

January 22, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Promoting Diversification of Ownership in the Broadcasting*, MB Docket No. 07-294;
*Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to
Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; and *Amendment of
the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

Dear Ms. Dortch:

Public Knowledge (PK) writes to express concern about two issues that, while seemingly unrelated, both represent ways that some media companies act in ways that can undermine the goals of the Commission's media ownership rules, both in promoting viewpoint diversity, and in ensuring economic completion between different outlets. In particular, CBS's interference with the editorial independence of its subsidiary CNET shows that the incentive and ability of media conglomerates to distort the news and put corporate strategy above the values of fair reporting and the needs of readers and viewers remains unchanged, even in the online environment; and coordinated retransmission consent negotiations between television stations means that for many purposes they are engaging as one entity even though a formal merger between them would be otherwise unlawful.

Broadcaster Influence over Online Editorial Judgments

PK has long defended the home recording rights of television viewers, and has followed the dispute between DISH and various broadcasters over its Hopper DVR with interest. PK firmly believes that DISH's subscribers do not violate copyright law when they time-shift programming and watch it later, even if they skip past commercials. But while traditional communications law concerns play a part in the arguments in this case,¹ copyright law is outside the Commission's jurisdiction. Unfortunately, CBS's actions outside the courtroom have implicated the Commission's work on media ownership issues.

Despite assurances by CBS and other opponents of media ownership rules, its actions have shown that a Commission licensee with an ownership interest in another media outlet will exert its editorial will, even into non-broadcast media such as online publications, and reduce viewpoint diversity in the marketplace of ideas. This is particularly true where, as here, the parent corporation's own economic interests are believed to be at issue. The actions of CBS

¹ For instance, in its briefs PK argued that the public interest obligations of broadcasters inform a court's analysis under the second prong of the fair use test. *See* Brief of Amicus Curiae Public Knowledge in *Fox v. DISH*, Central District of California, Case No. CV12-04529-DMG (SHx) (filed Sep. 17, 2012); Brief of Amicus Curiae Public Knowledge in *In Re Autohop Litigation*, Southern District of New York, Case No. 12 Civ. 4155 (LTS)(KNF) (filed Dec. 21, 2012).

should serve notice that the Commission must remain vigilant when considering revisions to its rules that could have the unintended consequence of reducing viewpoint diversity.

The facts in this case are not in dispute and have been covered widely by national news organizations and the trade press. The sequence of events was as follows:

- a. The Consumer Electronics Association (CEA) delegated to CNET the selection of CEA's "Best of CES" awards.
- b. On Thursday, January 10, 2013, CNET announced that it was withdrawing DISH Hopper with Sling Whole-Home HD DVR ("Hopper") from Best-of-CES consideration "due to active litigation involving [CNET parent] CBS Corp." and DISH.²
- c. That same day, CEA stated that it was "extremely disappointed that CBS [had] interfered with CNET's "Best of CES" awards" and that "CBS [was] practicing effective censorship over CNET's editorial staff."³
- d. CBS CEO Leslie Moonves was personally involved in the decision to override the editorial will of CNET.⁴
- e. On Monday, January 14, 2013, CNET reporter Greg Sandoval, a respected technology reporter who also had worked for The Washington Post and The Los Angeles Times, announced his resignation from CNET, stating that "CNET wasn't honest about what occurred regarding DISH" and that he found this "unacceptable." Mr. Sandoval also asserted that he no longer had "confidence that CBS is committed to editorial independence."⁵
- f. That same day, a technology website, The Verge, disclosed that Hopper had, in fact, won the "Best in CES" designation by CNET's editorial staff prior to CNET's announcement of Hopper's disqualification.⁶
- g. In response to The Verge story, CNET editor-in-chief Lindsey Turrentine released a detailed statement confirming that Hopper had won the "Best in CES"

² Keach Hagey, *CBS Quashes CNET Award for Dish's Ad-Skipping DVR*, WALL ST. JOURNAL (Jan. 14, 2013), <http://online.wsj.com/article/SB10001424127887324734904578242082771027240.html#articleTabs%3Darticle>.

³ CEA Denounces CBS' Interference with CNET's "Best of CES" Awards, press release, Consumer Electronics Association (Jan. 10, 2013).

⁴ Brian Stelter, *Resignation Suggests Rift Between CNET and CBS*, NEW YORK TIMES (Jan. 14, 2013), <http://mediadecoder.blogs.nytimes.com/2013/01/14/resignation-suggests-rift-between-cnet-and-cbs/>; Kimberly Nordyke, *CBS Chief Leslie Moonves Involved in Decision to Revoke CES Award to Dish Network's Hopper*, HOLLYWOOD REPORTER (Jan. 14, 2013), <http://www.hollywoodreporter.com/news/cbs-chief-leslie-moonves-involved-412448>).

⁵ Greg Sandoval, "Hello all. Sad to report that I've resigned from CNET. I no longer have confidence that CBS is committed to editorial independence. . . . CNET['s dishonesty] about what occurred regarding Dish is unacceptable to me. We are supposed to be truth tellers," Twitter (Jan. 14, 2013), <https://twitter.com/sandoCNET/status/290857669437308928>; <https://twitter.com/sandoNET/status/290856937472528384>).

⁶ Joshua Topolsky, *Exclusive: CBS Forced CNET staff to recast vote after Hopper won 'Best in Show' at CES*, THE VERGE, (Jan. 14, 2013), <http://www.theverge.com/2013/1/14/3874682/exclusive-cbs-forced-cnet-editors-to-recast-vote-after-hopper-win>.

designation prior to its disqualification by CBS, CNET editorial staff had wanted to disclose this fact, but CBS overruled CNET's editorial preference for transparency, leading Ms. Turrentine to explain that she and CNET's staff were "in an impossible situation as journalists."⁷

- h. CBS claimed that its action was an "isolated and unique" occurrence and that it continues to maintain "100 percent editorial independence" for its subsidiaries.⁸

This shows that CBS intervened in the editorial discretion of its subsidiary, CNET, not once but twice. First, it required the removal of the Hopper from consideration by CNET's editorial staff for the "Best in CES" award. Second, it prohibited CNET from giving a complete and honest account of why the Hopper was removed from consideration. Only after another media outlet disclosed that the Hopper had, in fact, won "Best in CES" did CNET itself disclose the complete story. CBS remained defiant and asserted, despite obvious facts to the contrary, that it maintains editorial independence for its subsidiaries.

The editorial meddling by CBS in CNET's activities goes directly to the heart of why the Commission has media ownership rules in the first place. Stated simply, ownership determines viewpoint. The actions of CBS belie decades of media conglomerate assurances that viewpoint diversity is not harmed by the consolidation of media sources. When the CEO of one of the largest media conglomerates in the world directly reaches into the editorial decision-making of an online subsidiary simply to protect the parent company's bottom line, viewpoint diversity, the marketplace of ideas, and American democratic values themselves are undermined. The Commission should take these actions into account in this proceeding. Moreover, the fact that CBS, a Commission licensee, exercised editorial control over an Internet-based media outlet suggests that the Commission should consider whether such actions violate the public interest obligations that all licensees share.

Throughout this proceeding, CBS and other large broadcast media conglomerates have argued that they do not have an economic incentive to thwart the editorial viewpoints of subsidiary companies and, therefore, the Commission should not be concerned about the relaxation of newspaper/broadcast and other media ownership rules.⁹ These opponents of strong media ownership regulations claim that reducing ownership diversity does not impact viewpoint diversity because corporate owners allow a plethora of viewpoints within their respective media

⁷ The 2013 Best of CES Awards: CNET's Story, Lindsey Turrentine (Jan. 14, 2013), http://news.cnet.com/8301-30677_3-57563877-244/the-2013-best-of-ces-awards-cnets-story/.

⁸ *CNET reporter quits after CBS vetoes best CES gadget pick due to dispute with Dish Network*, WASHINGTON POST (Jan. 14, 2013), http://www.washingtonpost.com/business/technology/cnet-reporter-quits-after-cbs-vetoes-best-ces-gadget-pick-due-to-dispute-with-dish-network/2013/01/14/3f436186-5ead-11e2-8acb-ab5cb77e95c8_story.html.

⁹ See Cox Communications Comments, MB Docket Nos. 09-1892, 07-294, p. 11 (March 5, 2012) (Cox notes that consolidated corporate owners are actually financially motivated to vary content and viewpoints, "common owners of newspapers and broadcast properties have a strong incentive to vary their editorial approach in order to reach the largest possible number of viewers, listeners, and readers."). See also National Association of Broadcasters Reply Comments, MB Docket Nos. 09-182, 07-294, p. 7 (April 17, 2012) ("[d]uopolies have resulted in improved programming services.").

outlets.¹⁰ CBS and others claim that media ownership restrictions run afoul of the Commission’s “deregulatory obligation” with respect to the acquisition of both broadcast and non-broadcast properties.¹¹

Contrary to these assurances, the editorial discretion of one of the nation’s leading technology journals was quashed by the direct involvement of its corporate parent, a decision that went straight to the top: CBS CEO Leslie Moonves. This should dispel any notion that ownership does not impact viewpoint diversity. In fact, ownership always will have an effect on the viewpoints of subsidiary media outlets. The heavy-handed tactics of CBS in this case need only be deployed once before striking fear into the hearts of editors, reporters, bloggers, and others throughout the media conglomerate’s empire who must appear on bended knee before their corporate bosses for expense accounts, pay, benefits, and other resources.

CBS exercised its editorial will to protect its own economic interest. It was concerned about how CNET’s editorial decision regarding a product made by a company CBS sued might impact the profits of CBS itself. This calls into question the journalistic integrity of any story presented by 60 Minutes, The CBS Evening News, CNET, or any other CBS journalistic enterprise whenever the story might ever so tangentially implicate CBS’ bottom line. This goes to the very heart of why Congress and the Commission instituted media ownership rules in the first place: to ensure that the marketplace of ideas remains competitive, robust, and open. If one media company buries or alters a story to promote its own economic gain, there should be plenty of other voices in the marketplace willing to provide accurate and complete information and analysis.

The actions of CBS in subverting the editorial will of its online subsidiary, CNET, should leave no doubt that ownership impacts viewpoint. Moreover, CBS has helped to illuminate a dangerous threat to viewpoint diversity that has emerged since broadcast media conglomerates began acquiring online properties: the restriction of viewpoints online. Ironically, many media companies (including CBS) often point to the availability of content online as a principle reason to relax media ownership rules, arguing that the Internet has increased viewpoint diversity in the media marketplace.¹² But CBS has demonstrated the opposite: when broadcasters and other

¹⁰ See NAB Reply Comments at p. 26 (“Available evidence does not demonstrate that commonly-owned broadcast stations and newspapers speak with a single editorial voice, or that such combinations harm public access to diverse news sources.”); Tribune Company Comments, MB Docket Nos. 09-182, 07-294, p. 3 (March 5, 2012) (“[c]ommon ownership of broadcast and printed media benefits the public through the enhanced gathering and dissemination of news, information and opinion.”).

¹¹ See CBS Corporation Comments, MB Docket Nos. 09-182, 07-294, p. 2 (March 5, 2012) (“Congress adopted Section 202(h) of the 1996 Act in order to drive systemic deregulation over time.”); Fox Entertainment Group and Fox Television Holdings Reply Comments, MB Docket Nos. 09-182, 07-294, p. 1 (April 17, 2012) (“These commenters would have the Commission ignore its deregulatory obligation and instead pile onerous new media ownership restrictions atop the layers of antiquated regulation that already shackle broadcasting and, consequently, harm the public interest.”).

¹² See CBS Comments at p. 5-6 (“The importance of the Internet as a source of competition to broadcasters is also documented in the comprehensive report released by the FCC’s Future of Media Working Group in June 2011, which found ‘that the Internet has created more diversity and choice in news and information, and that most communities have seen a rise in the number and diversity of outlets, as well as more diversity in commentary and analysis’... And other recent studies confirm the trend towards greater choice for consumers in news, information, and entertainment as well as the increasing importance of alternative media, including the Internet.”); NAB Reply

media conglomerates extend their influence to the Internet, they threaten diversity and competition within the marketplace of ideas.

Just as the Commission prohibited a local broadcaster from extending its editorial control to a local newspaper and thereby reduce viewpoint diversity, the Commission should now consider restricting broadcaster cross-ownership of online media, and whether Commission licensees serve the public interest, convenience, and necessity when they interfere with the editorial independence of their subsidiaries.

Coordination Between Broadcasters in Retransmission Consent Negotiations

The majority of most television broadcasters' viewers do not watch over-the-air signals, but view "broadcast" programming on MVPD systems, alongside other MVPD-delivered channels. Just as cable networks derive a significant portion of their revenue from carriage fees paid by MVPDs (and ultimately, by MVPD subscribers), broadcasters derive significant revenue from retransmission consent fees paid by MVPDs. Unlike cable networks, however, broadcasters are in a privileged regulatory position. Not only are they granted free use of the public airwaves, much of the programming they carry is not locally-originated but created by national networks. Local broadcasters are then given the privilege, backed up by regulation, of being the sole provider of this national content in a particular market. Finally, when they are carried by MVPDs, local broadcasters can demand special channel placement on MVPDs that is not available to cable networks. In exchange for these regulatory privileges, broadcasters have several public interest obligations. In comments on this matter before, PK has touched on many of these.¹³ But relevant here is how many "independent" stations are behaving as one for the purpose of one of their most important business negotiations: retransmission consent.

Data collected by the American Cable Association (representing small and independent cable operators), Time Warner Cable, DISH Networks, and DirecTV have shown¹⁴ that these joint negotiations are increasingly prevalent, and PK joins those entities in calling for the Commission to put an end to such practices. Media pluralism does not only ensure that citizens have access to a diversity of viewpoints and sources of information; it creates a baseline level of competition between media companies that helps keep markets competitive and prices low for consumers. Because of the joint negotiations between ostensible competitors, television stations are better able to create a "united front" in demanding higher fees, which are ultimately passed

Comments at p. 3-4 ("Most importantly, the Internet has fundamentally altered the media landscape, revolutionizing the manner in which news and local content are both consumed and produced, and providing yet another alternative for audiences and advertisers."); Cox Comments at p.9 ("The continued rise of the Internet, social media, and mobile applications has created additional choice for consumers and additional competitive pressures for local media companies.").

¹³ See, e.g., Comments of Public Knowledge in Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71 (filed May 27, 2011).

¹⁴ See Notice of Ex Parte Presentation of American Cable Association, Time Warner Cable, DISH Network, DirecTV; *2010 Quadrennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; and *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed Nov. 21, 2011).

along to consumers. If competing companies worked together on other aspects of their business—for example, in colluding to raise advertising rates—most observers would identify a plain violation of antitrust laws. But under current policies stations feel free to collaborate on this other important aspect of their business operations. This harms consumers and contributes to ever-rising subscription TV bills.

For these reasons, in addition to its authority “to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent,” 47 U.S.C. § 325(b)(3), the Commission should find that such joint negotiations constitute a “transfer of control” under Section 310(d) of its rules, and an attributable interest under Section 73.3555 of its rules.

* * *

The Commission’s work on media ownership issues is important, and it should take care that its policies are not undermined by companies finding new ways to control the expression of viewpoints in the media and collaborating with each other to raise consumer prices. Joint retransmission consent negotiations, and CBS’s interference with the editorial independence of CNET, show just two ways that companies may seek to undermine the values the Commission should seek to promote.

Respectfully submitted,

/s John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE