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### **Measuring Media Diversity: Problems and Prospects**

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The promotion of media diversity has long been a primary public policy objective, or “foundational principle,” to use Napoli’s phrase, of western democratic governments.<sup>1</sup> In fact, in the words of one scholar, Denis McQuail, “... diversity has come to acquire the status of an end in itself for mass media...”<sup>2</sup> No country arguably has had a more explicit commitment to the promotion and preservation of media diversity than the United States. Some scholars date the adoption of diversity as a goal of public policy in the United States to the 1879 Postal Act, which provided for subsidized postal rates for magazines.<sup>3</sup> Beginning almost sixty-five years ago, an extensive and interrelated set of structural regulatory policies involving ownership limits, both within and between individual forms of media, has been imposed by the Federal Communications Commission (FCC), the government agency with primary responsibility for regulating broadcasting media, with the explicit purpose of promoting diversity.<sup>4</sup> More recently, no country has experienced the controversy that ensued in the United States in 2003 over the attempts by the FCC to revise—critics alleged do away with or, at a minimum, profoundly undermine—its current policies governing media diversity.<sup>5</sup>

Although the controversy was multifaceted—how else could one describe a conflict that produced such a diverse coalition from the NRA to NOW?<sup>6</sup>—one of the core issues was the debate over the nature, and the use by the FCC, of a metric to measure diversity, namely the Diversity Index (DI). The FCC had developed this measurement system primarily to respond to judicial injunctions that its existing methods of measuring diversity were not rigorous enough to sustain its policies. Although, as noted below, the FCC did not claim that it relied primarily on the Diversity Index in its individual decisions to relax its ownership restrictions, critics latched onto the Index to challenge the new rules and ultimately to persuade successfully the courts and Congress to stay the implementation of them.

Given the centrality of media diversity as a longstanding policy goal and the attempt by the FCC to introduce a supposedly refined measurement system upon which it could, at least in part, justify its regulatory initiatives, the question of how one can effectively measure media diversity must be at the heart of any attempt to develop appropriate rules governing media ownership. This paper, through an analysis of the debate surrounding the FCC’s Diversity Index, seeks to answer that question. Before doing so, a prior question must be addressed, namely, what is “media diversity.” As Bruce Owen has noted, “we cannot jump directly into the measurement debate without considering what it is that we want to measure and why.”<sup>7</sup> As we shall see, answering this question, notwithstanding the centrality of the concept and goal, is almost as complicated and, consequently, controversial as developing the measurement system.

The paper consists of three sections. In the first, I address the meaning of media diversity and the complications that conceptualizing media diversity pose for developing a non-contestable (if such is possible) measurement system. The second section analyses the controversy that enveloped the FCC’s attempt to develop its Diversity Index. The final section will offer some concluding comments.

## **Media Diversity: A Conceptual Bog?**

Given the longstanding commitment in the United States and elsewhere to the promotion and preservation of media diversity, one would naturally expect that there would be some general agreement or consensus on what the term actually means. Unfortunately there is not. Furthermore, and more significantly, both for existing and proposed policy initiatives, there is apparently no causal or explanatory linkage between what has been defined as diversity and the measures implemented to sustain such diversity.

For some, media diversity can be considered a synonym for “variety.”<sup>8</sup> Alternatively, diversity has been equated with pluralism in the sense of “the presence of a number of different and independent voices, and of differing political opinions and representations of culture within the media.”<sup>9</sup> The value of the latter, as opposed to the former, conceptualization is that, even if not completely satisfactory, it hints at some of the underlying reasons why diversity is valued as a public policy objective.

Diversity is valued, at least in terms of the rhetoric of American policy, because it is a multifunctional instrumental concept which, rather than just being an end in itself, is presumed to be crucial for the attainment of some of the other primary objectives in American communications policy. The promotion of media diversity is presumed to be the means by which the FCC can put flesh on its “public interest” mandate. Thus, promoting diversity is thought to advance the case for localism, another primary policy goal. More importantly, the promotion and attainment of media diversity is presumed to be fundamentally crucial to the creation and enhancement of a flourishing “marketplace of ideas,” considered to be a crucial underpinning for a healthy and vibrant American democracy.<sup>10</sup>

For its part, reflecting the multiple goals sought through its various diversity policies, the FCC has identified five different types of diversity that it considers important: viewpoint, outlet, program, source, and minority and female ownership diversity:<sup>11</sup>

- Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives.
- Outlet diversity “simply means that, in a given market, there are multiple independently owned firms.” The FCC’s stated assumption is that “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.” (para. 38)
- Program diversity refers to a variety of programming formats and content.
- Source diversity refers to the availability of media content from a variety of content producers.
- Minority and female ownership diversity, which is self-explanatory, according to the FCC has long been an important regulatory policy objective.

Several aspects of the Commission’s conceptualization of diversity are worth noting. The first is that because of the constraints imposed by the First Amendment, the Commission must be extremely cautious and guarded lest its policies intrude on the actual content of

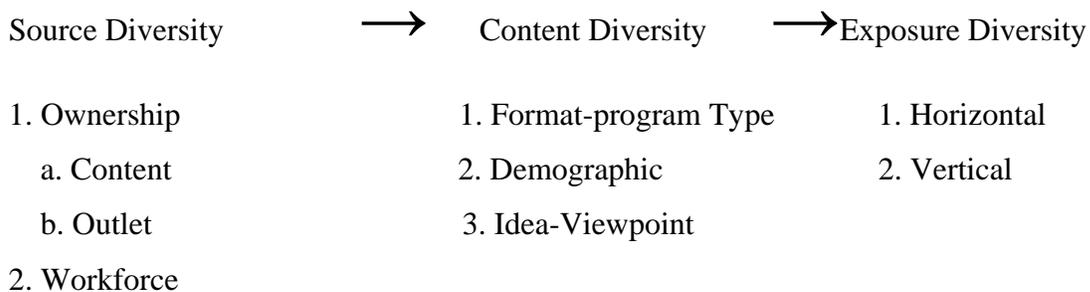
programs. Thus, in promoting diversity, the FCC seeks to do indirectly that which it is constitutionally prohibited from doing directly. It makes the critical assumption that ownership diversity will result in program and viewpoint diversity. This assumption will be discussed further below. Secondly, as the FCC notes in its decision, although it lists source as a dimension of diversity, it rejects the argument that “source diversity should be an objective of our broadcast ownership policies” on the grounds that “we find no basis in the record to conclude that government regulation is necessary to promote source diversity.”<sup>12</sup> This position reflected prior FCC decisions to eliminate its Prime Time Access Rule and Financial Interest and Syndication Rules.<sup>13</sup>

While the FCC understanding of diversity is more comprehensive than a simple reference to variety or even pluralism, it suffers in several important respects. The first is that it is still not as comprehensive as it can and should be. More importantly, the FCC relies more on a catalogue of characteristics or dimensions of diversity and does not attempt to conceptualize the linkages between and among the dimensions. In this regard, Robert Horwitz’ comment is apt: “The FCC and Congress usually soft-pedaled the conceptual difficulties associated with diversity, sticking to generic praise of the policy, and assuming that a diversity of owners would translate to a diversity of formats, viewpoints, and audience segments catered to.”<sup>14</sup>

One of the few analysts who have attempted a comprehensive identification of the dimensions of media diversity is Philip Napoli.<sup>15</sup> He develops what is perhaps the most sophisticated typology in the literature, found in Figure 1:

**Figure 1**

**Diversity Components. Subcomponents and Assumed Relationships**



In addition to its far greater comprehensiveness, what is particularly significant about Napoli’s typology is his attempt, reflected in the arrows, to depict the causal relationships that are assumed to exist between the diversity components or the diversity chain as he calls it. As he notes, source diversity is assumed to be causally related to content diversity and, adding a component, namely exposure diversity, which he argues persuasively is

“the neglected diversity dimension, although it is as central to communications policy (if not more so) as either source or content diversity.”<sup>16</sup>

For purposes of this paper, it is not necessary—even if it were possible, which is doubtful—to stipulate a conceptualization of media diversity that would be non-contestable. What we have done is survey some of the major approaches that reveal the conceptual issues that must be confronted in defining media diversity before one can attempt to develop a method for measuring it. The above discussion should amply demonstrate what Einstein has aptly noted: “no one has been able to develop a working definition of diversity—not the content providers, not the policymakers, not the scholars, and not the courts.”<sup>17</sup> Similarly, McQuail concluded that “the concept of diversity is so general and can have so many different formulations and expressions that any conclusion has to be open-ended.”<sup>18</sup> This conceptual ambiguity, indeed incoherence, not surprisingly, has important implications for both traditional and contemporary attempts to measure such diversity. It is to this issue that we now turn.

### **Measuring Media Diversity: Into the Bog**

Notwithstanding the centrality of diversity as a policy objective, until recently the FCC has relied on a rather unsophisticated measurement system to promote that objective. The traditional test has been a simple “voice test,” that is, the number of independent media groups or “voices” in particular markets.<sup>19</sup> Although, traditionally, the FCC had only included local broadcast stations, in 1999 the Commission adopted a more comprehensive concept of “media voices” to govern its ownership regulations. The FCC decided that it would henceforth determine the number of media voices in a market by counting the following:

... each independently owned, full-power, primary, broadcast television station with the DMA [designated market area] of the community of license; each independently owned, primary, broadcast radio station in the radio metro market of the community of license; all English-language newspapers within the TV station’s DMA which are published at least four days a week and have a circulation of at least 5% of the DMA households; and if cable is generally available in the DMA, one cable system.<sup>20</sup>

It is worth noting that this new measure was not without controversy. Furthermore, as a harbinger of the debate that was to ensue, it is also worth noting that one of the Commissioners, at the time this standard was adopted, plaintively asked: “How on God’s earth as a government do we decide what a voice is?”<sup>21</sup>

In order to promote as many independent voices as possible on the assumption that this would promote the greatest degree of content diversity possible, the Commission adopted a structural approach that had a number of dimensions. The first was to treat each sector of the media as separate silos, i.e., radio with AM and FM silos, television, cable and newspapers, with its ownership approach designed to deny, with limited exceptions, cross media ownership as shown in the regulations found in Appendix 1. Under this approach,

for example, television networks could not own cable networks and television licensees could not normally own newspapers in their market area.

The second dimension was to restrict significantly the extent to which an individual corporate entity could own “voices” within individual silos, either nationally or locally.<sup>22</sup> A third dimension, directed at diversity on television, was to limit, by means of the Financial Interest and Syndication Rules, ownership by the television networks of the sources of its prime time programming.<sup>23</sup>

Underlying all of the FCC’s rules, even as modified over the years, has been a central assumption, indeed a rebuttable assumption, that ownership is directly linked with diversity in content. Constrained as it is by the First Amendment, the Commission cannot directly impose content regulations as a means for promoting and enhancing diversity, the sole exception being the regulations imposed on children’s television programming, which has been upheld by the courts as a legitimate intervention. Consequently, as Einstein notes, the FCC has used the promotion of source and outlet diversity as proxies to compensate for this fundamental constraint.<sup>24</sup> The limitations of such proxies have been obvious as noted even by Commissioners such as the former Chair in the Clinton era, Reid Hundt, who noted that “structural rules promoting outlet and source diversity, however, do not necessarily give us ... program diversity....”<sup>25</sup>

The problems with the FCC’s structural rules are apparently far greater than Hundt’s comment would suggest. Numerous scholars have challenged the underlying assumption that media structures have any direct causal relationship with program content and consequently have argued that the use by the FCC of such proxies is extremely problematic. Mara Einstein is particularly sceptical and has argued, after a thorough review of the available literature, that “there is no proven causality between media ownership and programming content.”<sup>26</sup> Her overall conclusion is worth citing in full:

... there is no conclusive evidence that there is a correlation between the variable being studied, in this case media concentration, and changing levels of diversity. While intellectually this would seem to make sense, there is just no empirical support for it.<sup>27</sup>

While other authors, such as Philip Napoli, have criticized Einstein for the absolutism of her position, it is noteworthy that they do not attempt to defend the opposite conclusion, namely that there is in fact strong evidence in support for the presumed causal relationship. Rather, they limit themselves to the conclusion that the evidence is at best inconclusive.<sup>28</sup> In short, notwithstanding the longstanding central premise that justifies existing structural ownership rules, the evidence in support of it is either inconclusive or nonexistent. This suggests that existing diversity policies have been built on a house of straw that would not withstand a strong assault on it.

It is possible that the FCC might have been able to continue on the same course ignoring the academic debate about its questionable conceptual and empirical foundation. However, as a result of two developments in the 1990s, this was not to be. The first was

the enactment of the Telecommunications Act of 1996 and the second was the withdrawal of the traditional judicial deference that had long been paid to the FCC's diversity regulations. These developments will be discussed in turn.

The 1996 Telecommunications Act, which constituted the most comprehensive change in the objectives of telecommunications policy in the United States since the creation of the FCC in 1934, also contained provisions relevant to the broadcasting sector generally and to the regulations governing diversity. In the first place, the Act for the first time had specific diversity-related instructions in order for the FCC to liberalize its regulations governing local ownership of both radio and television. In particular, the FCC was ordered to extend its existing local television-radio cross-ownership waiver policy from the top 25 markets to the top 50, thereby allowing far more extensive cross-ownership. The Commission was also directed to reconsider its prohibition on a single licensee owning two television stations in the same market and to permit far more extensive ownership of radio stations by one licensee in the same market. It also ordered the removal of a national cap on the number of radio stations that an individual licensee could own.

As important as these specific changes were to existing structural regulations designed to promote source diversity was the injunction found in Section 202 of its new legislative mandate that the FCC

... shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation if it determines to be no longer in the public interest.<sup>29</sup>

Although the deregulatory injunction included in the biennial review was somewhat more specific than the Commission had hitherto been accustomed to meet, insofar as the existing regulations imposed to promote diversity of sources or outlets were concerned, there was no reason for the Commission to be particularly apprehensive about the new requirements. In particular, the Commission expected that any actions it took on its existing regulations, given the traditional support the courts had given its earlier attempts to promote diversity, would be upheld in the likely event of any judicial challenges.

The judicial response was not, however, what the Commission had come to expect. In 2000, after its first biennial review of its regulations, the FCC decided that it would not change the national television ownership rule which was stipulated in the 1996 Telecommunications Act as a prohibition on any entity owning television stations which exceeded a 35% audience reach of television households in the United States. It also decided not to change its current limitations on multiple local television station ownership in the same market area. Both decisions were challenged in the courts, by Fox Television in the case of the former rule and Sinclair Broadcast Group with respect to the latter rule. Unlike almost fifty years of judicial support for its ownership regulations, in

both cases the court, the D.C. Circuit Court of Appeals, remanded the issues back to the Commission for further review.<sup>30</sup> What is crucial about the remands was that the court ruled in both instances that the Commission had not provided or defended the empirical basis for retaining either rule. In the case of the Sinclair decision, the Court ruled that, in limiting itself to eight broadcast voices, the FCC had not adequately justified the exclusion of non-broadcast voices from its consideration, thereby raising the larger question of how one defines and measures the media market as opposed to simply the broadcasting market.

The issue of an empirical foundation for measuring media diversity was central to the 2002 biennial review of its regulations by the FCC. In this proceeding, the Commission undertook the most comprehensive review of its regulations in its history. In particular the Commission sought to review the national television ownership rule, the local television multiple-ownership rule, the radio-television cross-ownership rule, the dual network rule, the local-radio-ownership rule and the newspaper/broadcast cross-ownership rule.<sup>31</sup> At the heart of the proceeding was the attempt by the Commission to develop what it called the “Diversity Index,” which would overcome judicial concerns about the conjectural nature of its existing regulations and provide adequate empirical foundation and reasoned analysis that would withstand judicial scrutiny.

The FCC’s Diversity Index is supposedly modelled after, or “inspired by” to use the FCC’s words, the Herfindahl-Hirschman Index (HHI) which is used in the United States and elsewhere to measure market concentration.<sup>32</sup> The HHI was the product of extensive conceptual and empirical research and is employed by the Antitrust Bureau of the Department of Justice and the Federal Trade Commission to determine whether to approve or oppose proposed industrial mergers.<sup>33</sup> It is a remarkably parsimonious formula involving the determination of the specific market in which the merger is to take place, normally not a difficult obstacle, identification of the market shares of the individual participants, which are then squared and then added together. To use a simple example if, in a particular market, two firms had a 40% market share each and two others had a 10% share each, the HHI for that market would be 3,400. Markets with an HHI below 1000 are regarded as not concentrated while markets with an HHI 1800 and greater are considered to be highly concentrated and any merger involving such an HHI would be opposed by the Department of Justice. Markets with an HHI between 1000 and 1800 are deemed to be moderately concentrated and are subject to a case by case analysis depending on how much the HHI will increase as a result of a proposed merger. The HHI is based on a simple principle that has been subject to rigorous empirical testing, namely that mergers that produce an HHI above 1800, and sometimes between 1000 and 1800, are presumed to have adverse competitive effects that will negatively affect consumer welfare. Such effects may be higher prices than would normally prevail in a competitive, nonconcentrated market, or reduced product quality or variety.

The purpose of the DI was to measure viewpoint diversity in local markets through the measurement of the availability of outlets—a continuation of the traditional FCC assumption that outlets can act as a proxy for viewpoint diversity.<sup>34</sup> The construction of the DI begins with the FCC selecting which media outlets to include based on consumer

reported preferences as established in a consumer survey of 3,136 households for sources of local news and information. The outlets chosen were broadcast television, daily and weekly newspapers, radio and the Internet, via cable connection and DSL, dial-up or other connections. Drawing on the survey results indicating the popularity of each source, the Commission then assigned a relative weight to them: broadcast TV 33.8%; daily newspapers 20.2%; weekly newspapers 8.6%; radio 24.9%; Internet (cable) 2.3 % and Internet (DSL, dial-up, or other connection) 10.2%.

The next step involved the selection of many sample markets for which the FCC would determine a DI score. In each of the markets, it counted the number of outlets within each media type and assigned each outlet an equal market share. The ownership share was determined by multiplying the number of outlets owned by an entity by the market share. Each ownership share was then given its relative weight by media type. The FCC then squared all of the weighted ownership shares; their sum was the market's DI score. In markets with cross-owned shares (outlets of different media types owned by the same entity) the entity's weighted ownership shares were summed together before they were squared. The Commission then proceeded to calculate DI scores for all markets with five or fewer television stations, all markets with 15 and 20 television stations and ten randomly selected markets with between 6 and 10 stations.<sup>35</sup>

The next step was to develop scenarios for several different consolidations to determine how the DI scores would change. On the basis of these scenarios, the Commission then divided the markets into small, mid-sized and large. Its objective was to identify those local markets where media diversity might be "at risk" if it permitted cross media consolidations. On the basis of its analysis employing the DI, the Commission issued a set of "cross-media limits" that did not rely on blanket prohibitions but were market specific. Based on its analysis, the Commission found that the DI small markets were much more susceptible to a decline in diversity from consolidations and consequently prohibited newspaper/television, newspaper/radio and radio/television combinations in those markets.<sup>36</sup> In the large markets, the FCC found that all the consolidation scenarios resulted in acceptable increases in the average DI and therefore imposed no limits on cross-media ownership in those markets. For the mid-range markets, the FCC found that the increases would be modest and therefore permitted consolidations except for newspaper and television duopolies where the increase in the DI score suggested a significant decline in diversity.

Although it did not employ the Diversity Index for these issues, the Commission also issued a new regulation governing the national ownership reach, extending it to 45% of the television households from the existing 35%, and maintained its prohibition on affiliation with more than one of the four largest networks. The Commission also modified its local television ownership rules to permit a single entity to own three television stations, instead of the previous limitation of two, in markets with 18 or more television stations, but subject to the condition that only one of the stations could be in the top four in the particular market. This would apply to the nine largest markets or approximately 25% of the population. In those markets with 17 or fewer television stations, where duopolies had been restricted to the largest 70 markets, the rule was

relaxed to permit duopolies in the largest 162 markets, covering 95% of the population. Finally, although it made some administrative modifications, the Commission opted to retain the existing numerical limits on radio ownership that had been established by Congress in the Telecommunications Act of 1996.

The FCC could not have been surprised by the extremely negative public reaction to its new regulations from both those who wanted the existing structural regulations governing ownership to be maintained, if not strengthened, and those in the media industry who wanted further liberalization of the rules. The Commission, undoubtedly expecting opposition, had initially refused to hold public hearings on the proposals and only relented somewhat to hold a single hearing in Richmond, Virginia. As a measure of the public concern that was developing, the FCC had received more than 500,000 letters objecting both to the process and the original proposed modifications of the regulations.

For our purposes, what was significant about the opposition from both sides of the divide was the criticism of the new measurement system, the Diversity Index, that underscored the Commission's decisions to liberalize its cross-ownership rules.<sup>37</sup> In its decision the Commission sought to pre-empt such criticisms of the DI by stating that, while the Index gives it some "empirical footing" upon which to make its decisions, it was not the sole basis for the decisions. As if anticipating the controversy that its decisions would create, the Commission stated:

We use the DI as a tool to inform our judgments about the need for ownership limits.... The DI is based partly on the results of a consumer survey, which we acknowledge is not without flaws, and partly on our expert judgment and analysis of the local viewpoint diversity marketplace. While the Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment and decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media. It informs, but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets.<sup>38</sup>

The harsh criticism from both consumer groups and industry advocates of both its methodology and its decisions was obviously not something to be dismissed by the Commission as being insignificant, especially given the negative Congressional reaction that resulted, and the virtually unprecedented legislative action to reduce the national ownership limit to 39% from the FCC's 45%. The most important audience, however, for the Commission was the courts. It had been the judicial remands of its previous recent efforts that had forced the Commission to develop the Diversity Index in order to move beyond conjecture in its decision-making to give its regulations some "empirical footing" based on reasoned and defensible analysis.

The judicial audience was not persuaded, however, and its "review" was as scathing as anything given by other critics. The United States Court of Appeals for the Third District,

which was chosen by lottery after multiple appeals were launched, in September 2003 stayed implementation of the rules and then issued its decision in June 2004. It dismissed the FCC's claim that that the DI was only a "useful tool" by noting that:

... nowhere in the Order, in its briefs, or in its oral argument did the Commission identify any consideration other than the Diversity Index as having influenced the formulation of the Cross-Media Limits. Rather, the Cross-Media Limits prospectively ban certain combinations in specific markets, and allows others, based on nothing but the relative increases those combinations would have on the average Diversity Index scores of markets of that size.<sup>39</sup>

The Court's specific reasons for sending the Order back because of perceived deficiencies in the Diversity Index went to the core of the reasoning upon which the DI had been constructed. In the first place, it ruled that the FCC was in error because it did not justify its choice of specific media outlets to be included in the construction of the Index. While it accepted the limited role assigned to cable in the Index, an arguably questionable judgment on the part of the court, it argued that the FCC's reasoning should have also applied to the Internet and that the FCC's "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational."<sup>40</sup> Consequently, it ordered the Commission to either exclude the Internet or provide a better explanation for its inclusion.<sup>41</sup>

The court then ruled that the FCC's assumption of equal market shares for all outlets within the same media type was inconsistent and dependent on unrealistic assumptions. In a particularly trenchant observation, the court made the following comment, which merits stating in its entirety, about the New York City DI:

Additionally, there is no dispute that the assignment of equal market shares generates absurd results. For example, in New York City, the Dutchess Community College television station and the stations owned by ABC each receive an equal 4.3% market share. Or compare the Dutchess Community College station's weighted share of 1.5% (4.3 times the 33.8% multiplier for television) to the mere 1.4% weighted, combined share assigned to the New York Times Company's co-owned daily newspaper and radio station. 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>42</sup>

The third major reason for the court's remand back to the Commission was that the FCC had not rationally derived its Cross-Media Limits from the results of calculating the Diversity Index. The Court acknowledged that deference should be shown to the Commission in deciding where to draw the line between acceptable and unacceptable increases in the DI scores for individual markets. However, the

Court found that the FCC had been inconsistent in its efforts to draw the line and, after reviewing the various scores, consequently declared that the FCC's "... failure to provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious..."<sup>43</sup>

It is worth noting that the FCC's revisions to its local television and radio ownership rules were not based on the Diversity Index but on its more traditional "media voices" approach. Even here, however, the Court found the Commission's proposed changes to be unacceptable on similar grounds to those enunciated above with respect to the flaws in the DI. The court found that with respect to both sets of rules, the FCC decisions "... all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets."<sup>44</sup> Such an assumption was not consistent, the court concluded, with the evidence and had not been reasonably defended, and as the proposed amendments were "arbitrary and capricious," they were remanded to the Commission for reconsideration.

On July 13, 2005, the Supreme Court declined to hear the appeal of the decision of the Court of Appeals for the Third District.<sup>45</sup> This means that the FCC faces a serious quandary. It was initially told by the Court of Appeals for the D.C. Circuit that some of its current diversity-promoting rules lacked an empirical foundation. Now it has been told that its Diversity Index has led to arbitrary, capricious and unreasonable rules. It consequently must revisit almost all of its existing ownership rules and attempt to refine its reasoning sufficiently at least to win judicial approval. This is going to be an incredibly difficult, if not impossible, task.

The Third Circuit Appeals Court was actually rather kind in its assessment of the Diversity index. It is far worse than the Court characterized it. It is pseudo-science masquerading as a scientific instrument. To say that it was inspired by the Herfindahl-Hirschman Index is akin to the producers of the reality show "Lost" saying that they were inspired by Shakespeare's *The Tempest*. After all, just as the TV show and the play share the sea and a storm, so the HHI and DI share the word "index," the squaring of numbers and a common set of market dividers. But that is all they share. The DI is nothing more than an intellectual mixture of snake oil and Rube Goldberg, jerry-rigged in an attempt to provide a justification for a set of rules. The HHI is built on a rich theoretical and empirical background which can provide a measure that is linked to predictable behavioural or conduct outcomes. The DI is constructed out of imaginary or, to be kinder, conjectural linkages. Its division of media markets into three categories, similar to the three market ranges under the HHI, is sheer puffery, for the FCC does not and cannot argue that its numbers have any concrete relationship with the conduct of the media actors that may fall within one of the three ranges. The HI is little more than smoke and mirrors, or, to invoke Shakespeare again, "sound and fury signifying nothing." It is best buried. That, of course, will require the FCC to start all over in its quest to rationally, and empirically, justify its ownership restrictions. The Telecommunications Act biennial, now quadrennial statutory injunction that the Commission review its broadcasting regulations combined with the now three major court decisions declaring that the FCC has not empirically justified the same regulations means the Commission now finds itself

ensnared in a Gordian knot for which they may be no escape. The Commission may be “on God’s earth,” but divine guidance may be required.

### **Concluding Observations**

To this observer, there is a “fin de siecle” atmosphere to the recent debates in the United States about the nature and measurement of media diversity. This is not to say that media diversity, particularly in terms of a wide variety of viewpoints and opinions so as to facilitate and encourage a healthy democratic discourse—note how the author has fixed on his own preferred meaning of diversity—is not something that is to be valued and promoted. It is to say that the United States today already has one of, if not the most diverse, media universes—perhaps galaxies is the better word—in the world. Those who argue the opposite simply have not shown “the beef.” On the other hand, analysts such as Ben Compaine and Adam Thierer have in recent weeks offered overwhelmingly compelling empirical evidence to refute any claims that the American media world is insufficiently diversified.

Moreover, the best is yet to come.<sup>46</sup> As some of the larger media conglomerates have come to learn, the media universe continues to rapidly evolve and in ways not particularly favorable to them. This I think is particularly true of those which gave rise to the contemporary hysteria on the part of some media observers, namely AOL-Time Warner and CBS Viacom, not to mention the Clear Channel radio organization, which despite its size (it is not actually all that large within the radio market), scrambles to confront satellite radio competition. Already there are thousands of Internet radio channels. Admittedly some are simply duplicates of over-the-air stations, but many are not. And in the nascent stage are Internet television stations using the Internet protocol. And of course there is the constantly growing “blogosphere,” which is profoundly reshaping how the various media perform and how consumers use the media.

Of course for some, notably those who deny the contemporary and future reality of the incredible diversity of the American media world, this world of thousands of channels and choices is just a “vaster wasteland,” to update Newton Minow’s 1961 description of American television. But that gets to what is perhaps the real issue behind the contemporary debate over media diversity. The critics are more concerned about the quality, or lack thereof, in American media and the fact that for the most part it is commercial and market-driven. The debate over diversity has been somewhat of a phoney war in part because the specific constraints of the First Amendment are not conducive to public policy debates about content and media quality. In part the issue is not diversity per se or even diversity of owners but rather diversity of types of owners. The critics just don’t like corporate domination of the media but cannot attack it except indirectly through the FCC’s diversity rules. How the battles play out in the coming years as the FCC confronts the near impossible burdens that have been placed on it, while media actors struggle with the potential waves of Schumpeterian “creative destruction” that are about to envelop them, and media critics continue to rail against media corporate capitalism are of course the appropriate subjects of future research papers.

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## Endnotes

<sup>1</sup> Philip M. Napoli, Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media (Cresskill NJ: Hampton Press Communications Series, 2001). It should be noted, as Paul Starr so effectively documents in his masterful The Creation of the Media: Political Origins of Modern Communications (New York: basic Books: 2004), some western democracies were much slower to embrace the goal of diversity than others such as the United States.

<sup>2</sup> Denis McQuail, Media Performance: Mass Communication and the Public Interest (London: Sage Publications, 1992) p. 142.

<sup>3</sup> See for example, Starr, *ibid.* and Mara Einstein, Media Diversity: Economics, Ownership and the FCC (Mahwah, NJ: Lawrence Erlbaum Associates, 2004).

<sup>4</sup> See Appendix 1 for the current rules and the proposed changes.

<sup>5</sup> One need only compare the American public, congressional and judicial reactions to the FCC's proposed rules with the rather tepid Canadian response to the acquisition by Conrad Black's Hollinger Corporation of newspapers with approximately 80% of the circulation in the 1990s or the subsequent sale of those holdings to the Asper-controlled CanWest Global which also owned the third largest national television network, Global. - a Senate committee investigation of the state of the media is still ongoing- to appreciate the relative political salience of this issue in the United States. Similarly, the non-issue in both Great Britain over the media cross-ownership by Murdoch-owned News Corporation and especially Italy over the Berlusconi holdings reinforces the view that the United States is unique in the extent of its concern over the promotion of media diversity.

<sup>6</sup> See, for example, Robert W. McChesney, The Problem of the Media (New York: Monthly Review Press, 2004, esp. pp. 273-283.

<sup>7</sup> Bruce Owen, "Confusing Success with Access: "Correctly" Measuring Concentration of Ownership and Control in Mass Media and Online Services", Stanford Law School, John M. Olin Program in Law and Economics, Working paper 282, May 2004, p.4. [NB: will need to obtain permission to cite.]

<sup>8</sup> Daniel G. McDonald and John Dimmick, "The Conceptualization and Measurement of Diversity", Communication Research Vol. 30, No. 1, February 2003, p. 60.

<sup>9</sup> Gillian Doyle, Media Ownership (London: Sage Publications, 2002) p. 11.

<sup>10</sup> See, for example, the discussion of major legal cases and extensive commentary in which some media restrictions are deemed not to conflict with the First Amendment found in Napoli, *op.cit.* pp. 127-128 and Maurice E. Stucke and Allen P. Grunes, "Antitrust and the Marketplace of Ideas" Antitrust Law Journal Vol. 69, 2001, esp. pp. 261-268. See also the discussion in Mark Cooper, Media Ownership and Democracy in the Digital Information Age (Stanford Law School, Center for Internet and Society, 2002) pp. 11-22.

<sup>11</sup> Federal Communications Commission, "Report and Order and Notice of Proposed Rulemaking", In the matter of 2002 Biennial Regulatory Review –Review of Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to section 202 of the Telecommunications Act of 1996 ..." July 2, 2003, para. 18. The following definitions/descriptions of the individual types of diversity are taken from paras. 19-46.

<sup>12</sup> *Ibid.*, paras 43 and 44.

<sup>13</sup> On the latter, Mara Einstein *op. cit.* is particularly informative on the development, evolution and demise of the so-called Fin-Syn rules.

<sup>14</sup> Robert B. Horwitz, "On Media Concentration and the Diversity Question" p. 8, available at <http://communication.ucsd.edu/people/ConcentrationpaperICA.htm> viewed May 24, 2005.

<sup>15</sup> Napoli, *op.cit.* p. 129.

<sup>16</sup> *Ibid.*, p. 146.

<sup>17</sup> Einstein, *op.cit.*, p. 6.

<sup>18</sup> McQuail, *op.cit.*, p. 181.

<sup>19</sup> Jonathan D. Levy, "Australian and US Approaches to Media Ownership Regulation", Paper presented to Telecommunications Policy Research Conference, Arlington Virginia October 3, 2004, p. 11. See also Loy A. Singleton and Steven C. Rockwell, "Silent Voices" Analyzing the FCC "Media Voices" Criteria

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Limiting Local Radio-Television Cross-Ownership” Communication Law and Policy, Vol. 8, Autumn 2003, No. 4, pp. 387-403.

<sup>20</sup> Quoted in Loy and Singleton, ibid., p. 391.

<sup>21</sup> Ibid., p. 394.

<sup>22</sup> For a review of the early developments and the evolution of the FCC’s ownership regulations up to the 1980s, see S.M. Besen and L.L. Johnson, “Regulation of Media Ownership by the Federal Communications Commission: An Assessment (Santa Monica: Rand Corporation, 1984).

<sup>23</sup> The best single source on these rules, known as the FYN-SYN Rules, is Einstein, op. cit.

<sup>24</sup> Ibid. p. 38.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid. p. vii.

<sup>27</sup> Ibid. p. 38.

<sup>28</sup> See particularly Napoli op. cit. for an equally thorough review of the literature on media diversity. This is also the conclusion of Horwitz, op. cit.

<sup>29</sup> Telecommunication Act of 1996, Pub. LA. No.104-104, 110 Stat.56, section 202 (h).

<sup>30</sup> Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1044, (D.C. Cir. 2002); Sinclair Broadcast Group, Inc. v. FCC, 284 F 3d 148 (D.C. Cir. 2002)

<sup>31</sup> The details of these rules and the proposed modifications are found in Appendix 1 of this paper.

<sup>32</sup> See Note 11 above, para. 394.

<sup>33</sup> See, U.S. Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines” Issued April 2, 1992, Revised April 8, 1997, available at [www.usdoj.gov/atr/public/guidelines/hmg.htm](http://www.usdoj.gov/atr/public/guidelines/hmg.htm), viewed Feb. 11, 2005.

<sup>34</sup> The following summary is drawn from both the FCC order, see Note 11 above and especially the judgment of the United States Court of Appeals for the Third Circuit, “Prometheus Radio Project vs. Federal Communications Commission”, June 24, 2004, 373 F.3<sup>rd</sup> 372, which is a particularly lucid and comprehensible summation of the Index. The judgment was obtained from [www.lexis.com/research/retrieve? m=2e25e67c91c4045261b1929809fe0e21&docn...](http://www.lexis.com/research/retrieve? m=2e25e67c91c4045261b1929809fe0e21&docn...) and was downloaded on May 26, 2005. The specific citations are from this downloaded version.

<sup>35</sup> See Appendix C of the FCC Order for sample market Diversity Index calculations.

<sup>36</sup> See Note 11, para. 443 ff.

<sup>37</sup> For a particularly trenchant criticism see Mark Cooper, “Abracadabra! Hocus-Pocus! Making Media Market Power Disappear with the FCC’s Diversity Index” Consumers Federation of America, July 2003.

<sup>38</sup> FCC, “Report and Order...” op. cit., para. 391.

<sup>39</sup> United States Court of Appeals for the Third District, op.cit., fn. 38, p. 40.

<sup>40</sup> Ibid., p. 36.

<sup>41</sup> For our purposes, in setting out the reasons why the court sent the Order back to the FCC for reconsideration, we need not assess the reasons provided by the court. This treatment of the Internet by the court and in fact the limited weight originally given to it by the FCC also seems to be highly debatable in this era of rapidly changing media habits as documented by various Pew studies. The point we make below, however, is the fact that there are such debates over what should be included in the DI and how they should be most appropriately measured is a clear indicator of the highly contestable nature of the Index per se.

<sup>42</sup> Ibid., p. 40, references excluded.

<sup>43</sup> Ibid., p. 43.

<sup>44</sup> Ibid., p. 69.

<sup>45</sup> Annys Shin, “Limits on Media Ownership Stand” Washington Post, June 14, 2005, D1.

<sup>46</sup> Benjamin M. Compaine, “The Media Monopoly Myth: How New Competition is Expanding Sources of Information and Entertainment” (Washington D.C.: New Millenium Research Council, 2005) and Adam D. Thierer, Media Myths: Making Sense of the Debate over Media Ownership (Washington D.C.: Freedom and Progress Foundation, 2005).

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## Appendix 1

### The United States Media Ownership Rules and the Proposed Revisions

#### National TV Ownership Rule (TV Audience Cap)

**Old Rule:** Adopted in 1941, the rule prohibits broadcast television networks from owning TV stations with a combined audience reach of more than 35 percent. In 2000, the cap was raised from 25 to 35 percent.

**Proposal:** Audience cap raised from 35 to 45 percent.

#### Dual Television Network Ownership Prohibition

**Old Rule:** Adopted in 1946, the rule prohibits any of the top four traditional TV networks (CBS, NBC, ABC, and Fox) from acquiring each other.

**Proposal:** Unchanged.

#### Local TV Multiple Ownership Rule

**Old Rule:** Adopted in 1964, the rule limits a firm from owning more than one TV station in a market, or two if there are at least eight other stations and no more than one of the commonly owned stations is one of the four biggest in the market.

**Proposal:** In markets with five or more TV stations, a company may own two stations, but only one of those stations can be among the top four in ratings. In markets with 18 or more TV stations, a company can own three TV stations, but only one of those stations can be among the top four in ratings. In deciding how many stations are in the market, both commercial and noncommercial TV stations are counted. The FCC adopted a waiver process for markets with 11 or fewer TV stations in which two top-four stations seek to merge. The FCC will evaluate on a case-by-case basis whether merged stations would better serve their local communities together rather than separately.

#### Broadcast-Newspaper Cross-Ownership Ban

**Old Rule:** Adopted in 1975, the rule prohibits a newspaper owner from also owning a television or radio station in the same local market.

**Proposal:** In markets with three or fewer TV stations, no cross-ownership is permitted among TV, radio, and newspapers. A company may obtain a waiver of that ban if it can show that the television station does not serve the area served by the cross-owned property (i.e., the radio station or the newspaper). In markets with between four and eight TV stations, combinations are limited to one of the following: (A) A daily newspaper; one TV station; and up to half of the radio station limit for that market (i.e., if the radio limit in the market is six, the company can only own three) OR (B) A daily newspaper; and up to the radio station limit for that market; (i.e., no TV stations) OR (C) two TV stations (if permissible under local TV ownership rule); up to the radio station limit for that market (i.e., no daily newspapers). In markets with nine or more TV stations, the FCC eliminated the ban.

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### TV-Radio Cross-Ownership Ban

**Old Rule:** Adopted in 1970, the rule limits the number of radio stations that can be owned by a TV station owner in the same market, using a sliding scale based on the number of broadcast stations in the market.

**Proposal:** Same as broadcast-newspaper cross-ownership rule.

### Local Radio Ownership Limit

**Old Rule:** Adopted in 1941, the rule limits the number of radio stations a firm can own in a local market. The rules were modified under the Telecom Act of 1996 as follows: In markets with 45 or more radio stations, a company may own 8 stations, only 5 of which may be in one class, AM or FM. In markets with 30 to 44 radio stations, a company may own 7 stations, only 4 of which may be in one class, AM or FM. In markets with 15 to 29 radio stations, a company may own 6 stations, only 4 of which may be in one class, AM or FM. In markets with 14 or fewer radio stations, a company may own 5 stations, only 3 of which may be in one class, AM or FM.

**Proposal:** The Telecom Act ownership caps were retained but the FCC proposed a new “geographic contour” methodology for defining radio markets that would replace its old “signal contour” method. The end result of the new methodology is that it will likely restrict further consolidation in the radio industry.

*(Note: The following cable ownership rules were not considered as part of the FCC’s June 2, 2003 rulemaking).*

### Cable-Broadcast Cross-Ownership Ban

**Old Rule:** Adopted in 1970, the rule prohibited the joint ownership of a cable television system and a television broadcast station in the same local market.

**Status:** The D.C. District Court unilaterally threw the rule out in the February 2002 decision *Fox Television Stations, Inc. v. FCC*

### Cable National Ownership Caps

**Old Rule:** The Cable Act of 1992 directed the FCC to create both horizontal and vertical caps on cable ownership or vertical integration. The horizontal rule imposed a 30 percent cap on the number of subscribers that may be served by a cable operator. The vertical rule placed a cap of 40 percent on the amount of proprietary programming cable operators could put on their own systems.

**Status:** Not yet reviewed by the FCC since the D.C. District Court remanded the rules to the agency in the March 2001 decision *Time Warner Entertainment v. FCC* for further consideration. The rulemaking remains unfinished at the FCC.

Source: Adam Thierer, [Media Myths: Making Sense over Media Ownership](#),  
(Washington DC: Progress and Freedom Foundation, 2005)