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The Proposed Repeal of the Financial Interest and Syndication Rules: Network Domination or Public Interest Representation?

by Evie L. Kintzer*

I
Introduction

One of the most important issues facing the television broadcasting industry today is the Federal Communications Commission's (FCC) proposed repeal of the Financial Interest and Syndication Rules (FISR), which were enacted in 1970 after years of discussion among the FCC, the three national television broadcast networks and Hollywood's major studios and independent production companies. At the heart of the controversy concerning the Commission's rules regarding the financial interest and syndication rights held by the networks is the FCC public mandate set forth in the Communications Act of 1934.2

The data produced before the FCC in its investigation of network television broadcasting from 1960 through 1970 indicated an unhealthy situation, and the Commission in 1970 declared that "[t]he public interest required limitation on network control and an increase in the opportunity for development of

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truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time.\textsuperscript{3} To remedy the situation, the FCC decided to establish the Prime Time Access Rule (PTAR),\textsuperscript{4} which opened access directly to the top 50 markets for independent programming by prohibiting network affiliates in these markets... from taking more than 3 hours of network programs between 7 p.m. and 11 p.m. ... [In effect] the rule ... will open up 1/2 hour of additional time per evening for non network programs on affiliated stations. Off-network programs may not be inserted ... [since] this would destroy the essential purpose of the rule to open the market to first run syndicated programs.\textsuperscript{5}

The PTAR was adopted by the FCC in its \textit{Report and Order} on May 4, 1970.\textsuperscript{6} This action on the part of the FCC was believed to provide a "healthy impetus to the development of independent program sources."\textsuperscript{7} By opening the market, the FCC believed it would bring a greater supply of programs to independent stations, as well as a greater diversity of program ideas to the viewing public.\textsuperscript{8}

Our objective is to provide opportunity—now lacking in television—for the competitive development of alternate sources of television programs ... We believe that \textit{substantial benefit to the public interest} in television broadcast service will flow from opening up evening time so that producers may have the opportunity to develop their full economic and creative potential under better competitive conditions than are now available to them.\textsuperscript{9}

To strengthen its objective of expanding competitive opportunity in television program production, the FCC adopted rules to exclude the networks from distribution and profit sharing in domestic syndication.\textsuperscript{10} The financial interest rule prohibits

\begin{itemize}
  \item \textsuperscript{3} \textit{In re} Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382, para. 22 (1970) [hereinafter cited as Report and Order].
  \item \textsuperscript{4} For further discussion of the Prime Time Access Rule (codified at 47 C.F.R. § 73.658(k) (1982)), see generally \textit{Report and Order}, 23 F.C.C.2d at 382.
  \item \textsuperscript{5} Report and Order, \textit{supra} note 3, at para. 22.
  \item \textit{See} \textit{supra} note 4.
  \item \textsuperscript{7} Report and Order, \textit{supra} note 3, at para. 23.
  \item \textit{Id.}
  \item \textsuperscript{9} \textit{Id.} at paras. 25-26 (emphasis added).
  \item \textsuperscript{10} \textit{See} 47 C.F.R. § 73.658(j) (1982).
\end{itemize}
the networks from having any financial interest in programs they have not themselves produced. The syndication rule prohibits the networks from operating as syndicators or from sharing in the profits from distribution by others in the domestic syndication market. This alleviates any inducement on the part of the network to choose for network exhibition only those programs in which it had acquired rights. Producers would then become more competitive as the syndication market expanded to become a feasible alternative to network exhibition. Ultimately, the independent producers would gain in strength and be able to compete effectively for network time.11

The FCC believed that the rules adopted served the public interest. Without defining the public interest, it noted that “[d]iversity of programs and development of diverse and antagonistic sources of program service are essential to the broadcast licensee’s discharge of his duty as ‘trustee’ for the public in the operation of his channel.”12

Much controversy has surrounded the FISR since their inception. The issues at the center of the controversy are threefold. First, does the Communications Act of 1934, by its terms, give the FCC the power to regulate the contractual relations between the independent television stations and the television broadcast networks and/or to control the complex operations of these national networks?13 Second, what does the phrase in the “public convenience, interest, or necessity”14 mean and how is the FCC to determine its boundaries? Third, is the public interest best served by the abolition, amendment or complete retention of the rules at issue?

This article discusses the following issues: (1) the FCC’s power to regulate the complex dealings surrounding network television, (2) the background of the Prime Time Access Rule and the Financial Interest and Syndication Rules, established in the public interest, and (3) the compelling public interest in retaining the existing rules. These complex issues can be addressed only after a careful examination of the background of the rules and the television broadcast industry they regulate.

12. Id. at para. 37.
This article also examines some of the major court cases concerning these issues and briefly touches on the ramifications of the consent decree reached in the civil antitrust action of United States v. National Broadcasting Co.\textsuperscript{15}

II

History

Even before the advent of television, the National Broadcasting Company (NBC) challenged the regulatory power of the FCC. In National Broadcasting Co. v. United States,\textsuperscript{16} the Supreme Court determined that the Communications Act of 1934 "establishes that the Commission's [regulatory] powers are not limited to the engineering and technical aspects of . . . radio communication."\textsuperscript{17} In particular, the court determined that eight regulations concerning "chain broadcasting"\textsuperscript{18} and the relations between licensed broadcast stations and network organizations furnishing programs to such stations, were indeed within the powers Congress conferred upon the FCC.\textsuperscript{19}

The FCC found that "at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company . . . which operated two national networks . . . ."\textsuperscript{20} The FCC realized that network broadcasting was important to the continued development of radio, in that the result would be national coverage of entertainment and cultural programs.\textsuperscript{21} However, the Commission discovered that the networks were placing constraints on the affiliated stations; for example, the networks forced stations to accept many of the networks' shows, thereby precluding any decisions by the local stations concerning their communities' needs.\textsuperscript{22}

Furthermore, the network contracts bound their affiliates for a number of years, depriving "the public of the improved service it might otherwise derive from competition in the network

\textsuperscript{15} 449 F. Supp. 1127 (C.D. Cal. 1978).

\textsuperscript{16} 319 U.S. 190 (1943).

\textsuperscript{17} Id. at 215.

\textsuperscript{18} Chain broadcasting is the "simultaneous broadcasting of an identical program by two or more connected stations." Id. at 194 n.1.

\textsuperscript{19} Id. at 224.

\textsuperscript{20} Id. at 197.

\textsuperscript{21} Id. at 198.

\textsuperscript{22} Id. at 199.
The networks had complete control over the policies of their affiliated stations. The FCC found that this control restrained the stations' freedom and operated against the public interest. "It is the station, not the network, which is licensed to serve the public interest." The Supreme Court determined that "[t]he 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio' § 303(g)."

In examining the legislative history of the Communications Act, the Supreme Court found the Act gave the FCC expansive powers. Congress recognized that the communications field was growing so rapidly that an itemized listing of the general problems under the FCC mandate would frustrate the purpose of the Act. The FCC claimed to be "issuing these [chain broadcasting] regulations because [it] found that the network practices prevent the maximum utilization of radio facilities in the public interest." The Supreme Court found that the regulations were made pursuant to congressional authority, but pointed out that "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

These statutory obligations require the FCC to continually reexamine the television industry to determine if the FCC regulations serve the public interest. The financial interest and syndication rules emerged from a Commission inquiry begun in 1959 with an Order for Investigatory Proceeding, when the Commission instituted proceedings "to determine the poli-

23. Id. at 202.
24. Id. at 205.
25. Id. at 216 (emphasis added).
26. Id. at 219.
27. Id. The purpose of the Communications Act is to "secure the maximum benefits of radio to all the people of the United States." Id. at 217.
28. Id. at 224.
29. Id. at 225. "[W]hen the networks transmit their signals from a network owned station over leased connecting lines, and these signals are then relayed to the public by other network owned stations and by affiliated licensees, both the networks and the licensees are encompassed by the terms 'radio stations engaged in chain broadcasting.' " Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 481 (2d Cir. 1971).
30. The Commission must serve the "public interest, convenience, or necessity" according to 47 U.S.C. § 303 (1982).
cies and practices pursued by networks and others in the ac-
quision, ownership, production, distribution, selection, sale
and licensing of programs for television exhibition, and the
reasons and necessity in the public interest for said policies
and practices." 32 After public hearings were held, the FCC con-
cluded in part that "station responsibility, in practice, has be-
come a 'shared responsibility,' if not almost completely
'delegated' to the networks." 33

The FCC, through its Notice of Proposed Rule Making, 34 in-
troduced rules which were:

intended to multiply competitive sources of television pro-
graming by (1) eliminating networks from domestic syndi-
cation [network licenses program series to local independent
stations on a market-by-market basis] and from the foreign
syndication of independently (nonnetwork) produced pro-
grams; (2) prohibiting networks from acquiring additional
rights in programs independently produced and licensed for
network showing; and (3) limiting to approximately 50 per-
cent (with certain programs exempted) the amount of network
prime time programing in which networks could have interests
beyond the right to network exhibitions. The notice of
rulemaking sets forth in detail the conditions of increasing net-
work control of programs and subsidiary rights in programs
which led to its adoption. 35

The FCC had two motives behind the proposed rules: "(1) to
restrain network domination of night time television, and
(2) to open access to the valuable prime time hours to in-
dependent producers." 36

A. The Television Industry

In order to understand the issues under attack by the FCC,
one must understand something about the television industry.
Television is a business. While it may be only one of many
forms of entertainment, television is the most effective commu-
nications and advertising medium today. The networks have

33. Id. at 474. See also Office of Network Study, Interim Report of Office of
Network Study, Responsibility for Broadcast Matter (1960), reprinted in H.R.
34. In re Amendment of Part 73 of the Commission's Rules With Respect to Com-
petition and Responsibility in Network Television Broadcasting, Notice of Proposed
36. Id. at para. 4.
gradually dominated television since about 1947, although their role has been primarily that of middle agents. In this role, the networks buy or lease programs from independent producers or production companies, get advertisers to buy commercial time, and then pay their nationwide affiliated stations to air these programs with the packaged advertising. While this may be a simplified version of the entire process, it is clear the networks provide programs with an immediate connection to national coverage, assuring a large viewing audience and making advertising cost-effective.

If an independent producer were to market his program independently, he would have to travel throughout the country selling the program to each station. These stations would then have to find advertisers to buy commercial time on the program. Advertising brings in less revenue in the local market because the local audience is smaller than the national one and fewer people will buy the products or use the services advertised. In addition, the producer would find few affiliates to purchase programs, because most stations' prime time hours are taken up with network programming.

The independent producer thus fears that he will make less money if he sells his program independently, and is forced to deal with the networks. The networks have great bargaining strength in negotiations with the independent producers because they offer the independent producer a wider viewing audience. This arrangement also satisfies the advertiser whose commercials are aired nationally.

Numerous factors make this scenario more complex. Most independent producers cannot afford to finance a pilot script, let alone an entire series. Often, the networks will help finance the program, but only in return for some creative control and/or budget approval. Unfortunately for the producer, the price paid by the network rarely equals the total production

37. Id. at para. 11.
40. Report and Order, supra note 3, at paras. 7-8.
41. Id. at paras. 10-12.
42. Id.
costs and the producer falls under the control of the network, which can easily provide financing for the production, and which, through distribution of the program, can help the producer recoup some of his/her losses.\textsuperscript{43}

The independent producer is compelled to depend on the network for financing in order to obtain national distribution. Before the rules were adopted, independent producers were practically forced to bargain away many of their rights in their programs in order to secure their relationship with the networks.\textsuperscript{44} First, a network would take a financial interest in the production. In general, investments in productions not guaranteed to receive good ratings or make money were risky. Second, the network would take a percentage of the money brought in by the subsidiary uses of a program. While it would be to the networks' benefit to air programs in which they had a financial interest, this second interest \textit{assured} them of recovering their initial investment. Unfortunately, it was primarily through subsidiary use of a program that producers could recover their cost and make a profit.\textsuperscript{45} Independent producers eager to enter the valuable prime time television market found it necessary to transfer a "substantial part of the potential profitability of their products to the purchasers—the networks"—in order to have their programs aired, or to make any money at all.\textsuperscript{46}

When a network leases a program from its producer, the network pays the producer a license fee and acquires rights to air the program for a period of time.\textsuperscript{47} The networks argue that this arrangement is not sufficiently lucrative to cover the risk of financing such programs, and also demand some rights to share in the profits from the network run and the right to distribute and/or share in the profits from . . . domestic syndication and overseas sales and other valuable subsidiary rights. This type of arrangement facilitates network control of the form, content, and creative aspects of the show even though actual filming is done by a nominally independent producer.\textsuperscript{48}

Due to the disparity in bargaining power existing before the

\textsuperscript{43} \textit{Id.} at para. 10.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at paras. 10-12.
\textsuperscript{46} \textit{Id.} at para. 10.
\textsuperscript{47} Tentative Decision and Request, \textit{supra} note 38, at para. 4.
\textsuperscript{48} Report and Order, \textit{supra} note 3, at para. 12.
rules were enacted, the independent producer ended up with a license fee for the lease of the program. The networks ended up with a financial interest and a percentage of the syndication rights of programs they helped finance and distribute. The result was that the networks controlled the syndication rights of programs they neither had created nor developed.

The risk the networks take is not minor. The syndication rights to which the independent producer and network may be looking are worthless unless a series is aired for approximately 80-100 episodes, usually at least three years. At this time the network has enough shows to package for independent off-network run syndication. "The large number of episodes is required because the off-network syndicated series is usually broadcast daily, in the same period, a practice known as stripping." The risk taken by the networks is compounded by the fact that often they will not recover the high expense of production and distribution.

From the hundreds of ideas received by the networks for consideration for possible prime-time programming,

> [e]ach free commercial television network may review as many as 300 television series program 'ideas' in a year . . . . From these proposals, hundred of scripts for television pilots are ordered, such as the 700 pilot teleplays ordered by the three networks for the 1980-81 television season. From these 700 series pilot scripts, 100 pilot programs were ordered, with the other 600 scripts ending as financial losses. . . . [A]t the beginning of 1980, over 200 projects were in active development for the three television networks, with the hope that perhaps as many as one-third would result in programming which could be aired.

For example, CBS had pilots made for thirty-two shows out of the 155 scripts it had ordered for the 1982-1983 TV season. From these thirty-two pilots, thirteen new prime time series were created.

Finally, notwithstanding all of the development time, effort, and money spent on developing possible network television series, at least 75 percent of all new series are economic failures. Given the highly competitive ratings races among the three

49. Tentative Decision and Request, supra note 38, at para. 5.
50. Id.
52. Tentative Decision and Request, supra note 38, at para. 3. See also FCC under gun on financial interest, BROADCASTING, June 14, 1982, at 31.
commercial television networks, during one broadcast season: 'some 60 series will have been introduced by the networks—more than twice what used to be the normal number—with only a handful likely to be renewed for the fall.'

Before the rules were enacted, the network could license the program for stripping once a series was aired for approximately three years. This allowed the network to sell low-cost prints of the series to many stations in different cities. Syndication equaled big business, especially for a long running program with high ratings, i.e., a highly successful program, which could make a lot of money in a short time period. In 1967, three years before the rules were enacted, network revenues from domestic and foreign sales of television series were $29.3 million. The syndication market produced total revenues of $600 million in 1981, while today it generates $800 million annually.

The problem with this situation was not that the networks received a high percentage of the revenues, although the amount was substantial and always increasing. The networks usually earned only a percentage of the total earned by the producer for the syndication rights, and this was a small amount compared to their advertising revenues. Rather, the problem was that before the rules were enacted, the networks controlled the syndication market by warehousing programs. First, networks would not distribute or license programs to independent stations after there were a sufficient number of shows to prepare the series for the syndication market, but instead would wait for a longer period of time, a process known as warehousing. By withholding programs from the market, the networks were presumably protecting network programming. In addition, by restricting the program supply from the market, the price of the programming on the market was likely to rise. By refusing to lease the program to the independent stations, the networks tried to assure themselves of continued

53. 1 T. SELZ & M. SIMENSKY, supra note 51, at 2-26, 2-27.
56. Tentative Decision and Request, supra note 38, at para. 118.
57. Report and Order, supra note 3, at para. 18.
60. Tentative Decision and Request, supra note 38, at para. 146. See supra note 46 and accompanying text for an explanation of the assertion made by some commentators that the networks would have an incentive to withhold their most popular pro-
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public patronage and higher revenues. Second, networks would not distribute or license programs to independent stations for syndication if any programs would be aired to compete with a network program shown on the network affiliate in that local area. Third, networks were more likely to choose to exhibit a program on their network schedule if they had a financial interest in that program. This could be used as a bargaining tool with the independent producers, in order to extract a higher percentage in the program itself. These three factors gave the networks great control over the success or failure of a program. For all practical purposes, the three national networks controlled “the entire network television program production process from idea through exhibition.” The independent producers fear that repeal of the rules may reestablish this control.

B. Litigation Concerning the Prime Time Access Rule and the Financial Interest and Syndication Rules

1. Mt. Mansfield

By not defining “public interest,” the FCC left open the issue of how to serve or act within the public interest. In 1971, the Court of Appeals for the Second Circuit, in *Mt. Mansfield Television, Inc. v. FCC*, held that the PTAR was not arbitrary or against the public interest as a matter of law. The petitioners in that case, the three national networks and other affiliated local stations, attacked the PTAR on several grounds, the first and foremost being that it was a direct restraint on speech in violation of the first amendment. They argued that because the network distributors were barred from distributing their product for one-half hour, the station licensees had their freedom of choice restricted and the viewer was denied access to a network program he might have preferred to watch. In rejecting this argument, the court considered the peculiar nature of the broadcast media, that is, there are “substantially more individuals who want to broadcast than there are frequencies
to allocate.” Red Lion Broadcasting Co. v. FCC established that it is the “right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Therefore, since the PTAR is designed to promote diversity in views and programming, the rule will promote the opening up of the media to the viewing public and thus “enhance rather than abridge the freedoms of speech and press protected by the First Amendment.”

The plaintiffs in Mt. Mansfield also attacked the FISR on the grounds that the Communications Act of 1934 does not give the FCC explicit authority to regulate network activities. The court rejected this argument, citing United States v. Southwestern Cable Co., in which the Supreme Court determined that the Commission had been charged with broad responsibilities. The FCC has the authority to “generally encourage the larger and more effective use of radio in the public interest,” and is specifically empowered “to make special regulations applicable to radio stations engaged in chain broadcasting.”

The Mt. Mansfield court examined the statistics which demonstrated the increased network domination over evening program hours and concluded that “access to network affiliated stations during prime time is virtually impossible for independent producers of syndicated programs.” The statistics showed that “between 1957 and 1968, the share of network evening program hours either produced or directly controlled by networks rose from 67.2% to 96.7%.” The industry was set up so that the networks had an advantage because of their established relationship with their affiliates. The networks employed a “permanent unified distribution” process which left the independent producer at a disadvantage due to the pro-

67. Id. at 477 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)).
68. Id. (quoting Red Lion, 395 U.S. at 390).
69. Id. at 478-79.
70. Id. at 480-81.
72. Mt. Mansfield, 442 F.2d at 480-81.
73. 47 U.S.C. § 303(g).
74. 47 U.S.C. § 303(i); Mt. Mansfield, 442 F.2d at 481. See id. for an explanation of how both networks and their affiliates are encompassed by the phrase “radio stations engaged in chain broadcasting.” See also supra note 29.
75. Mt. Mansfield, 442 F.2d at 483.
76. Id. at 482.
77. Id. at 485.
cess, and not the product.\textsuperscript{78}

The \textit{Mt. Mansfield} court found that the FCC was reasonable in its 1970 findings that: (1) both the financial interest and syndication rules were necessary to restore to the independent producer those rights which they uniformly were forced to bargain away due to network control of the airwaves,\textsuperscript{79} and (2) the financial interest rule was essential to effectuate the syndication rule since only together could these rules preclude networks from getting an interest and thus controlling the product.\textsuperscript{80}

The FCC believed that a prohibition on syndication rights in programs first exhibited by the networks, would “remove the incentive for networks to choose for exhibition only those shows in which these [syndication] rights are granted, and [would] increase the profitability of independent production.”\textsuperscript{81} With the FISR in place, the television industry would no longer see totally independent productions competing against network-dominated programs for exhibition. The profitability of independent productions would increase with independent producers able to recoup their losses and even make a profit off their eventual run in syndication. The total effect, as predicted by the FCC, would result in “decreasing network dominance and curbing potential competitive restraints,”\textsuperscript{82} i.e., a diverse and competitive television marketplace.

\textit{Southwestern Cable Co.} established the test to determine whether or not the rules promulgated by the FCC are within the Commission's statutory power, and examined whether the rules are “reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.”\textsuperscript{83} The court in \textit{Mt. Mansfield}, applying this test, held that the “syndication rule is supported by evidence and is ‘reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.’”\textsuperscript{84}

The court did note that it had a duty to find that the FCC's

\begin{footnotesize}
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\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 485-86.
\item \textsuperscript{80} \textit{Id.} at 486. \textit{See also} Report and Order, \textit{supra} note 3, at para. 30.
\item \textsuperscript{81} \textit{Mt. Mansfield,} 442 F.2d at 486.
\item \textsuperscript{82} \textit{Id.} at 486-87.
\item \textsuperscript{83} \textit{Id.} at 481 (citing \textit{Southwestern Cable Co.}, 392 U.S. at 178).
\item \textsuperscript{84} \textit{Id.} at 487.
\end{itemize}
\end{footnotesize}
action was based on findings supported by evidence, and not to say that the public interest would be furthered by such actions. In other words, the question of what was in the public interest in the court's view was not answered. It is probably safe to conclude that if the court believed the Commission's actions not to be in the public interest, it would have found a way to hold that the FCC's actions were not reasonably ancillary to its effective performance. After this case, though, there remains no clear definition of the public interest in the media.


In April 1972, the Department of Justice filed complaints against the three networks alleging violations of the Sherman Act. In United States v. National Broadcasting Co., the government contended that National Broadcasting Company (NBC) had used the power it derived from control over its owned and affiliated stations to monopolize the production of prime-time television programming shown on the NBC network. In addition, the government alleged that NBC had entered into agreements in restraint of trade, particularly in purchasing programs produced by independent producers.

On November 17, 1976, the government and NBC submitted to the court a proposed final consent judgment, which paralleled the “restrictions placed on all three television networks by the FCC's financial interest and syndication rules.” The Antitrust Procedure and Penalties Act established that before a court can approve such a judgment, “it must determine that such judgment is in the public interest.” While there were many objections from public interest groups, the court ruled that none of the solutions offered by these groups met the required standard. Rather, the court held that “[t]he government in its role as protector of ‘the public interest’ appears to have accomplished an acceptable result,” and that the pro-

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85. NBC entered into a consent decree with the Department of Justice in 1978. ABC and CBS entered into similar consent decrees in 1980. See Tentative Decision and Request, supra note 38, at para. 18 n.4.
87. Id. at 1130.
88. Id.
89. Id. at 1131.
92. Id. at 1141.
93. Id.
posed consent decree was in the public interest.94

The court noted that the government was attempting to improve the position of the independent producers and suppliers against the networks and their enormous market power, and to "enhance competition in the buying and selling of television programming by imposing on the networks restrictions on the terms and conditions governing their contracts with the independent suppliers.95 As such, the remedy sought was to "limit the benefits and financial rewards that otherwise would flow from an exercise of [the enormous market] power [of the networks]."96 It was this remedy that the court found to be within the public interest.

C. Cable TV

While the networks were gaining control of the airwaves and becoming increasingly regulated, technology was simultaneously improving and producing several new forms of electronic communications, namely, cable television, pay television, satellite transmission, portable video cameras, home video recorders and video games, as well as improving those forms of electronic communications not yet perfected, including the video disk, fiber optics, electronic data transmission and several forms of computer-linked television.97

Cable television was initially developed as a means of providing better reception than was originally possible with an antenna, because of terrain or distance problems, as well as a means of providing a variety of program choices, including the three network services and nonnetwork and educational services, to areas too small in population to support a local television station.98 In this sense, the networks liked the idea of cable because it meant more people viewed the network programs and the networks could consequently charge more for advertising without incurring the cost of expansion into these local areas. "In the mid-1960s the FCC began regulating cable TV because it feared that such systems might begin importing

94. Id. at 1143.
95. Id. at 1145.
96. Id.
distant signals (programs from TV stations outside the local community) to the detriment of local over-the-air TV stations." New regulations were established in 1972 after "an industry-wide Consensus Agreement [was] negotiated by the White House and the affected industry interests—broadcasters, cable operators, and program producers (copyright owners)."

The FCC's regulations governing broadcast signal carriage by television systems were basically of four types: (1) "rules that mandate carriage of particular signals;" (2) "rules that limit the number of distant television broadcast signals that may be carried;" (3) "rules that require the deletion of particular network or syndicated programs from signals that are carried" (i.e., nonduplication and program exclusivity rules); and (4) "rules that require deletion of particular sports programs from signals that are carried." Finally, in 1980 the Commission repealed the distant signal carriage and syndicated program exclusivity rules. This action was attacked by television broadcasting and programming interests in Malrite T.V. v. FCC and upheld by the Second Circuit in 1981. The court found "that the FCC's action was neither arbitrary nor capricious" since "[a]fter considering several econometric and case studies concerning the impact of cable television on local station audiences and future cable penetration rates, the Commission found that the impact on broadcasting stations


102. Id. at para. 1. "The distant signal carriage rules generally vary the number of distant signals that cable systems may carry based on the size of the television market (35 mile zone) in which a system is located." Id. at para. 11.

The syndicated program exclusivity rules limit the carriage of individual programs on signals that are otherwise available for carriage under the distant signal carriage quotas. . . . In their application to the fifty largest markets, they require cable television systems, at the request of local television stations, to delete all programs from distant signals that are under contract for television exhibition to local stations.

103. Malrite TV, 652 F.2d at 1143.

104. Id. at 1147.
from the deregulation of cable television would be negligible, and that the consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services."\textsuperscript{105} In particular, "the expansion of cable services was reasonably found not to threaten the basic nature of free television."\textsuperscript{106} The FCC found that their actions were in the public interest since "elimination of the distant signal carriage and syndicated exclusivity rules will enhance consumers welfare by promoting competition in both the economic marketplace and the marketplace of ideas."\textsuperscript{107} The Second Circuit agreed that "[i]n shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal."\textsuperscript{108}

The only regulations that cable systems must continue to observe today are the mandatory carriage of local television signals (within a radius determined by the size of the market), the network nonduplication rules (which forbid showing current network programs) and the sports blackout rules (that require the "black[ing] out [of] local sporting events if the local broadcast station is also obliged to do so," e.g., "where the sporting event has not been sold out").\textsuperscript{109}

Judging from comments made by network executives in 1978, it would appear that the networks did not become concerned about the growth of cable until very recently.\textsuperscript{110} It is interest-

\textsuperscript{105} Id. at 1146.
\textsuperscript{106} Id. at 1150.
\textsuperscript{107} Cable Television Syndicated Program Exclusivity Rules, supra note 101, at para. 330.
\textsuperscript{108} Maltite TV, 652 F.2d at 1151.
\textsuperscript{109} Schwartz, Where Cable TV Stands After F.C.C. Deregulation, N.Y. Times, Aug. 21, 1980, at C26, col. 5.
\textsuperscript{110} In an article published in the New York Times on July 31, 1978, the networks contended that the present system of television was not in jeopardy. Brown, supra note 97, at C12, col. 1. This comment was made in the face of "developments [which] are leading to primarily . . . vast increases in the number of viewing channels available to viewers and cheaper and more efficient national distribution of programming." Id. "More channels and cheaper distribution would inevitably mean more networks, and these may be expected to cut into the audiences for ABC, CBS and NBC, as well as existing local television stations." Id. The article quotes CBS Broadcasting Group President, Gene F. Jankowski, as saying "[t]hese new industries . . . are small business and not a serious threat to us." Id. at col. 6. Alfred Ordonez, the executive in charge of corporate planning at NBC, said, "the expansion of cable to the 30 percent mark [estimated to reach there between 1981 and 1985] would more seriously affect small stations than it would the networks." Id. at cols. 5-6. See also Brown, supra note 39, at 66.
ing to note that the extensive changes in their attitudes about cable’s impact came at the same time that the FCC began to move closer and closer to total deregulation.

D. Reconsideration of PTAR-FISR

In 1977, the FCC's Network Inquiry Special Staff commenced a study to determine the future of American television networks. In 1978, the FCC issued a Further Notice of Inquiry. The Network Inquiry Special Staff, recommending abolition of the PTAR and the FISR, found that “the financial interest and syndication rules might well be disrupting an efficient risk-sharing arrangement between the networks and their program suppliers . . . . With the rules in place, network fees to producers were reduced, thus forcing the producer to shoulder a greater financial risk initially.” The staff concluded that this could result in a greater concentration in the program production industry because small independent producers would be forced to merge with larger more financially sound producers who could better absorb the risks of unsuccessful series, which had been previously shared with the networks.

While the networks were in favor of repeal of the PTAR, their affiliates disapproved. The half-hour period they had gained from the rules was typically devoted to nonnetwork programming and had become “their most lucrative advertising period of the entire broadcast day,” because the advertising revenues thereof were not shared with the networks. The networks realized that they needed their affiliates on their side and quickly dropped their position favoring repeal of the PTAR. Interestingly enough, the issue of repeal of the PTAR was “removed from the [FCC] agenda, and talk of full-scale repeal has never resurfaced.” The networks have succeeded

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113. Tentative Decision and Request, supra note 38, at para. 21.
114. Id; see also Waz, supra note 38, at 4.
115. Id. at 4.
116. Id. at 5.
in convincing their affiliates that repeal of the FISR would be in their best collective interest.\textsuperscript{117}

E. Current FCC Action

In June, 1981, the FCC released a \textit{Notice of Proposed Rule Making} regarding repeal of the FISR.\textsuperscript{118} While the FCC never expressly endorsed or rejected the Network Inquiry Special Staff's conclusions or recommendations, they "instituted the . . . rule making proceedings . . . in order to evaluate the special staff's conclusions. . . . [They] asked whether changes in market conditions over the past decade may have obviated the need for the financial interest and syndication rules."\textsuperscript{119}

The FCC issued a \textit{Tentative Decision and Request for Further Comment} on August 12, 1983.\textsuperscript{120} After a long discussion of the effects of the rules on the production industry, the television broadcast stations, advertising costs and the television networks, the FCC concluded that "no credible evidence [exists] that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market."\textsuperscript{121} The FCC specifically found that there was no justification for the financial interest rule and issued a tentative ruling to abolish it.\textsuperscript{122} "The financial interest rule has failed to increase the independent program supply, has no effect on program diversity or quality, has not decreased network control over program content or creativity, does not represent an inherently undesirable conflict, and appears to present no threat to the well-being of the independents."\textsuperscript{123}

A large portion of the proposal’s discussion section focused on the effect of the rules on the syndication market. The concern expressed in a great many comments received by the FCC was that repeal of the rules "would allow the networks to exer-


\textsuperscript{119} \textit{Tentative Decision and Request}, \textit{supra} note 38, at para. 22.

\textsuperscript{120} 48 Fed. Reg. 38,020.

\textsuperscript{121} \textit{Id.} at para. 195.

\textsuperscript{122} \textit{Id.} at para. 196.

\textsuperscript{123} \textit{Id.} at para. 201.
cise control over the availability of off-network programming, and that television stations, particularly independent stations in competition with network affiliates, would be affected adversely by such control." 124 Many opponents of repeal believe the networks would "warehouse," i.e., withhold off-network programs from the market, if the rules were repealed. 125 If networks prevent programs already shown on network television from going into syndication, many argue that the price of programming would go up because of the restricted supply or programming on the market, and the size of independent stations' audiences would be reduced, thereby alleviating the competition to the networks and their affiliates. 126

The FCC spent a good deal of time discussing the possibility of networks withholding programs from the syndication market and concluded that while it "would generally not be a profit maximizing course of conduct to follow, it is nevertheless a matter of sufficient concern to warrant some continued regulatory involvement." 127 The FCC proposed a revised syndication rule applicable only to the three major national networks and their domestic distribution of prime time entertainment series to television broadcast stations for nonnetwork television exhibition. 128

To reduce any possibility of warehousing, a network will be required, within six months of a series completing its network exhibition run, to transfer all rights in that series it may hold relating to its syndication, to an unaffiliated syndicator. In addition, no later than the end of the fifth year of a network series run, the network will have to transfer all syndication rights for programs in that series to an unaffiliated syndicator. 129

The FCC points out that the term unaffiliated is intended to separate ownership from control. 130 Therefore, a network affiliate could be the syndicator to whom the rights are transferred because there is no common ownership of the two. 131 In addition, the FCC will require a network to file a notice with the FCC within thirty days after each sale or transfer. 132

124. Id. at para. 145.
125. Id.
126. Id. at para. 146.
127. Id. at para. 202.
128. Id. at para. 203.
129. Id. at para. 204 (footnote omitted).
130. Id. at n.99.
131. Id.
132. Id. at para. 204.
work must certify that such sale or transfer was consistent with the FCC's rules. This will permit the FCC and the Department of Justice to monitor the networks' sales and possible anticompetitive practices.

F. Reaction to the FCC Tentative Decision

The reaction to the FCC's tentative decision was mixed. The networks and their affiliates were disappointed that no final action was taken and that the rules were not totally abolished, but welcomed the reduction in government regulation of the television industry as a well justified action.

The Committee for Prudent Deregulation (CPD), on the other hand, found the FCC action totally unacceptable. Other opponents of repeal reiterated comments made earlier, while stronger comments were made indicating that "this will be the worst disaster for the public interest in . . . 20 years" because the networks would be given "total, complete, fatal domination of the TV industry to the ultimate injury of the public."

Some independent stations opposed repeal somewhat less strongly than other stations because the FCC proposal allowing networks into limited syndication "fixed restrictions against the warehousing of programs to keep them out of independents' hands." Other independent stations remained skeptical about whether they would still get off-network series as early as they had since the rules were implemented. Others still did not believe the proposal would provide adequate protection to independent stations and television viewers.

The first-run syndicators feared that it would be "impossible to sell programs in the top markets where network owned-and-operated stations would likely be more inclined to pick up pro-

133. Id.
134. Id. at n.101.
136. Id. at 29.
137. Id.
139. Id. at 26.
grams produced by their own parent companies."\textsuperscript{141} In addition, the networks would probably establish close relationships with only a few syndicators, resulting in a strategy advantageous to the networks' overall interests.\textsuperscript{142}

This modified syndication rule would only be in effect until August 4, 1990, when the rule would "sunset," unless the FCC reached a determination that the public interest warranted continuation of the syndication rule.\textsuperscript{143}

Several groups opposed the 1990 "sunset" deadline. Paramount Pictures Corporation pointed out that "'[t]he 1990 "sunset" deadline means that networks effectively would control syndication of all program series produced hereafter since those programs generally will not be "ripe" for syndication until the end of the decade anyway.'"\textsuperscript{144}

The remainder of this article discusses the public comments received by the FCC in the fourteen months between its Notice of Proposed Rule Making\textsuperscript{145} and its tentative decision, as well as the comments received after its tentative decision was announced. At the time of this writing, no final decision has been reached by the FCC concerning the Financial Interest and Syndication Rules.

\section*{III}
\textbf{Arguments}

Television produced in the public interest means diversification in programming. Competition in industry generally leads to an offering of better and more varied products. Increased competition and diversity in the television industry benefits the television viewer as a consumer of programs, and the producer as a supplier of those programs. Independent producers and the viewing public are not the only two groups who would be affected by repeal of the Financial Interest and Syndication Rules. Fortunately, other groups have expressed their views on the subject, siding either with the networks for repeal of the rules, or with the independent producers, for the retention of

\begin{itemize}
\item \textsuperscript{141} Broadcasting, Aug. 22, 1983, supra note 138, at 26.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Tentative Decision and Request, supra note 38, at para. 209.
\item \textsuperscript{144} Broadcasting, Sept. 26, 1983, supra note 140, at 54.
\item \textsuperscript{145} 47 Fed. Reg. 32,959.
\end{itemize}
PROPOSED REPEAL

the rules. Both sides claim the result would be increased competition and diversity in programming, benefitting the public interest, and with the result coming about through a different process and course of change.

In general, those who favor repeal argue that the networks must be allowed to obtain syndication rights and financial interests in the programs they exhibit, in order to remain secure in their financial positions and thereby keep free television a viable medium. Those who favor retention of the rules argue that the “rules have made TV programming more competitive, and have strengthened independent TV stations, leading to greater diversity and allowing new programming sources to flourish.” They believe that repeal of the rules would lead to the situation that preceded adoption of the rules, i.e., network domination of the airwaves, as well as all the repercussions that the FCC specifically intended to prevent by its adoption of the FISR.

A. The Networks

The networks and their affiliates have several arguments which lead them to claim that television will only continue to improve with repeal of the FISR.

1. Programming
   
   (a) Risks

   CBS claims that the rules “discourage the networks from funding ‘creative and high-risk programming,’ and preclude the networks from helping small producers to finance new programs.” The networks claim that the prohibition “raises the cost of programming, reduces total investment in program production, and may reduce diversity by encouraging excessive production of ‘tried and true’ program types.” In addition, the networks believe that it is unfair to prevent them from sharing in the rewards of programs which they helped to finance in the first place. According to the FCC, because the

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147. Waz, supra note 38, at 5.
148. Id. at 4.
150. Tentative Decision and Request, supra note 38, at para. 31.
rules prohibit networks from participating in sales of syndication rights, the rules have generated inefficient risk-sharing.\textsuperscript{152} Although this may be true, the networks may be in the best position to bear the risks involved in producing a new program due to their national affiliations, expertise in designing program schedules and ability to pool the risks of programs across an entire program schedule.\textsuperscript{153}

The networks also claim that the fact that a broadcast network cannot share in the syndication profits of programs in which it invested "harms free broadcast networks in competing for programs with the pay media," because the pay media is not subject to these rules.\textsuperscript{154} The affiliates join the networks supporting repeal for this same reason, that is, "the rules hinder networks in their effort to obtain top-quality programming"\textsuperscript{155} and the affiliates do not "want the networks handicapped in their competition with the new technologies."\textsuperscript{156}

(b) **Cable Market**

The networks argue that cable television and subscription services "are expanding and enhancing the opportunities for program suppliers."\textsuperscript{157} Many of these pay services "can outbid the networks for programming that could otherwise be shown on 'free' [television]."\textsuperscript{158} "The American Legal Foundation contends that this situation eliminates programming options available to viewers unable to afford pay television."\textsuperscript{159}

This argument has many facets to it. In general, it is unfair that the networks are subject to rules to which their competition are not. The networks are facing increased competition from the new media, i.e., cable, satellite, etc. In reaction to this competition, the networks claim "that the rules have been made obsolete by technological change."\textsuperscript{160} When the rules were adopted, the FCC believed that the three networks mo-

\textsuperscript{152} Tentative Decision and Request, supra note 38, at para. 133.
\textsuperscript{153} Id. at para. 134.
\textsuperscript{154} Broadcasting, Jan. 31, 1983, supra note 146, at 29 (quoting NBC).
\textsuperscript{155} Financial interest debate gets change of venue—Las Vegas, Broadcasting, Mar. 28, 1983, at 60.
\textsuperscript{156} Id.
\textsuperscript{157} Tentative Decision and Request, supra note 38, at para. 69.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Broadcasting, Jan. 31, 1983, supra note 146, at 28.
nopolized the buying market and the rules gave the independent producers some leverage in selling their programs to the networks. NBC claims that “[n]o one today could rationally argue that the traditional broadcast networks are suppliers’ only program purchasers. Now, many substantial purchasers, including the new pay media buyers unforeseen when the rules were adopted, compete for all kinds of programs.”

While most of the networks’ claims are valid, there are problems with their reasoning. First of all, the enactment of the FISR is one of the sole reasons that the networks today are not the “suppliers’ only program purchasers.” According to the CPD the rules have “contributed to a marketplace structure in which independent television stations have ‘grown dramatically in just a decade from relative obscurity to a position of significant, albeit fragile, prominence as competitors to network-owned and affiliated stations.’” Independent stations have emerged as buyers competitive with the networks due to their “ability to obtain reasonable and timely access to recent and popular off-network program series.”

Second, the networks have continued to reach a “combined audience share of as much as 95% at times, even while the new media competition continues to grow.” Furthermore, “where the networks occupied 55% of the broadcast day in 1960, they now occupy 69% of it.” In other words, as of yet the new media has not substantially materialized. The “networks’ own studies reveal that ‘pay’ [sic] television and other emerging video technologies will pose no credible threat to the networks’ oligopoly in the television market for many years to come.”

Third, networks are free to enter the cable/pay television market. For example, “NBC’s parent company, RCA, has a hand in everything from satellites to the SelectaVision cas-
CBS and ABC have entered the cable market using a joint venture which allows access to large sums of money from more than one source. In this manner, smaller sums of money can be aggregated. The fact that many of the co-venturers who enter into the area of new technologies are "entertainment corporate giants, [may be] underscoring the extent of the risk which they are unwilling to bear themselves, even if it means sharing profits later." While this may be true, it remains clear that the networks are attempting to enter an area of broadcasting with the hope of gaining viewers and making profits. In this sense it appears that the networks are competing against themselves, while at the same time complaining that the competition is causing them to lose viewers and profits.

The networks' arguments tie in to the fact that they are not making as great a profit now as they were in the past, and they are concerned about their future. They believe that they have supported free television from its inception and that injury to them through loss in audience and profits constitutes injury to free television. In fact, however, "declines in earnings don't necessarily mean declines in sales." It should be made clear to the public that the networks have had "a 550% increase" in profits from 1970 to 1980. In 1970, $50 million in "profits accounted for 11% of all television profits for the industry," while in 1980, $325 million "accounted for 20% of the total profits returned." "The networks claim that their composite net share is declining." They point to emerging new video techniques

170. 1 T. SELZ & M. SIMENSKY, supra note 51, at 3-12.
171. Id. at 2-31.
172. While CBS's net earnings dropped two percent, its total revenues actually increased some twelve percent. Since normal population trends and the appeal of the new technologies are putting more and more people in front of television sets, the number of television users is expanding faster than the decline in network shares. This means that despite the slippage, the actual number of network viewers is increasing. And, therefore, ad revenues—which provide the ultimate justification and context for network television—are increasing as well. In 1980 total national television advertising revenues went up 10.7 percent over 1979.

Brown, supra note 39, at 69.
173. BROADCASTING, May 17, 1982, supra note 166, at 41.
174. Tentative Decision and Request, supra note 38, at para. 69.
as their competition for audience share.  

(c) Concentration in Supply

CBS contends that the rules have "tended to increase concentration in program supply," and therefore the rules have failed to achieve their objective. The Producers Guild of America stands by the presentation of the CPD, which explains that, while there may appear to be fewer suppliers now than before the rules were enacted, this situation is due to the decision of independent producers to affiliate themselves with larger production companies. It would appear that if more producers, distributors and independent stations have been able to enter the television industry since the rules were adopted, the purposes of the rules—increased competition and diversity in programming—have been fulfilled. Whether, as a result of the rules, the affiliation of independent producers with larger production companies has simply shifted the wealth from large television broadcast corporations (the networks) to large production companies must be more thoroughly examined.

The FCC staff in its tentative decision regarding repeal of the FISR argue that the financial interest rules lead to "inefficient risk-sharing" because the networks are unable to invest in programs they distribute, and the producers are left to bear the risk. The FCC therefore contends that if larger, established producers are better able, and hence more willing, to bear risk than smaller or new producers, the current rules work to the advantage of the larger producers who are relatively better off and insulated, to some degree, from competitive and new entry. The end result may be a more concentrated and less diverse program supply industry.

Independent affiliation with larger production companies may be necessitated by the need for entry level funding, in the

175. Id.
178. "[T]he number of producers supplying networks with prime time programming increased from 23 in 1970-1971, to 29 in 1981-1982. The number of distributors increased at an even faster rate, from 122 to 184. And where 10 producers were providing first-run programming for the half-hour period made available for nonnetwork programming by PTAR, in 1971, the number had increased to 42 last year." Broadcasting, May 17, 1982, supra note 166, at 41.
179. Tentative Decision and Request, supra note 38, at para. 133.
180. Id. at para. 136.
absence of selling rights to the networks. The production companies may fill the role played by the networks before the enactment of the rules by providing financing to the producers in return for an interest in such programs. However, the position of large production companies must be distinguished from that of the large networks. The independent producer may be turning to the large production company for financing, bargaining power against the networks, and stability. In return, the production company may have a financial interest in many projects. However, these production companies are not holding exhibition over the producers' heads as a way to exert creative control and total financial domination of the program. While the end result may be a more concentrated program supply, there is an increased incentive to make innovative programs, thereby serving the viewing public.181

2. Warehousing

The independent stations fear that if the FISR are repealed, the networks would engage in "warehousing," i.e., holding successful series off the syndication market to protect network program schedules.182 The networks would take this approach to syndication for two related reasons. First, by preventing successful series from entering the syndication market, networks would be forcing viewers to watch a program series on the network channel, rather than a rerun of the successful series shown on an independent station. By withholding these shows from the independent stations, the networks build up a larger viewing audience which they are assured of retaining when the program is syndicated. This allows the networks to extract a higher price from the distributor or directly from the independent stations purchasing the syndication rights.

Second, since independent stations generally compete with network affiliates for non-prime time hours, the hours when

181. It is now possible to have a successful program which is not accepted or distributed by a network, but which is independently distributed to independent stations and network affiliates throughout the country.

For example, Operation Prime Time is a group of 93 television stations which channels the relatively small production dollars available to each into a fund large enough to undertake the multimillion-dollar financing required to produce network quality prime time programming, such as 'The Bastard,' a four-hour television miniseries which cost $3.6 million in 1978.

1 T. SELZ & M. SIMENSKY, supra note 51, at 3-12.

182. BROADCASTING, Jan. 24, 1983, supra note 58, at 35.
off-network syndicated programs are generally aired, prohibiting independents from showing successful off-network programs would give affiliates a better chance of getting a greater audience share than the independent stations. "The independents' share of audience would decline, bringing them smaller revenues and forcing them to cut back on the purchase of first-run programming," thereby alleviating one major form of competition threatening the networks.\(^{183}\) If the FISR are repealed, the networks could obtain control of syndication rights and then have the ability and incentive to limit the availability of programs in syndication, as well as raise their prices.\(^{184}\) This action would hurt the independent stations, which make most of their money from rerunning successful network series.

Proponents of retention of the rules argue that "[f]or independent stations, the main audience-attracting programs are recent off-network syndicated shows. The FISR gives independents assurance that these programs will be available to them."\(^{185}\) Only recently have these independent stations been able to put money made from rerunning successful network series into first-run syndicated programs in direct competition with the networks. The net result of network control of syndication, according to the CPD, would be that "[v]iewer access to popular programs would be diminished, independent station competitive strength would decrease, and advertisers and consumers of advertised products would pay the price of diminished competition in the supply of television advertising."\(^{186}\)

After its thorough discussion of the theory behind warehousing,\(^{187}\) the FCC reached the conclusion that, while withholding is unlikely, it cannot be ruled out entirely. The FCC pointed to other forms of programming, such as sports events, movies or first-run syndicated programming, that are available to the independent stations as substitutes for off-network programming.\(^{188}\) These first-run programs, however, may be too

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188. *Id.* at para. 153.
expensive for independent stations to exhibit. The independents argue that off-network programs cost less than substitutes because their "production costs have already been recouped during the network run."¹⁸⁹ Such programs are less risky because their success can be predicted from the ratings received by the network during their first run.¹⁹⁰ Moreover, longer programs such as movies and sports events require a time commitment from the audience, which many viewers are often unwilling to make.¹⁹¹

The FCC found that the evidence submitted defeated the independents' argument that "for important time periods, other forms of programming cannot generate net revenues as high [sic] as those of off-network programs."¹⁹² In other words, since the FCC found that "first-run syndicated programming can generate revenues similar to those of off-network programs . . .",¹⁹³ independent television stations do have close substitutes for off-network programming and would still be able to survive even if the networks withheld certain programs from syndication.¹⁹⁴

The FCC agreed with the networks' contention that it would not make economic sense to warehouse programs for which syndication rights were paid at fair market value in a competitive market, because "such prices would incorporate all the revenues the programs would be expected to generate in syndication. Consequently, all the gains from withholding programs would be lost."¹⁹⁵

The networks continually attack the theory that they would warehouse programs if the FISR were repealed as lacking economic sense.¹⁹⁶ ABC claims that "[s]yndication represents an important potential source of revenue to a network. Its interests do not lie in subordinating those revenues; they lie in maximizing them."¹⁹⁷

The networks claim that repeal would not cause them to discriminate against the independent stations in favor of network

¹⁸⁹. Id. at para. 154.
¹⁹⁰. Id.
¹⁹¹. Id.
¹⁹². Id.
¹⁹³. Id. at para. 155.
¹⁹⁴. Id.
¹⁹⁵. Id. at para. 157.
affiliates, and that they had not done so before the rules were enacted. In a competitive syndication market, argue the networks, such discrimination would be bad business since the independents are "typically the syndicator's best customer."\(^{198}\)

The networks do not expect to achieve anything more than the eighteen percent share of the syndication market that they had before the rules were adopted.\(^{199}\) NBC claims it "has no plans to enter syndication, should the rules be dropped, opting instead for sale of syndication rights to other companies for a percentage of profits that [it] estimated might range 'from zero to 50%—we don't expect to get all of it.'"\(^{200}\)

Past history undermines confidence in the sincerity of the networks' position. The problem of their controlling the syndication market would not be totally solved even if the networks received as low a share as five percent of the syndication market. Before the FISR were enacted, networks often chose to exhibit shows in which they had a financial interest, rather than shows in which they had none.

[S]ave for about 6 or 7 percent of their schedules which were the result of direct dealing between independent producers and sponsors, networks accepted virtually no entertainment program for network exhibition in a 5 year period in which they did not have financial interests in syndication and other subsequent use . . . .\(^{201}\)

It was partially for this reason that the FCC recognized the need for both the syndication rule and the financial interest rule in order to control network domination of the television industry.

B. The Advertisers

The Association of National Advertisers (ANA), which "represents some 420 corporations, including all the top 100 advertisers," takes perhaps the most intriguing position.\(^{202}\) In opposing repeal of the FISR, the ANA claims that repeal will harm independent stations and newer media, "reduce the public's viewing options, and make TV advertising less effective,

\(^{198}\) Id.


\(^{200}\) Tinker answers the critics, Broadcasting, Jan. 17, 1983, at 101 (quoting Raymond Timothy, Group Executive Vice President of NBC).

\(^{201}\) Report and Order, supra note 3, at para. 19; see also id. at para. 17.

\(^{202}\) The TV Executive, supra note 185, at XI.
less efficient, and more costly." The ANA is also concerned with the continued survival of small advertisers, especially those with new or improved products or services, who can only afford to advertise on the local independent stations. This method of advertising is their only alternative to the expensive network medium and has only become a viable choice since the FISR were enacted.

The advertisers' position must be examined in the context of the entertainment industry and its historical relationship with the advertiser.

Formerly, most programming was individually or dually sponsored. Individual and dual (or alternate) sponsors frequently procured their own programs and placed them in time arranged for on the network through their advertising agencies. Occasionally an advertiser would indicate his wish to acquire an individual half hour program and suggest to the network that it buy the program and obtain an alternate sponsor. Typical situations involved programs put on by sellers of multiple brands such as Procter & Gamble, General Foods, and Lever Brothers. In such cases, the sponsor procured the program directly from an independent producer and used it to advertise his various products.

However, the inflationary effects on the television industry have been so great that advertisers eventually could not run the risk of sponsoring an entire show.

Ultimately, this kind of sponsorship was supplemented by minute participations in network-controlled shows, and more recently [late 1960's] by 30-second participations. Under this method of selling advertising, the network procures a filmed program, often of an hour or 90 minutes in length, slots it into its evening schedule and then sells advertising spots to a variety of sponsors.

The networks receive large sums of money from advertising revenues. It is hard to understand their cries of financial difficulties when the profits on the combined networks rose from

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203. Id.
204. Id.
206. Id.
207. Expenditures for television advertising in 1983 are expected to reach $15.8 billion, 12 per cent above 1982. Spending on TV advertising represents approximately 21 per cent [of the] spending for all advertising media. Network advertising is projected to increase about 12 per cent over 1982, to an estimated $7.1 billion. This would constitute 45 per cent of all TV advertising. Spot television advertising is expected to rise about 13 per cent in 1983, to $4.7 billion,
$50.1 million in 1970 to $325.6 million in 1980—the decade of the FISR. It is the advertisers who actually support free television. By claiming that repeal would be bad for free television, the advertisers are actually speaking against the forerunners of the industry they so strongly support. The fact is that the advertisers are supporting the independent stations in order to assure a larger representation of advertisers on television. The local station may offer specifically what the new and local advertisers need and desire—an audience that can be targeted to use their goods and services at a more affordable price. Independent stations will offer a lower price than networks because of the small viewing audience. “In those markets with high levels of viewing of independent stations, the [amount] paid by typical advertisers ranged from 20 percent to 60 percent lower than in markets with little or no independent-station viewing.”

While the ANA believes that the growth and development of advertiser-supported cable will add competition and help advertisers, it does not foresee this growth occurring in the near future. The ANA recommended that “the FCC keep its financial interest and syndication rules until 'such time as the television advertising market is genuinely competitive.'” The American Association of Advertising Agencies (AAAA) “recommended that the FCC monitor the video marketplace,” and consider when such time has arisen.

The current economic argument made by the ANA is that without the rules, the networks would demand from independent producers an ownership share of the profit in their programs in exchange for network exposure. The independent producers would then demand a higher price for the original network showing. The networks would pass this extra program expense on to the advertisers; “[w]ith less competition and higher program costs, the price of TV advertising would

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representing about 30 percent of the total. Local television advertising should rise 11 percent for the year to $4 billion, and account for 25 percent of the total.

Nyhen, Forecaster Calls TV Ad Growth Stable, The TV EXECUTIVE, supra note 185, at XII.

208. Margulies, supra note 183, at 50.
209. THE TV EXECUTIVE, supra note 185, at XI.
212. THE TV EXECUTIVE, supra note 185, at XI.
increase."213 This scenario would have two effects: (1) television use would be cost-prohibitive for small advertisers, and (2) larger advertisers continuing to advertise on television would pass the higher prices paid to the networks on to the consumers.214

The advertisers argue that by keeping "independent TV stations viable as an alternative to increasingly expensive network time,"215 more advertisers can convey their messages. This enables the consumer to make more efficient buys and "eventually leads to lower prices at the supermarket and department store."216 The advertisers' position also appears to be in the "public interest" since their arguments in support of smaller advertisers will ultimately benefit the consumer. "[I]t is the consumers' interest, not the question of who owns or syndicates what, that should carry the most weight in this controversy."217 Since we are all consumers at one time or another, the position of the consumer may best represent that of the public interest.

C. The Public Interest

The courts have never defined what is meant by the phrase "public interest." While the general goals of the rules have been stated to be increased competition and diversity in programming,218 no method has been approved as the best way to accomplish such goals in the public interest. Since the FISR are aimed at breaking up the control of the three networks over the airwaves, it would seem that the public interest would encompass the interest of those independent producers who have been stifled in their competition with the three networks. However, the "public interest" ordinarily indicates the public itself—the viewers—and not those producing materials and/or services for the public. The viewers are the persons who would benefit by increased diversity in programming.

Both opponents and proponents of repeal claim their position will better serve the public interest. The networks claim

213. Id.
214. Id.
216. Id.
217. Id.
218. See generally Report and Order, supra note 3, at paras. 30, 37; Tentative Decision and Request, supra note 38, at para. 101.
that repeal will harm free television. This claim has attracted some public interest groups to the side of repeal, perhaps without understanding the reasons behind this view. The networks and their affiliates contend that free television "serves" the public interest by providing diversity, competition to pay services, public affairs programming, and greater opportunities for minority actors and producers.\(^{219}\) In contrast is the comment received by the FCC from the National Association of Black Owned Broadcasters who claim that "repeal would grant inordinate control to the networks and decrease any chance for the development of specific programs that appeal to minority audiences."\(^{220}\)

The current marketplace has grown dramatically in ten years because of three rules which were adopted for that purpose. The rules were also adopted to control the growth of three corporations which sustained enormous benefits for thirty years while dominating the television industry. Each network seems to have painted its own picture of what television programming would look like without the FISR. However, it should be the facts that exist now, as a result of the adoption of the rules, that are important in deciding whether or not repeal is in the public interest. Metromedia Inc., an independent station in New York, points out that the facts indicate that the rules reduced its own financial involvement in network programming, increased the supply of syndicated programming and the number of syndicators, increased the number of independent stations and audience shares of such stations, and reduced television advertising costs.\(^{221}\)

The facts presented in this article indicate that the FISR have increased competition in the market place and diversity in programming such that the public interest has been and is continuing to be served.\(^{222}\) If competition, program diversity and the public interest truly were the goals of the FCC in its institution of the rules, then the rules should not be repealed.

Another rationale behind the adoption of the rules was a hope for the improvement of free television. "The rules have provided the only check on the dominant position of the three

\(^{219}\) Tentative Decision and Request, supra note 38, at para. 69.
\(^{220}\) Id. at para. 40.
\(^{222}\) See supra note 178.
major networks in the television program market."\textsuperscript{223} The networks are now being forced to review their own positions in the industry in order to compete for the viewing audience, whereas ten years ago, such viewing attraction was taken for granted. There has been an increase in the quality and variety of programming, as well as an increase in the number of viewing options.\textsuperscript{224} Independent production companies point to the fact that "[w]ithout the ability to recover its investment and make a reasonable profit, there would be no motivation for . . . any . . . production company to create and produce unique and expensive series such as \textit{Hill Street Blues} and \textit{St. Elsewhere}."\textsuperscript{225}

The Inter-Guild Council of the Talent Guilds of the Motion Picture and Television Industry, which represents writers, actors, producers and directors, also opposes repeal of the FISR, for reasons that perhaps lie behind the successful growth of the entire industry. "Freedom of expression and the climate that nurtures creativity and diversity in program content requires [sic] diversity of producers and less restraint on creative talent."\textsuperscript{226} Rather than producing homogeneous collaborations for the networks which previously held the purse strings over their projects, producers now have some creative freedom to explore new topics in new ways and serve the viewing public. Producers can now create programs without the pressure of needing network approval to insure public viewing.

The FISR have thus opened up an industry to the persons who create the programs viewed on television, thereby returning to those persons the creative and financial control they deserve. In this respect, the 1970 FISR can be analogized to the Copyright Act of 1976.\textsuperscript{227} While the Copyright Act of 1909 allowed an author's family or estate to recapture the author's publication rights given away to the publisher only if the author died, the Copyright Act of 1976 permits the automatic recapture of these rights.\textsuperscript{228} The author gave away publication rights to the publisher for the same reasons that an independ-

\begin{footnotes}
\footnotetext[224]{224. \textit{Id. at} 31-32.}
\footnotetext[225]{225. \textit{Id. at} 32.}
\footnotetext[226]{226. \textit{Id.}}
\footnotetext[228]{228. 17 U.S.C. §§ 203-204.}
\end{footnotes}
ent producer gave away syndication and other substantial rights in a program—because the author was unknown, had no money and needed the exposure offered by the publisher in order to become known and to make money. Thus, when the author became successful because of a creation, the publisher reaped tremendous benefit from merely doing its job, albeit well, while the author received a one-time payment for publication rights. Like the Copyright Act of 1976, the FISR recognized that along with a need for increased competition and diversity in programming, there was a need to give more credit, in financial terms, to the deserving party—the producer.

When ABC argues that “repeal would foster competition in program supply (by permitting the networks to deal with producers who need or desire to exchange syndication rights and interests for greater license fees),” the network is speaking for the interests of the network and network-dominated television. Competition has grown in other ways; more people and more companies have grown and benefitted by the creation of the FISR. These rules divested the networks of the creative and financial control which were owed to the producers. The working public and the viewing public have benefitted from competition in the marketplace and diversity in programming, while the networks have made huge profits, thereby prompting no other result than the benefit of free television. In the sense that free television is synonymous with the “public interest,” then, the FCC has satisfied its Congressional mandate to act according to the “public convenience, interest and necessity.”

Before the FCC proposed its modified syndication rule, opponents of repeal argued that the idea of retaining the syndication rule without the financial interest rule would not remedy the situation, because “[t]he networks . . . would have the incentive and the opportunity to raise the price of [off-network syndicated] programming . . . by persuading their affiliates and O&O’s [owned and operated local stations] to bid up the prices of the programming . . . .”

In 1970 the FCC took a similar position in its determination

231. AEI conference revisits FCC oral arguments on financial rules, Broadcasting, Mar. 28, 1983, at 84 (quoting Steven Salop, professor at Georgetown University Law Center).
that the financial interest rule was essential to effectuate the syndication rule in that only together could these rules preclude networks from getting an interest and thus controlling the product. Currently, the FCC has changed its position and has issued a tentative decision to modify the rules.

D. The Government

1. Department of Justice Backs Down from Its Antitrust Action Against the Networks

The Department of Justice, which originally favored repeal, later suggested "that the FCC consider adopting a 'narrow' rule to address the 'potential harm' the networks could do to the off-network syndication markets by withholding, or warehousing, programming." The FCC's proposed syndication rule was modeled after the recommendations of the Department of Justice, but even if the FCC adopts its tentative proposal as final action, the networks will still have to abide by the consent decrees entered into by the Department of Justice and the three national networks which duplicate the FISR. In order to allow the networks to go into the syndication business and acquire financial interests in programs produced by independent producers, as the FCC has proposed, the consent decrees would have to be modified or eliminated. It now appears that the Department of Justice may be willing to amend the consent decrees to "permit the networks to produce themselves more programming than they are allowed to produce at present," and thereby acquire a financial interest in the programming they broadcast because they produce the programming themselves. Any such change would have to be approved by the Federal District Court in Los Angeles.

2. Hollywood Lobbies Congress

Many comments received by the FCC before its tentative de-

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232. Report and Order, supra note 3, at para. 30. This position was also found reasonable in Mt. Mansfield, 442 F.2d at 486.
233. Mt. Mansfield, 442 F.2d at 486. See supra text accompanying notes 22-24, for a further discussion of this position.
cision was published suggested that discussion of the FISR repeal was premature. Those who oppose repeal would prefer the rules to be attacked at a time when cable and other new technologies pose a more viable challenge to the free television industry. Congress' reaction to the FCC debate is an important consideration here. An extensive discussion of the deregulation in radio broadcasting notes that "[a]lthough the commission can allow some relaxation of rules and guidelines, legislation is required to keep the courts from overturning FCC decisions or to prevent future commissions from reimposing the regulations."239

Interest in the FCC debate spread to the Congress when Representative Henry Waxman (D-Calif.) "introduced a bill (H.R. 2250) that would prohibit any change in those [financial interest and syndication] rules or in the commission's accompanying prime time access rule for five years."240

Representative Tim Wirth (D-Colo.), Chairman of the Telecommunications Subcommittee and one of the bill's sponsors, is against deregulation for the sake of deregulation.241 "We must only deregulate when it is warranted by the level of competition—and the level of competition in the video marketplace simply does not justify lifting those rules which were carefully designed to protect the public interest from the lack of competition now facing the networks."242 As an objective voice, Representative Wirth's statement carries great weight. Congress will continually be up against the strong broadcast lobby, and "[i]n part, it is precisely because the broadcasting industry is so powerful that politicians don't want to lose control over it."243

H.R. 2250 eventually passed the House Telecommunications Subcommittee.244 The subcommittee also passed an amend-
ment "that would void any action by the FCC after August 1 [1983] and before enactment of H.R. 2250 if it is inconsistent with H.R. 2250."²⁴⁵

In August 1983, Senator Pete Wilson (R-Calif.) introduced S. 1707, the Competition in Television Production Act, a bill which mirrors the House Legislation.²⁴⁶ It has been referred to the Senate Commerce Committee, where there is little support for the bill because the Chairman is unwilling to address the issue until the FCC has completed the proceeding.²⁴⁷

At the time of this writing, FCC Chairman Fowler has said that he would not attempt to alter the rules until after 1984.²⁴⁸ Members of Congress are still concerned that "the FCC [could act] on the rules in early 1985, while the new session of Congress will be getting organized and won't be in a position to block the FCC's action."²⁴⁹ Senator Wilson is currently attempting to delay change of the rules by reviewing his effort to attach a five-year moratorium on the rules to a pending bill.²⁵⁰

3. The President Gets Involved with the FISR

At a meeting on September 28, 1983, FCC Chairman Mark Fowler briefed President Reagan and White House staff members on the extremely controversial FISR.²⁵¹ The meeting brought speculation from members of the motion picture industry as well as network executives because Fowler had never briefed the President before, and more importantly, because it is well known that "the President maintains close ties with members of the motion picture industry who have denounced the commission's tentative proposal to liberalize the rules . . . ."²⁵²

²⁴⁵. Id. at 29.
²⁴⁹. Id. at 1, 27.
²⁵⁰. Id. at 27.
President Reagan later called in "pro-network administration officials," Secretary of Commerce Malcolm Baldridge and the United States Justice Department's antitrust chief William Baxter, to give the argument in favor of immediate total repeal of the FISR.\textsuperscript{253} A presidential aide gave the Hollywood argument "that the networks are still too powerful to be freed from restrictions."\textsuperscript{254}

President Reagan made public his pro-studio position in a letter read during a Senate Commerce Committee hearing on November 2, 1983.\textsuperscript{255} The President called for a two-year moratorium on changing the FISR.\textsuperscript{256} According to the President's letter, he is seeking "time to 'allow [Congress] to give the issue further study and monitor future changes in the marketplace, while at the same time ensuring continuing healthy competition within the industry.'"\textsuperscript{257} Shortly thereafter, both the Department of Justice and the Department of Commerce changed their positions regarding the FISR to ones in favor of the administration position.\textsuperscript{258}

The presidential announcement came the day before members of the film industry and independent station representatives met with network officials to work out a compromise regarding the FISR.\textsuperscript{259} Some members of Congress urged these negotiations because they themselves are reluctant to be involved in this "industry feud."\textsuperscript{260} As expected, both sides proposed very different limitations on networks' financial interest in and syndication of independently produced programs distributed by the networks.\textsuperscript{261}

\begin{footnotes}
\item[254] \textit{Id.} The President disclosed that to avoid any charges of a conflict-of-interest, he is "donating any residual payments from his 52 movies to charity," however the amount of the payment is "currently less than $1,000 a year." \textit{Id.} at 21.
\item[255] Leddy, \textit{supra} note 251, at 23.
\item[256] \textit{Id.} at 1.
\item[257] \textit{Id.} at 23.
\item[258] \textit{Id.} at 1.
\item[259] \textit{Id.} at 23.
\item[260] \textit{Id.}
\item[261] \textit{Id.} The networks agreed to limiting their ownership to 49\% of television programs "in exchange for the right to syndicate anything except prime time programs." \textit{Id}. The studios were receptive to the proposal of allowing the networks to bargain for program ownership, "but insisted that producers, in exchange for sharing ownership with the networks, be given comparable shares of network advertising revenue generated by their shows." \textit{Id}. In addition, the networks offered to support the restrictions on syndicating prime time programs until 1992, two years later than the FCC's tenta-
The negotiations between the parties eventually stalled and "ABC and NBC told top congressional leaders Jan[uary] 23 [1984] that they are backing off their current push to ease the regulations"—ABC until the end of 1984, and NBC for a reason-
able period of time. These two networks blame "the Hollywood side for causing a stalemate in the negotiations by bargain-
ing in bad faith." CBS's efforts to negotiate with the studios failed in mid-February because the "two sides were un-
able to agree on a definition of 'financial interest.'"

"[W]ith pressure from the White House and additional heat
from Congress, the FCC eventually backed off of its plan to
ease the restrictions and agreed to give Hollywood and net-
work negotiators a chance to develop a compromise set of
rules." After all negotiations failed, Chairman Fowler indi-
cated that "he will press ahead with his drive to relax the
FCC's financial interest and network syndication rules . . . ,"
after the FCC sees how Congress reacts to the breakdown in
negotiations. Although everyone is waiting for Congress to act, it is possible that the House and Senate will not address
the issue because of its tight timetable during an election year
session. The fact remains, though, that "Congress has legis-
lation in hand that would prevent the FCC from easing the
rules, and it previously was prepared to enact it." Meanwhile, "[a] House oversight subcommittee . . . accused
President Reagan of acting improperly by calling Mark Fowler,
Federal Communications Commission chairman, to the White
House last September [1983] to privately discuss the financial
interest and network syndication rules." The February 3,
1984 subcommittee report concluded that President Reagan
"undermined the fairness and integrity of the rule-making

dive proposal. Id. The studios and independent station representatives responded by stating that they would agree to "allowing the networks to syndicate only one type of show—educational programs." Id.
263. Id.
266. Leddy, supra note 264, at 3.
267. Id. at 21.
268. Id.
269. Leddy, supra note 265, at 1.
proceeding” by privately involving himself in the affairs of the FCC, an independent agency.\textsuperscript{270} Instead, the Reagan-Fowler conversation should have been recorded on the public record “in accordance with FCC rules regarding \textit{ex parte} discussions about pending rule makings.”\textsuperscript{271} Fowler insisted that there was no impropriety in not placing his conversation with the President on public record because “’it was a straight briefing to the President on this issue [FISR] and other communications matters’” and because the President “did not try to influence the FCC’s position.”\textsuperscript{272}

IV
Conclusion

History shows that networks have controlled the television airwaves since the inception of television. The three major networks continued their growth, even in the face of court decisions and FCC rules designed to limit network control and increase network competition. The FISR have played an important and necessary part in the expansion of participation and competition in the television industry. While the networks would prefer the situation to be as it was in the beginning—with no competition, a secured viewing audience, and easy money in the bank—that situation is no longer an option. Competition to network television exists; independent stations can now sustain themselves as viable alternatives for the viewing public by providing the diversity that is so much needed in television programming.

For the first time in television’s almost forty-year history, independent producers are able to work with the creative control they deserve and need. The financial control that the independent producers now have assures both the independent producers and independent stations of their survival. In turn, the success of the independent stations assures the ability of small or new advertisers to thrive in the most effective advertising device available—television. Ultimately, the success of the advertiser assures the consumer of more efficient and economical purchasing.

This scenario closely resembles the situation considered by

\textsuperscript{270} \textit{Id.}
\textsuperscript{271} \textit{Leddy, Congress spars with Fowler, ELECTRONIC MEDIA, Feb. 16, 1984, at 3.}
\textsuperscript{272} \textit{Id.}
the public interest mandate under which the FCC operates. While cases and statutes refuse to define what the "public interest" is, it seems clear that the present situation will benefit independent producers and consumers more than it will benefit the three huge corporations. As the National Association of Independent Television Producers and Distributors notes, the "rules 'remain necessary to the development of any program marketplace which is self-regulatory by means of competition through diversity rather than oligopoly.'"273 History shows that if these three huge corporations gain any control at all by repeal of the FISR, they will be able to gain strength and move forward to control again the entire broadcast industry. The current healthy television marketplace, which the FISR established, speaks for itself in the name of increased competition and diversity in programming. These two goals continue to benefit the "public convenience, interest or necessity"274 and greatly "encourage the larger and more effective use of radio [and television] in the public interest."275

If the FCC's tentative decision is finalized, the question will remain whether the FCC has acted and continues to act within the "public interest" pursuant to 47 U.S.C. section 303.276 In making this determination, the FCC will be closely watched by all those who favor retention of the FISR. In addition, the public will continue to watch television with the hope of a broader choice of programming. The networks claim that repeal will lead to diversity in the marketplace. The question will be whether there will continue to be competition in the marketplace which will further diversity and help monitor the actions of the networks in the marketplace. It is hoped that the public interest will remain a force behind a healthy and competitive market.

275. Id.
276. Id.