially impossible for a broadcast station to lose its license. The FCC's proposed rules will increase consolidation in the broadcasting markets without fixing these systemic problems. "On local TV news, fewer and fewer stories feature correspondents, and the range of topics that get full treatment is narrowing even more to crime and accidents, plus weather, traffic and sports."<sup>35</sup>

Radio as a whole has not been maintaining its audience. In September 2002, Duncan's American Radio reported that the "average persons rating" (APR) – the percentage of the U.S. population listening to the radio in any average quarter hour – was the lowest it had been since Duncan began keeping records in spring 1976.<sup>36</sup> That year, the APR was 15.74. The APR peaked at 17.53 in spring 1989 but has fallen steadily since then and was 14.55 in September 2002 – a near-17% drop in listening over thirteen years.<sup>37</sup> James Duncan, president of Duncan's American Radio, believed the cause was an increase in the average commercial time per

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<sup>34</sup> *Id.*

<sup>35</sup> The Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism*, [http://www.stateofthenewsmedia.org/2006/narrative\\_overview\\_intro.asp?cat=1&media=1](http://www.stateofthenewsmedia.org/2006/narrative_overview_intro.asp?cat=1&media=1).

<sup>36</sup> PM Update, *12+ Radio Listening At 27-Year Low*, RadioandRecords.com (Sept. 4, 2002), <http://www.radioandrecords.com/Subscribers/TodaysNews/archive/arch090402.htm> (on file with the Internet Archive Wayback Machine, *at* <http://web.archive.org/web/20021121050118/http://www.radioandrecords.com/Subscribers/TodaysNews/archive/arch090402.htm#12+%20Radio%20Listening%20At%2027-Year%20Low> (last visited Jan. 8, 2006)).

<sup>37</sup> *Id.*

hour.<sup>38</sup> The solution, according to Duncan, is “a commitment to localism -- local operations, local research, local programming decisions, local promotion, local news and events.”<sup>39</sup> This is supported by a telephone survey conducted during January and February of 2000, which found that 93% of respondents agree that an important function of radio news is to inform people about community events,<sup>40</sup> and 78% agree that an important function of radio news is to identify problems in the community.<sup>41</sup>

But instead of encouraging more local news, regulatory changes based on the market forces model have resulted in less news and more consolidation. In 1981, the FCC eliminated three broadcaster requirements that affected news programming: stations no longer were required to “ascertain” the issues that are important to their audiences, they no longer had to fill six to eight percent of airtime with “nonentertainment” programming, and stations could air more than eighteen minutes of advertising per hour.<sup>42</sup> The FCC believed that these restrictions were not

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<sup>38</sup> Steve McClellan, *Analysts paint rosy ad pix*, *Broadcasting & Cable* (Dec. 13, 1999). *But see* Scott Musgrave & Larry Rosin, “Will Your Audience Be Right Back After These Messages?” *The Edison Media Research/Arbitron Spot Load Study 3* (June 1999), <http://www.arbitron.com/downloads/spot.doc> (“Over the last six years, total radio listening is down by 9%. This erosion in listening cannot be entirely explained by the most recent increases in commercials. Time spent listening to radio has been gradually dropping for years with the same losses occurring from 1993 to 1996, (before the period of huge demand for radio ad time) and 1996 to 1999.”)

<sup>39</sup> Mark Schapiro, *The day the music died*, *Salon.com* (July 25, 2000), <http://archive.salon.com/business/feature/2000/07/25/sfx/print.html>.

<sup>40</sup> RTNDF Survey, *supra* note 18, tbl.8 (data based on a telephone survey conducted in January and February 2000).

<sup>41</sup> *Id.* tbl.10.

<sup>42</sup> *In the Matter of Deregulation of Radio*, 84 F.C.C.2d 968, 971 (1981).

necessary because broadcasters would self-regulate in order to maintain their audience.<sup>43</sup>

The 1996 Telecommunications Act led to absentee owners and remotely-programmed content.<sup>44</sup> It eliminated national radio ownership limits and substantially raised local ownership limits.<sup>45</sup> As a result, the radio industry lost 981 owners between 1995 and 1999.<sup>46</sup> By 1999, of the fourteen most popular music formats, ten had a nationwide format oligopoly in which more than 50% of all radio listeners in the U.S. who tuned to that format were serviced by four or fewer station ownership groups. By 2002, four firms controlled 70% market share or greater in “[v]irtually every geographic market.”<sup>47</sup> In smaller markets, consolidation was even more extensive. The largest four firms in most small markets controlled 90% market share or more.<sup>48</sup>

The effect of The 1996 Telecommunications Act on local radio news programming is quite clear. Four firms control 66.6% of the nations’ News format radio listeners.<sup>49</sup> In 2004, the FCC estimated that local ownership of TV stations

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<sup>43</sup> Margot Slade & Eva Hoffman, *F.C.C. Cuts Radio’s Regulatory Strings*, N.Y. Times, Jan. 18, 1981, at 4-8.

<sup>44</sup> *Prometheus*, 373 F.3d at 432 (citing Comments of Future of Music Coalition, MB Docket 02-277 at 13-14 (Nov. 20, 2002)).

<sup>45</sup> Telecommunications Act of 1996 § 202(a) and (b), 47 U.S.C. § 161 (2004).

<sup>46</sup> BIA Research, *1999 State of the radio industry* (cited in Todd Chambers, *Loosing Owners: Deregulation and Small Radio Markets*, 8 J. Radio Stud. 292 (2001)).

<sup>47</sup> Peter DiCola & Kristin Thomson, Future of Music Coalition, *Radio Deregulation: Has It Served Citizens and Musicians?* 31 (Nov. 18, 2002), <http://www.futureofmusic.org/research/radiostudy.cfm>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 38.

adds almost five and one-half minutes of local news and over three minutes of local on-location news to each station's half-hour local news broadcast.<sup>50</sup> This study has only recently come to light. FCC staff reportedly ordered that all copies of this report be destroyed.<sup>51</sup>

Although six stations focusing exclusively on local news were among the country's top thirty stations in terms of money earned from advertising in 2002,<sup>52</sup> at one of these stations, Chicago's WGN, the staff is half the size that it was twenty-five years ago. "Our primary mission is to cover the news of the day," says News Director Tom Petersen, who has been with the Tribune Company-owned station for two decades. "But if there was something I wish we could do, that would be spending more time on serious investigations and series," like the station used to.<sup>53</sup> Network newscasts on news-intensive stations may still run as long as five minutes, but three minutes is more common.<sup>54</sup> In smaller markets (areas with populations less than 125,000) there has also been a dramatic decrease in the number of news wire services since the passage of the 1996 Act.<sup>55</sup> These trends are summarized in the table below.

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<sup>50</sup> Federal Communications Commission, Do Local Owners Deliver More Localism? Some Evidence From Local Broadcast News 1 (June 17, 2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267448A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf).

<sup>51</sup> John Dunbar, Lawyer Says FCC Ordered Study Destroyed, Associated Press, Sept. 14, 2006, <http://www.freepress.net/news/17682>.

<sup>52</sup> Wenner, *supra* note 32.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Todd Chambers, *Losing Owners: Deregulation and Small Radio Markets*. 8 J. Radio Stud. 309 (2001).

Year	All markets	Major markets	Market size		
			Large	Medium	Small
1998	56	86	58	50	48
2000	42	71	45	35	42
2002	29	37	23	24	41

Whether a cause or an effect of the decline in local news on news-focused stations, a majority of radio audiences are now obtaining their local news from music stations. A survey conducted during January and February of 2000 found that although 93% of all persons age eighteen to sixty-four follow the news and listen to the radio, the most popular source of news on the radio is music stations.<sup>57</sup> Adults 18 to 64 spend as much time per weekday listening to news on stations that play mostly music as they do listening to all-news stations, talk radio, and National Public Radio combined.<sup>58</sup> Respondents reported spending 86 minutes listening to radio news/talk on the average day—half of their total radio listening on an average day.<sup>59</sup> In 1986, the average FM station in a typical market aired only three and a half minutes of news per hour.<sup>60</sup> And yet most local radio stations rarely send

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<sup>56</sup> Wenner, *supra* note 32.

<sup>57</sup> RTNDF Survey, *supra* note 18, Executive Summary.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> J. Tunstall, Communications Deregulation 151, 152 (1986).

reporters into the field.<sup>61</sup> Instead, headlines were read from wires or provided by national networks.<sup>62</sup>

### The Diversity Index

The 2003 Order revised five of the FCC's six ownership rules<sup>63</sup>: the national television multiple ownership rule,<sup>64</sup> the local television multiple ownership rule,<sup>65</sup> the local radio ownership rule,<sup>66</sup> the radio/television cross-ownership rule,<sup>67</sup> and the newspaper/broadcast cross-ownership rule.<sup>68</sup> The Order proposed eliminating the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership

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<sup>61</sup> The Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism*, [http://www.stateofthenewsmedia.org/2006/narrative\\_radio\\_contentanalysis.asp?cat=2&media=9](http://www.stateofthenewsmedia.org/2006/narrative_radio_contentanalysis.asp?cat=2&media=9).

<sup>62</sup> *Id.*

<sup>63</sup> Order, *supra* note 4, ¶ 2.

<sup>64</sup> 47 C.F.R. § 73.3555(e) (prohibiting any entity from controlling enough television stations to reach more than 35% of the television households in the United States).

<sup>65</sup> 47 C.F.R. § 73.3555(b) (allowing the combination of two television stations in the same Designated Market Area ("DMA"), as determined by Nielsen Media Research, provided: (1) the signals of the stations do not overlap; or (2) (a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination).

<sup>66</sup> 47 C.F.R. § 73.3555(a) (limiting the number of radio stations that an entity may own in a single market).

<sup>67</sup> 47 C.F.R. § 73.3555(c) (allowing common ownership of one or two TV stations and up to six radio stations in any market in which at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market in which at least ten independent "voices" would remain post-combination; and one TV and one radio station notwithstanding the number of independent "voices" in the market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV stations, radio stations, independently owned daily newspapers, and cable systems (all cable systems within the DMA are counted as a single voice)).

<sup>68</sup> 47 C.F.R. § 73.3555(d) (prohibiting the common ownership of a daily newspaper and a broadcast station in the same market).

rule in favor of a single Cross-Media Limits rule.<sup>69</sup> To determine the new limits, the FCC proposed using a new formula it named the Diversity Index or DI.<sup>70</sup> This formula is seriously flawed.

A market's DI score is the sum of the squares of each media outlet's weighted percent share of the market.<sup>71</sup> Although the FCC's ownership regulations affect at least seven different types of media outlet (broadcast television, cable television, satellite television, radio, newspapers, magazines, and the Internet), the FCC proposed using the DI to calculate the effect on viewpoint diversity on only four: broadcast television, radio, newspapers, and the Internet.<sup>72</sup> The weights for these four media outlets were calculated at the national level based on telephone survey data, giving the following relative weights: 33.8% for broadcast TV, 24.9% for radio, 28.8% for newspapers, and 12.5% for Internet.<sup>73</sup> Although the relative weights of the different media outlets are based on usage, individual sources within each media outlet are assumed to have an equal market share based on a choice to use availability as a measure of potential voices and an underlying assumption that all sources within an outlet have "at least similar technical coverage characteristics."<sup>74</sup> For sources in different outlets owned by a single parent company (e.g. a radio

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<sup>69</sup> Order, *supra* note 4, ¶ 2.

<sup>70</sup> *Id.* ¶ 391.

<sup>71</sup> Order, *supra* note 4, ¶¶ 403-4.

<sup>72</sup> *Id.* ¶391.

<sup>73</sup> *Id.* ¶ 412.

<sup>74</sup> *Id.* ¶¶ 420-21.

station and television station owned by the same company), the percent shares across all outlets are summed before they are squared.<sup>75</sup>

The FCC calculated DI scores for ten sample markets, and used these results to set its Cross-Media Limits.<sup>76</sup> Using these sample scenarios, the FCC found that in small markets (those with three or fewer television stations), all of the consolidation scenarios resulted in high increases to the average DI score.<sup>77</sup> As a result, the FCC prohibited newspaper/television, newspaper/radio, and radio/television combinations in these markets.<sup>78</sup> In large markets (nine or more television stations), all of the consolidation scenarios resulted in “acceptable increases” to the DI scores, so no limits were imposed on cross-media ownership in those markets.<sup>79</sup> In mid-sized markets (between four and eight television stations), the Commission found that only the newspaper/television duopoly scenario increased the DI scores to an unacceptable level.<sup>80</sup>

Based on these models, the FCC established new numerical limits for local television markets and common ownership of sources in different media outlets. The new limits were designed to keep a market’s DI score below the Department of Justice and Federal Trade Commission’s 1800 threshold, which indicates highly

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<sup>75</sup> *Id.* ¶ 431.

<sup>76</sup> *See Prometheus*, 373 F.3d at 408 n.38 (pointing out that the FCC cited no other factors influencing the formulation of the Cross-Media Limits).

<sup>77</sup> *Id.* at 404.

<sup>78</sup> *See Order*, *supra* note 4, ¶¶ 456, 459, 460.

<sup>79</sup> *Prometheus*, 373 F.3d at 404.

<sup>80</sup> *Id.*

concentrated markets for antitrust purposes.<sup>81</sup> For radio ownership limits, the FCC did not rely on the DI and instead maintained the existing “five equal-sized competitors” rule based on game theory.<sup>82</sup> Cable and satellite television are not included in the new Cross-Media Limits because satellite “provides little or no local nonbroadcast content,”<sup>83</sup> only one-third of cable subscribers have access to a local cable news channel, and these channels are the least watched of any channels in the market.<sup>84</sup> The FCC assumed that each market has only one weekly newspaper.<sup>85</sup> The *Prometheus* court did not question the FCC’s regulations regarding newspaper/broadcast combinations.<sup>86</sup>

### The DI Model is Flawed

The DI is based on the Herfindahl-Hirschman Index (HHI), used by the Department of Justice and Federal Trade Commission to evaluate mergers for antitrust purposes.<sup>87</sup> The *Prometheus* court summarized the problems with the DI perfectly: “In converting the HHI to a measure for diversity in local markets, [] the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently

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<sup>81</sup> *Prometheus*, 373 F.3d at 418.

<sup>82</sup> Order, *supra* note 4, ¶ 289.

<sup>83</sup> *Id.* ¶ 413.

<sup>84</sup> *Id.* ¶ 414.

<sup>85</sup> Order, *supra* note 4, ¶ 392.

<sup>86</sup> *Prometheus*, 373 F.3d at 400.

<sup>87</sup> *Prometheus*, 373 F.3d at 403.

derived the Cross-Media Limits from its Diversity Index results.”<sup>88</sup> Although the national media outlet weighting factors are supposedly based on actual usage, individual outlets within each media format are assumed to have equal shares based on equal availability. The court found this assumption to be “inconsistent with the Commission’s overall approach to its Diversity Index.”<sup>89</sup> “The Commission’s decision to assign equal market shares to outlets within a media type does not jibe with its decision to assign relative weights to the different media types themselves, about which it said ‘we have no reason to believe that all media are of equal importance.’”<sup>90</sup> As one example of the “absurd results” that result from the equal shares methodology, the Dutchess Community College television station in New York City had a 1.5% weighted share when the New York Times Company’s co-owned daily newspaper and radio station had a combined 1.4% weighted share.<sup>91</sup> As the court put it, “[a] Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality.”<sup>92</sup> The FCC’s explanation for not considering actual market share is that “current behavior is not necessarily an accurate

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<sup>88</sup> *Id.*

<sup>89</sup> *Prometheus*, 373 F.3d at 408.

<sup>90</sup> *Id.* (citing Order, *supra* note 4, ¶ 409).

<sup>91</sup> *Prometheus*, 373 F.3d at 408.

<sup>92</sup> *Id.*

predictor of future behavior.”<sup>93</sup> But it was current behavior that was used to assign the relative weights for different media types.

In the court’s view, the DI is also flawed in that it takes no account of differences in the amount of local news programming that an outlet provides.<sup>94</sup> The Order claims the process of classifying programming as local news and current affairs would pose “legal/Constitutional and data collection problems.”<sup>95</sup> The Court responded to this claim by pointing out that the actual use data that formed the basis of the relative weights was obtained without incident by simply asking the survey respondents where they obtained their local news.<sup>96</sup>

But using actual use data for so many aspects of the methodology poses other problems. The DI was meant only to be used in the aggregate because of “specific assumptions underlying the DI”<sup>97</sup> and limitations of the data used for the calculations (a national phone survey of 3,136 households conducted in August and September of 2002 and weighted to estimate the national population of persons eighteen years of age or older living in households with televisions).<sup>98</sup> Surveys will need to be larger and done more often. This will mean the surveys cost more to implement. Respondents may start to realize that the surveys are being performed

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<sup>93</sup> Order, *supra* note 4, ¶ 423.

<sup>94</sup> *Prometheus*, 373 F.3d at 408-9.

<sup>95</sup> *Id.* ¶ 424.

<sup>96</sup> *Prometheus*, 373 F.3d at 409.

<sup>97</sup> Order, *supra* note 4, ¶ 392.

<sup>98</sup> Nielsen Media Research, Consumer Survey on Media Usage 10, 12 (Sept. 2002), <http://www.fcc.gov/ownership/studies.html>.

by the FCC and color their answers based on what they would like the media landscape to look like.

The court ordered the FCC to either exclude the Internet from inclusion in the Diversity Index or provide evidence that it is a source of independent local news.<sup>99</sup> The only true example of an *independent* local news website was identified not in the FCC's Order but in the *Prometheus* dissent.<sup>100</sup> The cited site, the Independent Media Center (IMC), is "is a collective of independent media organizations and hundreds of journalists offering grassroots, non-corporate coverage."<sup>101</sup> There are now 163 different IMC regional sites, some encompassing a single city and some encompassing an entire country.<sup>102</sup> This is a wonderful example of the power of the Internet, but by the *Prometheus* court's own categorization, this may not be considered a valid news outlet.<sup>103</sup>

Besides the lack of evidence for including the Internet in the DI, there are structural inconsistencies with the way it is included. Although the FCC assumes that Internet Service Providers (ISPs) in no way filter or restrict the content that

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<sup>99</sup> "On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable." *Id.* ¶ 408.

<sup>100</sup> *Prometheus*, 373 F.3d at 468.

<sup>101</sup> Indymedia Documentation Project, Indymedia's Frequently Asked Questions – What is Indymedia?, <http://docs.indymedia.org/view/Global/FrequentlyAskedQuestionEn#how> (last viewed Jan. 16, 2006).

<sup>102</sup> Based on a count of the links along the left side of the Independent Media Center homepage. Independent Media Center, <http://www.indymedia.org/en/index.shtml> (last viewed Jan. 16, 2006).

<sup>103</sup> Most (if not all) of the articles on IMC websites are posted by individuals, not staff journalists. The court distinguishes between "source[s]" of news and "aggregators" of news and doesn't seem willing to consider individuals or aggregators as sources. *Prometheus*, 373 F.3d at 406-7.

customers can access,<sup>104</sup> it divides the Internet category between telephone and cable providers.<sup>105</sup> This artificially lowers the overall DI score by assuming there are more media outlets. But there is no evidence that ISPs provide any news content (or any content at all, other than technical support information). If anything, the Internet category should be subdivided between those with broadband access and those with slower dial-up connections. Connection speed is the most significant predictor of online behavior.<sup>106</sup> Finally, although there is a cross-ownership adjustment for entities that own outlets of multiple types,<sup>107</sup> there is no such adjustment for Internet outlets. The FCC acknowledges that “virtually all” of the major media providers have created websites.<sup>108</sup> But as the court noted, “[t]here is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart.”<sup>109</sup>

For respondents who reported using the Internet as a news source, the FCC’s survey asked which sites they had used in the past seven days.<sup>110</sup> Seventeen different websites were included in the results, with another 34% of respondents

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<sup>104</sup> Order, *supra* note 4, n.939

<sup>105</sup> *Id.* ¶ 426.

<sup>106</sup> Fox, *supra* note 25, at 6.

<sup>107</sup> Order, *supra* note 4, ¶ 431.

<sup>108</sup> *Id.* n.836.

<sup>109</sup> *Prometheus*, 373 F.3d at 405-6.

<sup>110</sup> Nielsen Media Research, *supra* note 98, Table 19.

referring to other websites. Five of the listed websites are for cable television networks, three are for newspapers, and two are for national broadcast television networks.<sup>111</sup> If the percentages are normalized to sum to 100%, the cable networks comprise 22.5%, newspapers comprise 5.3%, the television networks comprise 2.6%, independent Internet sites comprise 43.7%, and “other” websites comprise 25.9%. None of the independent Internet sites produce their own content. Instead, they all aggregate news from other sources. Even assuming all of the “other” websites are independent, 30.4% of websites should be calculated separately as part of the cross-ownership adjustment. The actual number will be even higher because many of the “other” websites are likely the sites of local broadcasters and newspapers. The end result should be a DI value for the Internet that is much lower than the 12.5% calculated by the FCC.

### The DI Weights Are Based on a Flawed Survey

The *Prometheus* court ruled that the FCC did not justify its choice and weight of specific media outlets used in its Diversity Index.<sup>112</sup> Although the court did not comment on the methodology of the survey, the FCC rulemaking provides no explanation for its chosen weights (33.8% for television, 28.8% for newspapers, 24.9% for radio, and 12.5% for Internet) other than stating they were derived from the results of a certain telephone survey.<sup>113</sup> But the accuracy of telephone surveys “in even the simple task of determining whether [respondents] used a particular

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<sup>111</sup> *Id.*

<sup>112</sup> *Prometheus*, 373 F.3d at 404.

<sup>113</sup> Order, *supra* note 4, ¶ 412.

medium appears suspect.”<sup>114</sup> When telephone survey responses on minutes of media use are compared to actual observation, the actual observed use can be between 13% and 169% more, depending on the type of media.<sup>115</sup>

Even assuming the responses in the survey accurately reflect actual media use, the way the responses were factored into the DI is flawed. The DI weights are based on the normalized responses to the question “What sources, if any, have you used in the past 7 days for local news and current affairs?”<sup>116</sup> But when participants were asked “What single source do you use most often for local or national news and current affairs?”, the responses were very different: 56.4% for television, 25.2% for newspapers, 10% for radio, and only 5.9% for Internet.<sup>117</sup> This second question asked about local *or national* news and current affairs. If the question was restricted to just local news and current affairs, the Internet percentage would likely be even lower than 5.9%.

The survey then asked people if they would be more likely to use different types of media if their primary news outlet were no longer available.<sup>118</sup> Thirty-eight percent of respondents who identified broadcast television as their primary news source stated they would be more likely to substitute cable or satellite news

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<sup>114</sup> Robert A. Papper et al., *Media Multitasking... and how much people really use the media*, Int’l Digital Media & Arts Ass’n J., Spring 2004, at 3, 19.

<sup>115</sup> *Id.* tbl.5.

<sup>116</sup> Nielsen Media Research, *supra* note 98, Question 1. Note: Responses for magazines (20%) were excluded from the normalization. Order, *supra* note 4, ¶ 412.

<sup>117</sup> Nielsen Media Research, *supra* note 98, Question 10.

<sup>118</sup> *Id.*, Question 11.

channels, a daily newspaper, or the radio.<sup>119</sup> Only 14% stated they would be much more likely to substitute the Internet.<sup>120</sup> Another study commissioned by the FCC's Media Ownership Working Group focused specifically on media substitutability.<sup>121</sup> It found that there is clear evidence of substitution between Internet and broadcast TV, both overall and for news; but there is little or no evidence of substitution between weekly newspapers and broadcast TV, or between radio and either Internet or cable TV.<sup>122</sup> Only in smaller markets were the Internet and cable found to serve as substitutes for newspapers, local television, and radio.<sup>123</sup> This suggests that using fixed weights across all markets will yield inaccurate DI scores in individual markets.

### The DI Does Not Further the FCC's Goals

The FCC's 2003 Order lists three goals: localism, competition, and diversity.<sup>124</sup> Localism is a goal because it is believed that local radio and television stations will be responsible to the needs and interests of their local communities.<sup>125</sup> Competition is important because “[c]onsumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Joel Waldfogel, *Consumer Substitution Among Media* (Sept. 2002), <http://www.fcc.gov/ownership/studies.html>.

<sup>122</sup> *Id.* at 3.

<sup>123</sup> *Id.* at 19.

<sup>124</sup> Order, *supra* note 4, ¶ 5.

<sup>125</sup> *Id.* ¶ 74.

one or more firms exercise market power.”<sup>126</sup> The FCC recognizes both economic competition and “competition in the marketplace of ideas—viewpoint diversity.”<sup>127</sup>

The FCC has identified five different types of diversity pertinent to its media ownership policies: viewpoint, outlet, program, source, and ownership diversity.<sup>128</sup> Viewpoint diversity is the availability of media content reflecting a variety of perspectives.<sup>129</sup> Outlet diversity is defined as a market having multiple independently-owned broadcasting companies.<sup>130</sup> Outlet diversity is seen as a means of achieving viewpoint diversity because station owners select the content to be aired and having multiple outlets will result in more diverse programming.<sup>131</sup> Program diversity is defined as the availability of a variety of program formats (e.g. news, music videos, dramas, sitcoms, reality shows, game shows, etc.). Source diversity is the availability of content from a variety of producers. The Order abandoned source diversity as a policy goal because of the significant increase in the number of channels available to most households today.<sup>132</sup> Minority and female ownership diversity are also seen as means of achieving viewpoint diversity.<sup>133</sup>

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<sup>126</sup> *Id.* ¶ 57.

<sup>127</sup> *Id.* ¶ 58.

<sup>128</sup> *Id.* ¶ 18.

<sup>129</sup> *Id.* ¶ 19.

<sup>130</sup> *Id.* ¶ 38.

<sup>131</sup> *Id.* ¶ 20.

<sup>132</sup> *Id.* ¶¶ 44-45.

<sup>133</sup> *Id.* ¶ 51.

Of all the goals and all the types of diversity, viewpoint diversity is the FCC's stated "core policy objective".<sup>134</sup> It is defined as the availability of media content reflecting a variety of perspectives.<sup>135</sup> Viewpoint diversity is of such importance because "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>136</sup> "Information and political viewpoints are crucial inputs that help citizens discharge the obligations of citizenship in a democracy."<sup>137</sup> Although viewpoint diversity is the FCC's core policy objective, directly regulating viewpoint diversity "treads on the editorial independence guaranteed by the first amendment to broadcasters."<sup>138</sup> For that reason, FCC regulations have used other types of diversity as proxies for viewpoint diversity.

### The Digital Divide is Still a Problem

The Internet should not be considered an alternate source of local news in media ownership regulations until penetration levels are relatively high across all demographic groups. The "digital divide" is the term used to describe the clear differences in Internet access and usage rates based on demographic factors such as age, educational attainment, and household income. While 84% of Americans age

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<sup>134</sup> *Id.* ¶ 399.

<sup>135</sup> *Id.* ¶ 19.

<sup>136</sup> *Id.* (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663-64 (1994) (internal quotation marks omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

<sup>137</sup> *Id.* ¶ 393.

<sup>138</sup> Fowler & Daniel L. Brenner, *supra* note 26, at 209.

eighteen to twenty-nine use the Internet, only 30% of those age sixty-five and over use the Internet.<sup>139</sup> Only 38% of American adults who did not complete high school use the Internet, compared to 94% of Americans who completed college.<sup>140</sup> Only 54% of households with income of less than \$30,000 per year use the Internet, compared to 94% of households with income of \$75,000 or more.<sup>141</sup> There is less of a disparity based on race/ethnicity, with 60% of black, non-Hispanic American adults using the Internet, 73% of white, non-Hispanic American adults using the Internet, and 79% of English-speaking Hispanic American adults using the Internet.<sup>142</sup> The result of these disparities is that the percentage of “truly disconnected” Americans that have never used the Internet or email and do not live in Internet-connected households has remained essentially the same at 22% to 23% for the last three years.<sup>143</sup>

The digital divide is not bridged simply by obtaining dial-up Internet access. Connection speed is the most significant predictor of online behavior.<sup>144</sup> Although more than 145 million American adults (72%) use the Internet<sup>145</sup> and ninety-four

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<sup>139</sup> Pew Internet & American Life Project, Demographics of Internet Users (Dec. 5, 2005), [http://www.pewinternet.org/trends/User\\_Demo\\_12.05.05.htm](http://www.pewinternet.org/trends/User_Demo_12.05.05.htm).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Fox, *supra* note 25.

<sup>144</sup> *Id.* at 6.

<sup>145</sup> Pew Internet & American Life Project, Internet Activities (Dec. 5, 2005), [http://www.pewinternet.org/trends/Internet\\_Activities\\_12.05.05.htm](http://www.pewinternet.org/trends/Internet_Activities_12.05.05.htm).

million American adults (65%) go online each day<sup>146</sup>, only 84 million (42%) have high-speed Internet access at home.<sup>147</sup> A December 2005 survey found that 43% of respondents with broadband Internet access reported getting news from the Internet the previous day, compared to only 26% of respondents with dial-up Internet access.<sup>148</sup> For broadband Internet users, online news is nearly as much of a daily habit as is getting the news from national TV newscasts (57%) and radio (49%).<sup>149</sup> Although broadband penetration in the home is likely to increase, it may be reaching a plateau.<sup>150</sup> The number of American adults that do not use the Internet held steady at 32% for the first six months of 2005<sup>151</sup> and shrunk only 4% by December.<sup>152</sup>

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<sup>146</sup> *Id.*

<sup>147</sup><sup>147</sup> John B. Horrigan, Pew Internet & American Life Project, Home Broadband Adoption 2006 (May 28, 2006), [http://www.pewinternet.org/pdfs/PIP\\_Broadband\\_trends2006.pdf](http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf). While 42% of Americans with broadband access at home seems like a good statistic, the Government Accountability Office determined that in 2005, only 28% of American *households* subscribed to Internet service. Government Accountability Office, Pub. No. GAO-06-426, Broadband Deployment Is Extensive throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas 10 (May 2006). The difference between the two figures is likely due to the fact that Internet use is most common among younger demographics, which likely includes many households with children. See Thomas M. Lenard & Daniel B. Britton, The Progress & Freedom Foundation, The Digital Economy Fact Book, 7 (8th ed. 2006), [http://www.pff.org/issues-pubs/books/factbook\\_2006.pdf](http://www.pff.org/issues-pubs/books/factbook_2006.pdf).

<sup>148</sup> John B. Horrigan, Pew Internet & American Life Project, Online News: For many home broadband users, the internet is a primary news source (March 22, 2006), [http://www.pewinternet.org/pdfs/PIP\\_News.and.Broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf)

<sup>149</sup> *Id.*

<sup>150</sup> Thomas M. Lenard & Daniel B. Britton, The Progress & Freedom Foundation, The Digital Economy Fact Book, 6 (8th ed. 2006), [http://www.pff.org/issues-pubs/books/factbook\\_2006.pdf](http://www.pff.org/issues-pubs/books/factbook_2006.pdf).

<sup>151</sup> John B. Horrigan, Pew Internet & American Life Project, Broadband Adoption at Home in the United States: Growing But Slowing 2 (Sept. 24, 2005), [http://www.pewinternet.org/pdfs/PIP\\_Broadband.TPRC\\_Sept05.pdf](http://www.pewinternet.org/pdfs/PIP_Broadband.TPRC_Sept05.pdf).

<sup>152</sup> Pew Internet & American Life Project, Internet Activities (Dec. 5, 2005), [http://www.pewinternet.org/trends/Internet\\_Activities\\_12.05.05.htm](http://www.pewinternet.org/trends/Internet_Activities_12.05.05.htm).

## There Is Little Independent Local News on the Internet

Surveys show that those who do have Internet access are using it to obtain news. In December 2005, 44 million adults (31% of Internet users) reporting getting news online on the typical day.<sup>153</sup> But as the table and graph below illustrate, most users turn to national news sources for their online news.<sup>154</sup> Only 22% of Internet users and 25% of broadband users reported going to foreign or non-traditional news sites.<sup>155</sup> Virtually all original newsgathering on the Internet is being done by traditional media outlets.<sup>156</sup> The fifth site on the list of top news websites averages only half as many visits as the fourth. If the number of unique visitors in millions for the listed top news websites are divided between national sites (MSNBC, CNN General News, Yahoo! News, AOL News, ABC News, and USAToday.com) and local sites (all others), the national sites have almost twice as many visitors (85.5 versus 46.4).

All Internet users	Home broadband users	Source
46%	52%	website of a national TV news organization such as CNN or MSNBC
39%	44%	Portal websites such as Yahoo or Google
32%	36%	website of a local daily paper
31%	33%	website of a local TV news station

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<sup>153</sup> John B. Horrigan, Pew Internet & American Life Project, Online News: For many home broadband users, the internet is a primary news source (March 22, 2006), [http://www.pewinternet.org/pdfs/PIP\\_News.and.Broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf).

<sup>154</sup> *Id.* at iv.

<sup>155</sup> *Id.*

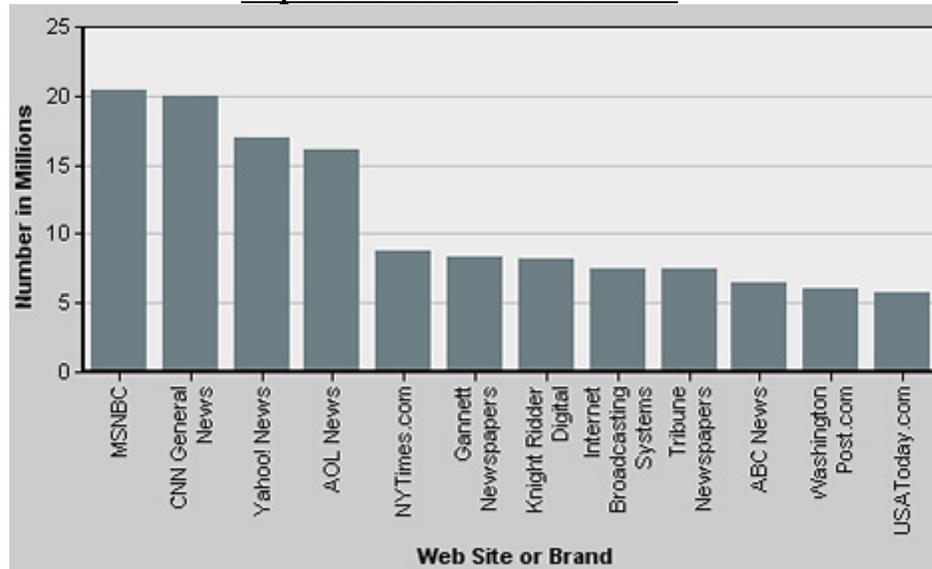
<sup>156</sup> The Project for Excellence in Journalism, The State of the News Media 2006: An Annual Report on American Journalism, [http://www.stateofthenewsmedia.org/2006/narrative\\_online\\_contentanalysis.asp?cat=2&media=4](http://www.stateofthenewsmedia.org/2006/narrative_online_contentanalysis.asp?cat=2&media=4).

20%

24%

website of a national daily newspaper

### Top News websites or Brands<sup>157</sup>



By average monthly unique visitors, January through October 2003

Although content on the Internet is usually accessible by any user on the Internet, finding it can pose a problem. Because of the limited range of broadcast radio and television, if you are able to receive a station, it is local.<sup>158</sup> On the Internet, there is currently no way for a user to find news based on their physical location.

Finding information on the Internet typically means using a search engine. Websites without a major media counterpart like a newspaper, television station, or radio station, can face serious difficulties in reaching an online audience because

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<sup>157</sup> The Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism*, [http://www.stateofthenewsmedia.org/narrative\\_online\\_audience.asp?cat=3&media=3](http://www.stateofthenewsmedia.org/narrative_online_audience.asp?cat=3&media=3).

<sup>158</sup> Admittedly, most content on radio and broadcast television is not locally-produced. Finding locally-produced content on broadcast stations can be just as much of a challenge as finding locally-produced content on the Internet.

there are no “sidewalks in cyberspace”-- interstitial public forums that “enable individuals to target specific private property owners by providing a forum from which individuals can address the precise targets of their speech.”<sup>159</sup> The closest analogy to sidewalks in cyberspace is the search engine, but search engines are privately-owned spaces and not subject to First Amendment scrutiny.<sup>160</sup> Google, “the information gatekeeper of the 21st century” has banned advertisements for, among other things, a liberal website that contained an article critical of President Bush,<sup>161</sup> an advertisement for The Nation which was headlined “Bush Lies,”<sup>162</sup> and a website criticizing Royal Caribbean Cruise Line’s environmental policies<sup>163</sup> because the websites included “language that advocates against an individual, group or organization.”<sup>164</sup> It has also banned advertisements for anti-Iraq war bumper stickers with the message “Who Would Jesus Bomb?” (although later allowed),<sup>165</sup> ads for abortion services that make reference to religion,<sup>166</sup> a book about

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<sup>159</sup> Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115, n.140 (quoting Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 Harv. J.L. & Tech. 149, 151-52 (1998)).

<sup>160</sup> *See, e.g.*, U.S. v. Am. Library Ass’n, 539 U.S. 194 (2003).

<sup>161</sup> Jon Perr, Google’s Gag Order: An Internet Giant Threatens Free Speech (June 20, 2004), [http://www.perrspectives.com/articles/art\\_gagorder01.htm](http://www.perrspectives.com/articles/art_gagorder01.htm).

<sup>162</sup> Katherine C. Reilly, *Google’s “Haphazard” Ad Policy*, *The Nation*, Aug. 12, 2004.

<sup>163</sup> Michael Liedtke, *Search Site Bans Environmental Group’s Ad*, *USA Today*, Feb. 12, 2004, at [http://www.usatoday.com/tech/news/2004-02-12-google-bans-ad\\_x.htm](http://www.usatoday.com/tech/news/2004-02-12-google-bans-ad_x.htm).

<sup>164</sup> Perr, *supra* note 161.

<sup>165</sup> Unknown News, Google Refuses Our Ad, <http://www.unknownnews.net/google.html> (last visited Jan. 16, 2005).

<sup>166</sup> Verne Kopytoff, *Google’s Ad Rules Complex, Controversial*, *S.F. Chron.*, Aug. 9, 2004, at F1.

the detainees at Guantanamo and Abu Ghraib,<sup>167</sup> ads by People for the Ethical Treatment of Animals,<sup>168</sup> and t-shirts with slogans critical of President Bush.<sup>169</sup> These websites will still be indexed in Google's search database, but without use of Google's targeted advertising programs, they may be unable to find their audience and instead be buried in pages upon pages of results for generic terms like "San Francisco local news." Even new technologies like RSS require a user to first find a source before they can subscribe to the source's RSS feed.

The *Prometheus* opinion distinguishes the mainstream media from other entities that use the Internet to disseminate information by suggesting that mainstream media "provide an aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, etc.)."<sup>170</sup> This is a technical problem that some websites are already solving.<sup>171</sup> The court could be alluding to a deeper concern about the difference between professional journalists and citizen journalists. Because the distribution costs for content on the Internet are almost nothing, more

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<sup>167</sup> W. Frederick Zimmerman, Guantanamo/Abu Ghraib Ads Banned by Google (Aug. 6, 2004) (on file with Google's cache at <http://66.102.7.104/search?q=cache:-nrlacCBcCMJ:www.wfzimmerman.com/article.php/20040806144418698%3Fblockmenu%3D11+%22Abu+Ghraib+Ads+Banned+by+Google%22&hl=en> (last visited Jan. 16, 2006)).

<sup>168</sup> Amy Harmon, *Is a Do-Gooder Company a Good Thing?*, N.Y. Times, May 2, 2004, at 12

<sup>169</sup> *Id.*

<sup>170</sup> *Prometheus*, 373 F.3d at 407.

<sup>171</sup> BusinessWeek online, How digg Uncovers the News (Nov. 21, 2005), [http://www.businessweek.com/magazine/content/05\\_47/b3960426.htm](http://www.businessweek.com/magazine/content/05_47/b3960426.htm).

non-journalists are becoming content creators.<sup>172</sup> Because the costs for maintaining a website are so low, the Internet will undoubtedly have some independent local news sites that compete directly with broadcasters. But at this point, the number of such sites serving any particular community is low, especially when the definition of news is narrowed to exclude sports and weather and only focus politics and community issues.<sup>173</sup>

### A Better Solution: Return to the Trusteeship Model for Regulating Broadcasters

The FCC's duty is first to the public,<sup>174</sup> so the public interest inquiry "must be first and foremost on the interest, convenience, and the necessity of the ... public."<sup>175</sup> There is a clear public desire for localism. In a May 2002 telephone survey, 80% of respondents favored some type of government action to either preserve or increase the number of locally owned radio stations.<sup>176</sup> The FCC received over 500,000 comments from individual citizens expressing "general concerns about the potential consequences of media consolidation, including

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<sup>172</sup> See Pew Internet & American Life Project, Internet Activities (Dec. 5, 2005), [http://www.pewinternet.org/trends/Internet\\_Activities\\_12.05.05.htm](http://www.pewinternet.org/trends/Internet_Activities_12.05.05.htm) (19% of Internet users have created content for the Internet; 9% have created a "blog.").

<sup>173</sup> This assumption is based on the fact that there was just one such site identified by the *Prometheus* court. *Prometheus*, 373 F.3d at 468.

<sup>174</sup> See Order, *supra* note 4, ¶¶ 68-69.

<sup>175</sup> *Id.* ¶ 65 (quoting Fed. Radio Comm'n, Second Ann. Rpt. 169-70 (1928)).

<sup>176</sup> DiCola and Thomson, *supra* note 47, at 82.

concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition.”<sup>177</sup>

The FCC’s new media ownership rules, in the form of the Diversity Index, are based on the same free market theory of regulation as the previous media ownership rules. This model is premised on the belief that media outlets will provide local news if audiences truly want it.<sup>178</sup> But broadcasters see advertisers as the real customer<sup>179</sup> and advertisers are only interested in their target demographics, usually middle class to wealthy Americans age eighteen to thirty-five.<sup>180</sup> Even news programs format stories to attract target audiences.<sup>181</sup> While the free market approach may fulfill the FCC’s goal of competition, it ignores the other two more important goals of broadcast regulation: diversity and localism.<sup>182</sup> At best, the ownership consolidation made possible by the 1996 Telecommunications Act has resulted in remotely-produced non-local news from a small number of sources.<sup>183</sup>

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<sup>177</sup> Order, *supra* note 4, ¶ 9.

<sup>178</sup> Sophos, *supra* note 27, at 680.

<sup>179</sup> The FCC itself acknowledged that “[t]he ‘products’ involved in competition analysis of broadcast media are the listening or viewing audiences, which are in effect sold by radio and television stations to advertisers.” In the Matter of Amendment of Section 73.3555 of the Commission’s Rules, the Broadcast Multiple Ownership Rules, 4 F.C.C.R. 1723, 1727 n.42 (1989).

<sup>180</sup> Michael J. Copps, *The “Vast Wasteland” Revisited: Headed for More of the Same?*, 55 Fed. Comm. L.J. 473, 477 (2003) (stating that modern media focuses its content toward the advertising-friendly demographic of viewers ages eighteen to thirty-five).

<sup>181</sup> Cheryl Leanza & Harold Feld, *More Than “A Toaster With Pictures”:* *Defending Media Ownership Limits*, 21 Comm. Law. 12, 18 (2003) (explaining that networks favor “soft news” stories about celebrities for economic reasons).

<sup>182</sup> Order, *supra* note 4, ¶ 5.

<sup>183</sup> *Prometheus*, 373 F.3d at 432 (citing Comments of Future of Music Coalition, MB Docket 02-277 at 13-14 (Nov. 20, 2002)).

With more and more Americans turning to non-broadcast media formats, it makes even more sense to consider broadcasting separately. Eighty-six percent of American households with TV use a subscription TV service (cable, satellite, or TV-over-Internet).<sup>184</sup> As more and more of the existing media owners use alternate media such as cable, satellite, and the Internet to reach their audiences, and as more and more consumers shift to non-broadcast sources for programming, broadcast television and radio--the primary domain of FCC regulatory oversight--should be separated from other media by gradually increasing the public interest obligations imposed on broadcasters. The FCC should acknowledge the huge installed base of radios and the importance of radio broadcasting as a critical public resource for local news as well as cultural, educational, and emergency purposes.

Regulation of broadcasters should return to a trusteeship model in which government supervision ensures that stations operate in the public interest. Specifically, the ascertainment, documentation, and non-commercial programming requirements should be re-imposed on a per-owner/per-market basis (instead of the previous per-station basis). This would allow large companies to use some economies of scale, but would also force them to provide local community-focused content.

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<sup>184</sup> Federal Communications Commission, "Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming." Twelfth Annual Report, March 3, 2006. (<http://www.caltelassn.com/reports06/FCC-06-11A1.pdf>), pages 4-5.

## Radio Occupies a Unique Position and Should Not be Further Consolidated

Although the FCC used a separate justification for its radio ownership rules in 2003, it is again re-evaluating those rules. No amount of substitution between media should justify increasing radio ownership limits. Among media, radio occupies a unique position.

From a technical perspective, radio is the ideal media for local news. As a broadcast medium, it is designed to be local—audiences must be within range of the transmitter. Radio is also inexpensive to produce and receive. Reporters can use inexpensive handheld recorders with excellent fidelity. They can also phone in breaking news by telephone at no additional cost above the price of the phone call. Almost any computer sold in the past few years is capable of recording and editing audio. Transmitters with a range of several miles can fit in a backpack, be operated by battery power, and cost just a few hundred dollars.<sup>185</sup> Radio receivers can be purchased for just a few dollars and almost every automobile includes one as standard equipment. Between 1990 and 1999, there were more than 190 million radios sold in the United States—and this figure does not include radios pre-installed in cars.<sup>186</sup> Unlike televisions, almost every radio includes an antenna for out-of-the-box use. In an emergency, a portable radio can last for hours on a few

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<sup>185</sup> See Steve Ongerth & Radio Free Berkeley, Challenging the Manufacture of Consent, Zmagazine (Oct. 1995), <http://zena.secureforum.com/Znet/ZMag/articles/oct95ongerth.htm> and Free Radio Berkley, Store: Broadcast Kits & Accessories, [http://www.freeradio.org/index.php?pagename=store/frb\\_kits.html](http://www.freeradio.org/index.php?pagename=store/frb_kits.html) (last visited Sept. 18, 2006).

<sup>186</sup> R.R. Bowker, *Broadcasting & Cable Yearbook* D-732 (2001).

batteries, and there are now radios with hand crank dynamos that provide over a half-hour of playing time from just thirty seconds of cranking.<sup>187</sup> The fact that radio is audio-only is also an advantage for the visually impaired because radios with non-digital controls can be tuned by ear and touch alone. And unlike computers, radio (and television) is just as accessible to the 3% of the U.S. population that is illiterate.<sup>188</sup> In terms of audience, radio is essentially ubiquitous. Radio reaches more than 94% of the U.S. population aged twelve and over each week.<sup>189</sup> On average, Americans spend almost twenty hours per week listening to the radio.<sup>190</sup> In comparison, only 28% of U.S. households currently subscribe to a broadband Internet service<sup>191</sup> and broadband adoption is not estimated to reach 95% until the year 2021.<sup>192</sup> Satellite radio is also not a good substitute for AM/FM radio. An April 2006 survey found that 77% of Americans believe they will continue to listen to

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<sup>187</sup> Freeplay, Specifications, <http://www.freeplayenergy.com> (last visited Jan. 16, 2006).

<sup>188</sup> Central Intelligence Agency, The World Fact Book: United States (Nov. 2005), <http://www.cia.gov/cia/publications/factbook/geos/us.html> (figure based on 1999 estimate). Some may argue that accessibility for the 3% of the U.S. population that is illiterate is unimportant. On the other hand, this segment of the population is probably the least likely to use text-based media such as the Internet, newspapers, and magazines.

<sup>189</sup> Arbitron, Radio Today: How America Listens to Radio 3 (Dec. 2004), <http://www.arbitron.com/downloads/radiotoday05.pdf>.

<sup>190</sup> *Id.*

<sup>191</sup> Government Accountability Office, Pub. No. GAO-06-426, Broadband Deployment Is Extensive throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas 10 (May 2006).

<sup>192</sup> Robert W. Crandall, Charles L. Jackson, and Hal J. Singer, The Effect of Ubiquitous Broadband Adoption on Investment, Jobs, and the U.S. Economy 10 (Sept. 2003), <http://www.calteclassn.com/Reports06/Broadband/econbroad.pdf>.

AM/FM radio as much as they do now despite new satellite radio technologies.<sup>193</sup> And 64% of satellite radio subscribers said they plan to continue listening to the same amount of AM/FM radio.<sup>194</sup>

Proponents of ownership consolidation have argued that ownership consolidation is necessary to keep more stations on the air because without the cost savings from a single company operating multiple stations, it is financially impossible to stay in business.<sup>195</sup> While this may be true for commercial stations, it is no longer true for low-power community-operated stations. According to the Prometheus Radio Project, “the basic equipment for a hundred watt radio station will cost between five and eight thousand dollars, depending upon your circumstances.”<sup>196</sup> But because there are so many commercial stations, there is no room for low-power stations in most markets.<sup>197</sup>

In addition to more government supervision of existing commercial stations, the FCC should lower its interference rules to allow more low-power FM (LPFM) radio stations. The current LPFM service is too little too late. Of the 3,300 LPFM applications received, the FCC estimates that only a third will be approved.<sup>198</sup>

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<sup>193</sup> Jack Loechner, “New Technology In Broadcasting Platforms Doesn’t Deter AM/FM Listeners,” Media Post (April 26, 2006), [http://blogs.mediapost.com/research\\_brief/?p=1169](http://blogs.mediapost.com/research_brief/?p=1169).

<sup>194</sup> *Id.*

<sup>195</sup> Order, *supra* note 4, ¶ 138.

<sup>196</sup> Prometheus Radio Project, Prometheus Fact Sheet: LPFM At a Glance, <http://oldsite.prometheusradio.org/glance.shtml> (last visited Sept. 16, 2006).

<sup>197</sup> Michael Roberts, *Power Up!*, Westword (Sept. 25, 2003), <http://www.westword.com/issues/2003-09-25/news/message.html>.

<sup>198</sup> Mike Janssen, In low-power FM fight, who’s more local?, Current (April 8, 2002), <http://www.current.org/tech/tech0207lpfm.html>.

LPFM stations are more suited for local news than independent news websites (such as blogs) because of their inherently local nature, which makes it easier for listeners to find them. And combining a LPFM station with a website would allow easy access to the station broadcast schedule and possibly archived shows and/or streaming audio for those who are a little too far from the transmitter to get good reception. Additionally, the FCC should consider re-assigning the VHF television licenses that will be freed up by the conversion to HDTV for low-power audio-only stations. Some radios can receive the audio portion of television broadcasts. Presumably these radios would also be able to receive audio-only broadcasts from newly-licensed low-power community-focused non-profit stations. Because FM radio broadcasts use a smaller band of spectrum than television broadcasts, re-assigning this frequency band for FM radio would allow many more stations than is possible with television broadcasts.

### Conclusion

The FCC likely will improve its methodology for the Diversity Index. It should use actual use data to assign shares to outlets within each market. It should assign shares of the Internet market to websites not ISPs, and it should include websites cross-owned by entities owning outlets in other markets in separate cross-ownership calculations. It should define a bright-line limit for market concentration and consistently apply that standard. It should also develop a succinct definition of local news that focuses on politics and community issues instead of weather, traffic, and national sports. It must also define whether cable and satellite providers should

be thought of as single outlets with a lot of source diversity or conduits for multiple outlets. If ISP filtering of Internet content does become common, ISPs should be the unit of measure for Internet diversity. The FCC should clearly state how it derives the relative weights from actual use data, or better yet use actual use data for each individual market.

Although the FCC may be able to provide sufficient evidence of independent local news sites on the Internet in its next biennial review, this alone should not justify lowering ownership caps. Instead of simply improving the statistical and legal underpinnings of the Diversity Index until it passes judicial muster, the FCC should consider broadcasting separate from other media formats. Whatever the FCC does, it should not consider the Internet a substitute for broadcasting until there is clear evidence that a large percentage of Americans across all demographic categories have broadband Internet access at home and are using the Internet as a substitute for broadcast media.

If the FCC continues on its current course of deregulation and raises the ownership limits, it will result in *less* ownership diversity for local news on the Internet. This is because the majority of local news sites on the Internet are websites for traditional media outlets. As ownership consolidation leads to fewer owners of broadcast stations, there will be fewer independent local news websites. The concerns about ownership consolidation in broadcasting that were raised eighty years ago are just as relevant today.

There is no agency so fraught with possibilities for service of good or evil to the American people as the radio. As a means of entertainment,

education, information, and communication it has limitless possibilities. The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. ... [Broadcasting stations] can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a Republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people.<sup>199</sup>

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<sup>199</sup> 67 Cong. Rec. 5558-59 (bound ed. Mar. 13, 1926). Quoted in Nicholas Johnson, "Forty Years of Wandering in the Wasteland," 55 F.C.L.J. 521, n. 31 (2003). statement of Rep. Johnson during debate over the Radio Act of 1927