

Christine Becker  
University of Notre Dame

### Finsyn Begin Again?

Most of the rhetoric surrounding the ongoing FCC biennial review of media ownership rules involves predictions: representatives of the media conglomerates predict that if the rules remain in place, their competitive power within the current multimedia landscape will decline, and ultimately diversity and localism will suffer. Representatives of independent organizations predict that if the rules are relaxed, their competitive power within the current multimedia landscape will decline, and ultimately diversity and localism will suffer. As these descriptions illustrate, the rhetoric on both sides is often strikingly similar; however, it's the meaning behind this rhetoric that contrasts deeply.

As a way of trying to define these contrasting meanings, I'd actually like to look at the rhetoric surrounding a set of rules not under direct investigation in the biennial review: the former Financial Interest and Syndication Rules, commonly known as finsyn. Why these rules as a case study? First, we can see in finsyn a template for the rules currently under consideration: the finsyn rules were revoked a decade ago because they were deemed unnecessary in light of the competitive landscape of 1990s television, and this revocation led very directly to considerable media concentration. As such, both sides have used finsyn as an example to justify their predictions about what will happen if the FCC relaxes ownership regulation. Further, finsyn has not merely been used as an example; there are many who are in fact calling for a return to some form of the rules to ensure that independent producers and writers still have a significant role in broadcast and cable television, especially if the Commission insists on relaxing broadcast regulations. Thus, finsyn serves as an effective case study.

In this paper, I will analyze the rhetoric being used by both the pro-finsyn and anti-finsyn camps. As we will see, both sides claim that their positions on finsyn sufficiently satisfy the FCC's desire to ensure competition and diversity in broadcasting. The difference is that they simply insist on different definitions of competition and diversity to be used as the Commission's standards of measurement. For the anti-finsyn conglomerates, the focus is on horizontal competition and viewpoint diversity; for the pro-finsyn independents, it's on vertical competition and source diversity.

Skipping over the history of finsyn. Instituted in 1971, revoked in early 90s, they were intended to control the three-network monopoly over broadcasting by severely restricting network ownership and profit participation in the shows that they aired, with the intended result of fostering more independent production and diverse programming.

What exactly has happened since finsyn was dismantled in the early 1990s, and why is finsyn a hot topic all over again? First, the Big Four networks currently control, whether through in-house production or co-production, about 76% of primetime network television.<sup>1</sup> Depending on whose numbers you look at and how those numbers are calculated, the six major nets control anywhere from 55% to 85% of their own line-ups, with CBS and FOX controlling the most of their own line-ups and NBC the least.<sup>2</sup> Moving beyond network television, a recent Morgan Stanley study showed that 85% of primetime television, whether network or cable, is controlled by only five companies,<sup>3</sup> and a Writers Guild of America survey found that 70% of compensated writers in Hollywood are paid by only six companies.<sup>4</sup>

All of this has translated into the virtual disappearance of truly independent production in television. In a study commissioned by the FCC, Dr. Mara Einstein assessed how the shares of programming by network suppliers have changed in the past three decades. She first charted the

top 20 suppliers (SEE FIGURE 1) in 1970, and noted that eleven of the top 20 were true independents, unaffiliated with either networks or studios, and then 1977, where 12 of the top 20 were unaffiliated. She then turned to the 1990s (SEE FIGURE 2), but for recent years couldn't even come up with 20 different suppliers and instead just went with a top 10.<sup>5</sup> There's seemingly no way to deny, no matter which side of the argument you're on, that primetime television production has become more concentrated since 1992, when finsyn started to be dismantled, and that the networks have significant leverage over program ownership and profit.

In response to figures like these, independent artists and their representatives have petitioned the FCC to regulate space for independent producers in television, through both production percentages and finsyn-like controls. (SEE FIGURE 3) For instance, the Writers Guild of America and the Producers Guild of America aren't asking for a return to finsyn, but they are demanding that for the six primary networks and all major cable services, 50% of prime time should come from a producer not affiliated with the particular network or cable service that airs it. The Coalition for Program Diversity has proposed a 25% minimum of independent production for primetime on the Big Four networks, beholden to finsyn restrictions. The Center for the Creative Community proposes a sliding scale, but no finsyn: the Big 4 and basic cable services owned by the Big 4 should take 35% of their primetime programming from independents, the WB, UPN and other advertising-supported cable services 25%, and new networks and subscription cable channels no limit. The most aggressive plan comes from The Caucus for Television Producers, Writers and Directors, which seeks to prevent networks and large cable services from producing more than 50% of their own programming in-house and from gaining financial interest and syndication rights on the remaining programming.

The networks and their conglomerate partners oppose all of these requests, of course, and argue vehemently against the necessity for or even legality of any minimum production source requirements or finsyn rules. First, on the standpoint of competition, the networks claim that the current horizontal competitive landscape in media industries dictates the structure of predominant network control over broadcast television and that, by extension, without this structure, free network television simply couldn't survive. Just as the independents had to turn to big studios during the finsyn era, they now need the conglomerates' deep pockets to help them cover deficit financing of programs, especially since the cost of primetime production has risen around 30% since the early 1990s, likely because of competition from cable.<sup>6</sup> The networks claim that if this substantial financial investment and subsequent profit participation is taken away from them in significant measure, they won't be able to afford the costly risks of supporting and airing high-quality, high-budget shows, and thus not only will independent producers lose from the very structural changes they're demanding, but so will viewers.

Further, when the independents point to charts of concentration and claim that competition has declined precipitously in network television, the networks think this drastically misrepresents the overall media landscape. They stress the fact that there are now seven primary television networks, over 1300 commercial stations, nearly 300 national cable networks and over 50 regional cable networks.<sup>7</sup> Disney lobbyist Preston Padden explains the network stance: "Finsyn was applicable when television consisted almost entirely of three networks. The courts threw it out when there were four broadcast networks and 100 cable networks. It plainly makes no sense in a world with seven broadcast networks and 300 cable networks."<sup>8</sup>

And because of this competition, the networks claim that if the competitive market demands independent voices, the market will receive independent voices. Les Moonves claims:

“All the networks are looking and begging for outside suppliers to provide the financial resources to go with these series. We’re forced to own (parts of) shows to help cover the deficit. We welcome as many outside suppliers as we can.”<sup>9</sup> And ultimately, it’s the viewer that decides. It shouldn’t be finsyn or an arbitrary percentage that controls programming; it should be the audience. Finally, the networks argue that if they truly are restraining fair competition, it’s a matter for the Justice Department, not the FCC.

Through these arguments, we can see that the networks are constructing a definition of competition with a horizontal outlook, that given the entirety of the current media landscape and its cutthroat competition, it is neither feasible nor reasonable to demand a return to any finsyn restrictions. In contrast, the independent viewpoint argues that the conglomerates are heavily manipulating the concept of competition in order to strengthen their control over just one slice—a very lucrative, influential and deep slice—of the media landscape: primetime television programming.

For their evidence, they first point to the fact that it’s not just minor, fly-by-night producers demanding a return of finsyn or minimum percentages of independent production. Even conglomerate companies like Universal and Sony which don’t own networks claim that they’re finding it difficult to break through network control of primetime.<sup>10</sup> As this indicates, the pro-finsyn lobby disputes the networks’ claims that horizontal competition provides a level playing field. For instance, a Writers Guild of America filing with the FCC points out that while the networks tout their many cable channel competitors, only 91 of the many operating cable channels reach at least 16 million homes, and 80% (or 73) of those 91 are owned or co-owned by only six companies, five of which also own broadcast networks.<sup>11</sup> Thus, to say that the networks are under fire from their cable competitors is to ignore the fact that in many cases they own those

supposed competitors, thereby in fact proving the case that there's little space for independent voices on television and that there are fewer and fewer separate ownership outlets for independent writers and producers to take their work.

The independent viewpoint also argues that the networks stretch this alleged horizon of competition to excessive distances, such as in a joint FCC filing from Fox, Viacom/CBS and NBC which cites "interpersonal communications" as a competitor and as evidence that there are plenty of outlets for expression available to consumers and thus no need to create more through regulation.<sup>12</sup> However, one seemingly cannot create a sitcom during interpersonal communications, nor can a viewer turn to a newspaper for a live-action drama or even to the internet for the kind of entertainment found on broadcast television. And for 43 million people in this country, broadcast television is their only access to television.

And in that single realm, according to independents, there simply and most certainly isn't a level competitive playing field. As *Weakest Link* producer Phil Gurin describes, "A good idea from an independent can get through, but it has to be that much stronger than the (in-house) studio's ideas."<sup>13</sup> Additionally, because of their control over programming line-ups, the networks can effectively control the profit potential of shows through scheduling and promotion, and even if an independent gets a show on their air, there's no guarantee it will be treated equally and fairly in those realms.

Further, because of their reliance on advertising revenue, the nets are risk-averse, and then because of their additional ownership dominance, they can control that risk through both economic and creative leverage. A WGA filing with the FCC cites a recent incident from the production of *The Education of Max Bickford* as an example. They claim that the creators wanted to push the show and its main character into more complex areas, but the network resisted and

ultimately fired those creators, who “were replaced by others who would do the network’s bidding.”<sup>14</sup> Tons of examples of creativity being squashed by the drive for profits in primetime.

Overall, the independents argue that the conglomerate viewpoint touting many competitive alternatives is moot if you look vertically, just at primetime programming and its lack of competition within schedules, not just across them and across different media. Within this scope, media consolidation has left few places for independents to turn, let alone viewers, and thus there can’t be true competition if there are limited alternatives for both suppliers and audiences.

The second definition under consideration is diversity. The conglomerates argue that even if there are fewer separate producers of broadcast programming today, we cannot automatically assume that diversity of programming has declined. The independents argue, on the other hand, that logic dictates that fewer separate voices means less diversity and greater homogeneity. Both opinions essentially hinge on different definitions of diversity.

In its Notice of Proposed Rulemaking for the current biennial review,<sup>15</sup> the FCC cites four standards of diversity that they factor into policy decisions:

- 1) viewpoint diversity, referring to the existence of a “wide range of diverse and antagonistic opinions and interpretations.”
- 2) outlet diversity, or the existence of multiple media outlets controlled by a variety of owners, “assuming that multiple outlets will increase the likelihood of available independent viewpoints.”
- 3) source diversity, or the existence of information and programming from multiple content providers.
- 4) program diversity: a variety of formats and types of content.

Viewpoint diversity has traditionally been the FCC's dominant goal; source and outlet diversity have been viewed largely as proxies for viewpoint diversity, and program diversity as evidence of viewpoint diversity.

The conglomerates insist that viewpoint diversity should remain as the dominant guide for the FCC's judgments, and that it is competition which will ensure such diversity, not regulation. Social commentator Virginia Postrel explains: "It's not in the interest of these large firms to be super-homogenous in their offerings. The ultimate user, the viewers, are so diverse that you have to offer lots of different kinds of programming."<sup>16</sup>

In fact, the conglomerates argue that television is as diverse as it's ever been, likely because of conglomerate adaptation to increased competition. Les Moonves exclaims: "I vehemently disagree with the idea that TV is more bland than it was 10 years or even 20 years ago. With *Survivor*, *The Sopranos*, *CSI*, *Law and Order*, *Sex and the City*, *The Bachelor* and *Fear Factor* all on the air, to call TV more bland is ridiculous. Especially in drama, this really is the golden age of television."<sup>17</sup>

The conglomerates also point to the Einstein study, part of which examines diversity in programming schedules across finsyn and post-finsyn periods, basically by quantifying genres and program categories.<sup>18</sup> The study concluded that because genre diversity expanded after the revocation of finsyn, "diversity is not measurably affected by the number of independent program producers; changes in the availability of formats turn on public taste rather than on any market power in the hands of the network buyer."<sup>19</sup> Besides which, the networks argue, there is no guarantee that independents will automatically satisfy viewpoint diversity. Michael Powell himself has espoused this contention: "I don't think it necessarily follows that (independent producers) are the only source of an independent viewpoint."<sup>20</sup>



Independents insist that it is diverse sources which will lead to diverse viewpoints, and that the conglomerates' reliance on viewpoint diversity is deeply flawed. First, viewpoint diversity as a standard is not easily measured, and any proof thereof is subjective. As former SAG president Richard Masur asks, "What possible objective metrics can we give you about diversity, other than opinion?"<sup>21</sup> The independents also attack the empirical evidence being used by the conglomerates to prove that viewpoint diversity is being served. First, they argue that the Einstein study is flawed in that it does not actually measure viewpoint diversity or even program diversity, but only program genre diversity and in the most general way possible.<sup>22</sup> (as a sidenote, Dr. Einstein herself just this week in B&C expressed regret that her study has been used to legitimate deregulation).<sup>23</sup>

The independents also view very differently the shows that the conglomerates point to as proving that quality and diversity of viewpoint have increased under media concentration. As Jonathan Rintels explains: "Consider the network shows most often cited in support of this claim [that television has never been better]: *Friends*, *ER*, *Law and Order*, *Law and Order: Special Victims Unit*, *Law and Order: Criminal Intent*, *NYPD Blue*, *The West Wing*, *Frasier*, *The Practice*. Not one of these quality shows is produced in-house by the network that airs it. Each of these shows is produced by an outside, independent producer."<sup>24</sup> For Rintels, source does matter. Only independent producers can provide truly innovative programming, since they are not beholden to the conglomerate structure driven only by profit and synergies, which leads to homogenous, bland and unchallenging programming. Thus only source diversity can ensure the flowering of diverse, quality programming.

With such evidence, the independents insist that source diversity must be the basis on which the FCC judges the need for regulation. It can be sufficiently and objectively measured,

and source diversity in the form of diverse ownership “is the single best way to ensure that as many points of view reach the public as the technology will permit.”<sup>25</sup> While the conglomerates argue that competition serves this role sufficiently, the independents insist that this is simply illogical. Sandra Ortiz, the Executive Director of USC’s Center for Communication Law and Policy, contends, “it is counterintuitive to believe that media ownership concentrated in the hands of the few results in greater diversity of any kind than ownership dispersed among many.”<sup>26</sup>

If the FCC assesses competition vertically, in terms of primetime program production, and considers diversity in terms of program sources, the pro-finsyn stance will carry strong weight. If, however, the FCC considers horizontal media competition and viewpoint diversity as their standards of measurement, the anti-finsyn conglomerate lobby will likely win. Given the commissioners’ stated stances on the current rules, three would seemingly side with the conglomerate definitions, while two would side with the independents. And this split in fact indicates that the FCC itself resists clear definition. As Philip Napoli has argued, while “the industries the FCC regulates have a unique capacity for social and political influence,” the Commission’s regulatory decisions are also often economic in nature.<sup>27</sup> Thus, “the FCC remains difficult to classify as either a purely economic or purely social regulatory agency,” and these concerns frequently compete and overlap.<sup>28</sup>

Of course, in recent decades, the FCC has certainly headed further down the path of the “marketplace approach” and has seemingly lifted socially-motivated regulation for economically-motivated reasons, all while still using the same socially-identified rhetoric of “public interest” and “diversity” as its supposed end goals. And especially with the diversity component, the conglomerate definition speaks to that position better than the independent

definition, given their argument that competition should determine viewpoint diversity, rather than regulation determining source diversity. Further, the reliance on numbers, charts, and genre taxonomies to define the nature of competition and diversity—the kind of empirical evidence that the FCC has asked for—seems necessarily to favor economic interpretations rather than social ones (and of course, as Napoli points out, it is those interest groups with economic stakes that have the resources to submit such evidence, meaning that the “public record that provides the foundation for Commission decision making is likely to contain far more economic analysis than social or political analysis.”<sup>29</sup>).

But where are studies of actual media content or how audiences use that content or how that content affects the social welfare of American society? These studies are not easy to conduct, and they can’t be done quickly enough to satisfy Michael Powell. But perhaps this is a direction we as television scholars can head in regard to the FCC’s power over television: what other definitions, perhaps social and cultural, of competition, diversity and localism can we devise? Or what about calling for structural diversity? After all, most television programming is supported by advertising, which automatically pushes content into the realm of the bland and homogenous, no matter who produces it. Why not push for what media scholar Robert Horwitz advocates, “a more mixed media system with different modes of financing?”<sup>30</sup> Or why not develop other standards of measurement, besides just competition, diversity and localism? What other ways can we understand how television and its industrial structures serve—or don’t serve—the public interest?

It’s perhaps pure fantasy to think that the FCC would actually pay attention to the answers to such questions or mandate any substantial structural changes, but to me it’s no more fantastical than Michael Powell’s belief that unchecked conglomerates in an advertising-based

system will serve the public interest and bring us delightfully diverse programming within a competitive atmosphere.

<sup>1</sup> Michael R. Gardner and Kenneth Ziffren, "Reply Comments by The Coalition for Program Diversity," (submitted to the FCC on February 3, 2003), 3. <http://www.wga.org/pr/0203/fccpdfs/DiversityCoalREPLY.pdf>

<sup>2</sup> Bill McConnell, "Over our dead bodies," *Broadcasting & Cable* (January 6, 2003). Lexis Nexis, accessed March 19, 2003. Diane Mermigas, "Finsyn repeal has yet to pay off," *Electronic Media* (June 3, 2002). Lexis Nexis, accessed March 19, 2003.

<sup>3</sup> Henry Jessell, "Voice and Choices: The sweet sounds of heated, contentious and robust debate," *Broadcasting & Cable* (January 20, 2003), 71.

<sup>4</sup> Charles B. Slocum on behalf of Writers Guild of America, West and Writers Guild of America, East, "Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry," submitted to the FCC on January 4, 2002, 22. <http://www.wga.org/pr/0102/WGA-Comments.pdf>

<sup>5</sup> Mara Einstein, "Part I: A Historical Perspective on Program Diversity," *Program Diversity and the Program Selection Process on Broadcast Network Television* FCC Media Ownership Working Group, Study No. 5, September 2002, 25-26. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A10.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf)

<sup>6</sup> Michael Freeman, "TV in Transition: Forging a Model for Profitability," *Electronic Media* (January 28, 2002). Lexis Nexis, accessed March 12, 2003.

<sup>7</sup> Victor B. Miller IV, Opening Statement, FCC Hearing Addressing Ownership Rules, Richmond VA, February 27, 2003. [http://www.fcc.gov/ownership/enbanc022703\\_docs/Miller.pdf](http://www.fcc.gov/ownership/enbanc022703_docs/Miller.pdf)

<sup>8</sup> McConnell, "Fin-Syn Fever."

<sup>9</sup> Pamela McClintock, "TV Industry Girds for Deregulation Showdown," ETOnline.com (January 3, 2003).

<sup>10</sup> McConnell, "Fin-Syn Fever."

<sup>11</sup> Charles B. Slocum, "Joint Comments of Writers Guild of America, West, Producers Guild of America, Shukovsky English Productions, John Wells Productions, Bungalow 78 Entertainment, Oh Shoot Productions, Gideon Productions, and UBU Productions," submitted to the FCC on January 2, 2003, 2-3. [http://www.democraticmedia.org/news/WGAw\\_Comments.pdf](http://www.democraticmedia.org/news/WGAw_Comments.pdf)

<sup>12</sup> "Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications, Inc. and Viacom," submitted to the FCC on January 2, 2003, 23-24. [http://www.democraticmedia.org/resources/filings/ownershipComment\\_Foxetal.pdf](http://www.democraticmedia.org/resources/filings/ownershipComment_Foxetal.pdf).

<sup>13</sup> Cynthia Littleton and Steve Hockensmith, *Hollywood Reporter* (February 18, 2003). Lexis Nexis, accessed on March 21, 2003.

<sup>14</sup> Slocum, "Comments of the Writers Guild," 5.

<sup>15</sup> FCC 02-249 Notice of Proposed Rule Making, pars. 33-39.

<sup>16</sup> Cynthia Littleton, "Taking on entertainment Goliaths," *Hollywood Reporter* (February 18, 2003). Lexis Nexis, accessed on March 21, 2003.

<sup>17</sup> McClintock, "TV Industry Girds."

<sup>18</sup> Einstein, "Part I," 3-37.

<sup>19</sup> Comments of Fox/NBC/Viacom, 46.

<sup>20</sup> Littleton.

<sup>21</sup> Greg Gatlin, "FCC gets opinions, few facts on owner rules," *Boston Herald* (January 17, 2003), 27. Lexis Nexis, accessed April 3, 2003.

<sup>22</sup> Rintels, "Comments," 5.

<sup>23</sup> Dr. Einstein herself has recently spoken out against the way that the conglomerates have used the results of her study. She believes that the study is being interpreted out of context, and that the overall concept of diversity itself is flawed and needs revision. See Mara Einstein, "Dereg? We Should Talk Re-Reg," *Broadcasting & Cable* (April 28, 2003), 50.

<sup>24</sup> Rintels, "Reply Comments, 7-8.

<sup>25</sup> Sandra Ortiz, "Comments of Sandra M. Ortiz in the Matter of 2002 Biennial Regulatory Review," submitted to the FCC on January 2, 2003, 25. [www.democraticmedia.org/news/Ortiz\\_Comments.pdf](http://www.democraticmedia.org/news/Ortiz_Comments.pdf)

<sup>26</sup> Ortiz, 13.

<sup>27</sup> Philip M. Napoli, "The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis," *Journal of Broadcasting and Electronic Media* 43(4) (Fall 1999), 566-568.

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<sup>28</sup> Napoli, 568

<sup>29</sup> Napoli, 574

<sup>30</sup> Horwitz, 32-33.