

LIMITS ON MEDIA OWNERSHIP: SHOULD THE FCC CURB ITS RELIANCE ON DEREGULATION?

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I. INTRODUCTION

Two very divergent paths beckoned us.

Down one road is a reaffirmation of America's commitment to local control of our media, diversity in news and editorial viewpoint, and the importance of competition. . . .

Down the other road is more media control by ever fewer corporate giants. This path surrenders to a handful of corporations awesome power over our news, information, and entertainment. On this path we endanger time-honored safeguards and time-proven values that have strengthened the country as well as the media.

Media conglomerates thrive on the ability to reach as many potential audience members as possible. When the Federal Communications Commission (“FCC”) voted to expand the limits that television broadcasters must follow regarding span of ownership, the FCC arguably altered the landscape of mass media delivery. On June 2, 2003, the FCC approved new media ownership rules that allow broadcast networks to reach 45 percent of the national audience—an increase of 10 percent from the previous limitations.² These regulations permitted media companies to own two television stations in most markets and up to three stations in the largest markets.³ In addition, the new regulations allow the same corporation to own both a television station and a newspaper in all but the smallest media markets.⁴

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1. Commissioner Michael J. Copps, Federal Communications Commission, Statement Before the Senate Committee on Commerce, Science, and Transportation 1 (June 4, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235127A3.pdf.

2. Stephen Labaton, *Deregulating the Media: The Overview; Regulators Ease Rules Governing Media Ownership*, N.Y. TIMES, June 3, 2003, at A1.

3. *Id.*

4. *Id.*

Reasons given for the relaxed FCC regulations center around the increased usage and availability of the Internet; in addition, relaxed regulations stem from the rise of new media alternatives such as wireless networks, satellite radio, digital satellite television, and low-power FM radio broadcasting.⁵ While recognizing that the changes are significant, FCC Chairman Michael Powell argued that this modernization “takes into account the explosion of new media outlets.”⁶ Powell stated that further deregulation and decreased diversity in media ownership will actually lead to increased diversity in programming and “localism.”⁷ In addition, media companies viewed the old regulations as “outdated” and feared that increased legal challenges would likely result.⁸

Congressional opposition to the new regulations began immediately. Members of the House of Representatives and the Senate voiced their disapproval and predicted dire consequences from the Republican-led FCC actions.⁹ Referring to the new regulations as a “detriment to our democracy,” Representative Jay Inslee (D-Wash.) viewed the changes as a motive for large media corporations to restrict the information that is disseminated to the population at large.¹⁰ “Further media consolidation poses a danger to our system of free press and American democracy. . . . The FCC has shirked its primary responsibility by choosing to ignore the interests of the American public.”¹¹

Public interest groups initiated legal challenges soon after the FCC promulgated these new regulations in an effort to delay the effectiveness of the FCC’s decision.¹² On September 3, 2003, the U.S. Court of Appeals for the Third Circuit stayed the FCC’s order, preventing enforcement of the new regulations until judicial review was complete.¹³ After hearing oral arguments in February 2004, the Third Circuit struck down the FCC regulations that allowed increased broadcast television station ownership.¹⁴ The court cited inconsistencies in the methodology

5. Declan McCullagh, *FCC Eases Rules on Media Ownership*, CNET NEWS.COM, at <http://news.com.com/2100-1028-1012027.html> (June 2, 2003).

6. *Id.* At the date of this publication, Mr. Powell has tendered his letter of resignation but has yet to leave office. Frank Ahrens, *Powell to Resign as Head of FCC*, WASHINGTON POST, Jan. 22, 2005, at A1.

7. *See* Associated Press, *FCC Relaxes Media Ownership Rules*, WIRED NEWS, at <http://www.wired.com/news/business/0,1367,59068,00.html> (June 2, 2003).

8. *See id.*

9. Press Release, Consumers Union, Bipartisan Senate Coalition Votes to Rollback New FCC Media Ownership Rules (Sept. 16, 2003), available at http://www.consumersunion.org/pub/core_telecom_and_utilities/000376.html.

10. *See* OFFICE OF REP. JAY INSLEE, INSLEE MOVES TO PRESERVE MEDIA DIVERSITY; WORKING TO ROLL BACK NEW FCC MEDIA OWNERSHIP RULES (June 2, 2003), at http://www.house.gov/inslee/issues/media_ownership/rules.html.

11. *Id.*

12. *See* Media Access Project, Issues: Media Consolidation/Encouraging Diversity of the Electronic Media, at <http://www.mediaaccess.org/programs/diversity/courts.html> (last visited Apr. 2, 2005).

13. *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003).

14. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004).

used by the FCC in reaching its conclusions to further deregulate the landscape of media ownership.¹⁵ In January 2005, the Department of Justice (“DOJ”) opted not to seek Supreme Court review of the Third Circuit’s decision, throwing into question the future of newspapers and television stations purchased by media conglomerates in anticipation of further deregulation.¹⁶

The relaxed FCC regulations and related legal challenges prompt two related questions. First, what limitations are currently in place to serve as a “check” against FCC rules? Second, may antitrust law effectively serve as a regulatory tool against an increasingly smaller number of media companies that deliver the majority of news to a substantial percentage of the population? In Section II, this Note examines the regulations that govern the FCC to determine how the current state of affairs has arisen. In Section III, this Note discusses the current Congressional and legal opposition to the regulations. It also analyzes current antitrust regulations that must be strengthened in order to guard against virtually limitless FCC power in determining what percentage of the viewing public may be reached by a single media corporation. In Section IV, this Note recommends that tougher antitrust regulations and closer scrutiny by the DOJ are the keys to curbing the FCC’s mantra of deregulation.

II. BACKGROUND

In the Communications Act of 1934, Congress created the FCC and delegated to the agency the authority to regulate the broadcast and telephone industries.¹⁷ The purpose of this creation was to regulate interstate and foreign commerce in communication by wire and radio “so as to make available, so far as possible, . . . wire and radio communication service.”¹⁸ More recently, the growth in the telecommunications industry, coupled with new media-delivery technologies, increased the demand for greater portions of the electromagnetic spectrum to be available for new transmission technologies.¹⁹ The spectrum is divided into separate areas for use by different technologies.²⁰ For instance, television broadcasting occupies a limited portion of the spectrum, while FM radio broadcasting occupies a different portion. In part, the FCC determines the amount of bandwidth

15. *Id.* at 403–12.

16. Stephen Labaton, *U.S. Backs Off Relaxing Rules For Big Media*, N.Y. TIMES, Jan. 28, 2005, at C1.

17. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2000)).

18. *Id.*

19. See Marjorie Lundquist, A Brief History of the Telecommunications Act of 1996, *available at* http://www.wave-guide.org/library/tca_hist.html (last visited Apr. 2, 2005).

20. See generally *id.*

that is available to a technology, with certain portions reserved for governmental use.²¹

A. The Telecommunications Act of 1996

President Bill Clinton signed the Telecommunications Act of 1996 (“the Act” or “the 1996 Act”) into law in February of that year, providing the first major overhaul of telecommunications law since the Communications Act of 1934.²² The Act attempted to restructure the telecommunications industry to reflect emerging forms of technology and growth in the communications sector.²³ As Lawrence Gasman, director of telecommunications and technology studies at the Cato Institute, noted:

The 1996 Act envisions a network of interconnected networks that are composed of complementary components and generally provide both competing and complementary services. The 1996 Act uses both *structural* and *behavioral* instruments to accomplish its goals. The Act attempts to reduce regulatory barriers to entry and competition. It outlaws artificial barriers to entry in local exchange markets, in its attempt to accomplish the maximum possible competition. Moreover, it mandates interconnection of telecommunications networks, unbundling, non-discrimination, and cost-based pricing of leased parts of the network, so that competitors can enter easily and compete component by component as well as service by service.²⁴

The goal of the new law largely was to deregulate the telecommunications industry—to let communications businesses compete in any market against each other and expand the services they offer.²⁵ Gasman further noted that “the relatively strong consensus for [the Act] has enabled both parties to take credit for its passage and to present it as radical deregulation under which the country will move forward to a brave new world of telemedicine, distance learning, and movies-on-demand.”²⁶

With the advent of single corporate entities ready to provide consumers with multiple communications products, it was thought that the convergence of the different technologies would lead to a diverse

21. 47 C.F.R. § 2.105 (2003).

22. See FCC, Telecommunications Act of 1996 [hereinafter FCC, 1996 Act], at <http://www.fcc.gov/telecom.html> (last modified Mar. 29, 2004).

23. See Nicholas Economides, *The Telecommunications Act of 1996 and Its Impact*, 11 JAPAN AND THE WORLD ECON. 455, 457 (1999), available at <http://raven.stern.nyu.edu/networks/telco96.html> (last visited Apr. 2, 2005).

24. *Id.* (emphasis in original).

25. See Lawrence Gasman, *The Telecommunications Act of 1996*, REGULATION: THE CATO REV. OF BUS. & GOV'T, Summer 1996, available at <http://www.cato.org/pubs/regulation/reg19n3d.html> (last visited Apr. 2, 2005); FCC, 1996 Act, *supra* note 22.

26. Gasman, *supra* note 25.

telecommunications marketplace.²⁷ The Act was “based on the premise that technological changes [would] permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers and programmers being made available to the American consumer.”²⁸ However, the Act was widely regarded as an experiment to determine whether true competition would flourish.²⁹

1. *The Limiting Functions of the 1996 Act*

Prior to passage of the 1996 Act, Congress and the FCC had limited the amount of broadcast television media outlets a single company could own in a single market.³⁰ In addition, the FCC limited the number of stations or percentage of homes one company could control nationally, as well as the total number of homes one entity could serve by cable broadcasting.³¹ In order to create the opportunity for competition between different media, the Act reduced or eliminated the then-existing limitations.³² The effect of the Act was “to wave the green flag at the convergence race—the race to amass the largest information company—by reducing or eliminating ownership barriers.”³³ The Act provided broadcasters significant regulatory relief: it substantially relaxed restrictions on license renewals, and eased or eliminated many of the limits on ownership of multiple broadcast licenses.³⁴ The Act also removed the national limit on the number of television stations, leaving only the ceiling “that one entity cannot own television stations which, together, reach more than 35 percent of the nation’s households.”³⁵ This limit is referred to as the National Television Station Ownership Rule (“NTSO Rule”).³⁶ In addition, the Act provided for increased flexibility for broadcast television networks to consolidate.³⁷ Prior to the Act, all television networks were prohibited from cross-ownership.³⁸ The 1996 Act permitted mergers between smaller broadcast television networks, as

27. See Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 252 (1997).

28. *Id.*

29. *Id.* at 253.

30. Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1015 (1996).

31. *Id.*

32. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 539 (1999).

33. *Id.*

34. Meyerson, *supra* note 27, at 277–78.

35. *Id.* at 278.

36. Boris Bershteyn, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 392 (2004).

37. Meyerson, *supra* note 27, at 279.

38. *Id.*

well as between any existing network and a new network formed after the passage of the Act.³⁹

The FCC's core reason for limiting broadcast ownership is to promote viewpoint diversity.⁴⁰ In its press release accompanying the new regulations, the FCC stated that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. [M]ultiple independent media owners are needed to ensure a robust exchange of news, information, and ideas among Americans."⁴¹ In short, the FCC's theory is that deregulation of media ownership will essentially lead to increased diversity of news programming. As predicted, however, the deregulation instead led to increased consolidation in the communications industry.⁴²

Four years after the passage of the Act, the National Telecommunications and Information Administration ("NTIA"), a division of the U.S. Department of Commerce, commenced a media ownership survey to determine the effects of the Act's passage on broadcast television ownership.⁴³ Norman Mineta, then Secretary of Commerce, stated: "Protecting diversity of media ownership is a top priority of the Administration and is important to our nation's future."⁴⁴ This was one of the first instances of governmental recognition of the potential problems of convergence and its possible effects on decreased diversity in media broadcasting. For example, consolidation of media ownership had raised concerns regarding the ability of minority populations to have a voice in the media.⁴⁵

2. *Opposition to the 1996 Act*

The 1996 Act triggered massive changes in the telecommunications industry. Waves of mergers and acquisitions took place with respect to long distance telephone service providers, and similar conduct was evident in the fields of broadcast and cable television.⁴⁶ As one commentator noted, "The worst part is that it accelerates a process of

39. *Id.*

40. Press Release, FCC, FCC Sets Limits on Media Concentration 1 (June 2, 2003) [hereinafter FCC Press Release], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf.

41. *Id.* at 2 (internal quotation marks omitted).

42. Press Release, United States Department of Commerce, Assistant Commerce Secretary Rohde Opens Minority Media Ownership Roundtable (July 18, 2000), available at <http://www.ntia.doc.gov/ntiahome/press/2000/mr071800.htm>.

43. Press Release, United States Department of Commerce, U.S. Department of Commerce Launches Minority Media Ownership Survey (Aug. 8, 2000), available at <http://www.ntia.doc.gov/ntiahome/press/2000/survdocpr8800.htm>.

44. *Id.*

45. *Id.*

46. See Steve Mizrach, *Will the New Telecommunications Act Promote Monopoly? Yes, It Will*, MASS COMM. & SOC'Y, Oct. 28, 1998, available at <http://www.fiu.edu/~mizrachs/telecom-act-of-96.html>.

media monopolization in our country which began in the 1980s.”⁴⁷ This monopolization was likely fueled, at least in part, by the increased access of cable companies to the mainstream broadcast network television industry. After the Act, cable operators were permitted to own up to eight individual “properties” (television and/or radio broadcast stations) in a market of forty-five or more stations, and five individual properties in a market of fourteen or fewer.⁴⁸ The Act effectively created financial incentives for media mergers to occur, and consolidation soon followed.⁴⁹ This has resulted in the concentration of more content providers and delivery systems among fewer entities.⁵⁰

The consolidation of media ownership sparked a litany of controversy. The dominant argument against these mergers focused on the negative effects of such concentration, especially within the smaller markets. Dr. Mark Cooper, the director of research for the Consumer Federation of America (“CFA”), remarked that to encourage further consolidation by relaxing current media ownership rules would “reduce the prospects for competition in local markets, diminish the provision of local news and information, and limit the diversity of local perspectives.”⁵¹ The FCC vigorously contended that the new ownership regulations were principally designed to prevent concentration, enhance competition, and promote the diversity of voices available.⁵² “[In] the Commission’s view, diversity of outlets is in the public interest both because it will prevent the creation and exercise of market power and because it is likely to lead to a diversity of content and views.”⁵³

Despite the disparity of each position, the major concern with increased media consolidation continues to be fear of reduced diversity in news and information programming. Some members of Congress have recognized these concerns. As Senator Herb Kohl (D-Wis.) noted:

Excessive media consolidation can seriously diminish the diversity of views and information Americans receive in the news media, can harm the coverage of local issues as national conglomerates own more and more local stations, and can make [it] unduly difficult for independent producers of news and entertainment programming to distribute their products.⁵⁴

47. *Id.*

48. Russell H. Mouritsen, *Telecommunications Act of 1996: Relationships to Functional Theory*, 5 PERSP. para. 18 (2002), available at <http://www.aabss.org/journal2002/Mouritsen.htm> (last visited Apr. 2, 2005).

49. *Id.* at para. 17.

50. *Id.* at para. 23.

51. Press Release, Consumer Federation of America & Consumers Union, Analysis Shows Media Markets Are Already Highly Concentrated; Consumer Groups Question Wisdom of Further Consolidation 1 (May 12, 2003), available at <http://www.democraticmedia.org/resources/filings/concentrationrelease.PDF>.

52. Lili Levi, *Reflections on the FCC’s Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 584 (2000).

53. *Id.* at 584-85.

54. Office of U.S. Senator Herb Kohl, Media Ownership Diversity [hereinafter Kohl], at

Diversity has been recognized as the core of contemporary broadcast regulation, second in importance only to the public interest.⁵⁵ The U.S. Supreme Court has affirmed the opinion that diversity in the dissemination of information is “essential to the welfare of the public.”⁵⁶ In addition to news and information, specific types of programming are targeted, including television geared towards children. In a study conducted after the passage of the 1996 Act, the consumer interest group Children Now determined that increased media consolidation leads to a decrease in children’s television programming.⁵⁷

Minority groups also remain dubious about the deregulatory effects of the 1996 Act. In a report detailing the relationship between minority-owned television broadcast stations and programming geared toward minority groups, the NTIA found that the 1996 Act increased television station prices and reduced the possibility of minority ownership.⁵⁸ According to the NTIA, minority broadcast ownership is desirable because it promotes minority broadcast employment, as well as diversity of viewpoints.⁵⁹ Minority station owners perceived the 1996 Act as a threat to continued station ownership, specifically because of the possibility of increased media consolidation.⁶⁰ Indeed, the report indicates that minority ownership in 1997 was limited to just over 3 percent of all television broadcast stations in the United States.⁶¹ This percentage followed a decrease in minority ownership of twenty-seven stations in 1997 alone.⁶²

Some members of Congress continued to oppose further deregulation of the television broadcast industry just prior to the passage of the June 2003 amendments. As noted by Representative Diane E. Watson (D-Cal.), some members of Congress are still apprehensive about any further relaxation of ownership limits.⁶³ Referring to the potential impact as “deleterious,” Representative Watson noted that current minority ownership is at an “all-time low due to media consolidation over the past two decades.”⁶⁴ In a letter to FCC Chairman Michael Powell, Watson and twenty-eight other members of the

http://kohl.senate.gov/pri_cons_media.html (last visited Apr. 2, 2005).

55. Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 814.

56. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

57. See Press Release, Children Now, TV Shows Cut by Half After Media Mergers (May 21, 2003), available at <http://www.childrennow.org/newsroom/news-03/pr-05-21-03.cfm>.

58. LARRY IRVING ET AL., NAT’L TELECOMM. & INFO. ADMIN., MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES (Aug. 1997), available at <http://www.ntia.doc.gov/reports/97minority>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Press Release, Office of Congresswoman Diane Watson, Watson Says Minorities Threatened by FCC Rule Changes (May 13, 2003) [hereinafter Watson Press Release], available at http://www.house.gov/watson/press/press_051303.html

64. *Id.*

Congressional Black Caucus stated that any further changes to the current limits could “undermine diversity in both media content and ownership,” referencing recent statistics that indicate minority ownership in the broadcast television market has fallen to less than 2 percent of total stations.⁶⁵

B. The June 2003 Regulations

The FCC based its newest regulations on empirical evidence that is reflective of the current marketplace.⁶⁶ The FCC referred to the June 2, 2003, changes as “carefully balanced” and stated that the new limits will “foster a vibrant marketplace of ideas.”⁶⁷ In order to evaluate diversity effectively in different size markets, the FCC developed a “Diversity Index” (“DI”).⁶⁸ This index compiles and compares data on how Americans use different media to obtain news and other informational programming.⁶⁹ The FCC explains that the DI “does not assess diversity by looking to the specific views expressed over a media outlet. Instead, it measures the availability of outlets of various types and assigns a weight to each class of outlet based on their relative value to consumers.”⁷⁰ The expected end result of the DI is an “assessment of the degree of media diversity concentration taking into account all of the media outlets in the market.”⁷¹ In short, the FCC compiles a list of the owners of all broadcast television stations, radio stations, newspapers, and Internet providers in a single market and then compares each owner’s percentage share to the total market.⁷² Those results are squared and used to produce the market’s DI, which corresponds to the amount of ownership concentration that is apparent in any one market.⁷³ This formula is the source of widespread opposition to the methods used by the FCC to determine the limits of market oversaturation.

In addition to expanding the number of television broadcast stations a media company may own, the new regulations also revised radio broadcast guidelines by placing new Arbitron geographic limits on market designations.⁷⁴ According to Rick Staeb, general manager of

65. *Id.*

66. See FCC Press Release, *supra* note 40, at 1.

67. *Id.*

68. *Id.* at 9.

69. *Id.*

70. *Id.*

71. *Id.*

72. See *id.*

73. See *id.* The DI is modeled after the Herfindahl-Hirschman Index used in antitrust analysis to measure concentration in an economic market. *Id.*

74. Lee Fehrenbacher, *FCC Regulations Cause Little Change Locally*, W. FRONT ONLINE, June 6, 2003, available at <http://www.westernfrontonline.com/vnews/display.v/ART/2003/06/06/3ee0fe3dcdb04>. Arbitron is a service designed to measure radio market ownership and listener participation, similar to the Nielsen ratings used by television broadcast networks. Arbitron Inc., About Arbitron, at <http://www.arbitron.com/about/home.htm> (last visited Apr. 2, 2005).

Cascade Radio Group, “The new Arbitron markets will decrease market areas and further limit the number of radio stations a company may own in each market.”⁷⁵

While a common concern under the new radio ownership regulations continues to be the loss of media diversity, owners of television stations and other media outlets have praised the FCC for allowing increased mergers.⁷⁶ The detractors of this movement, including current and former FCC chairpersons, conclude that this “radical view of media consolidation . . . is driven by ideology and business interests, without the consuming public in mind.”⁷⁷ Despite studies released by the FCC indicating that any negative effects of such deregulation are minimal, possible consequences of such action include loss of jobs and unfair advantages for major players in the media industry.⁷⁸

The potential impact on news, entertainment, information, communications, and advertising sectors is at the forefront of the criticism directed at the FCC. Fears of monopoly control permeate consumer unions and public interest groups.⁷⁹ As noted in a recent Executive Council Statement issued by the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”):

Media giants, the networks, and others who want even more deregulation claim that the proliferation of newer media outlets—cable, satellite and the Internet—create sufficient competition, rendering FCC media ownership regulations obsolete. Yet evidence in the FCC’s rule making presented by the entertainment guilds, AFL-CIO unions in broadcasting and journalism, consumer and public-interest organizations, business groups including independent producers and advertisers, as well as some of the FCC’s own studies clearly shows that a large swath of these “new” outlets are owned by the same conglomerates that control traditional media. As such, they are not new and diverse voices in the marketplace. In fact, programming on the four major networks has become more, not less, homogenous over the past ten years. Moreover, there has been a precipitous decline in the growth of media outlets in radio and newspapers in particular, with significant

75. Fehrenbacher, *supra* note 74.

76. *See id.* (incorporating the statements of Dave Reid, general manager for KVOZ, a radio station in Bellingham, Washington, and Norm Lewis, editor of the Skagit Valley Herald in Mt. Vernon, Washington). Reid mentioned that the relaxed regulations will give journalists additional capacity to do better work. *Id.* Furthermore, Lewis noted that media concentration does not necessarily mean fewer voices. *Id.* He also noted that since newspaper ownership has become more consolidated, the quality of reporting has increased. *Id.*

77. KAREN YOUNG, CHICAGO MEDIA WATCH, WHEN MEDIA REGULATIONS FALL AND YOU DON’T HEAR THEM, IS THERE REALLY A SOUND? (Nov. 2002), available at <http://www.mediatank.org/fcc%20article.pdf> (quoting former FCC chairman Reed Hundt).

78. *Id.*

79. *See* AFL-CIO, MEDIA MONOPOLIES: A THREAT TO AMERICAN DEMOCRACY (Feb. 26, 2003), available at <http://www.aflcio.org/aboutaflcio/ecouncil/ec02262003.cfm>.

consequences for these two traditional sources of news for many Americans.⁸⁰

With opposition running rampant against further deregulation, the FCC adopted the new regulations that increase previous limitations on media ownership.⁸¹ These new regulations effectively increased the national percentage of individuals that any one media company may reach through television programming, radio programming, and newspaper ownership.⁸² Various members of the American public and Congress became involved and began voicing their concerns.⁸³

III. ANALYSIS

More than one million complaints were lodged with the FCC and Congress regarding the new regulations.⁸⁴ Such expansive opposition indicates consumer outrage against further deregulation. As FCC Commissioner Copps noted, “Ninety percent of the top fifty cable stations are owned by the giants that own the [television] networks and the cable systems Having more channels . . . does not necessarily mean having more diversity of editorial opinion or . . . competition.”⁸⁵ Major critics of the new regulations point out that the same companies are both producing the programming and controlling the method of delivery, which leads to the danger that these few large companies could shut out diverse or competitive voices.⁸⁶ While antitrust law would normally serve as a means of recourse, Congress has vested primary enforcement authority in the FCC to regulate anticompetitive behavior.⁸⁷ Thus, the current regime grants a large amount of discretion to the FCC and allows increased consolidation, despite the recognized need for program diversity and station independence.

A. Congressional Opposition

On May 13, 2003, the Senate introduced a bill entitled the “Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003” (the “Senate bill”).⁸⁸ Introduced prior to the FCC’s passage of the new regulations, this bill was likely a preemptive strike to preserve the national broadcast

80. *Id.*

81. FCC Press Release, *supra* note 40, at 1.

82. *Id.*

83. See generally *infra* Section III.

84. Stephen Labaton, *The Nation: Debate/Monopoly on Information; It's a World of Media Plenty. Why Limit Ownership?*, N.Y. TIMES, Oct. 12, 2003, § 4, at 4.

85. *Id.*

86. *Id.*

87. 15 U.S.C. § 21(a) (2000).

88. Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, S. 1046, 108th Cong., available at <http://thomas.loc.gov/> (searching S. 1046 in Bill Number field).

ownership limits set by the 1996 Act. A major component of the Senate bill would prevent the FCC from expanding the national audience reach limits to 45 percent.⁸⁹ In so doing, the Senate bill seeks to “prevent excessive concentration of ownership by establishing a limit to the national audience reach of the television stations that any one party may own or control.”⁹⁰ Specifically, the Senate bill seeks to include a new section which would not only limit the national audience percentage to 35 percent, but also negate any potential grandfather clauses.⁹¹ This provision would require any television broadcast station in excess of the 35 percent limitation “to divest itself of such licenses as may be necessary to come into compliance with such limitation within one year after the date of enactment of this section.”⁹²

Two of the most interesting sections of the Senate bill include provisions for public hearings and restoration of cross-ownership rules. Section 6 amends the 1996 Act to include the following language: “Before making any determination under this subsection concerning an ownership rule or regulation, the Commission shall hold no less than five public hearings in different areas of the United States with respect to that rule or regulation.”⁹³ Section 7 requires an immediate repeal of the June 2003 regulations, but includes a “rural state exemption” that allows for broadcast television station and newspaper cross-ownership in smaller markets.⁹⁴

The House proposed a companion bill entitled the “Protect Diversity in Media Act” (“the House bill”).⁹⁵ In addition to repealing the FCC’s June 2003 regulations, the House bill includes a section that specifically prohibits the use of biennial review.⁹⁶ This prohibition would effectively solidify the limits on national broadcast ownership at 35 percent. While smaller in scope than the Senate proposal, the House bill seeks to repudiate any FCC-initiated broadcast ownership changes. The

89. *See id.* § 3(a).

90. *Id.* § 2(b)(4).

91. Proposed as 47 U.S.C. § 340 in the bill. *Id.* § 3(a).

92. *Id.*

93. *Id.* § 6.

94. *Id.* § 7(b).

[I]n a small market with a Designated Market Area of 150 or higher, the public utility commission of the State or States in which such market is located may recommend, on a case-by-case basis, that the Commission grant a waiver of such cross-ownership rules if the public utility commission finds that the proposed transaction for which the waiver is required will enhance local news and information, . . . promote the financial stability of a newspaper, radio station, or television station, or otherwise promote the public interest.

Id.

95. Protect Diversity in Media Act of 2003, H.R. 2462, 108th Cong., available at <http://thomas.loc.gov/> (searching H.R. 2462 in Bill Number field).

96. *Id.* § 2(d).

expansive positions proposed by the Senate are mirrored in a separate House resolution.⁹⁷

B. Use of the Diversity Index

The new rules propounded by the FCC rely upon a calculated relationship between media ownership in large markets and the percentage share of audience members that each company may reach. As discussed in Section II, use of the DI has raised widespread opposition. Consumer groups find the DI to be “an intentional distortion of market analysis driven by a desire to allow more media consolidation.”⁹⁸ The leading criticism of the DI is the fact that it never considers the actual market share of media outlets, which leads to bizarre results that do not reflect market reality.⁹⁹ This flaw causes the DI to underestimate concentration of media markets by overemphasizing the effect of small and noncommercial outlets, while underemphasizing the market effects of cross-ownership by the larger conglomerates.¹⁰⁰ Since the DI is the crux of the cross-ownership proposal in the new regulations, these criticisms should be closely scrutinized by the courts and Congress to determine the validity of its results.

Before utilizing a tool such as the DI, it is necessary to scrutinize the current concentration of media markets. Evidence indicates that over 95 percent of the television and radio markets are highly concentrated, thus lending support to the argument that further consolidation is not necessary.¹⁰¹ The FCC’s new regulations allow markets to become “extremely concentrated and the local news markets to be dominated by one huge media giant.”¹⁰²

97. Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, H.R. 2052, 108th Cong., *available at* <http://thomas.loc.gov/> (searching H.R. 2052 in Bill Number field).

98. Press Release, Consumers Union, Consumer Groups Charge FCC Analysis Supporting Media Ownership Rules Is Fundamentally Flawed (July 21, 2003), *available at* http://www.consumersunion.org/pub/core_telecom_and_utilities/000230.html.

99. *Id.* Examples of these bizarre results include: in New York, the Shop at Home television network carries more weight than the New York Times; and in Pennsylvania, the Fox broadcast television affiliate is given twice the weight of the CBS and NBC affiliates, despite the fact that both CBS and NBC have over four times the viewing audience of Fox. *Id.*

100. *Id.*

101. MARK N. COOPER, CONSUMERS UNION, PROMOTING THE PUBLIC INTEREST THROUGH MEDIA OWNERSHIP LIMITS: A CRITIQUE OF THE FCC’S DRAFT ORDER BASED ON RIGOROUS MARKET STRUCTURE ANALYSIS AND FIRST AMENDMENT PRINCIPLES 3 (May 2003), *available at* <http://www.consumersunion.org/pdf/0521%20divindexsum.pdf>.

102. *Id.*

The results of a survey conducted by the CFA and the Consumers Union (“CU”) indicate that newspapers are the most important and frequent source of local news for almost two-thirds of survey respondents.¹⁰³ However, the FCC gave newspapers a weight of only 29 percent in the DI, attributing the largest proportion of the index to television news delivery.¹⁰⁴ According to the CFA and the CU, these problems permeate the DI, negating its use as an effective method of calculating diversity in media markets.¹⁰⁵ The discrepancy was not lost on the FCC. As Commissioner Jonathan S. Adelstein remarked:

The Diversity Index was a noble effort that tragically degenerated into an ill-conceived rote formula that even Merlin couldn't decipher. The Index is seemingly nothing more than economic jujitsu, an ornate castle built upon a foundation of sand at the ocean's edge.

....

Among its many flaws, the index distorts how it calculates the market shares of relevant providers in each local market, resulting in grossly understated measurements of the impact of any particular combination

Despite the quest for empirical footing, the index is premised on admittedly incomplete data.¹⁰⁶

The inherent flaws of the DI raise serious questions regarding the FCC's increase on media ownership limits. However, the index is only the tip of the iceberg.

C. Deregulation

The FCC adopted a policy of competition and deregulation in the 1980s to encourage the development of new media outlets.¹⁰⁷ Since the 1996 Act, the FCC has aggressively pursued further deregulation.¹⁰⁸ In 2001, the FCC sought revision of the cross-ownership rule.¹⁰⁹ This rule formerly prohibited a single media company from owning both a daily newspaper publication and a television broadcast station in the same market.¹¹⁰ The debate surrounding media deregulation focuses on

103. *FCC's Rationale Challenged on Media Ownership: Survey Exposes Major Flaws in Commission's Judgment*, TELECOM POL'Y REP., Feb. 4, 2004, available at http://www.findarticles.com/p/articles/mi_m0PJR/is_5_2/ai_112915717.

104. *See id.*

105. *Id.*

106. Jonathan S. Adelstein, *A Dark Storm Cloud Is Looming Over the Future of the American Media*, COMMON DREAMS NEWSCENTER, at <http://www.commondreams.org/views03/0602-13.htm> (June 2, 2003).

107. Judith C. Aarons, *Cross-Ownership's Last Stand? The Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 329 (2002).

108. *Id.*

109. *Id.* at 318.

110. *Id.* at 319.

whether diversity in programming is actually achieved. In the case of the cross-ownership rule, some argue that deregulation has led to a “dramatic increase in media outlets, ensuring that diverse viewpoints are aired.”¹¹¹ However, the effects of deregulation in other communication industries illustrate a decidedly different picture.

Despite healthy revenues generated as a result of deregulation in the radio industry, for example, consolidation has eliminated smaller, less efficient media companies.¹¹² Media consolidation can lead to “mutilation of the community’s thinking process,” in addition to suppression of portions of the communicated message.¹¹³ The likely result of the new FCC broadcast television regulations is an increase in mergers and further consolidation of the media industry.¹¹⁴ This would essentially lead to less diversity in the media outlets and a loss in local control of television stations.¹¹⁵ The concept of deregulation, as propounded by the FCC, is a misleading term that actually increases the power of the administrative agency.¹¹⁶ Raising the media concentration threshold will likely lead to new mergers, which, in turn, will lead to more work for the FCC.¹¹⁷ Ultimately, the increase in mergers could produce far-reaching antitrust issues that could affect diversity in programming.

The problem of cross-ownership is specifically discussed in *Sinclair Broadcast Group, Inc. v. FCC*.¹¹⁸ *Sinclair* concerned a local television ownership rule that limited the situations under which a single company could own two television stations in the same market.¹¹⁹ Specifically, the rule allowed common ownership of two television stations in the same local market if one of the stations was not among the four highest-ranked stations in the market, and if eight independently owned, operational television stations remained in that market after the merger.¹²⁰ Sinclair Broadcast Group challenged this rule, contending that the FCC propounded the rule in an arbitrary and capricious manner.¹²¹ Although the court eventually agreed with Sinclair’s argument, it remanded the rule to the FCC for further determination and study of the numerical

111. *Id.* at 320.

112. Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 493 (2000).

113. Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy—A Review Essay of Lucas Powe’s American Broadcasting and the First Amendment*, 56 GEO. WASH. L. REV. 187, 216 (1987).

114. See Kerri Smith, *The FCC Under Attack*, 2003 DUKE L. & TECH. REV. 19, at ¶¶ 9–10 (Aug. 26, 2003), at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0019.html>.

115. See *id.*

116. S.M. Oliva, *Antitrust, Politics and the Media*, CAPITALISM MAG., May 26, 2003, at <http://capmag.com/article.asp?ID=2820>.

117. *Id.*

118. 284 F.3d 148 (D.C. Cir. 2002).

119. *Id.* at 152.

120. *Id.*

121. *Id.*

limits on ownership.¹²² Following a traditional pattern of administrative agency deference, the court effectively granted the authority to the FCC to define its own boundaries using its own methodology.¹²³

Prior to *Sinclair*, the U.S. Court of Appeals for the D.C. Circuit had specifically addressed the relationship between media consolidation and program diversity.¹²⁴ Drawing the conclusion that an increase in media consolidation generally affects both competition and diversity in programming, the court found that the FCC did not provide an adequate basis for believing relaxed limits on ownership would further diversification.¹²⁵ The court stated: “The FCC must still justify the limits that it has chosen as not burdening substantially more speech than necessary. In addition, . . . the FCC must show a record that validates the regulations, not just the abstract statutory authority.”¹²⁶ Critics of the FCC theory that deregulation results in diversity often point out the contradiction in the equation: an increase in consolidation of the media industry does not mean more information will be conveyed to the public.¹²⁷ The actual result is that less diverse information will be given to the public.¹²⁸ After the radio industry was substantially deregulated by the 1996 Act, less diversity was evident in radio programming across the country.¹²⁹ As Marcelino Ford-Livene, counsel for the New Media Policy division of the FCC, remarked: “The amount of deregulation and consolidation in broadcast television and radio today has become a critical problem in the area of diversity and media ownership.”¹³⁰

D. International Perspectives

Media ownership is sometimes seen as a reflection of political conditions—authoritarian regimes control the media directly, while democracies allow pluralism of ownership.¹³¹ Thus, while Britain legalized private commercial broadcasting in the 1950s, France, Germany, and Denmark did not do so until the 1980s.¹³² The availability of advertising also affects the number of privately owned broadcast stations in developed nations. In poorer countries, this need translates

122. *Id.* at 162.

123. *See id.*

124. *See generally* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130 (D.C. Cir. 2001).

125. *Id.* at 1130–31.

126. *Id.* at 1130.

127. Jonathan W. Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Acts*, 17 ST. JOHN'S J. LEGAL COMMENT. 11, 25 (2003).

128. *Id.*

129. *Id.*

130. Marcelino Ford-Livene, *The Digital Dilemma: Ten Challenges Facing Minority-Owned New Media Ventures*, 51 FED. COMM. L.J. 577, 578 n.1 (1999).

131. Richard Carver, *Media and Elections: Structure of Media Ownership*, in Administration and Cost of Elections Project (Dec. 2000), at <http://www.aceproject.org/main/english/me/meb03a.htm> (last visited Apr. 2, 2005).

132. *Id.*

into an increase in the number of publicly owned broadcast stations, both radio and television.¹³³ For example, national radio stations in Africa, as well as parts of Asia and Latin America, are owned almost entirely by the public.¹³⁴

Despite differences in media ownership structure, a large portion of foreign governments are also allowing increased deregulation. In Britain, new laws have lifted the ban on non-European ownership of British broadcasters.¹³⁵ Japan is considering relaxation of a law that bans a single firm from owning several television stations.¹³⁶ New Zealand, Sweden, and Finland now have no limits on media ownership.¹³⁷ Conversely, political opposition precluded the Australian government from attempting to ease ownership limits both within the country and by foreign media conglomerates.¹³⁸ Viewed in the context of the FCC's new regulations, it would appear that the United States is following a global trend towards media deregulation. In fact, some regulators suspect that strict ownership rules would be ineffective regardless of the form of government.

Germany, for example, has been particularly determined to avoid concentration of media ownership.¹³⁹ This is due in part to the power of Alfred Hugenberg, a media baron who aided the rise of Adolf Hitler in the 1930s by utilizing the power of mass communication.¹⁴⁰ However, Germany's media law has failed to stop two families—Bertelsmann and Kirch—from controlling the country's private television market.¹⁴¹ A similar situation exists in Italy, a country with numerous rules designed to limit media ownership.¹⁴² Despite these regulations, current prime minister Silvio Berlusconi still exercises excessive control over Italian television and the press through Mediaset, his own company, and RAI, the state-owned broadcasting body.¹⁴³ However, the effects of concentrated control in television broadcasting present only a portion of the larger issue. Because the FCC's new regulations allow one media company to own both a television station and a daily newspaper in the same market, the potential for decreased diversity is apparent.

133. *See id.*

134. *Id.*

135. *Turning It Off*, THE ECONOMIST, Sept. 13, 2003, at 56, available at <http://rider.wharton.upenn.edu/~faulhabe/790/Media%20Regs%20Outside%20US.html>.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

A similar situation exists across the islands of the South Pacific. Two transnational media conglomerates control all of the major circulating newspapers in the South Pacific.¹⁴⁴ As David Robie, former head of the journalism program at the University of Papua New Guinea, remarked: “Through their subsidiaries, Rupert Murdoch’s News Corporation . . . and French media magnate Robert Hersant’s group in the French territories own five of the six [daily newspapers] in the region.”¹⁴⁵ The problem of media concentration results from Murdoch also owning a substantial percentage of the television broadcast stations in the surrounding region. News Corporation’s television stations has historically reached forty-five million people in thirty-eight Asia–Pacific countries.¹⁴⁶ After discussing the implications of such widespread cross-ownership, Professor Robie noted, “Television has grown rapidly in the South Pacific in the past few years. But in terms of ownership and programming, the broadcast systems of the island nations display little independence.”¹⁴⁷ While the loss of media ownership sovereignty remains a growing concern across the globe, efficient implementation of federal antitrust law may alleviate domestic concern.

E. Antitrust Implications

One potential avenue to resisting the loss of diversity in media ownership and programming lies in antitrust law. An antitrust suit remains a credible threat as the FCC moves along on its crusade.¹⁴⁸ As University of Illinois professor Robert McChesney remarks, “Antitrust provisions have really deteriorated in their vitality in the last two decades. But the law hasn’t changed—it’s the way it has been enforced and interpreted that is much more business friendly.”¹⁴⁹ However, the victory in such a suit would be far from certain because antitrust violations hinge on how attorneys define a particular competitive market.¹⁵⁰ For example, if the defined market is newspapers, other properties like television stations would be irrelevant in proving illegal market fixing.¹⁵¹ In addition, Hew Pate, chief of the DOJ’s antitrust division, has stated that competitive factors, rather than diversity implications, will drive any DOJ decisions.¹⁵²

144. David Robie, *Media Ownership and Control in the Pacific: A Case for National Sovereignty*, TIMES OF PAPUA NEW GUINEA, Oct. 28, 1993, available at <http://nativenet.uthscsa.edu/archive/nl/9311/0221.html>.

145. *Id.*

146. *Id.*

147. *Id.*

148. Dan Levine, *Bad to Worse: FCC Approves Even More Media Consolidation*, IN THESE TIMES, June 6, 2003, available at http://www.inthesetimes.com/site/main/article/bad_to_worse/.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

Despite the difficulties associated with an antitrust suit, consumer groups have still petitioned the FCC to reconsider the new regulations, specifically citing “inconsisten[cies] with established antitrust practice.”¹⁵³ Weak enforcement of current antitrust regulations and lax implementation of First Amendment policy have resulted in concentrated media markets.¹⁵⁴ Other commentators realize the merits of an antitrust suit regarding media consolidation. As Reid Horwitz, an antitrust attorney with the firm of Dechert L.L.P. in Washington, D.C., remarked:

Case-by-case enforcement of federal antitrust law would distinguish between media ownership consolidation that promotes consumer welfare by improving the quality of broadcasting services and consolidation that leads to anti-competitive harm and fewer choices in the marketplace. If the past is prologue, the Antitrust Division of the [DOJ] will employ the antitrust laws to police any substantial consolidation, as it did in the radio industry after the passage of the Telecommunications Act of 1996.¹⁵⁵

The overwhelming political power of the largest media conglomerates is cause for some concern. Professor McChesney has remarked that the period of fast growth that normally accompanies a relaxation of regulatory standards has led to the industry being “untamable by government. . . . After a decade of deal-making, the U.S. system is now dominated by nine massive media conglomerates. Although not one is a monopoly of any one national market . . . , these are closed markets for all intents and purposes.”¹⁵⁶

Evidence gathered by the CFA and the CU indicates that media mergers would be allowed in 140 concentrated local markets.¹⁵⁷ Nearly half of the national population is served by only one dominant newspaper in their local markets.¹⁵⁸ The CFA and the CU have noted that “allowing a merger between a dominant newspaper and a large television station would create a local news giant that threatens alternative news viewpoints. In these markets, one firm would have half

153. Press Release, Consumers Federation of America & Consumers Union, Consumer Groups Ask FCC to Rewrite Media Rules; Court’s Stay Leaves Time for Agency to Correct Mistakes (Sept. 4, 2003), available at http://www.consumersunion.org/pub/core_telecom_and_utilities/000310.html.

154. CONSUMER FED’N OF AM. & CONSUMERS UNION, MEDIA OWNERSHIP LIMITS SERVE THE PUBLIC INTEREST 1 (May 9, 2003), available at <http://www.consumerfed.org/mediaownership050903.pdf>.

155. Reid B. Horwitz, *Modification of Rules May Lead to More Consolidation; DOJ Ruled a Joint Sales Pact Eliminated Competition*, NAT’L L.J., Nov. 4, 2002, at B10, available at <http://www.dechert.com/library/Media%20Ownership%20Rules%2011-02.PDF>.

156. Robert McChesney, *Antitrust & the Media—I*, THE NATION, May 22, 2000, available at <http://www.thenation.com/doc.mhtml%3Fi=20000522&s=mcchesney>.

157. Press Release, Consumers Federation of America & Consumers Union, Green Light for Mergers Could Result in Media Giants Dominating 100 Local Markets; Groups Charge FCC Proposal Guts Public Interest Standard (May 21, 2003), available at <http://www.consumersunion.org/telecom/merger-503.htm>.

158. *Id.*

of the total audience and employ half the total news employees.”¹⁵⁹ These statistics contradict the purposes behind the new regulations. Applying the DOJ’s antitrust powers to this enormous industry may help curb the deregulation and its associated problems, but this may only scratch the surface.

IV. RECOMMENDATION

The current deregulatory scheme provides economic incentives for media companies to merge, thus reducing the total number of market players. Problems associated with this reduction are normally addressed by antitrust law. However, the significant amount of self-governing authority that Congress has provided to the FCC and other administrative agencies thwarts the potential success of such an antitrust suit. To counter the unequal balance in power, the scope of the FCC’s influence must be curtailed through statutory amendments and heightened DOJ scrutiny.

Analysis of the likelihood of anticompetitive effects resulting from a proposed merger between media providers begins with an assessment of concentration in the relevant market.¹⁶⁰ A transaction “resulting in a high concentration of market power and creating, enhancing, or facilitating a potential that such market power could be exercised in anticompetitive ways is presumptively unlawful.”¹⁶¹ As argued by several members of Congress, allowing a single media company to own multiple sources of information dissemination creates less diversity in the message itself.¹⁶²

At least one commentator has argued that “the path from violating the former FCC cross-ownership rules to illegal monopoly is not a smooth one. Just because . . . cross-ownership stifles the diversity of news . . . doesn’t mean the company will meet the criteria of a monopoly that restricts trade.”¹⁶³ Despite criticism, Congress vested the FCC with enforcement authority of antitrust provisions in the case of communication providers, including international media conglomerates.¹⁶⁴ This results in a paradox: the FCC has the power to relax ownership regulations while concurrently defining the instance at which a communications provider becomes a monopolist.

159. *Id.*

160. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497–98 (1974) (holding that although merger may have caused undue concentration in the coal industry, other considerations showed “no substantial lessening of competition occurred or was threatened”).

161. *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1294, 1302 (W.D. Mich. 1996) (finding that, despite merger of two hospitals being presumptively anti-competitive, defendants successfully rebutted the prima facie case by showing that merger of non-profit hospitals would not necessarily lead to higher prices and profits).

162. *See, e.g.*, Kohl, *supra* note 54; Watson Press Release, *supra* note 63.

163. Levine, *supra* note 148.

164. 15 U.S.C. § 21(a) (2000).

A. Current Legislation

Congress has provided statutory guidelines to aid in the identification of anti-competitive market practices:

[T]he [FCC] shall forbear from applying any regulation . . . to a telecommunications service . . . if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.¹⁶⁵

To determine the extent of the public interest, Congress instructs the FCC to “consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”¹⁶⁶ To justify the June 2003 regulations, the FCC relied upon the previously discussed Diversity Index.¹⁶⁷

While a multitude of media-conscious entities, television broadcast associations, and even current FCC commissioners have seriously criticized reliance on the DI’s arbitrary calculations, the root of the problem lies with the extent of the FCC’s decision-making authority. In a 1980 case, the D.C. Circuit defined the predominant factor the FCC must utilize in making its determination: “[T]he Commission’s overriding responsibility is not to foster the maximum level of competition in the industry it oversees, but to promote the public interest.”¹⁶⁸ While the case discussed the emergence of satellite communication, the court noted two distinct advantages from increased competition: first, competition may prevent “supra-competitive price pressures”; and second, there is potential for “technological advances and more efficient operations.”¹⁶⁹ The court allowed the proposed joint venture between satellite communication providers to proceed largely because it would foster increased competition.¹⁷⁰

165. 47 U.S.C. § 160(a) (2000).

166. 47 U.S.C. § 160(b).

167. *See supra* Section III.B.

168. *United States v. FCC*, 652 F.2d 72, 96, 104 (D.C. Cir. 1980) (deferring to FCC discretion in weighing antitrust considerations for a new entrant into the domestic satellite communications field).

169. *Id.*

170. *Id.* at 105–07.

B. *Judicial Precedent*

In order for current antitrust regulations to be effectively enforced in the media and mass communications industries, the enforcement authority must reside with a separate and independent agency. Currently, the FCC is directed by five commissioners who are nominated by the President and confirmed by the Senate for five-year terms.¹⁷¹ The President delegates one of the commissioners to serve as chairperson.¹⁷² Only three commissioners may be members of the same political party.¹⁷³ This appointment process causes the FCC to be controlled by consistent pressure from lobbying efforts and partisan politics. Independent review of sweeping FCC proposals, such as the June 2003 regulations, may help stem the tide of decreasing diversity in programming.

Generally, independent review is performed by the DOJ in filing an anti-competitive suit against the content distributor. The outcome of such a suit is uncertain at best. At least one court has identified the public interest as the overriding concern in an antitrust suit, rather than “whether [the final judgment] is certain to eliminate every anticompetitive effect of a particular practice or whether [the judgment] mandates certainty of free competition in the future.”¹⁷⁴ However, the definition of “public interest” is subject to varying interpretations.

In 1978, the U.S. Supreme Court opined, “In setting its licensing policies, the [FCC] has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”¹⁷⁵ The Court continued, stating that “[t]his perception of the public interest has been implemented over the years by a series of regulations imposing increasingly stringent restrictions on [owning multiple] broadcast stations.”¹⁷⁶ From these words, it is evident that the goals of the FCC have changed and the courts need to recognize the new thrust of FCC regulations. While efficiency considerations argue in favor of allowing increased deregulation—and thus increased media consolidation—the potential threat to programming remains a recognizable harm. If the courts view diversity as a strong prevailing concern in the landscape of media ownership, then antitrust regulation of the FCC is essential to

171. CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, ABOUT THE FCC: A CONSUMER GUIDE TO OUR ORGANIZATION, FUNCTIONS AND PROCEDURES 3, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-229127A1.pdf (last visited Apr. 2, 2005).

172. *Id.*

173. *Id.*

174. *United States v. News Corp.*, No. Civ.A.010771, 2001 WL 34038534, at *7, 13 (D.D.C. Aug. 20, 2001) (holding that the proposed Final Judgment was “within the reaches of public interest” and thus allowable).

175. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780, 815 (1978) (allowing the FCC to establish regulations which allow one owner to control a radio or television broadcast station and a daily newspaper in the same community).

176. *Id.*

maintaining the appropriate level of variety in programming, and thus to protecting the public interest.

V. CONCLUSION

The inherent problems in increased media consolidation have sparked a significant amount of controversy. Consumer interest groups, broadcasters' affiliations, and members of Congress have responded to the FCC, predicting the dire consequences of loss of program diversity and decreased competition within the communications industry. Current antitrust legislation and policy are insufficient barriers to future FCC regulations, and they must be strengthened in order to ensure diversification of media delivery.

Diversity in media is a social goal and a matter of public policy. If left unchecked, the FCC's actions may create public mistrust of the communications industry, allowing only major media conglomerates to broadcast programming. The loss of diversity and competition in this industry will not satisfy the public's interest in obtaining a wide variety of objective news and information. Courts must be sensitive to the potential social costs of allowing further consolidation.