DOCUMENT RESUME

ED 180 012 CS 502 720

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TITLE Accountability and Broadcast Diversity: A Proposal for Community Control of Radio Formats.
PUB DATE Nov 79
NOTE 18p.: Paper presented at the Annual Meeting of the Speech Communication Association (65th, San Antonio, TX, November 10-13, 1979)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Broadcast Industry: *Differences: *Federal Regulation: Interests: *Programing (Broadcast): *Radio

ABSTRACT

The Federal Communications Commission (FCC) standards for diversity in radio broadcasting apply only to news and public affairs programing--not to entertainment programing. In addition, the FCC has defined diversity solely in terms of what any one station broadcasts regardless of what other stations in the same service area may be programing. Diversity as a goal of broadcast regulation can be examined in the context of three hypotheses: it is mandated by the First Amendment: it is necessary to remedy a structurally deficient system of broadcasting: and it yields pluralistic programing, which is itself a "meritorious good." Of the three, the latter may be the most significant according to economist Bruce Owen, who suggests, however, that format duplication may increase consumer satisfaction. Listeners who prefer a particular kind of programing comprise a "community of taste" and these communities delineate a market's need for pluralistic programing even though a particular community of taste may not be of enough economic interest to advertisers to support a station. One solution might be for the FCC to establish local boards to identify communities of taste and assign stations to each. This would necessitate some form of subsidy for those stations assigned unprofitable communities of taste. (TJ)

ACCOUNTABILITY AND BROADCAST DIVERSITY

A PROPOSAL FOR COMMUNITY CONTROL OF RADIO FORMATS

by

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Presented to the Mass Communication Division of the Speech Communication Association, San Antonio, Texas, November 1979.

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Of all the mass media, radio is the most abundant. Both in terms of the number of radio stations in operation (over 8,000) and the number of radio receivers in use (more than 425 million), radio today is as readily accessible as electricity. Although the number of hours spent listening to radio has dwindled in the last decade--due presumably to the increasing popularity of television--radio remains a steadfast ally, the only truly "portable" medium. To be sure, Americans purchased as many radios in 1976--nearly 31.7 million--as they did in 1965.[1]

But radio isn't nearly as diverse as it is abundant. Even in the major markets, where large numbers of listeners can support more than a mere handful of "formats,"[2] there is far more abundance than diversity. Among Chicago's 64 radio stations, for example, there are only 13 distinctive formats. While Chicago accommodates 15 "middle-of-the-road" stations, not a single station uses a "top 40" format.[3] Put another way, there are more stations in Chicago using the same format than there are different formats. Nationally, there are only 14 distinguishable formats (see Table 1).

Unhappily, given the dynamics of a competitive market and the Federal Communications Commission's reluctance to interfere with a licensee's discretion in the choice of format, format duplication is inevitable. That is, since format selection is strictly a matter of "public acceptance" and "economic necessity,"

TABLE 1

Format	Also characterized as	Number of Stations Using Format*
Middle-of-the-Road	Adult, adult contemporary, bright, uptempo, good or easy listening, standards entertainment, conservative	2530
Country & Western	Country, bluegrass, countrypolitan, contemporary country, modern country	1850
Top 40	Contemporary, rock, request, popular, hit parade	1479
Beautiful Music	Good music, instrumental music	602
Progressive	Underground, hard rock, folk, album oriented rock (AOR), alternative, free form, progressive rock	551
Religious	Gospel, sacred, Christian, inspirational	485
Black	Rhythm and blues, soul	248
Talk	Discussion, interview, personality, informational	240
Classical	Concert, fine music, semi-classical serious music	213
Golden Oldies	Nostalgia, gold, solid gold, solid gold rock, classic gold	174
Jazz		128
All News		117
Ethnic/Foreign Language		114
Agricultural and Farm		111

*Blocks of programming averaging more than 20 hours per week constitute a format; some stations use more than one format and are counted more than once.

Source: Broadcasting Yearbook 1979.

to quote the Commission,[4] lucrative formats are more likely to be duplicated than challenged so long as the market share commanded by a duplicate format exceeds what a new or different format might attract.[5] Even a truly unique format--one which services a loyal but less-than-profitable audience--can be abandoned if broadcasters can demonstrate financial losses attributable to the format itself.[6] In Chicago and elsewhere, it follows, only economically viable formats will survive; format diversity, therefore, reflects divergent interests and tastes *only* as *marketplace forces dictate*.

As a matter of principle, little can be said in opposition to diversity; that would "seem to be an argument against variety and choice in a heterogeneous society distrustful of centralized decision making."[7] As a matter of policy, however, little has been done to remedy an inherently deficient marketplace; the FCC, in particular, has been curiously lax in its effort to "secure the maximum benefits of radio to all the people."[8] Pluralistic programming, Roland Homet concludes in his recent study of communications policymaking, "is an ideal to be saluted but not implemented."[9]

Beyond its attempt to reduce the amount of duplicated programming between jointly-owned AM and FM stations,[10] the FCC's commitment to variety and choice has been limited to *intramedia* diversity--as opposed to intermedia diversity--and only in regard to news and public affairs programming.[11] Accordingly, broadcasters are required to attend to an elaborate ascertainment-of-community-issues procedure; they must accommodate certain access rights in the name of fairness and equity; and when time for license renewal they must specify the percentages of programming devoted to everything and anything except entertainment and sports. In other words, diversity is defined solely in terms of what any one station broadcasts, regardless of what other stations in the same service area may be programming; and diversity is defined only in the context of nonentertainment programming, as though a broadcaster's fiduciary responsibility--including a federal mandate to broadcast in the "public interest, convenience, and necessity"--applies only to a small fraction of total programming.

Deliberately, the FCC has established a "double standard" approach to broadcast regulation, a policy intended to strike a balance between, as the Supreme Court put it in 1940, "the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in the Communications Act, on the other."[12] Ergo, the FCC's programming policy:

> ...with respect to the provision of news, public affairs, and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop programming responsive to those identified needs. In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces.[13]

Precisely why the Commission decided the balance should be struck "with entertainment programming in one pan," the Court of Appeals lamented, "and everything else in the other is not clear."[14] That broadcasters will offer entertainment fare "to fill whatever void is left by the programming of other stations,"[15] as the Commission reasoned, runs counter to the available evidence. That First Amendment considerations justify non-intervention in entertainment programming--another FCC rationale--is similarly lame: "familiar First Amendment concepts would," the Court of Appeals suggested, "indicate a lesser--not a greater--governmental role in matters affecting news, public affairs, and religious programming."[16]

In sum, format diversity--or a lack thereof--has not been subject to regulatory scrutiny. Prodiversity policy focuses on nonentertainment programming and is intended to achieve only intramedia diversity. To realize radio's potential--to convert abundance into diversity--thus requires a fundamental shift in policy and a fully novel approach to radio regulation. Before discussing changes in policy and ways of implementing such policy, however, it will be useful to examine in greater detail the desirability of diversity.

A Rationale for Diversity: Three Hypotheses

Borrowing liberally from the work of economist Bruce Owen, diversity as a goal of broadcast regulation can be examined in the context of three alternative--though not mutually exclusive--hypotheses: (1) Diversity is the goal of freedom of expression and is thus mandated by the First Amendment; (2) Diversity is necessary to remedy a structurally deficient system of broadcasting; and (3) Diversity yields pluralistic programming, which is a "meritorious good." None of these hypotheses, however, is likely to satisfy all the demands of an ideal or perfect system of broadcasting. The task here, then, is to decide only which hypothesis is likely to minimize the risk of undesirable consequences. Broadly conceived, the question is: "What is diversity and why should it be an important goal of communications policy?"[17]

The First Amendment Hypothesis

That diversity is the goal of freedom of expression and is thus mandated by the First Amendment translates into the issue of access. The access issue, in turn, centers on two fundamentally different--and often conflicting--"rights": the producer's right to be heard and the consumer's right to hear. In its broadest terms the question is, as Schmidt phrases it, whether "the First Amendment, in essence, states a constitutional policy in favor of the broadest diversity of expression, and nothing more, or whether the First Amendment guarantees individual (or institutional autonomy) from government regulation with respect to the content of expression?"[18]

According to the Supreme Court, listeners of radio and viewers of television--in contrast to consumers of print media--do indeed have a right to hear. As the Court made clear in Red Lion, it is the right of the consumer, not the right of the producer, which is paramount. Broadcast media ought to function "consistently with the ends and purposes of the First Amendment"; and the purposes of the First Amendment, the Court ruled, is to preserve a fair and robust marketplace of ideas. Thus, the right to hear: "It is the right of the public to receive suitable access to social,political, esthetic, moral, and other ideas."[19]

As appealing as the Court's interpretation of the First Amendment may be, however, it fails to appreciate the important distinction between an uninhibited marketplace and a diverse or "balanced" marketplace. To guarantee the latter--as the Court attempts to do in Red Lion--necessarily impairs the former. Simply put, protecting freedom of expression may foster diversity but fostering diversity does not protect freedom of expression.[20] Thus, the folly of the Supreme Court's decision lies not in desiring a robust marketplace but in viewing such a marketplace as a Constitutional imperative.

There is, in short, no necessary connection between freedom of expression and diversity. Moreover, it is unlikely that the First Amendment can accommodate both freedom of expression (the right to be heard) and diversity (the right to hear). "It is doubtful," Owen concludes, "that the First Amendment really contains an implied 'right to hear' distinct from freedom of expression. The whole concept of such a right, and its exercise, runs counter to the most basic notions of freedom of expression, precisely because the institutional arrangements implied by the first requires subjugation of the second."[20] That freedom for producers may be good for consumers hardly justifies substituting diversity for freedom of expression.

The Structural Deficiency Hypothesis

While the FCC favors the marketplace as "the best available means for providing diversity,"[22] the Court of Appeals believes that marketplace forces--especially the dominant role advertising plays in commercial radio--may generate a mix of programming "inherently inconsistent" with broadcasting's public interest mandate.[23] That is, since broadcasters produce programs to facilitate the consumption of advertising, consumer preferences are either distorted or ignored. The structural deficiency hypothesis thus posits a bias against diversity due to economic incentives wholly unrelated to consumer tastes.

Radio is free to the consumer in the sense that the individual listener does not have the opportunity to express preferences by purchasing--or not purchasing--particular programs (or formats). Also, with no ability to purchase, there is no reasonable measure of the intensity of preferences, which is ordinarily interpreted as the economic value of a program.

Instead, advertisers pay for programming by buying "desirable" audiences. More importantly, advertisers have an opportunity to express the intenity of their preferences by assessing the value of a given audience. Quantitatively as well as qualitatively, advertisers decide how much an audience is worth and, by so doing, advertisers--not consumers--establish the value of programming. The range of desirable audiences thus dictates the range of "acceptable" formats.

Clearly, so long as broadcasters are engaged in the production and sale of audiences, format selection is more likely to reflect advertiser interest in audiences than consumer interest in programs. Therefore, it could be argued, Owen hypothesizes, that "a policy favoring diversity may result in a mix of programming which more nearly approximates the conditions which would obtain in a free market than would the advertising mechanism, operating without constraints."[24] However, Owen finds no sound theoretical reason for little empirical support for supposing that approximating a free market will yield more diversity.[25] In fact, consumer preferences may not be at odds with advertiser preferences; it may well be that advertisers are not responding to economic incentives wholly unrelated to consumer tastes.

In so far as the intensity of preferences is concerned, there is an inevitable bias against products for which demand is insensitive to price. Because of the problem of fixed costs, even if consumers paid directly for programs, broadcasters might be biased against small groups of listeners with intense preferences.[26]

Accordingly, an advertiser-supported system of broadcasting may be inefficient in an economic sense and minority tastes may be systematically discriminated against, but it is sheer willfulness to conclude that it is deficient in regard to diversity.

The Merit Good Hypothesis

A format may be preferred--and preferred intensely--but still be economically unviable because its audience is too small or because the aidience's demographics are of little interest to advertisers. One reason for requiring the production of such a format is because pluralistic programming is itself desirable; a format produced only because it is good for the public is called a "meritorious good," a type of programming whose societal value transcends its economic worth. The merit good hypothesis thus proposes a system of broadcasting responsive to the intensity of consumer preferences without regard to economic consequences.

From a merit good perspective, diversity is defined in non-economic terms. Diversity is good and thus desirable only to the extent that it serves the needs of a pluralistic society;[27] diverse programming--or a diversity of formats--can be justified only as it fosters cultural pluralism. The concept of diversity, therefore, is essentially normative in that it requires consensus on questions of value: what kinds of programming will best meet the needs of a culturally plural society?

In Owen's evaluation, the merit good argument emerges as the sole justification for having diversity as a goal of communications policy.[28] The merit good hypothesis may appear less attractive than the other hypotheses because of its emphasis on programming that "ought" to exist, but its conclusions follow logically from its premises. Whether pluralistic programming of a merit nature will bring about consequences more undesirable than desirable is certainly subject to speculation; at the very least, however, the hypothesis deserves further attention.

Rational Preferences and Communities of Taste

The ambiguity of the phrase "format diversity" should be of concern to policymakers, Owen suggests, if they intend to distinguish between diversity within a given format and diversity among different formats. If diversity means only the number of objectively distinguishable formats, the degree of diversity may be understated:

> ....consumers can and do have preferences among stations which have similar formats. All stations with the same format do not have identical programs. Stations with the same music format will have different non-music programs and advertising, to say nothing of announcer personalities. Consumers do not allocate themselves at random among stations with the same format. There is some increase in consumer satisfaction associated with the addition of a new station within a given, already occupied, format.[29]

What Owen's analysis neglects, however, is the relative rationality of consumer preferences. It is true, as Owen points out, that format duplication may increase consumer satisfaction. But it does not necessarily follow that diversity within formats is as desirable as diversity among formats. For the crux of the issue rests not on the preferred format or format variation but on the nature of the preference.

Chosing one program or format over another can be a more or less rational choice, depending on the "feeling of loss" consequent on not being able to make the choice. In its simplest terms, if a listener had no choice but to listen to format A instead of format B, would the listener feel worse off?[30] The greater the feeling of loss, the more rational the preference. Using a continuum from "rational" to "irrational"--rather than dichotomizing the terms--it can be demonstrated that preferences for a distinguishable or unique format are likely to be more rational than preferences for a duplicated format.

Typically, listeners who rationally prefer a particular kind of programming comprise what might be called a "community of taste." These communities of taste, as such, delineate a market's need for pluralistic programming. Since rational preferences are a first order priority in that they should be accommodated before irrational preferences are accommodated, there is a need for diversity among formats before there is a need for diversity within formats. Additionally, variety and choice in formats can best serve the needs of communities of taste through intermedia diversity rather than intramedia diversity. In an effort to aid communities in developing their own "listening traditions,"[31] individual radio stations should become specialized and separate.

Community Control of Radio Formats

Not unlike the decentralized system of broadcasting in West Germany, which allows for the organization and regulation of broadcasting on a local level,[32] the FCC might establish local radio boards for purposes of identifying communities of taste. Identifying these communities may require an instrument more sophisticated than the ascertainment survey now required of broadcasters, but the task is manageable. These boards would exist on a market-by-market basis, elected or appointed for, say, a three to five year term; their principal responsibility would be to assign stations to their respective communities and review each station's performance on a post hoc basis only. In practice, there would be no need to assign formats--thus encouraging innovation; how a station serves its community can be left to the discretion of the licensee.

The only remaining obstacle is economic: how to "protect" unprofitable formats and thus unprofitable stations?

To avoid excessive sameness in formats, there is a need to protect unprofitable formats in much the same way--and for essentially the same reason--the Carroll doctrine protects nonremunerative public affairs programming on television.[33] While the Carroll doctrine protects existing television stations against new competition by regulating entry, economically unviable radio formats require some form of subsidization from stations in the same market whose profits exceed a given percentage. Specifically, stations serving large and demographically appealing communities might lease their frequencies, while stations servicing less appealing communities would either receive a licensee lease-free or with a subsidy; as Posner describes it, this would be a form of "taxation by regulation."[34]

NOTES

1 Christopher H. Sterling and Timothy R. Haight, "The Mass Media: Aspen Institute Guide to Communication Industry Trends, (New York: Praeger Publishers, 1978), pp. 36J-363.

2 According to FCC Commissioner Robinson, "Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another), all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and, alas, appellate judges) call format." 57 FCC 2d 580, 594, 595 (1976).

3 Figures cited in Bruce M. Owen, "Regulating Diversity: The Case of Radio Formats." Journal of Broadcasting, 21 (Summer 1977), p. 308.

4 Programming Policy Statement, 25 Fed. Reg. 7293 (1960)

5 See Harvey J. Levin, "Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings." American Economic Review, LX1 (May 1971), pp. 81-88.

6 Citizens Committee to Save WEFM v. FCC, 506, F. 2d 246.

7 Douglas H. Ginsburg, Regulation of Broadcasting. (St. Paul: West, 1979), p. 294.

8 NBC v. U.S., 319 U.S. 190, 216-217.

9 Roland S. Homet, Jr., Politics, Cultures and Communications, (New York: Aspen Institute for Humanistic Studies, 1979), pp. 53-54.

10 47 CFR 73.242 (1972).

11 Intramedia diversity refers to diversity within media; intermedia diversity refers to diversity between or among media.

12 FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474.

13 40 FCC 2d at 230.

14 Quoted in Ginsburg, p. 305.

15 25 Fed. Reg. 7293 (1960).

16 Quoted in Ginsburg, p. 305.

17 Bruce M. Owen, "Television and Diversity," pp. 317-322 in Ginsburg, p. 317.

18 Benno C. Schmidt, Jr., Freedom of the Press vs. Public Access (New York: Praeger, 1976), p. 31

19 Red Lion v FCC, 395 U.S. 367 (1969).

20 Or, "If the first amendment protects against the suppression of ideas, it follows that a marketplace of sorts may emerge. It does not follow that a marketplace necessarily will emerge or that if it does, the result will seem fair or balanced." See David L. Lange, "The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," The North Carolina Law Review, 52 (November 1973), p. 11.

21 Bruce M. Owen, Economics and Freedom of Expression (Cambridge: Ballinger, 1975), p. 25.

22 41 Fed. Reg. 32950 (1976).

23 WEFM v. FCC; quoted in Ginsburg, p. 306.

24 Owen, Television and Diversity, p. 319.

25 Owen, Television and Diversity, p. 321.

26 Owen, Economics and Freedom of Expression, p. 113.

27 Of course, diversity may not be desirable if the society isn't pluralistic.

28 Owen, Television and Diversity, p. 322. That the merit good hypothesis is the sole justification for diversity does not imply that it is sufficient justification for a prodiversity policy.

29 Owen, "Regulating Diversity," p. 313.

30 E. H. Chamberlin, "Product Heterogeneity and Public Policy." American Economic Review, 40 (May 1950), p. 88.

31 Peter Hesbacher, et. al., "Radio Format Strategies." Journal of Communication, 26 (Winter 1976), pp. 110-119.

32 Homet, pp. 22-~4.

33 Carroll Broadcasting Co. v. FCC 258 F. 2d 440 (1958).

34 Richard A. Posner, "Taxation by Regulation." Bell Journal of Economics and Management Science, 2 (Spring 1971), pp. 22-50.