The Federal Communications Commission ("FCC" or "Commission") enacted the financial interest and syndication ("fin-syn") rules in 1970 in response to concerns that the broadcast television networks were unfairly dominating the supply of television programs to television stations throughout the United States. The fin-syn rules restrict the ability of television networks, primarily American Broadcasting Company, Inc. ("ABC"), National Broadcasting Company, Inc. ("NBC") and CBS Inc. ("CBS"), to acquire ownership and distribution rights in television programs. The Commission adopted the fin-syn rules out of concern that the networks would use their dominance among television viewers to exercise monopsony power when acquiring programs from producers and monopoly power when distributing these programs to stations unaffiliated with the networks.

In 1970, ABC, NBC and CBS comprised virtually the entire video industry. Since that time, cable television service has emerged to the point of offering five hundred channels, video cassette recorders ("VCRs") have taken up residence in over seventy percent of American homes, Fox Broadcasting Company ("Fox") has become a serious competitor to the traditional three networks, and the Warner Brothers Network ("WB Network") and the United Paramount Network ("UPN") recently joined the fight for a respectable audience share. None of this existed in 1970. Although the broadcast industry has changed significantly since 1970, the FCC still holds the traditional three networks accountable to the fin-syn rules, albeit less restrictive than when first enacted. This Article traces the history of the fin-syn rules as they existed in 1970, the FCC’s changes to those rules in 1991, and the FCC’s response to the Seventh Circuit Court of Appeals’ remand of the fin-syn rules.

I. PRE-1991 FIN-SYN RULES

The FCC adopted the fin-syn rules in 1970 in an effort to limit the power of ABC, NBC and CBS over television programming. The 1970 Order prohibited the networks from syndicating programs they had produced "in-house" and from obtaining financial interests in programs produced by outside producers that the networks aired. The FCC asserted two primary reasons for adopting the fin-syn rules. First, the Commission believed that the networks had "monopsony" power, or the ability to acquire programming rights under terms distinctly unfavorable to producers. This monopsony power arose, according to the Commission, because the networks were the only program providers that could access virtually every American household. Thus, if producers wanted to have their programs shown, they had little choice but to comply with the networks’ terms. Second, the Commission asserted that without the fin-syn rules, the networks would prevent independent stations from being able to purchase and/or show popular programs by withholding, or warehousing, those programs or by granting favorable syndication rights to their network affiliates. This second argument refers to the claim that the networks have, and will exercise, monopoly power.

These practices would have further increased the networks’ dominance in the television programming

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1 Tamber Christian is an associate at a telecommunications law firm in Washington, D.C. She is also Co-Chair of the Federal Communications Bar Association Young Lawyers Committee and a member of the American Bar Association Intellectual Property Law Section.


3 1970 Order, supra note 2, para. 30.

4 Id. para. 8.

5 Id.

marketplace at a time when cable television barely existed and VCRs were still virtually unknown. The problem with the networks obtaining greater dominance, as the FCC saw it, was that the networks would not only exercise monopsony power over producers, but also would have a virtual monopoly over the programs that Americans watched. This would have the effect of limiting the number and variety of programs available to the public, thereby limiting program diversity, contrary to the FCC’s much sought after goal.

The Commission reaffirmed its intent to promote program diversity in 1993 by asserting:

[T]he Commission has the authority to regulate the networks in accordance with the public interest, convenience or necessity and, thus, has the authority to restrict network programming activities so as to foster diversity of programming sources and outlets that might result in a greater variety of programming than the free market would provide.

Consequently, the Commission structured the fin-syn rules to promote diversity in three different, yet interrelated, ways — source diversity, outlet diversity and program diversity. Source diversity measures the number of program originators, or producers, involved in supplying television programs; outlet diversity measures the number of different means of communications available to the public, such as network television, cable television, and VCRs; and program diversity measures the different types of programs offered to viewers.

In 1977, the Commission established an array of experts, the Network Inquiry Special Staff (“NISS”), to evaluate how the marketplace for producing programs had changed over the past seven years. The FCC also requested the NISS to determine the extent the 1970 Order had on networks and producers. Based on an extensive two-year study undertaken by the NISS, the Commission released a Tentative Decision in 1983, proposing to eliminate the financial interest rule entirely, and to significantly narrow the syndication rule. If the Tentative Decision had taken effect, the only remaining restrictions on the networks would have been a prohibition against domestic syndication of prime time programming and a prohibition against warehousing.

The Commission concluded in the Tentative Decision that the fin-syn rules should be relaxed based on the NISS’ finding that the networks no longer had the ability to control the price or conditions under which producers would sell their programs. The Commission reasoned that:

In order for these concerns to be realized, two conditions regarding network behavior must be met. First, the three networks must be able to act in concert, either tacitly (by parallel behavior) or collusively (by active conspiracy). Second, the three networks together must comprise the sole purchasers of the program producers’ product. If either of these conditions is not met, it is not likely that the networks could exert power over program producers. This is so because, if adequate alternative program purchasers exist, any producer who may be dissatisfied with the treatment he receives by a single broadcast network has the option of offering his product to a different network or some other program purchaser.

Neither of these conditions existed. Instead, the Commission discovered that the networks did in fact compete with one another. The Commission also found that the number of program purchasers had increased due to an increased demand for new programming, which increase was caused by an expansion in the number of broadcast outlets. Furthermore, the Commission “found no credible evidence that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market.”

The Tentative Decision barely had time to be printed before a powerful lobbying battle arose in Congress with the networks on one side and Hollywood actors, producers and directors on the

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7 From 1957 through 1968, the percentage of prime time network programming provided by independent producers declined to nearly 4% from 33%. Also during this time, the networks controlled program production both through their own production activities as well as through co-production arrangements, in which independent companies produced the programs and then sold first-run rights as well as syndication rights to the networks. DOUGLAS H. GINSBURG ET AL., REGULATION OF THE ELECTRONIC MASS MEDIA 266 (2d ed. 1991).


9 Id. para. 5.

10 Id. para. 42 (citing Tentative Decision and Request for Further Comments in Docket 82-345, 94 F.C.C.2d 1019, para. 104 (1983) [hereinafter Tentative Decision]).

11 Tentative Decision, supra note 10, paras. 10-14.

12 Id.

13 Id. para. 124.

14 Id. para. 125.

other. 18 The Commission never adopted the Tentative Decision. Instead, Congress entered the battle on the side of Hollywood, and along with the Commission, encouraged Hollywood and the networks to negotiate a compromise. 19 The two sides never did enter into a compromise, and in 1990, Fox petitioned the FCC for a waiver of the fin-syn rules. 20 Fox argued that the rule defining a network was overly broad and had the effect of restraining new networks such as itself from adequately competing with the established networks. 21 The rules in effect in 1990 defined a network as "any person, entity or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states." 22 Fox, which had launched its network in 1986, now had 129 affiliates and would soon exceed the fifteen-hour programming limit. 23 By subjecting emerging networks to the fin-syn rules, Fox argued, the Commission was in effect causing more harm to diversity than good because the rules discouraged emerging networks from programming to their full capacity. Emerging networks' refusal to program at full capacity limited the number of outlets to whom producers could sell their programs, all the while giving the traditional three networks an even greater concentration of power. 24

The Commission used the Fox Petition as an opportunity to review the fin-syn rules, once again, in light of the changes that had occurred in the marketplace since the FCC first adopted the rules in 1970. In the review, the Commission found:

- The number of independent television stations had increased from 65 in 1970 to nearly 340 in 1990, and 130 independent stations obtained a significant portion of their programming from Fox;
- Programming services originating on cable had grown substantially, with over 90 national pro-

19 Ginsburg, supra note 7, at 277.
20 Fox Broadcasting Company Petition for Resumption of Rulemaking and Request for Temporary Relief in Amendment of the Syndication and Financial Interest Rules, BC Docket 82-345 (Jan. 30, 1990) [hereinafter Fox Petition] (on file with the FCC).
21 Id. at 39.
23 Fox Petition, supra note 18, at 6.
24 Id. at 39. Indeed, as the Commission later discovered, the fin-syn rules had precisely this effect. Fox reduced the number of hours of programming it supplied to affiliates specifically to avoid being classified as a network and thereby become subject to the financial interest and syndication restraints. See 1993 Order, supra note 8, para. 104.

26 The FCC also redefined "network" to mean "any entity providing more than 15 hours per week of prime time programming on a regular basis to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide." 1991 Order, supra note 15, para. 145; see also 47 C.F.R. § 73.658(j)(4) (1993). The Commission defined "regular basis" as "exceeding the specified number of hours per week on an average basis during the preceding six months of operation." 1991 Order, supra note 15, para. 156.
28 Id.
The networks argued that the Commission had failed to justify its decisions in the 1991 Order in light of arguments raised by commenters, and that the 1991 Order was therefore unenforceable. Judge Posner, writing for the court, agreed. Judge Posner concluded that the 1991 Order, “despite its length, is unreasoned and unreasonable, and therefore, in the jargon of judicial review of administrative action, arbitrary and capricious.”

The information that the Commission relied on in 1991 when deciding to reexamine the twenty-year-old rules included: (i) the results of the NISS study, which concluded that the fin-syn rules had failed to achieve the Commission’s goals of diversity and increased competition in the program supply market; (ii) the Justice Department’s and the Federal Trade Commission’s remarks that they had not seen any evidence that the networks were in a position to exploit their alleged market power either with or without the rules; and (iii) the FCC Chairman’s own conclusion that “[t]he video marketplace of 1991 bears not even a superficial resemblance to the video marketplace that existed when the rules were originally adopted.” Judge Posner described the 1991 Order best when he said:

It can be paraphrased as follows. The television industry has changed since 1970. There is more competition—cable television, the new network, etc. No longer is it clear that the networks have market power in an antitrust sense, which they could use to whipsaw the independent producers and strangle the independent stations. So there should be some “deregulation” of programming—some movement away from the 1970 rules. But not too much, because even in their decline the networks may retain some power to extort programs or program rights from producers. . . . [T]he Commission’s concern . . . is not just with market power in an antitrust sense but with diversity, and diversity is promoted by measures to assure a critical mass of outside producers and independent stations. . . . The new rules will give the networks a greater opportunity to participate in programming than the old ones did, while protecting outside producers and independent stations from too much network competition.

The court’s description parallels that of Henry Geller, who served as General Counsel for the FCC in 1970 when the FCC initially enacted the fin-syn rules. Geller described the process leading to the 1970 Order as being a lot like Alice in Wonderland - - “Sentence first, judgment later.”

Although the Communications Act of 1934 (the “Communications Act”) grants the FCC considerable discretion in deciding telecommunications issues, that discretion does know certain limitations. Both the Administrative Procedure Act and the Communications Act require the FCC to engage in reasoned decisionmaking. Consequently, the FCC cannot simply announce its conclusion without first providing a reasoned basis supporting that conclusion. The Schurz court concluded that the FCC had failed substantially in measuring up to this standard with the 1991 Order. The court held that the Commission had failed to articulate its reasons for concluding that the restrictions on network participation in programming were necessary to promote diversity. Consequently, the court vacated the 1991 Order and remanded it to the Commission for further proceedings.

As particular instances of where the Commission failed to respond to facts and issues raised in the course of adopting the 1991 Order, the court pointed to several arguments asserted by the networks. For example, despite the FCC’s claim that the new rules deregulated the fin-syn rules in substantial respects, the networks argued that the new rules did not in fact increase their access to the programming market, and may have even decreased their access. The networks also argued that the forty percent limit on the amount of prime time entertainment programming that they could provide from in-house productions was a new restriction that had no counterpart in the

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27 Schurz Communications v. FCC, 982 F.2d 1043 (7th Cir. 1992).
28 Id. at 1048-49. Coalitions of producers and independent stations also filed petitions for review, arguing that the Commission should have left the original rules (i.e., the 1970 Order) intact. Id.
29 Id. at 1055.
original rules. In addition, the court noted that "carving out" nonentertainment programs from the restrictions imposed by the new rules is a throwaway because there is no syndication market for news and sports programs. The networks further argued that their newly-granted privilege to acquire syndication rights from outside producers was illusory because the fin-syn rules required a thirty-day "cooling off" period following the date on which the outside producer and the network reached an agreement on network license fees that the network could charge for the sale of syndication rights in a given program and the date on which the networks could begin negotiating the sale of those rights. The networks asserted that the cooling off period actually harmed outside producers because producers must rely on the immediate sale of syndication rights if they are to have enough money to produce the program in the first place.

The FCC responded to the court's remand in Schurz by issuing a Second Report and Order in 1993. In the 1993 Order, the Commission highlighted, clarified, and in some instances modified, the fin-syn rules to specifically address five points that the court had made. The points included: 1) Network Acquisition of Back-End Rights; 2) Network Syndication of Off-Network Programming; 3) Network Participation in the First-Run Programming Market; 4) Entities that Qualify as a Network; and 5) Reporting Requirements Imposed on Networks.

A. Network Acquisition of Back-End Rights

The 1991 Order created a two-step process through which the networks could acquire financial interests or syndication rights in outside productions aired on their respective networks. Under the 1991 Order, a network would first execute a licensing agreement with the outside producer, establishing the amount the network would pay the producer for the right to air the program. Then, after no less than thirty days, the network could enter into entirely separate negotiations with the producer for the right to acquire a financial interest in the program. Acquiring a financial interest in a program enables a network to sell the rights to reruns of that program.

The two-step process was premised on a theory that separating the license fee agreement from the financial interest negotiations would protect producers from the networks' exploitation of their power over the marketplace. The Commission noted that "[a] network that has not committed to license a program could . . . condition its commitment on a producer's agreement to relinquish financial interests or distribution rights in the program for less than a compensatory price." According to the Commission, this harms the public interest because the less-than-compensatory price paid for programs will discourage independent producers from creating programs, and thereby decrease program diversity by limiting the number of sources that will remain willing or able to supply programming.

The Schurz court pointed out that this two-step negotiation process actually disserved the Commission's stated goals of competition and diversity because smaller producers would be unable to afford the cost of producing a program without financial backing, and thus would be forced out of business. This would decrease the number of producers able to supply television programming to the networks. As ABC explained, "producers 'must explore "deficit" financing options' long before a network license fee agreement is signed, because the availability, size and terms of that financing will determine the program budget the producer can afford and the deficit he or she can realistically accept." However, the 1991 Order prohibited the networks from providing such financing because the networks were unable to pay for anything more than the right to air the program on the network until thirty days after the network and producer entered into a licensing agreement. As indicated previously, this was often too late for small, independent producers who needed funding prior to creating a program in order to be able to hire actors and directors.

Networks often are in the best position to bear the risk that a program will not be one of the select few that becomes a "smash hit"—typically a necessary prelude to syndication. By prohibiting the networks right to air reruns of the program to other stations—usually independent stations or cable networks.

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40 Id.
41 Id. at 1051.
42 Schurz, 982 F.2d at 1050-51; see also infra, discussion at Part II.A.
43 1993 Order, supra note 8, paras. 6-10.
44 Id.
45 1991 Order, supra note 15, para. 49.
46 The networks typically air a program twice, then sell the
network to sell the rights to reruns of that program.
47 Id., paras. 48-49.
49 Id., para. 23, n.23.
50 Schurz, 982 F.2d at 1051-52.
51 1993 Order, supra note 8, para. 36.
52 Before a program can enter syndication, the program usu-
from helping finance programs, the 1991 Order eliminated three major sources of financing for producers. This caused the greatest harm to small, independent producers who had to seek financing elsewhere - often in the hands of larger production companies or in bankruptcy proceedings. Thus, the large production companies would continue to grow larger, while the small production companies or independent producers would become virtually nonexistent.85

In the 1993 Order, the Commission acknowledged that the networks had experienced a decline in network share, which was attributable primarily to the "emergence of other viewing options," including the Fox network, independent television stations and cable television networks.86 These alternative viewing options presented additional sources of diversity for viewers as well as more market opportunities for program producers.87 As a result, the traditional three networks could no longer be said to hold monopoly power over the programs available to viewers, which was the original rationale behind the fin-syn rules. Consequently, the Commission eliminated the restrictions on the networks' ability to acquire financial interests and syndication rights in network programming.88

ally must have aired on a network for at least four years. When off-network stations purchase the rights to air a program, they typically air daily, rather than weekly, episodes as the networks do. Without a large number of episodes, the off-network stations have an insufficient number of programs to fill their schedules. Providing enough episodes can often be difficult, because nearly 80% of prime time network programs fail before their third year. Brief for Federal Communications Commission in Schurz Communications, Inc. v. FCC, Docket No. 91-2350, at 5 (June 12, 1992) (on file with the FCC).

85 CBS noted that:
[t]elevision production and distribution companies that have declared bankruptcy or been absorbed by larger companies in the last few years include Orion, Fries Entertainment Inc., New World Entertainment, Studio Three Film Corp., Orbis Communications, CBS Communications, Blair Entertainment, and Hanna-Barbera. . . . In addition, MGM and Imagine Films have both abandoned television production.


In May 1994, New World Communications Group ("New World") and News Corp.'s Fox sent a wake-up call to ABC, NBC and CBS by announcing an affiliation agreement under which New World's twelve current or soon to be owned VHF network affiliates would become Fox affiliates for the next ten years. In exchange, Fox guaranteed New World time on Fox-owned stations for New World programming. Geoffrey Foisie, Fox and the New World Order, BROADCASTING & CABLE, May 30, 1994, at 6. The Fox-New World agreement upset CBS the most because CBS had to locate new affiliates in eight markets as a result of former affiliates switching to Fox pursuant to the Fox-New World agreement. Fox also secured additional affiliates and receivers of Fox programming in March 1994, upon acquiring rights to the National Football Conference games. Steve McClellan, Fox Snaps Up Other Networks' Affiliates, Broadcasting & Cable, Mar. 28, 1994, at 12.

B. Network Syndication of Off-Network Programming

The 1991 Order permitted the networks to actively syndicate, within the United States, forty percent of their prime time entertainment shows, as well as any non-entertainment and non-prime time programming, that the networks produced in-house and aired on their own network.89 Networks could also acquire syndication rights in off-network programming produced by someone other than the network as long as the networks used an independent syndicator to distribute the programs.90 In foreign markets, the networks could acquire syndication rights in, and actively syndicate, all off-network programming aired on any network, regardless of whether the programs were produced in-house or by an outside producer.91

The Commission believed these restrictions were necessary to prevent the networks from warehousing programs in which they held syndication rights. The Commission reasoned that the networks would withhold certain syndicated programs from distribution in order to increase the price independent stations would be forced to pay for the right to air the programs.92 However, when the warehousing theory proved untrue, the Commission developed a second theory. Under the second theory, networks could un-
reasonably delay the commencement of syndication of a few popular, current network programs, thereby keeping the viewers tuned in to the networks and limiting the amount of competition the networks would encounter from independent stations.\textsuperscript{61} Delaying the release of popular programs would harm outlet diversity by limiting independent stations’ ability to compete effectively in their local broadcast markets. This inability to compete would arise from independent stations’ preclusion from showing some of the most popular programs, which in turn would cause more viewers to turn to network programs rather than to programs aired on independent stations. Advertising revenue for independent stations would relatedly decrease, thereby limiting independent stations’ ability to purchase popular programs. Consequently, the gap between networks and independent stations would increase even further.

As a result of this warehousing concern, the 1991 \textit{Order} required the networks to release into syndication any program for which they held syndication rights either: (i) four years after the program’s network debut; or (ii) within six months following the date on which the network discontinued airing the program, whichever occurred first.\textsuperscript{62} The FCC also required the networks to make syndicated off-network programming available to any non-affiliated station on terms and conditions no less favorable than those offered to affiliates or owned-and-operated stations.\textsuperscript{63} The FCC automatically presumed favoritism if a network syndicated programming to affiliates or owned-and-operated stations in more than thirty percent of the markets where the network sold programming rights.\textsuperscript{64} Those who opposed the networks’ ability to acquire syndication rights argued that warehousing or “affiliate favoritism practices” limit the number of programs available to independent stations, thereby inflating the cost of syndicated programs and threatening the viability of independent stations.\textsuperscript{65}

The \textit{Schurz} court noted that the “safeguards” against warehousing and affiliate favoritism were futile because:

If the networks insisted on buying syndication rights along with the right to exhibit a program on the network itself, they would be paying more for their programming. . . . If the networks then turned around and refused to syndicate independent stations, they would be getting nothing in return for the money they had laid out for syndication rights except a long-shot chance - incidentally, illegal under the antitrust laws - to weaken the already weak competitors of networks stations.\textsuperscript{66}

Likewise, the networks and those in favor of repealing the fin-syn rules argued that in order for the networks to even be able to warehouse programs, the networks would have to acquire syndication rights to nearly all, if not in fact all, of the program series they air.\textsuperscript{67} Unless the networks were able to acquire syndication rights to all or nearly all programs, independent stations could simply bypass the networks by purchasing programs from other sources.

Even if the networks were financially capable of acquiring syndication rights to all of the programs they aired, the networks would do themselves more harm than good by warehousing programs. The networks would receive a much lower price for a program by waiting to sell program rights until some time after the network no longer aired the program. Likewise, some statistics show that reruns can actually increase the ratings of original network programs.\textsuperscript{68} The amount of competition that the networks would allegedly avoid by warehousing programs could in no way come close, in terms of dollars and cents, to equaling the amount of money the networks would receive upon selling program rights. As if this were not enough, the networks would also have to start from ground zero in withholding programs because between 1970 and 1991, the networks were prohibited from acquiring syndication rights in programs, the necessary precursor to distributing programs. To make matters even more difficult, antitrust laws prohibit warehousing.\textsuperscript{69}

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\textsuperscript{61} 1993 Order, supra note 8, paras. 75-79.
\textsuperscript{62} See 47 C.F.R. § 73.660(b) (1993).
\textsuperscript{63} 1991 Order, supra note 15, para. 110.
\textsuperscript{64} See 47 C.F.R. § 73.660(b) (1992).
\textsuperscript{65} 1991 Order, supra note 15, paras. 83-84.
\textsuperscript{66} \textit{Schurz}, 982 F.2d at 1045.
\textsuperscript{67} See Brief for Petitioner National Broadcasting Co., Inc. in \textit{Schurz Communications, Inc. v. FCC}, Docket No. 91-2350, at 37 (Aug. 13, 1992) [hereinafter NBC Appellate Brief] (on file with the FCC); see also Comments of Action for Children’s Television, Henry Geller and Donna Lampert in Evaluation of the Financial Interest and Syndication Rules, MM Docket No. 90-162, at 12 (June 14, 1990) (on file with the FCC); 1991 Order, supra note 15, at 3196 (Sikes, A., dissenting).
\textsuperscript{68} For example, \textit{Cheers} became available for syndication in 1987, was the top-ranked program for the 1990-91 season, and in 1993, still ranked consistently among the top ten. Additionally, \textit{Roseanne} and \textit{Murphy Brown}, which both entered syndication in the fall of 1992, ranked second and third, respectively, for the season, behind \textit{60 Minutes}. \textit{Full House} entered syndication in 1991, and ranked eighth for the season. Reply Comments of CBS Inc. in \textit{Evaluation of the Syndication and Financial Interest Rules}, MM Docket No. 90-162, at 15, n.61 (Feb. 16, 1992) [hereinafter CBS Reply Comments] (on file with the FCC).
\textsuperscript{69} See \textit{Schurz}, 982 F.2d at 1046.
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sequently, if any network employed this tactic with even one program, the Justice Department, as well as the FCC, would be ready to respond in kind with restrictions likely never to be lifted.

Despite acknowledging that the networks no longer possessed monopoly power over the video marketplace, in 1993 the Commission nonetheless retained the anti-warehousing rule\(^7\) and prohibited the networks from actively syndicating any off-network programming, including in-house productions.\(^7\) The Commission based the remaining restrictions on “three critical non-market factors”:

1. the impossibility of being certain that lifting fin-syn constraints would cause no harm,
2. the more significant risk of damage to outlet diversity in the event we improvidently removed the remaining restrictions, and
3. the danger that immediate elimination of all the rules would be disruptive and have unintended and unforeseen effects.\(^7\)

Therefore, the networks must use an independent syndicator for both in-house and outside productions if they wish to distribute off-network programming in which they own syndication rights. Networks may still acquire foreign syndication rights in off-network programming and may actively syndicate those programs.\(^7\) The FCC also repealed the affiliate favoritism restraints, finding the restraints unnecessary given the newly-enacted rule prohibiting networks from actively syndicating off-network programming within the United States.\(^7\)

C. Network Participation in the First-Run Programming Market

The 1993 Order does not restrict networks from acquiring financial interests or syndication rights in domestic first-run syndication programs produced solely in-house.\(^7\) Networks may also acquire financial interests and syndication rights in any first-run syndication programs that are distributed entirely outside of the United States.\(^7\) Although the networks may acquire financial interests and syndication rights in programs produced in-house, their distribution of these programs into domestic syndication is limited to passive syndication — for example, using an independent syndicator to distribute the programs. In foreign markets, the networks may actively syndicate (or distribute themselves) any first-run programming.\(^7\) These rules simply copy those adopted in 1991.

In response to the Schurz court’s concern that the 1991 first-run syndication rules were inconsistent with the Commission’s 1983 Tentative Decision, the FCC argued that the Tentative Decision did not specifically address first-run programming.\(^7\) The Commission also stated that the continuing restrictions were necessary to ensure that the networks would not be able to control the program distribution market and thereby drive independent stations out of business.\(^7\) In concluding that the networks could harm independent stations’ vitality if they were to actively syndicate first-run programming, the Commission agreed with assertions made by the Association of Independent Television Stations (“INTV”) that the networks would favor their own affiliate stations if they were permitted to actively syndicate programs.\(^7\) Examples of how INTV believed the networks would favor their affiliates included funnealing the networks’ most attractive syndicated programming to their affiliates, favoring the bids of their own affiliates, providing advance notification to affiliates, block booking, instituting affiliate program tie-ins, implementing discriminatory pricing, and exploiting their owned and affiliated stations to handicap the launch of new first-run programs by independent syndicators.\(^8\)

\(^{7,8}\) 1993 Order, supra note 8, paras. 73-74.

\(^{7,8}\) Id. para. 81.

\(^{7,8}\) “First-run” programs are those that producers intend to be distributed directly to stations without first airing on a network. Examples of first-run programs include Jeopardy!, Entertainment Tonight and Oprah Winfrey. See, e.g., 1991 Order, supra note 15, para. 137.

\(^{7,8}\) 1993 Order, supra note 15, para. 128.

\(^{7,8}\) 1993 Order, supra note 8, para. 93.

\(^{7,8}\) Id. para. 97.

\(^{7,8}\) Id. paras. 97-98. The Tentative Decision would have limited any syndication constraints to the distribution of prime time entertainment programming. Tentative Decision, supra note 10, para. 202.

\(^{7,8}\) 1993 Order, supra note 8, paras. 80-82.

\(^{8}\) NBC Appellate Brief, supra note 67, at 36.
In addition to affiliate favoritism concerns, the Commission reasoned that the very nature of first-run programs makes it easier for the networks to gain an advantage over independent stations.

The success of a program produced for the first-run market is contingent first, on clearances by the most powerful stations in the top few markets, and second, on clearances in a large number of markets throughout the country. The first step is a prerequisite to the second, and the major networks are uniquely positioned — because they own powerful stations in virtually every major network and have significant influence over a web of affiliates serving the entire United States — to achieve both steps in much more expeditious and efficient fashion than any other competitor.88

D. The Definition of a Network

The 1991 Order defined a television network as “any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide. . . .”89 At the time of the 1991 Order, Fox was supplying twelve to fourteen hours of prime time programming per week to its owned and affiliated stations, after cutting back from fifteen hours to avoid becoming subject to the fin-syn rules. Henry Geller declared that Fox’s situation demonstrates the “absurdity of this whole thing,”90 because in order for Fox to remain profitable, Fox had to program less than fifteen hours, which naturally limits the diversity of programming available to viewers as well as the number of sources to whom producers will be able to sell their programs. The Schurz court agreed, pointing out that many Fox affiliates are traditionally weak UHF91 stations who are more like independent stations than network affiliates.92 “Anything that weakens Fox’s incentives to furnish prime-time programming weakens [the stations], contrary to the Commission’s desire . . . to strengthen independent stations.”93

The Schurz court commanded the FCC to reconsider, or at the very least provide a reasoned basis for, the Commission’s decision to subject Fox to the fin-syn rules. On reconsideration, the Commission chose to retain the same network definition but to exempt “emerging networks” from most of the fin-syn rules.94 An “emerging network” is any entity which did not qualify as a network under the Commission’s 1991 rules at the time the 1993 Order became effective, even if that network later meets the criteria defining a network. Therefore, any entity that did not provide more than fifteen hours of prime time programming per week as of June 5, 1993, when the 1993 Order became effective, will not become subject to the financial interest and syndication restraints.95

The Commission declared that exempting emerging networks from the rules, rather than redefining the term network, made more sense because the 1993 Order prescribed that the fin-syn rules will expire two years after a California district court modifies the network consent decrees.96 The Commission fur-

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88 1993 Order, supra note 8, para. 89. ABC, NBC and CBS are not unique in their position of owning stations in the top three markets (New York, Chicago and Los Angeles) as well as having nationwide household penetration. Warner Brothers, for example, in establishing the WB Network uses the Tribune broadcasting stations, other than WGN in Chicago, as network affiliates. Tribune owns stations in New York, Los Angeles, Philadelphia, Atlanta and New Orleans. Joe Flint, Warner Details Hybrid WB Network, Broadcasting & Cable, Nov. 8, 1993, at 26. Tribune also has 20.7% household penetration, compared to CBS and NBC, which had 20.5% and 22.1%, respectively, in 1990. Broadcasting & Cable, Nov. 8, 1993, at 43; see also NBC Appellate Brief, supra note 67, at 40.
89 47 C.F.R. § 73.662(i) (1991); see also 1991 Order, supra note 15, para. 156.
90 Telephone Interview with Henry Geller, former FCC General Counsel (Oct. 19, 1993).
91 The major networks’ owned and affiliated stations, on the other hand, operate primarily in the VHF band, which provides them with a technological advantage over UHF stations. See October MO&O, supra note 72, para. 77. However, Fox removed some of the advantage traditionally held by ABC, NBC and CBS when it reached an agreement with New World, pursuant to which Fox would broadcast programs on New World’s twelve VHF affiliates. See Foisie, supra note 53.
92 Schurz, 982 F.2d at 1053.
93 Id.
94 1993 Order, supra note 8, para. 99. Any network that provides in excess of 15 hours of prime time programming per week still remains subject to the Commission’s reporting requirements described infra at Part II.E. Id.
95 1993 Order, supra note 8, paras. 99, 120.
97 ABC, NBC and CBS filed a joint motion with the United
ther concluded that exempting Fox and any other emerging networks best served the Commission’s goals of enhancing competition and promoting diversity because this would allow emerging networks to devote their resources to acquiring more and higher quality programs. Emerging networks could then display these programs on their affiliate stations to increase the number of viewers who tune in to the network. Competition and diversity would be enhanced by the ability of emerging networks to supply independent stations with programming they might not otherwise be able to afford, and which is essential to independent stations’ survival.\textsuperscript{91}

E. Reporting Requirements

As a way of monitoring networks’ compliance with the fin-syn rules, as well as the networks reaction to the lifted financial interest and syndication restraints, the FCC implemented certain reporting requirements. In contrast to the remaining fin-syn rules, all networks, emerging or otherwise, that provide more than fifteen hours of prime time programming per week to interconnected affiliates must comply with the reporting requirements.\textsuperscript{92}

The reporting requirements instruct networks to place reports in their owned and operated stations’ public files before the first regular business day of March and September of each year, and to submit a copy of the reports to the FCC by the same dates.\textsuperscript{93} These reports must: 1) certify compliance with all remaining fin-syn rules; 2) list all network prime time entertainment programs and all first-run non-network programs in which the network holds or acquires a financial interest or syndication right, including the name of the program, whether the program was a network or first-run program, the nature of the interest or right held in the program, the dates any network program began and ended its network run, and the date any first-run program first appeared in syndication; and 3) the party who initiated negotiations that led to the network’s acquisition of a financial interest or syndication right in programs acquired prior to June 5, 1993, which are presented to the public.\textsuperscript{94}

Additionally, networks must maintain a “customer list,” which records sales to broadcast stations of any prime time entertainment program or any first-run non-network program that the network actively syndicates.\textsuperscript{95} When networks sell programs to foreign broadcast stations, the network may either redact the identity of the foreign stations (if the network provides contracts as part of its report required by Section 73.661 of the Commission’s rules) or list only the city and country of the station to which the program is syndicated.\textsuperscript{96} The Commission allowed networks to exclude the actual identity of foreign stations so as to protect the networks from having to disclose sensitive proprietary information.\textsuperscript{97}

III. THE FIN-SYN RULES’ FUTURE

Networks, syndicators, producers and independent television stations each petitioned the Seventh Circuit Court of Appeals for review of the 1993 Order and the October MO&O, arguing that the FCC had no rational basis for the current fin-syn rules.\textsuperscript{98} Judge Posner, once again writing for the court, addressed each of the restrictions imposed on the networks by the current fin-syn rules, and concluded that the few remaining restrictions are not unduly burdensome upon the networks, especially given the fact that the rules are set to expire in November 1995.

In his decision, Judge Posner pointed out that the networks should be able to obtain independent syndicators to negotiate the conditions for airing a program “at approximately the same cost at which [the networks] could perform it themselves.”\textsuperscript{99} Second, although the networks can diversify their business practices by syndicating programs purchased from

\begin{itemize}
  \item \textsuperscript{91} States District Court for the Central District of California (the “District Court”) following the Commission’s 1991 Order, requesting that the decrees be modified to allow the networks to acquire financial interests and syndication rights in programming, at least consistent with the 1991 Order. On November 9, 1993, the District Court granted the networks’ motion. See United States v. National Broadcasting Co., Inc., 842 F. Supp. 402 (C.D. Cal. 1993). Thus, the fin-syn rules are set to expire on November 15, 1995, unless those in favor of retaining the fin-syn rules can convince the Commission that the rules are still necessary under the Commission’s final review of the rules, which the Commission initiated in April 1995. See 1993 Order, supra note 8, para. 191; see also Review of the Syndication and Financial Interest Rules, Notice of Proposed Rule Making in
  \item \textsuperscript{92} In his decision, Judge Posner pointed out that the networks should be able to obtain independent syndicators to negotiate the conditions for airing a program “at approximately the same cost at which [the networks] could perform it themselves.”
  \item \textsuperscript{93} See also 1993 Order, supra note 8, para. 104.
  \item \textsuperscript{94} Id. para. 99.
  \item \textsuperscript{95} 47 C.F.R. § 73.661(f) (1993).
  \item \textsuperscript{96} 47 C.F.R. § 73.661(a) (1993). Networks must also make program contracts available to the Commission upon request. Id.
  \item \textsuperscript{97} 47 C.F.R. § 73.661(b) (1993).
  \item \textsuperscript{98} October MO&O, supra note 72, para. 72; see also 47 C.F.R. § 73.661(b) (1993).
  \item \textsuperscript{99} Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994).
  \item \textsuperscript{100} Id. at 315.
\end{itemize}
independent producers, the networks did not present any evidence that this was in fact true when the FCC solicited comments prior to issuing the 1993 Order.\textsuperscript{100} Furthermore, Judge Posner noted that although the anti-warehousing restriction might prevent the networks from maximizing their copyright revenues by establishing a date upon which the networks must release prime time programs into syndication, the number of programs from which increased copyright revenue might be obtained is minimal given the fact that the networks could not acquire syndication rights in prime time programs shown on their networks until March 1993.\textsuperscript{101}

As noted previously, the fin-syn rules are set to expire on November 15, 1995. However, consistent with the 1993 Order, the Commission initiated a proceeding in April 1995 to review the status of competition in the video marketplace.\textsuperscript{102} Those in favor of retaining the fin-syn rules have the burden of demonstrating "an excellent, a compelling reason" in the 1995 Review for retaining the rules.\textsuperscript{103} Proponents of the fin-syn rules have previously argued that the networks provide the only way to access nearly one hundred percent of all television households in the country, which ensures that program suppliers will not surpass the traditional television networks in favor of other program providers such as cable networks or independent television stations.\textsuperscript{104} However, the Commission's stated purpose in enacting the fin-syn rules was to encourage competition and diversity. The marketplace itself has done more to accomplish this result than have the rules.\textsuperscript{105} Therefore, the only reason for maintaining these restrictions is to dictate how the economics of the video marketplace will be divided.\textsuperscript{106}

The Commission's authority to promulgate rules in the public interest does not extend to distributing business throughout the marketplace. Even the Commission recognized that, "[a]ltering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission."\textsuperscript{107} CBS likewise noted that "FCC intervention is not justified [if] the transfers involve primarily the distribution of rents between producers and networks."\textsuperscript{108}

The Commission itself does not believe the fin-syn rules remain necessary to ensure adequate competition in the video marketplace.\textsuperscript{109} Indeed, former FCC Chairman James Quello vividly demonstrated the rapidity with which the video marketplace is changing when he pointed out the "real or potential changes that have occurred in the six short months" between the adoption of the 1993 Order and the October MO&O.\textsuperscript{110} Among the changes, several federal courts declared the cable-telephone company cross-ownership restriction unconstitutional, clearing the way for telephone companies to become involved in program production;\textsuperscript{111} Warner Brothers and Para-

\textsuperscript{100} 1993 Order, supra note 8, para. 42 (quoting Tentative Decision, supra note 10, para. 206).
\textsuperscript{101} CBS Comments, supra note 53, at 10, n.28 (quoting DOJ Comments, supra note 31, at 27-28); see also RCA v. United States, 341 U.S. 412, 423 (1951) ("The touchstone of the [Communications] Act is solely the public interest; the Act is not a code for the adjustment of conflicting private claims."); FCC v. Potomac Broadcasting Co., 309 U.S. 134, 138 (1940) (The Commission "must place the public interest above private interests in carrying out its duties.").
\textsuperscript{102} Id. at 8313 (Quello, J., dissenting in part).
\textsuperscript{103} See, e.g., October MO&O, supra note 72, at 8316 (separate statement of Comm'r Andrew C. Barrett) ("It is out of an abundance of caution about the resulting impact of finsyn's elimination that I support the finsyn sunset provision.").
\textsuperscript{104} See, e.g., Proprietary Interests in Television Shows: A Production Company's View, 11 LOY. ENT. L.J. 1-993 para. 14.

\textsuperscript{105} See, e.g., Proprietary Interests in Television Shows: A Production Company's View, 11 LOY. ENT. L.J. 1-993 para. 14.
\textsuperscript{106} Id., para. 13; see also Capital Cities/ABC, Inc., 29 F.3d at 316. The Commission also sought comment in the 1995 Review on whether the Commission should eliminate the remaining fin-syn rules prior to November 15, 1995, if those in favor of retaining the rules do not meet the requisite burden of proof. 1995 Review, supra note 90, para. 14.
\textsuperscript{107} See, e.g., CBS Reply Comments, supra note 68, at 18 (proclaiming that the increase in the number of independent stations is not attributable to the fin-syn rules, but rather to a growth in the demand for advertising time, improvements in UHF television stations, the carriage of independent stations on cable television systems, and satellite distribution of national programming to independent stations).
\textsuperscript{108} Id.
\textsuperscript{109} 1993 Review, supra note 90.
\textsuperscript{110} See, e.g., Ralph Baruch, Proprietary Interests in Television Shows: A Production Company's View, 11 LOY. ENT. L.J. 1, 3 (1991).
\textsuperscript{100} See, e.g., CBS Reply Comments, supra note 68, at 18 (proclaiming that the increase in the number of independent stations is not attributable to the fin-syn rules, but rather to a growth in the demand for advertising time, improvements in UHF television stations, the carriage of independent stations on cable television systems, and satellite distribution of national programming to independent stations).
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\textsuperscript{110} See, e.g., Proprietary Interests in Television Shows: A Production Company's View, 11 LOY. ENT. L.J. 1-993 para. 14.
\textsuperscript{111} See also United States Telephone Ass'n v. United States, No. 94-1588-A (E.D. Va. Jan. 13, 1995).
\textsuperscript{109} 1993 Review, supra note 90.
IV. CONCLUSION

The multitude of changes that have taken place in the past twenty years, not to mention in the brief time since the California District Court issued the opinion establishing an expiration date for the fin-syn rules, demonstrate that the traditional three networks face significant competition not only for viewers, but also for program rights. Given this ever-changing and growing environment, the networks face an unlimited amount of competition that will promote diversity on a scale much larger than the FCC could have possibly imagined in 1970 when the

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On October 13, 1993, Bell Atlantic, the Chesapeake & Potomac’s parent company, announced its proposed merger with Tele-Communications Inc. (“TCI”), the nation’s largest cable television operator. See Paul Farhi & Cindy Skrzeczyki, Bell Atlantic, Cable TV Giant Joining Forces, WASH. POST, Oct. 13, 1993, at A1; see also Sandra Sugawara & Paul Farhi, Merger to Create a Media Giant, WASH. POST, Oct. 14, 1993, at A1 (the merger, if consummated, would create the second-largest corporate merger ever and the largest communications/entertainment merger, with the two companies serving approximately one out of every four households); Sean Scully & Rich Brown, Wired Worlds Tie the Knot, BROADCASTING & CABLE, Oct. 18, 1993, at 6 (some estimates place the Bell-Atlantic-TCI merger as the largest in U.S. history).

On June 15, 1995, the Senate passed a wide-reaching telecommunications bill that will allow telephone companies to own cable systems within their service areas. S. 652, 104th Cong., 1st Sess. (1995). The House Commerce Committee also plans to introduce a bill, H.R. 1551, that would allow cable companies to enter the telephone marketplace, either on their own or through joint ventures and mergers with telephone companies). See, e.g., Kim McAvoy, House GOP Delivers Deregulatory Goods, BROADCASTING & CABLE, May 8, 1995, at 6. Congress’ attempt to introduce legislation governing telephone companies’ entry into the cable television marketplace and vice versa is not new. Congress has been attempting to pass legislation governing cable-telephone company cross ownership at least since 1993. See, e.g., Sen. John Danforth, Competition = Quality + Service, ROLL CALL, Nov. 15, 1993, at 17 (promoting the ability of all communications carriers to interconnect, as provided for in S.1086); see also Rep. Edward Markey, More Than Just Movies on Demand, ROLL CALL, Nov. 15, 1993, at 6 (discussing his strategy for allowing an integration of telephone, television, computer and information services).

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119 “In its bid to merge with Paramount, Viacom has been joined by both NYNEX and Blockbuster Video. This possible combination would create a single entity that is involved in motion picture production and distribution, cable channel networking, cable system ownership, television programming, publishing, broadcasting, telecommunications, video rentals, and interactive multimedia products.” October MO&O, supra note 72, at 8313-14 (Quello, J., dissenting in part).

114 Id. at 8313.

115 Recent studies show that ABC, NBC and CBS receive only 57% of the television viewing audience, down 4% from the 1994 season. Elizabeth Jensen, ABC Is Expected To Be No. 1 In Ratings But Total TV Network Share Declines, WALL ST. J., Apr. 14, 1995, at B5.
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Real concluded that the claims of network monopsony or monopoly power exist only in theory, and if this power should somehow come to exist in reality, "the [United States of America] with its many organizations dedicated to the public good and private attorneys general, with the aid of the courts, can meet the challenges presented by such conduct." Judge Real’s November 1993 opinion paves the way for the networks to have full access to the programming market in November 1995, in accordance with the FCC’s 1993 Order and 1995 Review. When this does occur, it is hard to say who among the networks, producers and programmers will be the winner — ultimately, the public.

Some network opponents believe that when ABC, NBC and CBS become completely freed of the finsyn rules, the networks will quickly engage in anticompetitive behavior, perhaps by producing more of their own programs and then airing those programs exclusively on the networks’ station and cable affiliates. Given the rapidly changing television programming industry, it is hard to see how the networks could generate a sufficient audience share to harm competing stations. However, one unfortunate result that could arise from the removal of these restrictions is the removal of several important “showcases” available to independent producers.

UPN and WB Network will probably fill most of the air time on their networks with programs from their own production studios. ABC, NBC and CBS are likely to follow, given the amount of money they could receive by syndicating their own programs. All of this could signal trouble for small, independent producers because although there may very well be a virtual cornucopia of channels available on which they could display their programs, if independent producers do not receive financial support at the beginning, they will be unable to produce any programs. Many times, the networks are in the best position to provide this financing. Who knows if the “owners” of the remaining 497 channels will be able to afford the cost of producing a new television series. This remains one of the unknowns not to be passed by as television travels along the “information highway.”

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117 See, e.g., Joe Flint, Fin-syn Will Be Back, Warns Former FCC Commissioner, BROADCASTING & CABLE, Sep. 20, 1993, at 30 (former FCC Commissioner Sherrie Marshall, who strongly supported the retention of the fin-syn rules in 1991, predicted that if all the restrictions were lifted, the fin-syn rules would be back before the FCC in 1995).