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The Syndication And Financial Interest Rules: Is It a "Prime Time" for a Change?

by ROBERT M. Osher*

I
Introduction

On July 21, 1982 the Federal Communications Commission (FCC) released a Notice of Proposed Rule Making (Notice),¹ which would abolish the television network syndication and financial interest rules (Rules).² The Notice was the result of the recommendation from an FCC study instituted in 1977,³ which was a “wide-ranging inquiry into commercial television network business practices.”⁴

The FCC undertook the study to determine the effect of its rules on television network conduct. For some years, the FCC has tried, where warranted, to reduce federal regulation of the broadcasting industry. Nearly twenty years had passed since the FCC had ordered such a broad inquiry into the broadcast industry.⁵ A special staff was created to study the syndication and financial interest rules, which limit the three major networks (Networks)⁶ to first run network broadcast profits. The special staff recommended regulatory change.

The syndication rule prohibits the Networks from licensing, distributing or selling programming to television stations for

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⁴ Notice, supra note 1, at para. 1.
⁵ Id.
⁶ "Network(s)" as used in this article refers to one or more of the three major networks: American Broadcasting Company (ABC), National Broadcasting Company (NBC), and Columbia Broadcasting System (CBS).
non-network broadcast.\textsuperscript{7} The financial interest rule prohibits the Networks from purchasing a financial or proprietary interest in distribution, exhibition or other commercial use of any television program produced in any part by an independent producer. The Networks are limited to the right to broadcast the program on Network telecasts.\textsuperscript{8} The effect of these Rules is that the Networks must rent, rather than purchase, programs for Network exhibition.\textsuperscript{9}

The basic fallacy underpinning the Rules is that the licensing fee the Networks will be willing to pay for the syndication right is less than the additional revenue the producer will be able to accrue in the syndication market. The FCC believed that by regulating certain Network practices, programming wealth would be shifted to the program producer, who would use the money to create diverse, quality programming. Ten years after the Rules' promulgation, the special staff reported that the "rule[s] were not necessary when adopted, and in any event, could not possibly deter the practices that [these rules were] designed to reach."\textsuperscript{10}

In its \textit{Notice}, the FCC requested comments on the following issues:

1. the effect of the rules on the producers and networks and their ability to spread financial risks and rewards;
2. whether the rules in fact achieve any balancing or bargaining power between the producer and network;
3. whether the rules create a bargaining imbalance between the networks and non-network outlets to acquire and make programming available through their various delivery systems;
4. the effect on the relationship of the FCC Rules and the Justice Department consent decrees obtained against the networks;
5. what impact the deletion of the rules would have on the independent television stations; and
6. whether the protection of program producers from the bargaining strength of the networks is the appropriate concern of the commission.\textsuperscript{11}

Although the FCC requested comments on six distinct is-

\textsuperscript{7} 47 C.F.R. § 73.658(j)(i) (1982).
\textsuperscript{8} Id. § 73.658(j)(ii).
\textsuperscript{9} Id. § 73.658(j)(i), (ii).
\textsuperscript{10} Notice, \textit{supra} note 1, at para. 2.
\textsuperscript{11} Id. at paras. 40-42.
The major disputes between the Networks and producers are far more limited. Basically, the producers, opponents of repeal, claim that independent television stations will be harmed by the Networks' ability to "warehouse"—or hold off the market—potential syndicated shows. The theory is that the diminishing supply of popular off-network programs weakens the independent stations' ability to compete for sponsors, thus creating higher advertising rates which further impair the independent stations' ability to compete. The Networks, proponents of repeal, claim that the FCC's justifications for enactment of the Rules were questionable from the outset, and even if originally correct, are no longer valid given today's television market. Furthermore, the Rules raise the cost of television programming because of inherent risk-sharing inefficiencies and encourage concentration of T.V. program protection, instead of creating diversity as planned. The Networks further contend that there is no precedent or overwhelming financial reason for them to warehouse off-network programs and thus prevent their broadcast in syndication markets.

In its simplest terms, this is a battle of giants: the Networks versus the large motion picture studios and other independent producers of television programming. The two financially powerful sides are fighting over the lucrative syndication market; the Networks want a share of the syndication pie. The core of the syndication market is the off-network rerun of successful network program series. The remainder of the syndication market consists of first-run shows especially created for the syndication markets and foreign T.V. series.

Many of the arguments presented in this battle over syndication dollars are mutually destructive. Any attempt to reconcile all of the arguments would be futile. No total resolution can be achieved by logic itself; rather, the issues can be weighted to favor either side if the television business is viewed as a continuum. Because of the very fluid nature of the business,
strong arguments on behalf of a particular position may later serve to undercut that position in another area of discussion. This article focuses on whether the Rules actually solve the problems they were created to correct. Conceding the Networks’ dominant position as gatekeeper of the broadcast industry, the author concludes that these particular Rules are not the most efficient way to limit Network domination given today’s technologies and broadcast practices.

II

FCC Jurisdiction

A. History

Throughout the history of the FCC, the agency has instituted investigative studies into television network practices. The Rules were promulgated in an era when television business practices were much different from those of today. The FCC could not have anticipated the explosive growth in technology and the changes in the market relationship among the producer, sponsor and Network. The history leading up to the Rules’ enactment demonstrates the FCC’s systematic attempt to limit Network dominance.

As early as 1938 the FCC was investigating network practices in the radio industry. In 1941, the FCC issued the Report on Chain Broadcasting. The resulting rules regulated the following practices: “exclusive affiliation of stations, territorial exclusivity, term of affiliation, option time, right to reject programs, network ownership of stations, dual network operations, [and] control by networks of station rates.” In 1946, these regulations were extended to television.

On other occasions, the FCC instituted studies into the T.V. broadcast industry to determine if regulation of a business practice was desirable. In particular, a 1965 Notice of Proposed

19. Notice, supra note 1, at para. 3.
20. Id. at para. 32.
21. Id. at para. 3.
22. FCC, REPORT ON CHAIN BROADCASTING in Docket No. 5060, 40 RAD. REG. 2d (P & F) 82 (1941).
Rule Making stated:

The information and data before the Commission appear to establish that network corporations, with the acquiescence of their affiliates, have adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs.

In 1970, after much debate, the FCC found its concerns were valid, and accordingly, promulgated the syndication and financial interest rules.

Subsequent to the FCC action, the Department of Justice looked into the dominant market power of the Networks. As a result of suits instituted by the Department of Justice, the Networks entered into consent decrees which dictated even greater restrictions on Network business practices. Generally, the consent decrees enjoined the Networks from purchasing certain financial interests in independently produced shows, set limits on the number of in-house Network-produced programs and controlled both the timing of negotiations between the Networks and independent program producers and the terms of agreements between them. Many of the consent decree provisions are effective for only a limited number of years.

In 1977, the FCC once again chose to study these practices.

26. Id. at para. 4.
27. 47 C.F.R. §§ 73.658(j), (k).
30. See cases cited supra note 29.
In its findings, the FCC special staff recommended repeal of the syndication and financial interest rules.\textsuperscript{32} Opponents of repeal argued that the original justifications for the regulations were still valid. Therefore, an understanding of Network dominance in the 1960's is crucial to comprehending why the FCC adopted the Rules.

B. The Three Networks

In the 1960's, when the FCC was considering the adoption of the Rules, the Networks were the dominant force in program access.\textsuperscript{33} In 1970, after an extensive study of the television industry, the FCC noted,

\begin{quote}
only three organizations control access to the crucial prime time evening television schedule. In the top 50 markets, which are the essential base for independent producers to market programs outside the network process, they are at such a serious disadvantage that prime time first run syndicated programming has virtually disappeared.\textsuperscript{34}
\end{quote}

The FCC hoped the adopted rules would open access for new producers in both prime time syndication and network television production,\textsuperscript{35} diminish network control over program availability\textsuperscript{36} and allow stations to fulfill their public duty of broadcasting programs that better reflect the needs and interests of the community.\textsuperscript{37} In writing the Rules, the FCC incorporated three major objectives: "1) enhancing the profitability of program producers; 2) restraining or diminishing the networks' bargaining power, allegedly derived from their control over access to affiliated stations and employed to extract syndication and other financial interest from producers; and 3) preventing networks from favoring programs in which they had these interests."\textsuperscript{38} This framework was the cornerstone for

\begin{flushright}
\textsuperscript{32} See Notice, supra note 1, at para. 31.
\textsuperscript{33} Notice of Proposed Rule Making, supra note 25, at para. 8 (1965).
\textsuperscript{34} 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, 394 (1970) [hereinafter cited as Report and Order].
\textsuperscript{35} Id. at para. 23.
\textsuperscript{36} Id. at paras. 21-27.
\textsuperscript{37} Id. at para. 26.
\textsuperscript{38} 2 FCC NETWORK INQUIRY SPECIAL STAFF, AN ANALYSIS OF TELEVISION PROGRAM PRODUCTION, ACQUISITION AND DISTRIBUTION IN NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 725 (1980) [hereinafter cited as 2 FCC NETWORK INQUIRY STAFF].
\end{flushright}
the adoption and preservation of the Rules.39

III
The Effect of the Rules on the Producers and Networks

A. The Cost of Program Development

The Networks claim that the Rules promote inefficiencies in program development risk sharing.40 This theory assumes that program development is a risky business. For example, an internal NBC study of its development successes and failures claims that the practice of choosing which shows to buy for prime time programming from independent producers is an expensive undertaking.41 First, a producer will “pitch” an idea for a proposed show to the Network development department. If the idea has the potential to become a financially viable program, the Network will then commission the producer to write a script for a pilot show or demo.42 The script will be produced by the independent producer with funds made available by the Network. However, “[f]ew scripts ever become pilots. Even fewer pilots turn into series.”43 Even fewer shows last the three to four seasons necessary for them to become a successful syndicated program.44

Because of the high failure rate of pilots, demos and series, development is inherently very risky. Of the 105 pilots and demos NBC financed between 1979 and 1982, only twenty-one of these shows made the Network schedule.45 In two instances, a series was based on two or more pilots or demos.46 Six series were cancelled in their first year.47 Seven more are presently in their first year, and undoubtedly a number of them will be

39. Id. at 726.
40. NBC Comments, supra note 15; at 119-20; Broadcasting, Jan. 31, 1983, at 28; Broadcasting, Jan. 24, 1983, at 37; Hollywood Reporter, Jan. 18, 1983, at 36. A pilot is a one time produced version of a proposed T.V. show. Presumably upon viewing it the Network will be better able to decide if it should invest in the production of the series for a T.V. season. A demo is a short version of a pilot.
41. NBC Comments, supra note 15, at 112.
42. Id.
43. Id.
44. 2 FCC Network Inquiry Staff, supra note 38, at 599.
45. NBC Comments, supra note 15, at 113.
46. Id.
47. Id. at 114.
cancelled before they achieve potential syndication value.\footnote{Id.} NBC spent $75 million during this period to develop eighty-one pilots.\footnote{Id. at 113.}

Opponents of repeal argue that development is just a cost of doing business and is not as risky as, for example, financing a Broadway play.\footnote{ICF REPORT, supra note 13, at paper 1, 1-26.} This analogy is tenuous at best. For a producer of Broadway plays, development costs are similarly a cost of doing business. If one agrees that the risk of failure is greater in the live theatre, then the profits of success should likewise be greater. Otherwise, the producer would invest his development dollars in another medium.

Still, opponents of repeal support their position that development is just a cost of doing business by noting that once a show commitment is made, the independent producer can obtain capital to finance the production of his show.\footnote{Id.} The smaller independent producer can affiliate with the major motion picture studios or larger independent producers for financial help.\footnote{Id.} In fact, the Networks often require such an arrangement.\footnote{Id. at 1-27.} Thus, the argument follows, if risk capital is available, then the risk is being taken by those individuals who want to share in it.\footnote{Id.} The independent producer can look to many studios and producers for support, while there are only three networks.\footnote{Id. at 1-26 to 1-27.} Therefore, the greater number of options available to the independent producer, the more efficiently risk is spread.\footnote{Id.}

B. Efficient Risk Sharing

A characteristic of television production is that the producer will incur substantial costs at the start of production. Generally, the licensing fee paid by the Network to the producer for his prime time show does not cover production costs.\footnote{2 FCC NETWORK INQUIRY STAFF, supra note 38, at 728; Report and Order, supra note 34, at para. 10.} The producer is forced to produce his programs at a deficit using outside funds to make up the difference.\footnote{2 FCC NETWORK INQUIRY STAFF, supra note 38, at 728.} The amount of
money the producer must supply above the Network licensing fee proceeds represents the risk which the producer is willing to take in return for the possibility of sharing in the rewards. A producer who is not willing to take this risk will look for a financier who will pay a premium to purchase the risk and the possible rewards. Some producers may wish to sell only a portion. The exact allocation of risks and rewards between the producer and Networks depends on several factors.

Assuming that the Networks are free to assume the risk and to share in the accompanying rewards, three major factors will determine the allocation:

1) the willingness of the parties to assume all or part of the risk; 2) the ability of the Networks, large independent producers, and major studios to spread the potential losses over a portfolio of shows, so that successes will balance losses; and, 3) the financial ability of the producer to shoulder some of the risk.

At times when the Networks are averse to assuming risk, they will offer the producer a premium to retain it. The Rules force the producer to find another risk bearer or assume more of it himself. If the show is a success, the producer will be in a better position than if he transferred risk to the Network for a greater licensing fee. This result occurs because when one party is risk-averse, the bearer of the risk receives a monetary premium for assuming the risk. However, if the show is not a success and syndication revenues are small or nonexistent, the producer would have been better off if he had transferred the risk.

Where revenues are uncertain and neither party is averse to assuming some risk, the Network licensing fees will be lower than in the above situation, because payment will not reflect the monetary enticement to transfer risk. Thus, when risk aversion is not a factor, the producer will be in the same position whether he retained all his rights or transferred some risk.

59. *Id.* at 616-22.
60. *Id.*
63. 2 FCC Network Inquiry Staff, *supra* note 38, at 616-22.
64. *Id.*
65. *Id.*
66. *Id.*
to the Networks for a higher licensing fee.\textsuperscript{67}

Presently, the producer is forced to go to a large independent producer or to the studios to find backers who will share in the risk. "However, in the process of shifting risk to the suppliers, the aggregate amount of risk taking is increased since the risk pooling function of the network is reduced."\textsuperscript{68} Risk pooling highlights the inefficiency of FCC regulation. A Network, due to its financial size and portfolio, may feel it can successfully cover losses with successes. The Networks have the "gateway" power to television households, the control of program mix and selection, and financial strength. Arguably, these characteristics make the Networks the most efficient risk taker. Yet, the Rules eliminate the Networks from the risk market, thus forcing the transfer of risk and possibly raising the cost of production.\textsuperscript{69}

The Justice Department agrees with this view: "It is possible that the rules, by precluding what may be the most efficient risk spreading technique, to some extent add to production costs."\textsuperscript{70} Furthermore, "the rules in their present form have no justification to warrant even the relatively minor inefficiencies they appear to cause."\textsuperscript{71} The network special inquiry staff notes that if the suppliers are averse to bearing risks and the Networks are efficient risk sharers, then "the effect of a ban on network acquisition of rights that have uncertain value is to raise the cost of program production."\textsuperscript{72} This ban hurts the small and intermediate sized suppliers, because they do not have the option to shift their risk to the Networks.\textsuperscript{73} Therefore, the Rules which prevent the Networks from acquiring all risk associated with the production of a program may create inefficiencies.

\section*{IV
Balancing of Bargaining Power}

In adopting the syndication and financial interest rules, the
FCC believed that the bargaining position of the small independent producer would improve. In enacting the syndication rule, the FCC claimed, "Relieved of the need to grant to networks large portions of his broadcast profit, the producer's ability to operate in the network television program market will be greatly enhanced." The theory was that left unregulated, the Networks would abuse their market power and systematically deprive producers of their syndication rights as a precondition for Network broadcast.

In 1965, the FCC became concerned that the Networks would totally dominate the production as well as distribution of T.V. programming because of their ability to distribute programs nationally. A Network broadcast of a show could expect to be aired in most cities and towns in the United States. Since many of these markets have three or fewer stations in their respective broadcast area, the formation of another Network was unlikely. This gateway to three nationally interconnected affiliate systems assured the Networks a superior bargaining position.

A. The Networks' Financial Interest

In 1970, the FCC concluded, as a purported basis of fact, that if the Networks could compete for syndication rights and a financial interest in a show, the producer was compelled to choose a Network for financial support if he wanted his show aired. "[N]etwork judgment in choosing new programs is substantially influenced by their acquisition of subsidiary interests in the programs chosen." This theory is no longer accepted, as shown by the report of the FCC's Network Inquiry Staff (Network Inquiry Report). The Networks are highly competitive with one another and if a producer has a good show idea, the Networks will compete for that potential show.

75. Id.
76. Report and Order, supra note 34, at paras. 11-12.
77. Id.
78. Id.
79. Id. at para. 21.
80. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 603.
The great show idea and its resulting program may be so valuable to the Networks because of scheduling/lead-in appeal and potential viewership levels, that one or all three of the Networks may be willing to forego syndication rights to purchase the program.\textsuperscript{81} A distinction must be made, however, between small, intermediate, and large independent program suppliers. It is unlikely that repeal of the Rules will have much effect on the small or large program supplier's ability to retain syndication rights.\textsuperscript{82}

The large independents and the major studios have a firm foothold in the Networks' prime time schedules.\textsuperscript{83} The Networks are careful to keep their dominant suppliers of programming happy.\textsuperscript{84} For example, if a Network does in fact cancel a Warner Brothers show, it is likely to purchase a few pilots from the studio so that a new Warner Brothers show may replace the cancelled one.\textsuperscript{85}

A Network cannot afford to offend its major sources of programming, because after the initial production contract expires, the producer is usually free to take his proven show or shows to another Network or broadcast outlet, a situation the Networks do not like.\textsuperscript{86} As a result of their financial strength and domination of market supply, it is not likely that the larger program producers can be pressured into giving up their syndication rights to the Networks.

On the other hand, the small program supplier will have difficulty retaining his syndication rights in any event. Presently, a producer of one or two shows will affiliate with a large independent producer, usually by request of the Networks as a precondition of Network sale.\textsuperscript{87} A small supplier who affiliates with a large independent will usually "lay off" syndication rights and total creative control.\textsuperscript{88} If the Networks are allowed to enter this market, the small supplier will have a choice of three more entities that will demand syndication rights for financial help.

The impact of repeal, however, will be significant to the inter-
mediate-sized supplier of programming. If this producer has a sought-after program idea, he may be able to retain his syndication right. The Networks will be three more potential buyers for his product. Arguably, the greater the competition, the better the possible deal the producer can negotiate. The producer would have the option to shift his risk elsewhere for a higher licensing fee. Furthermore, the Networks may be interested in hiring such a producer to develop programs for them in an employer/employee relationship. The Networks could guarantee development dollars, salary and security. At a point where the producer is successful enough, he will be in a position to demand a share of the profits. Thus, because the Rules inefficiently shift risk, the potential amount the producer can receive with the Rules in effect is less than if the Rules were repealed.

B. The Networks Participate Indirectly with Syndication Revenues

The FCC reasoned that the Rules would prevent the Networks from gaining valuable rights from the independent producer. The producer would become more financially independent because he would retain the profitable syndication rights. Eventually, the producer's dependence on the Network would be diminished. “[W]ith the expanded syndication market as a feasible alternative to network exhibition, his bargaining position will be improved and he can be expected to develop into a stable and continuing alternate source of programs and ultimately to compete for network time.” However, in 1980, in its Network Inquiry Report, the FCC determined that the Rules did not affect the source of the Networks’ bargaining power, and therefore, could not be expected to diminish that power.

The major reason the Network bargaining power has not diminished is that the Rules fail to change the Networks’ position as gatekeeper. Accordingly, the Networks continue to

89. Justice Comments, supra note 70, at 17.
90. Memorandum Opinion and Order, supra note 74, at paras. 29-30.
91. Id.
93. Report and Order, supra note 34, at para. 29.
94. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 732.
95. “Gatekeeper” refers to the Networks' ability to control access to the prime time television schedule.
exercise monopsony\textsuperscript{96} powers in other ways.\textsuperscript{97} First, under the Rules, a producer cannot bargain away his syndication rights.\textsuperscript{98} As a result, the Networks offer lower licensing fees because they cannot purchase these rights.\textsuperscript{99} Theoretically, the price will be lowered by approximately the same amount of anticipated syndication revenues the Networks would have acquired without the Rules in effect.\textsuperscript{100} The licensing fee typically turns out to be lower than production costs.\textsuperscript{101} The producer is forced to spend more money on production than is taken in from network licensing fees and hope that syndication revenues will be greater than the Networks anticipated. However, there is no guarantee the show will ever be syndicated or that syndication revenues will offset losses. Because the Rules prevent the producer from opting to sell his syndication right to the Networks, the producer must bear the additional costs or find alternative ways of sharing or eliminating risk.

Second, the Networks can prevent syndication of a show by signing contract provisions which prevent such syndication during the network run of the show.\textsuperscript{102} This limitation is secured in a contractual right of exclusivity.\textsuperscript{103} The Networks are limited by the Justice Department’s consent decrees from making exclusivity clauses longer than four years as measured from the airing of the first prime time episode.\textsuperscript{104} After the initial contract term, a producer of a successful show can usually bargain not to include an exclusivity clause in his network contract.\textsuperscript{105} Yet, such clauses are the rule rather than the exception.

Additionally, a spin-off provision is contained in many production contracts.\textsuperscript{106} The producer agrees in advance that the

\begin{footnotesize}
\textsuperscript{96} Monopsony is "[a] condition of the market in which there is but one buyer for a particular commodity." BLACK'S LAW DICTIONARY 908 (5th ed. 1979).
\textsuperscript{97} 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 732.
\textsuperscript{98} Id. at 907.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 728.
\textsuperscript{102} Id. at 469-72.
\textsuperscript{103} A contractual right of exclusivity entitles the Network to an exclusive right to broadcast the programs in the television series. By holding this right, the Networks can prevent broadcasts in other dayparts, cable systems and other competitive forms of distributions. See 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 469-73.
\textsuperscript{105} 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 609, 610.
\textsuperscript{106} Id. at 473.
\end{footnotesize}
Network will have all rights to any spin-off shows (i.e., a new T.V. series based on characters from a continuing series), or at least a right of first refusal for a given number of years.\(^{107}\) A renewal option clause, another common contract provision, typically lasts for five years.\(^{108}\) Although licensing fees are often renegotiated before the end of the option years, they do prevent a show from moving over to another Network.\(^{109}\) Thus, the value of these clauses is their ability to prevent losses by show defections or competing spin-off series.\(^{110}\) Therefore, the producer's inability to bargain his syndication rights away has not increased his bargaining power. Unless the FCC is prepared to limit the use of these types of contract clauses, the Rules will make no difference in the television marketplace power balance.

C. The Rules Do Not Promote Program Diversity or Quality

A long-time fundamental goal of the FCC is to increase program diversity.\(^{111}\) In 1970, the FCC claimed that greater competition between the producer and the Networks would increase the number and types of shows produced.\(^{112}\) The FCC concluded that the Rules would give the producer a competitive chance because the Networks could no longer favor shows in which they had a financial stake.\(^{113}\) This competitive chance would translate into greater revenues at the producer level, and thus would stimulate ventures into novel areas of programming,\(^{114}\) such as first-run syndicated programs. Even assuming that the Rules have had the effect of spreading wealth from the Networks to the producer, there is no evidence that this transfer of wealth promotes diversity or quality.

There are two major reasons why the Rules do not achieve these goals. First, the Rules do not increase competition in the production market. There have always been many suppliers who have tried to sell their ideas to the Networks.\(^{115}\) Even opponents of repeal concede that the competition is fierce.

\(^{107}\) Id.
\(^{108}\) Id. at 467, 609.
\(^{109}\) Id.
\(^{110}\) Id. at 610.
\(^{111}\) Report and Order, supra note 34, at para. 21.
\(^{112}\) Id.
\(^{113}\) Id.
\(^{114}\) Id.
\(^{115}\) 2 FCC Network Inquiry Staff, supra note 38, at 327-33.
“Turnover remains very high; barriers to entry seem small . . . . This competitive and wide-open market is of great benefit to creative talent.”\textsuperscript{116} Prime time programs produced by nonaligned independents have remained constant since the Rules were introduced.\textsuperscript{117}

For the most part, it is the game shows and magazine format programs which have emerged.\textsuperscript{118} These first-run syndicated shows usually appear in the 7:30 or 8:00 p.m. half-hour time slot.\textsuperscript{119} The credit for their emergence does not rest with the syndication and financial interest rules. Rather, the prime time access rule, also enacted in 1970, is responsible for the increase of first-run syndicated shows.\textsuperscript{120} The hoped-for spillover effect of innovative quality prime time shows into syndication markets has had limited success.\textsuperscript{121} One such example is Universal’s \textit{Operation Prime Time}. These first-run syndicated prime time offerings closely resemble their Network counterparts; unfortunately, without a guaranteed nationwide affiliate system in place, these programs have had difficulty raising sufficient advertising revenues to justify their continued production.\textsuperscript{122}

It has been argued that a producer retaining his syndication rights will spend more money on his productions because he has a vested interest in their continued marketability.\textsuperscript{123} This greater production expenditure is supposed to translate into greater quality.

Quality, in the FCC sense, means the creation of innovative show alternatives which might not have mainstream appeal.\textsuperscript{124} An increase in production expenditures is tangential to the creation of quality programming because originality, ingenuity and creativity are not necessarily expenditure sensitive.\textsuperscript{125} For instance, public broadcasting programs, which many consider to be quality productions, are generally produced for less money than their network counterparts. Since the Rules in no

\textsuperscript{116} ICF \textit{Report}, \textit{supra} note 13, at 1-29.
\textsuperscript{117} \textit{Id}.
\textsuperscript{119} \textit{Id}.
\textsuperscript{120} 2 FCC \textit{Network Inquiry Staff}, \textit{supra} note 38, at 413-22, 736.
\textsuperscript{121} \textit{Id}.
\textsuperscript{122} \textit{Id}. at 439-43.
\textsuperscript{123} \textit{Id}. at 618-19.
\textsuperscript{124} Report and Order, \textit{supra} note 34, at para. 7.
\textsuperscript{125} 2 FCC \textit{Network Inquiry Staff}, \textit{supra} note 38, at 726, 515, 516.
way benefit a producer who chooses this route of production, they therefore have no bearing on the ultimate program choices of the producer and broadcaster.\textsuperscript{126} In fact, the Networks that can more easily spread losses might be more willing to gamble on quality shows. One example, \textit{Hill Street Blues}, initially did not generate enough advertising revenue to even cover the Network’s licensing fee. Hence, it can be argued that the financially weaker producer is more likely to risk the development of a quality program in a situation where he can offer to sell some or all of his risk to a Network in exchange for his syndication right.

The second and probably more significant reason the Rules do not promote diversity and quality is that they fail to change the Networks’ position as gatekeeper. The Networks will only accept those shows that fit into their programming schedules.\textsuperscript{127} Typically, the Networks work closely with a producer after his script is ordered and exercise an extensive amount of creative control.\textsuperscript{128} Furthermore, even if the Rules do stimulate more ideas initially, the subsequent effect of Network handling will reshape these ideas into programs that will fit the Network schedule. Therefore, as long as there are only three Networks, the amount of diversity at the script/pilot stage will remain irrelevant. Ironically, a side effect of this show homogenization may reduce diversity. If the Rules do encourage more rapid and widespread syndication of off-network programming, diversity will diminish as the more profitable reruns are broadcast in lieu of first-run syndicated programs.\textsuperscript{129}

\textbf{V}

\textbf{Do the Rules Create a Bargaining Imbalance?}

The greatest threat to the Networks’ dominance is the technology revolution. Due to the cable explosion, there may well be more than three Networks. Opponents of the Rules claim that superstations and pay T.V. systems have such great access to American households that they are in effect “networks” and are in competition with the traditional “free” broadcast Networks.\textsuperscript{130} Many of these new broadcast systems are com-

\begin{flushright}
126. \textit{Id.} at 726, 727.
127. \textit{Id.} at 367-72.
128. \textit{Id.} at 356-72.
130. NBC Comments, \textit{supra} note 15, at 28, 29.
\end{flushright}
peting for the same original programming ideas, theatrical motion pictures, sporting events, advertising dollars and viewers.\textsuperscript{131}

The most successful advertising-supported cable network is WTBS, Ted Turner's superstation.\textsuperscript{132} The superstation is distributed via satellite to cable systems throughout the United States. WTBS has over twenty-three million subscribers.\textsuperscript{133} The largest pay supported network is Home Box Office (HBO) with over eleven million subscribers.\textsuperscript{134} It is estimated that basic cable service reaches thirty-five percent of the nation's total number of homes with television. This represents some twenty-nine million homes.\textsuperscript{135} Pay service, which charges an additional fee beyond basic cable service, features predominantly theatrical films, sports, and special interest programming and reaches in excess of 14.5 million homes.\textsuperscript{136} The growth of cable since 1970, when the Rules were adopted, has been extraordinary. The number of homes subscribing to cable has increased 455\%.\textsuperscript{137} These facts illustrate a changing television market.

A. Pay Services Have a Competitive Advantage

The Networks have complained that the Rules prevent them from competing with other broadcast outlets.\textsuperscript{138} The Networks argue that since they cannot bargain for non-network revenues, they cannot bid competitively against pay television suppliers which are able to invest more because of syndication and other non-network profits.\textsuperscript{139} The Federal Trade Commission supports this position: "network attempts to exercise market power would be limited by the growing number of new distribution technologies."\textsuperscript{140} Furthermore, the Commerce Department has warned that "the restrictions placed on risk and reward sharing might make the Networks 'unable to compete

\begin{footnotes}
\begin{enumerate}
\item Id. at 34-50.
\item \textit{CableVision}, Nov. 29, 1982, at 117.
\item \textit{Id}.
\item \textit{CableVision}, Nov. 15, 1982, at 121.
\item NBC Comments, \textit{supra} note 15, at 139, 140.
\item Justice Comments, \textit{supra} note 70, at 22.
\end{enumerate}
\end{footnotes}
effectively with other program distributors and exhibitors who enjoy the ability to participate as full partners' in program production."\(^4\)

For example, let us assume that HBO, a pay service, spends ten cents an hour per subscriber on programming during prime time. HBO, with eleven million subscribers, can afford to spend $1.1 million per hour regardless of the amount of actual viewers. The advertising-supported Networks spend less per viewer but because they have larger potential audiences, can afford to spend more per hour in prime time programming as long as their average audience tunes in. Let us further assume that, with an average audience, the Networks can afford to spend $1.2 million per hour during prime time. If HBO can generate more than $100,000 in syndication or other markets for the one hour series for which the Networks and HBO are bidding, then HBO can offer the producer a higher licensing fee. As HBO adds subscribers or the Networks lose viewers, HBO will be able to increase licensing fees to the point where the producer will make a greater profit by selling his syndication rights to HBO. The Networks, unable to recoup some of the licensing fee loss in syndication markets, will be forced out of competition for the "best" programming. Consequently, the "best" programming may no longer be initially available to the public on traditional free television.

The pay T.V. services all basically provide the same theatrical movies to subscribers.\(^4\) By adding a series, the pay services will increase subscriber loyalty as well as build an independent personality. Presently, the pay services are offering first-run traditional program series to subscribers, such as new episodes of the ex-Network series *Paper Chase*. According to a president of a pay cable network, "[T]he key to Showtime's future is series."\(^4\) It must be realized that these pay services are often owned by the very companies that finance the program's production. Showtime is owned by a partnership of movie studios that produces a large percentage of the Networks' present prime time offerings.\(^4\) Therefore, a pay service or its studio owner can collect revenues from all ancil-

\(^{141}\) *Id.; see also* ICF REPORT, *supra* note 13, at 1-30 to 1-46.

\(^{142}\) NBC Comments, *supra* note 15, at 34, 35.

\(^{143}\) VARIETY, Apr. 28, 1982, at 75, 88.

\(^{144}\) VARIETY, May 12, 1982, at 450, 461; Wall St. J., Nov. 8, 1983, at 1, 24.
lary markets and thus outbid the regulated Networks for the top shows.

Another example of the Networks’ inability to compete is demonstrated by the inability of NBC’s parent corporation, RCA, to compete effectively in the videodisc industry.\textsuperscript{145} The Rules restrict RCA’s ability to develop programming in new technologies by “preventing RCA from acquiring syndication profit share in outside-supplied programs that it helps finance.”\textsuperscript{146} RCA is also hampered in the distribution of programs it produces itself.\textsuperscript{147} Yet, as mentioned in previous sections, since the producer can only receive a fair value for the additional rights he gives up, “sales to non-networks are not inherently advantageous simply because these purchasers can buy syndication rights.”\textsuperscript{148} The main fear is that eventually the “best” programming will only be available to those people who can afford to pay for services like HBO and Showtime.\textsuperscript{149}

B. Other Technologies Are Increasing Diversity

One assumption on which the FCC based the Rules was that the “American commerce and industry will support greater diversity of program and program sources than presently are represented in network schedules.”\textsuperscript{150} The assumption was correct; however, the Rules did not effect the change. New technologies have increased diversity and provided program suppliers with new avenues to sell their program ideas. Since 1970, the Networks’ market share has dropped significantly, corresponding to the rise in cable and other new program distribution technologies.\textsuperscript{151} Frederick Pierce, President and Chief Operating Officer of ABC, predicts that the Networks’ share of the television audience will “dip to 60-70% by 1990.”\textsuperscript{152} This audience drop will reflect the fact that viewers are tuning into their pay services during prime time. Furthermore, the exposure of movies on pay T.V. diminishes the potential audience share for subsequent Network broadcasts.\textsuperscript{153}

\begin{itemize}
  \item \textsuperscript{145} \textit{Broadcasting}, Jan. 31, 1983, at 29.
  \item \textsuperscript{146} \textit{Id.} (quoting RCA).
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} Justice Comments, \textit{supra} note 70, at 23.
  \item \textsuperscript{149} \textit{Broadcasting}, Jan. 31, 1983, at 9.
  \item \textsuperscript{150} \textit{Report and Order, supra} note 34, at para. 36.
  \item \textsuperscript{151} \textit{Hollywood Rep.}, Mar. 3, 1983, at 29.
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Bus. Wk.}, Feb. 21, 1983, at 78-89.
\end{itemize}
These pay services include: subscription television (STV);\textsuperscript{154} Multipoint Distribution Services (MDS);\textsuperscript{155} Satellite Master Antenna Television (SMATV);\textsuperscript{156} Low Power Television (LPTV),\textsuperscript{157} and Direct Broadcasting Satellite (DBS).\textsuperscript{158} These new types of broadcast distribution will continue to chip away at the Networks' market share and thus their dominance; "[a]ny attempt by a single network to reduce the price paid to its program suppliers would lead to a shift of suppliers to the other two networks or other distribution systems."\textsuperscript{159} Thus, the changing nature of the industry places in question the use of the syndication and financial interest rules as a mechanism to achieve FCC policies.

VI
Impact of the Elimination of the Rules on Independent Television Stations

The strongest argument in favor of retention of the Rules is that repeal would be disastrous to independent television stations. The success of independent television stations (independents) has been astounding in recent years. In 1973, the eighty-eight independents achieved a total broadcast income of $6.7 million.\textsuperscript{160} In 1978, with an additional thirteen stations, their income exceeded $154 million.\textsuperscript{161} According to the FCC Inquiry Report, increases in national and local spot advertising expenditures helped independents obtain greater advertising

\textsuperscript{154} Subscription television consists of "[s]crambled signals that are transmitted by an over-the-air station to viewers who have equipped their television sets with special decoders. Subscribers pay a fee to receive the broadcast every month and a fee to lease the decoder." ICF REPORT, supra note 13, at 4.

\textsuperscript{155} Multipoint Distribution Services are the "[s]hort distance, line-of-sight transmission of one channel of TV programming to selected locations." Id. at 2.

\textsuperscript{156} Satellite Master Antenna Television "offers services through the use of antenna systems installed on multiple-dwelling units which transmit satellite-fed programming and local television broadcasts." Id. at 3.

\textsuperscript{157} Low Power Television refers to "TV stations which the FCC permits to operate at low power without observing the standards of operation that apply to full power stations." Id. at 2.

\textsuperscript{158} Direct Broadcasting Satellite refers to "[a] satellite which delivers a signal directly to an earth station supplied by the viewer." Id. at 1.

\textsuperscript{159} Syndication, Financial Interest Comments High-Stake Rulemaking, BROADCASTING, Jan. 31, 1983, at 29 (quoting the FTC).

\textsuperscript{160} FCC, 40TH ANNUAL REPORT 124-26 (1974).

\textsuperscript{161} Federal Communications Commission, T.V. Broadcast Financial Data Table 3 (1978); see 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 428-29.
income;\textsuperscript{162} "[t]he most direct beneficiaries of this increased advertiser demand have been the local stations, both affiliates and independents."\textsuperscript{163} Independents have been able to capture these advertising revenues because they have competed successfully with Network affiliates for audience share, within certain broadcast periods of the day. Between 5:00 and 8:00 p.m., the independents consistently have counter-programmed their most popular shows, off-network programs, against the less popular local and national news on Network-owned stations and affiliates.\textsuperscript{164} During the half-hour after national news and before prime time, the prime time access rule prevents local affiliates from broadcasting off-network programs.\textsuperscript{165} It is during the 5:00 to 8:00 p.m. period that independents generate a large percentage of their income. This rapid growth in the independents’ market share, the increased demand for limited broadcast advertising space, and the prime time access rule have greatly enhanced the profitability of independent stations. Repeal opponents claim that gains by independents may be severely curtailed.\textsuperscript{166} It is argued that without the Rules the Networks will: (1) acquire syndication rights and warehouse off-network programs; (2) favor their affiliates when selling syndication licenses; (3) increase advertising rates for all programming because the independents’ market share will diminish; and, (4) as a result, force independents to curtail broadcast hours or go out of business.\textsuperscript{167}

A. Warehousing Is Against the Networks’ Best Interest

Opponents of the repeal have stated in no uncertain terms that if the Networks are allowed to syndicate and purchase financial interests in television shows, the Networks will warehouse-delay program entry into the syndication market.\textsuperscript{168} The practice of holding back possible syndication entrants until their value will not threaten prime time Network programs would severely limit the main program source of the independ-

\textsuperscript{162} 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 427-28.
\textsuperscript{163} Id. at 428.
\textsuperscript{164} Justice Comments, supra note 70, at 28-31; 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 428, 429.
\textsuperscript{165} 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 253-55.
\textsuperscript{166} ICF REPORT, supra note 13, at iii.
\textsuperscript{167} Id. at paper 2, 1-1.
\textsuperscript{168} Id. at 1-2.
ents’ profitable 5:00 to 8:00 p.m. time slots. This assertion assumes that a delay in syndication entry will lower the popularity of an off-network series and thus lower audience share. Because independents generate a large percentage of their profits from these off-network programs, as audience share goes down, so do the independents’ advertising revenues. If the independents become financially fragile, they will not be able to offer diverse programming to the public. This result is contrary to the FCC’s goals of promoting diversity and the financial security of independents.

Network control of subsidiary interests in a program series, particularly syndication rights, does raise the risk that the Networks can determine the timing of the release for syndication, thus affecting the number of off-network programs available to independents. Furthermore, the Networks could set conditions on the use of off-network programs so that the programs would be less of a threat to Network programming. This argument, however, has three basic flaws. First, the Networks must be sufficiently able to prevent access of the independents to a majority of off-network programs. Otherwise, the independents will purchase shows from other off-network program syndicators. Presently, there are a substantial number of off-network programs for sale. Since it takes approximately three years for a show to have syndication value, the Networks could not start warehousing for at least three years after repeal. “Thus, the networks can continue to influence the entry of series into syndication by exercising their exclusivity rights rather than by retaining syndication rights.”

The FCC inquiry into the 1968 syndication market indicated “that none of the networks controlled a sufficient portion of the syndication rights to programs to exercise market power.” Opponents of repeal contend that FCC investigations during this time prevented the Networks from exercising market

169. Id. at 1-1.
172. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 732, see Justice Comments, supra note 70, at 36.
173. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 732-33.
174. Id.
175. Id. at 733.
176. Id.
power. It is unlikely, however, that after repeal the FCC and Justice Department would allow the Networks to drive the independents out of business.

A second flaw in the warehousing theory is that the Rules do not presently prevent this behavior. As noted earlier, through exclusivity clauses in Network contracts, the Networks can effectively prevent or delay the entry of shows into the syndication market. The Networks can also prevent syndication entry by: (1) cancelling a show before a sufficient number of episodes have been produced; (2) lowering quality of first-run programs, thereby lowering syndication appeal; (3) adjusting Network schedules so that a larger percentage of first-run Network shows will not be suitable for the family oriented off-network market; and (4) purchasing syndication rights and re-running the shows during the daytime, thus diluting the value of the program to the independents. The Networks have not gone to these extremes, probably because such practices are unprofitable. Although Network warehousing is undesirable, the Rules should not be retained to prevent an activity they have been unable to control.

A third flaw in the warehousing theory is that if one Network decides not to warehouse, the strategy is severely undercut. For instance, if Network A is in desperate need of cash, it may decide to syndicate its shows for cash flow reasons. If the other two Networks do not follow suit, Network A will have a windfall because it can demand higher fees due to the limited supply of off-network programs. Since the overall need for off-network shows is finite, one network may be able to alleviate the shortage sufficiently so that warehousing would be ineffective. Thus, market forces are an effective deterrent to potential Network warehousing.

Warehousing of valuable syndication rights might not produce the Networks' allegedly desired goal of less competition from independents. "Today, it would be difficult for the Networks to acquire even the small share (of the syndication market) that they had in the past, considering the dominant position in off-network programming that the studios have established . . . ." As long as there are either off-network or

177. ICF Report, supra note 13, at 6-6.
178. Id. at 6-7; see 2 FCC Network Inquiry Staff, supra note 37, at 732.
179. ICF Report, supra note 13, at 6-6.
180. NBC Comments, supra note 15, at 212.
other syndicated shows of equivalent value for sale, a Network policy of warehousing would be a futile, expensive mistake. Since the marketplace for new shows is very competitive and the studios are financially strong, the Networks' advantage as gatekeeper may be so insignificant that the producer may not have to give up syndication rights at all.

It should be noted that syndication revenues are substantial. A recent studio survey estimated that over a one year period, the studios took in revenues of $300 million from the syndication of made-for-television programming, with a profit of over $150 million.\textsuperscript{181} It is not clear whether Network advertising revenue gains, due to the demise of competition from the independents, will be greater than potential syndication revenues.

The Networks advance three other reasons why warehousing would not occur.\textsuperscript{182} First, the value of syndication rights diminishes as the program gets older "since virtually all programs lose popularity as they grow older."\textsuperscript{183} Therefore, withholding shows might produce tremendous revenue losses. Second, Networks would probably not own the entire syndication profit share. Keeping a show from the syndication market would deprive the profit participants from syndication profits. There would be great pressure from these participants to get programs into syndication. Third, assuming that warehousing would lower the independents' audience share, there is no guarantee that viewers and advertisers will turn to the Networks. Rather, new broadcast technologies may capture this viewing public and the all important "lead in" avenue to the prime time schedules.

Historically, Networks have scheduled their most successful shows in the early part of prime time, hoping to "lead in" and keep the viewer throughout the evening.\textsuperscript{184} This has been a successful programming strategy. By encouraging the independents' viewers to switch to alternate sources of programming, the Networks could conceivably lower their entire prime time audience share, thus lowering their revenues. Since the above arguments are based on what the Networks may or may not do in the wake of repeal, the fear of warehousing is realis-

\textsuperscript{181} Id. at 141 (quoting Booz, Allen & Hamilton Inc. Report 1982).
\textsuperscript{182} Id. at 213-14.
\textsuperscript{183} NBC Comments, supra note 15, at 213.
\textsuperscript{184} 2 FCC Network Inquiry Staff, supra note 38, at 369.
tic. Yet market forces and the growth of new technologies and their ability to purchase original first-run program series may very well make warehousing a suicidal strategy.

B. Networks Will Not Favor Their Affiliates

In 1970, the FCC believed that if the Networks “are prevented from operating as syndicators or from sharing in the profits from distribution by others in the domestic syndication market, there will no longer be any inducement to choose for network exhibition . . . programs in which they have acquired other rights.”\(^{185}\) Although the Rules have indirectly achieved this narrow objective, it is not clear that the Networks, in fact, ever favored shows in which they had a financial interest.\(^ {186}\) One study on the FCC Rules has noted that, statistically, Networks were more likely to cancel shows in which they had a financial stake than those in which they did not.\(^ {187}\)

The FCC was also afraid that Networks would favor their affiliates in syndication sales.\(^ {188}\) The FCC raised an argument based on conflict of interest, stating that “[the Networks] are in the position of selling programs to independent stations in competition with their own network programs on affiliated stations, and they compete against independent syndicators in the affiliated-station market where they have an advantage due to their permanent relationship with the stations.”\(^ {189}\) The FCC based this assertion on the fact that, in 1970, of the top fifty markets which reach over seventy-five percent of the available audience, only fourteen have one or more independent VHF\(^ {190}\) stations.\(^ {191}\) VHF stations have greater viewership than the more numerous UHF\(^ {192}\) stations because of better reception by viewers, and simpler channel tuning. VHF stations also have lower operating costs for broadcast transmission.\(^ {193}\) Therefore, to reach an adequate audience the syndicator must turn to net-

\(^{185}\) Report and Order, supra note 34, at para. 29.
\(^{186}\) 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 733.
\(^{188}\) Report and Order, supra note 34, at para. 30.
\(^{189}\) Id. at 394.
\(^{190}\) VHF signifies Very High Frequency television (channels 2-13).
\(^{191}\) Report and Order, supra note 34, at para. 7.
\(^{192}\) UHF signifies Ultra High Frequency television (channels 14-83).
\(^{193}\) 1 FCC NETWORK INQUIRY SPECIAL STAFF, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 64-78 (1980).
Work affiliates for market penetration. "Not only is there the natural tendency of an affiliate to do more business with its dominant supplier, but the program distribution process is much simpler via a network." Yet, at the time the Rules were adopted this situation did not exist. For example, in 1964 six major studios controlled 67.6% of the total domestic syndicated dollar sales.

Ironically, the Networks might have incentives not to favor their affiliates. The Networks' revenues depend on audience share. Network affiliates are not required to broadcast (clear) each Network offering. When an affiliate does not clear a Network show, the Network audience is smaller, and a smaller share of the audience means smaller advertising revenues because advertisers pay according to the number of viewers the program attracts. The Network Inquiry Report found that clearance of Network programs is greatest during prime time and the presence of an independent VHF station increases the clearance of a VHF affiliate during other times in the day. If these findings are accurate and the Networks want to increase their clearance rate and thus their share of the market, they might want to encourage the stability of independents and prevent their affiliates from showing syndicated off-network programs during non-prime time hours. Therefore, it is unlikely that, given the freedom to syndicate, the Networks will act any differently from the way they did before the Rules were adopted.

C. Effect on Advertising Rates

Opponents of repeal have strongly argued that advertising rates will go up if the Networks re-enter the syndication field. All parties agree that when advertising rates go up, the public indirectly pays the increase through higher product prices. This threat of increasing advertising rates may be accomplished in two ways.

First, if a show producer is able to sell his syndication and

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194. Report and Order, supra note 34, at para. 7.
195. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 733.
196. Id. at 510-11.
197. Clearance is "[a] station's agreement to broadcast the program being fed by the network during a given time slot." ICF REPORT, supra note 13, glossary at 1.
198. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 262-63.
199. ICF REPORT, supra note 13, at 1-3.
financial interest rights, he can expect to receive higher licensing fees than is presently possible. This argument assumes that the Networks will pass on the added licensing fee cost to the public by demanding greater advertising revenues. Initially, the Networks will have greater expenditures because of the time delay of syndication profits. Yet, the Networks should have no problem borrowing funds secured by this valuable property right. Thus, if the Networks are, in fact, the most efficient risk holder and if the Networks have correctly estimated syndication revenues, then the cost of programming should go down rather than increase. Hence, the assumption that the Networks will routinely demand higher advertising revenues if they choose to pay higher licensing fees is unfounded.

Second, it is argued that if, due to Network warehousing, independents cannot deliver the large audiences that the advertisers desire, the advertiser will be forced to turn to the Networks for exposure. Since advertising space is limited on the Networks, the demand will exceed supply and prices will go up. "[W]e are dealing with supply and demand of an extremely valuable commodity, the cost of which has been rising at a rate out of proportion to the rest of the economy because of insufficient supply." Research by advertising agencies has shown that where independents are strongest, spot advertising costs are lowest. Thus, competition which increases the supply of advertising time, has the effect of bringing advertising costs down. This result is not surprising. Yet, this argument is valid only if the Networks in some way collude to force the independents' audience share down.

As discussed in earlier sections, it might be neither in the Networks' best interests nor within their power to harm the independents. Unlike during the 1970's, advertisers can now turn to new broadcast media for exposure. The Association of

200. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 612-22.
202. The studios and other syndicators in this situation have been able to borrow money. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 332, 333.
204. Id. at 8.
205. Id.; see also BROADCASTING, Jan. 31, 1983, at 31.
National Advertisers (ANA) does not disagree with this point.\textsuperscript{207} The ANA still believes, however, that in the near future the Networks will remain the dominant outlet and the most efficient means for advertisers to effectively reach their markets.\textsuperscript{208} If new broadcast media can sufficiently increase the supply of advertising space and are able to attract the desired audience, then the supply argument will be severely undercut. An alternative way to restrain the Networks, which will prevent potential abusive Network practices at a lower cost to society, may be achieved by balancing possible Network abuses of market power with the inefficiencies of the syndication and financial interest rules.

VII
Alternatives to the Syndication and Financial Interest Rules

The \textit{Network Inquiry Report} states that the Commission must overcome two main obstacles if it hopes to achieve a rational approach in intervening in the network-supplier relationship.\textsuperscript{209} First, any attempt to restrict the Networks’ use of monopsony power in acquiring program rights must encompass all of the avenues the Networks have to exercise this power.\textsuperscript{210} Thus, the new rules should only regulate practices which cannot be justified on the “basis of economic efficiency.”\textsuperscript{211} Second, placing more profits in the hands of the producer will not guarantee diversity; therefore, rules to regulate contract terms should not be based solely on the goal of diversity.\textsuperscript{212} These guidelines will be difficult to follow when constructing alternatives to the Rules.\textsuperscript{213}

One possible alternative is to allow the Networks syndication rights only while the series is in first-run Network production.\textsuperscript{214} Presumably, the Networks will pay higher licensing fees for such a right, and thus be exposed to more risk.\textsuperscript{215} The

\begin{itemize}
\item 207. Ryan, \textit{supra} note 203, at 11, 12.
\item 208. \textit{Id.}
\item 209. 2 FCC \textit{Network Inquiry Staff, supra} note 38, at 762-63.
\item 210. \textit{Id.} at 761.
\item 211. \textit{Id.}
\item 212. \textit{Id.}
\item 213. \textit{Id.}; Justice Comments, \textit{supra} note 70, at 47.
\item 214. Justice Comments, \textit{supra} note 70, at 48.
\item 215. \textit{Id.} at 49.
\end{itemize}
Networks will have the incentive to syndicate the show as early as possible, because of the limited nature of the acquired right. Although this will simultaneously give the Networks the right to withhold programs, "they would be unable to control enough programs at any one time to make a withholding strategy profitable." 216 After prime time production is cancelled, the Networks will be required to divest themselves of their limited financial interest. 217 According to the Justice Department, enforcement of such a rule would not be difficult. 218

Another alternative is the extension of the prime time access period. 219 If a greater amount of high viewership time is reserved for first-run syndicated shows, independent producers will have a profit incentive to produce programs of network quality. As the number of shows produced increases, costs will come down because of greater production efficiencies, and this extended access period will increase production of first-run syndicated programs. 220 Critical to such a regulation will be provisions prohibiting Network in-house production for the extended access period. 221

Some inefficiencies will arise from this rule. The new "access period networks" will not have the promotional efficiency of the Networks 222 nor the ability to spread risk over as large a program schedule. The Networks, on the other hand, with a smaller broadcast schedule, will lose their efficiencies of scale. Prime time live news coverage will suffer because the Networks will have to ask for waivers to preempt the "access period network" programming. 223 Although an extended access period appears to be workable, there are no guarantees that the public will actually receive anything different from what the Networks would have provided. Given the increased costs of such a plan, with no guarantee of diversity, other options may be more desirable.

216. Id.
217. Id. at 48.
218. Id.
219. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 765.
220. Id. at 764-65.
221. Id. at 765, 766.
222. Promotion inefficiencies arise because when the Networks have no financial stake in a show's syndication revenue, they have no incentive to promote the show through their prime time counterparts. Further, the Networks are not compensated for any promotion that may in fact arise from the prime time counterpart's own promotion.
223. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 763-68.
A third option is to allow the Networks a minority financial interest in a program with no control over syndication distribution.224 The Networks will be able to obtain profits from syndication and eliminate promotional inefficiencies. This option might be particularly difficult to enforce. Through contract provisions, the Networks may be able to retain control of syndication distribution while appearing to have only a minority interest.225 It is hoped that other minority interest holders will complain to the FCC if such a practice is developed.

Many other options have been discussed: (1) to allow the Networks to syndicate programs, yet require divestiture if they do not exercise this option within a certain time period;226 (2) to allow purchase of syndication rights up to a certain percentage of programs (e.g., thirty-five percent) shown during prime time;227 (3) to regulate the pilot process by limiting exclusivity, options and spin-off clauses;228 and (4) to allow the Networks to purchase a fixed financial interest in their programs "that would increase as their share of television viewers decreases, which is expected to happen as a result of cable competition."229 Presently, the parties to the controversy are attempting to reach a compromise. Many of these options have been brought to the bargaining table, but no final accord has yet been reached.230 Clearly, any compromise should prevent the Networks from dominating the creative and distribution markets.

**VIII**

**Conclusion**

In sum, drastic changes in the television marketplace, and questionable underlying assumptions indicate that it is time to replace the syndication and financial interest rules. The threat of the Networks' exercising monopoly power, in the wake of repeal, illustrates the need for new regulations more carefully constructed to prevent unwanted Network dominance. Al-

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224. See Justice Comments, supra note 70, at 49-50.
225. Id.
226. Id.
227. Id. at 50.
228. 2 FCC NETWORK INQUIRY STAFF, supra note 38, at 763-79.
though this article mentions only a few of the potential regulatory options, the FCC should enact some type of narrowly focused syndication/financial interest rule contemporaneously with repeal of the present Rules. Failure to do so would result in the FCC taking a dangerous gamble: allowing the Networks to police themselves. The ultimate fear is that without some type of rule the Networks will change the way the present market operates, and market forces alone will be unable to prevent undesired Network practices.