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ABSTRACT

That competition in broadcasting may not bring about sufficiently heterogenous programing has long been the subject of debate among policymakers, and nowhere has that debate been more acrimonious than in its application to the diversification of radio formats. While the Federal Communications Commission (FCC) prefers to leave questions of diversity to the demands of the marketplace, the District of Columbia Court of Appeals has been encouraging the FCC to accommodate exceptions to--and thus exemptions from--its policy of nonintervention. In its 1981 "FCC v. WNCN Listeners Guild" decision, the Supreme Court rebuked the Court of Appeals and tacitly endorsed the FCC's desire to rely on marketplace forces to promote diversity in entertainment programing. Consequently, the Court finds itself supporting a policy that favors competition, not diversity; free enterprise, not consumer welfare; the broadcaster, not the listener. In contract to the "Red Lion" decision of 1969, when the Court upheld a listener's "right to hear," the WNCN decision fails to require the FCC to look beyond the marketplace for the standards by which it assesses program diversity. In practice, the FCC's format policy confuses variety with diversity, and fails to recognize that competition in the marketplace mitigates against the ideal of pluralistic programing. (Author/FL)

COMPETITION AND DIVERSITY AMONG RADIO FORMATS: LEGAL AND STRUCTURAL ISSUES

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Abstract

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LEGAL AND STRUCTURAL ISSUES

That competition in broadcasting may not bring about a sufficiently heterogenous mix of broadcast programming has long been the subject of debate among policymakers, and nowhere has this debate been more acrimonious than in its application to the diversification of radio formats. While the Federal Communications Commission prefers to leave questions of diversity to the demands of the marketplace, the District of Columbia Court of Appeals has been encouraging the Commission to accommodate exceptions to--and thus exemptions from--its policy of nonintervention.

In FCC v. WNCN Listeners Guild (1981), the Supreme Court recently rebuked the Court of Appeals and--at least tacitly--endorsed the FCC's desire to rely on marketplace forces to promote diversity in radio entertainment programming. Consequently, the Court finds itself supporting a policy that favors competition, not diversity; free enterprise, not consumer welfare; the broadcaster, not the listener. In striking contrast to Red Lion in 1969, when the Court upheld a listener's "right to hear," WNCN fails to require the FCC to look beyond the marketplace for the standards with which to assess program diversity.

The FCC's laissez-faire approach to format allocation--which the Court of Appeals describes as a "mechanistic deference" to free enterprise--underscores the Commission's aversion to diversity as a goal of the First Amendment. In practice, the FCC's format policy confuses variety with diversity and, in the end, fails to recognize that competition in the marketplace typically mitigates against the ideal of pluralistic programming.

COMPETITION AND DIVERSITY AMONG RADIO FORMATS: LEGAL AND STRUCTURAL ISSUES

It has never been clear what Congress and the courts intended as the proper relationship between broadcasting and the realitites of free enterprise. The legislative history of the Communications Act of 1934 suggests that Congress did not want broadcasters to be constrained by federally imposed programming priorities.[1] As the Supreme Court recognized in 1940, broadcasters are not common carriers: "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee...to survive or succumb according to his ability to make his programs attractive to the public."[2] At the same time, however, Congress expects licensees to be responsive to the "public interest, convenience, and necessity,"[3] and the judiciary has cautioned broadcasters about their "enforceable public obligations."[4] In its effort to "secure the maximum benefits of radio to all the people,"[5] the Federal Communications Commission must thus acknowledge that, at times, the consumer's right to hear far outweighs the broadcaster's right to be heard.[6]

To reconcile these contrasting and often conflicting views of the role of broadcasting, the FCC has established a "double standard" approach to broadcast regulation, a policy intended to strike a balance between, as the Supreme Court puts it, "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."[7] Accordingly, the FCC requires a certain degree of equity, balance, and accountability insofar as public affairs programming is concerned,[8] but generally leaves entertainment programming to the demands of the marketplace.

The viability of a laissez-faire approach to entertainment programming, however, remains a major policy issue. That the marketplace for broadcasting may not yield a sufficiently heterogeneous mix of programming has long been the subject of debate among policymakers, and nowhere has this debate been more acrimonious than in its application to the diversification of radio formats. While the judiciary ordinarily upholds the Commission's disparate treatment of public affairs and entertainment programming, for nearly a decade the D.C. Circuit Court of Appeals had been encouraging the FCC to temper its marketplace approach to format allocation by providing a "safety valve" procedure that would accommodate exceptions to--and thus exemptions from--its policy of nonintervention.

In FCC v. WNCN Listeners Guild, the Supreme Court recently rebuked the Court of Appeals and--at least tacitly--endorsed the Commission's desire to rely on "market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners."[9] Ultimately, though, the Court's decision rested not on the wisdom of the FCC's policy but on the fact that the Commission offered a "rational" and "reasonable" preference for its policy.[10] In contrast, this paper focuses on the wisdom of

the FCC's policy, especially in the context of the broader legal and structural issues it raises.

In an effort to identify and assess the legal and structural issues endemic to the FCC's marketplace model, this paper (i) reviews the proposition that the marketplace for radio is structurally deficient; (ii) offers a brief chronology of the conflict between the Court of Appeals and the FCC, including the Court's rather conservative attempt to impose limits on the FCC's policy; (iii) explicates the Supreme Court's decision in WNCN; and (iv) appraises the broader public policy question of format diversity, particularly as this question comes to bear on industry structure and First Amendment jurisprudence.

Structural Deficiencies in the Marketplace

Occasionally, someone may naively suggest that broadcasters will simply select whatever format is unrepresented or underrrepresented in their market,[11] but generally it is an accepted truism that broadcasters will select whatever format will maximize profits--regardless of how many competing stations may be using the same format. Moreover, it is no longer always true that the largest number of listeners will necessarily maximize profits, a proposition advanced by Steiner in one of the earliest--and still one of the most insightful--analyses of competition in radio broadcasting.[12] Broadcasters today are very much aware of audience quality, not just quantity; a smaller but demographically attractive audience may indeed be more profitable than a larger but demographically unattractive

TABLE I

FORMAT DUPLICATION AMONG TOP 10 STATIONS
IN FOUR SELECTED MARKETS

	Houston	Cleveland	Columbus	Oklahoma City
Country	3	1	2	2
Beautiful Music	2	2	2	1
Top 40	0	1	1	1
News/Talk	1	1	0	0
Middle of the Road	0	0	1	1
Adult Contemporary	0	3	3	3
Album Oriented Rock	1	1	1	2
Contemporary	2	1	0	0
Urban Contemporary	1	0	0	0
% of Duplication	40%	30%	40%	40%

Source: Broadcasting, August 17, 1981, pp. 78-86.

audience. Assumptions about format duplication, therefore, must rest not on audience maximization, as Steiner proposed, but on profit maximization: a station will duplicate an existing format rather than produce a unique format if its share of the audience for a duplicated format yields higher profits than the profits generated by the entire audience for a unique format.

Since the market share commanded by a duplicated format often exceeds a new or different format's share of the market, format duplication is the rule, not the exception. As Table I illustrates, format duplication among the most profitable radio stations in the larger markets is often as high as 40 percent. To be sure, in some markets there are more duplicated formats than there are distinctive formats.[13] Format diversity exists, it follows, but only to the extent that consumer preferences cluster into large and profitable audiences.

Format duplication, however, is not in itself prima facie evidence of a structurally deficient marketplace. While it can be readily demonstrated that the range of formats does not fully accommodate listener's divergent tastes and interests,[14] consumer dissatisfaction is only a necessary--not a sufficient--condition of a structurally deficient marketplace.[15] Only if it could be demonstrated--theoretically if not empirically--that the marketplace for radio offers less variety and choice than a truly "free" marketplace, would there be sufficient reason to conclude that the marketplace for radio is structurally deficient.

Theoretically, the marketplace for radio is structurally imperfect--and deficient from a listener's perspective--in three ways. First, since commercial radio is supported entirely through advertising, broadcasters tend to be more responsive to advertisers than to listeners. Inevitably, broadcasters are concerned more with advertiser welfare than listener welfare because the advertiser, not the listener, is the consumer. Since a broadcaster's goal is to provide the most attractive product (audience) for the consumer (advertiser), radio programming is more likely to reflect advertisers' interest in a particular kind of audience than listeners' interest in a particular kind of programming. Although advertiser and listener interests may at times converge and perhaps even overlap considerably, to the extent that advertiser satisfaction and listener satisfaction do not actually coincide, the marketplace for radio can be said to be structurally deficient.

Second, since broadcasters are engaged in the production of audiences, not programs, there is no real index of what listeners would be willing to pay for the programs of their choice; consequently, there is no reasonable measure of the intensity of listener preferences, which ordinarily would be interpreted as the economic value of a program. Under the existing structure of broadcasting, therefore, minority preferences "are probably systematically discriminated against," at least insofar as minority preferences are defined as "preferences for material that are held by

relatively small groups, each member of which might be willing to pay quite a lot for them."[16]

Third, instead of using marketplace forces for purposes of spectrum allocation, Congress has chosen to have frequencies assigned--and licenses granted--at no cost to the broadcaster. As a result, there are no incentives for broadcasters to use their share of the spectrum efficiently and thus economically. Specifically, without a pricing mechanism whereby frequencies are defined in terms of their economic worth, it is virtually impossible to assess the relative benefit and cost of a radio format; not only are taxpayers deprived of payment for a presumably public resource, but broadcasters are afforded an extraordinary--and an economically distorted--return on their investment. Moreover, since broadcasters neither buy nor lease the use of an obviously valuable resource--the electromagnetic spectrum--there is no opportunity for individuals or firms to prevent over-consumption of frequencies. "A private-enterprise system cannot function properly," concluded economist Ronald Coase in his now frequently cited critique of the regulation of broadcasting, "unless property rights are created in resources, and, when this is done, someone wishing to use a resource has to pay the owner to obtain it."[17]

Although Coase does not conclude "that administrative allocation of resources is inevitably worse than an allocation by means of the price mechanism,"[18] and while economist Bruce Owen agrees that even with direct listener payment and an abundance of frequencies there may

still be discrimination against minority preferences, it would be reasonably prudent to posit that under a truly free system of competition, as Owen puts it, "things probably would not be as bad."[19]

The FCC and the Marketplace for Entertainment Programming

While the FCC has long acknowledged the imperfections of its marketplace model, it has nonetheless maintained that format allocation--and thus format diversity--should not be subject to regulatory scrutiny. In a Memorandum Opinion and Order in 1976, the Commission reaffirmed its commitment to the marketplace as "the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (i.e. promoting the greatest diversity of listening choices for the public) or in economic terms (i.e., maximizing the welfare of consumers of radio programs)."[20] Whether an administrative allocation of formats might yield a greater diversity of programming was not germane because, in the Commission's view, there was no requirement "to measure any system of allocation against the standard of perfection"; the marketplace model was both convenient and "the best available means of producing the diversity to which the public is entitled."[21]

Significantly, the 1976 Opinion and Order made clear the Commission's "long and continuing reluctance to define and enforce" a public interest standard as it might be applied to radio entertainment

programming. As a review and restatement of policy, it served to fortify the FCC's conviction that the "regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion."[22] But the FCC's Opinion was much more than a policy statement, for it was a considered repudiation of a format diversity philosophy promulgated by the District of Columbia Court of Appeals. The FCC's Opinion not only identified its "fundamental disagreement" with the Court's philosophy but in effect rejected what had become "a vexing series of reversals."[23]

What the Commission sought to reject, specifically, was an emerging "format doctrine," an effort by the Court of Appeals to apply a public interest standard to entertainment programming: if broadcasting is to be regulated in the public interest, the Court had maintained, it follows that the "FCC would seek to assure that, within technical and economic constraints, as many as possible of the various formats preferred by segments of the public would be provided"; and if indeed the Commission "is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition."[24] In short, the Commission's Opinion stood in opposition to the Court's requirement that, should circumstances dictate, the FCC would be obliged to consider whether the "disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio."[25]

The Format Doctrine

Between 1970 and 1974, in a series of four cases,[26] the District of Columbia Court of Appeals established its format doctrine, essentially a "set of criteria for determining when the 'public interest' standard requires the Commission to hold a hearing to review proposed changes in entertainment formats."[27] While the Court did not expect the Commission to "restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format, or command provision of access to non-licensees,"[28] it did want the FCC to at least hold a hearing when a proposed format change raised "substantial and material questions of fact."[29] The FCC's role in reviewing format changes would thus be limited to those special circumstances when (i) notice of a format change brought about "significant public grumbling," (ii) the "grumbling public" was large enough to be accommodated by available frequencies, (iii) the proposed format change would leave the service area without a "unique" format--i.e., there was no adequate substitute for the format being abandoned, and (iv) the format being abandoned was economically feasible.[30] The Court viewed these critieria as defining those unusual circumstances when the FCC's policy of non-intervention constituted an evasion of its statutory responsibility to hold evidentiary hearings.[31] As a matter of policy and procedure, however, the format doctrine was not intended to contravene the FCC's preference for a marketplace approach to format allocation. Indeed, the format doctrine was devised as an

exception to--not a substitute for--the imperfect system of free competition.

> The Commission, nonetheless, viewed the format doctrine as flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming.[32]

The FCC's 1976 Opinion and Order interpreted the format doctrine in general--and in particular the Court's decision in WEFM--as having "far-reaching ramifications to our entire scheme of radio broadcast licensing"; if the Court intended for the format doctrine a limited and well-defined role, the FCC saw it as imposing "comprehensive, discriminating, and continuing state surveillance."[33] Although the Commission acknowledged its responsibility to comply with the Court's mandate in WEFM, its 1976 Opinion described the format doctrine as an "extremely unwise policy" and, in the end, rejected it as neither administratively tenable nor necessary in the public interest."[34]

Three citizens groups[35] petitioned the Court of Appeals for review of the FCC's Opinion and Order, and in June of 1979 the Court, sitting en blanc, held the FCC's policy "to be unavailing and of no force and effect."[36] Taking the Commission to task for comparing its "policy" to the "policy" of the Court, Judge McGowan reminded the FCC

that the judiciary interprets the law--it does not make "policy"; the format doctrine was "an interpretation of a statute" and, as such, qualified as a decision "in which the judicial word is final."[37] Notwithstanding the "deference owed the Commission's construction of the Communications Act," any contrary construction by the judiciary clearly takes precedence: it is the "Commission's obligation," the Court ruled, "to accept and carry out in good faith its legal duties as interpreted by the court."[38]

WNCN and the Demise of the Format Doctrine

In response to writs of certiorari filed by the FCC, the National Association of Broadcasters, and two broadcasting companies, the Supreme Court ruled in favor of the Commission's marketplace approach to format allocation. Justice White, writing for the Court, identified the controversy in its most narrow terms: "The issue before us is whether there are circumstances in which the Commission must review past or anticipated changes in a station's entertainment programming when it rules on an application for renewal or transfer of a radio broadcast license."[39] The Court's ruling was similarly narrow: since the FCC's policy on format diversity neither conflicts with the Communications Act of 1934 nor violates the First Amendment, the Court of Appeals had no basis for invalidating it. Without assessing the merits of either the format doctrine or the FCC's 1976 Opinion and Order, the Court found the latter to be "a reasonable

accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion."[40]

While it could be difficult to read WNCN as an enthusiastic endorsement of the FCC's marketplace model, it would be just as difficult to ignore the significance of the Court's desire to empower the Commission with broad discretion in determining how much weight should be given to the goal of promoting diversity in radio programming and what policies should be pursued in realizing that goal.[41] Decidedly, WNCN focused not on the larger question of radio diversity and the role of government might properly play in achieving it but on the institutional competence of the Federal Communications Commission. In the Court's view, since "the construction of a statue by those charged with its execution should be follwed unless there are compelling indications that is wrong,"[42] and since the Communications Act does not specifically require format regulation by the Commission, it follows that the Court of Appeals' format doctrine violated the FCC's "broad rulemaking powers."[43] Whether the format doctrine was itself a rational and reasonable approach to the diversification of radio programming was irrelevant because the FCC's policies are entitled to "substantial judicial deference."

Apparently, the FCC's "broad rulemaking powers" are to be protected even when the Commission decides not to make rules. Whereas the FCC expressly declined the regulate radio formats "as an aspect of the public interest,"[44] the Supreme Court took this to be a

"constitutionally permissible means of implementing the public interest standard."[45] Citing its 1940 ruling in FCC v. Pottsville Broadcasting, the Court described the public interest standard as a "supple instrument for the excercise of discretion by the expert body which Congress has charged to carry out its legislation";[46] and it was certainly within the FCC's competence, the Court reasoned, for it to conclude "that its statutory duties are best fulfilled by not attempting to oversee format changes."[47]

Of course, that the FCC had chosen to remove itself entirely from the process through which formats would be allocated was the principal justification for the Court of Appeal's format doctrine. If the lower court was willing to accept the logic of the Commission's marketplace model, it wanted to be sure that the FCC had at least provided a "waiver provision" or a "safety valve" procedure whereby citizens could petition for a hearing.[48] In at least two earlier decisions--NBC v. U.S (1943) and U.S. v. Storer Broadcasting (1956)--the Supreme Court had considered the validity of the FCC's rules "in light of the flexibility provided by the procedures";[49] and so the Court of Appeals was confident that its format doctrine was firmly rooted in administrative law, if not Constitutional law. In WNCN, however, the Supreme Court inexplicably retreated from its earlier rulings: The Court "did not hold," Justice White explained in a footnote, "that the Commission may never adopt a rule that lacks a waiver provision."[50]

Consumer, Welfare, Pluralistic Programming and First Amendment Values

The FCC's commitment to the marketplace as the most desirable--or least objectionable--means of achieving format diversity not only underscores the ambiguity of diversity as a First Amendment ideal but illustrates the Commission's indifference toward the relationship between economic incentives, industry structure, and democratic values. From a policy perspective, the Commission's abiding faith in the principles of free enterprise is manifestly inimical to the needs of a culturally plural society because it effectively precludes consideration of the importance of pluralistic programming.

Cultural Pluralism and the First Amendment

While freedom of speech may be "essential as a means of assuring individual self-fulfillment,"[51] the self-fulfillment function of speech "finds little counterpart in relation to the press."[52] Arguably, the free press clause--in contrast to the free speech clause--denotes an essentially instrumental value, an effort to safeguard those conditions necessary for the survival of a wise and sophisticated electorate. Accordingly, freedom of the press is an important constitutional guarantee not because a free press is inherently valuable but because a free press can best meet the public communication needs of a democratic society: First Amendment protection for the print and electronic press is desirable because it

fosters a robust and uninhibited press; a robust and uninhibited press is desirable because it is a press able and presumably willing to accommodate divergent points of view; divergent points of view are desirable because they sustain public debate; public debate is desirable because it nurtures an informed citizenry; and an informed citizenry is desirable because it brings about a more perfect polity and, in the end, legitimates the very idea of self-government. The goal of the free press clause of the First Amendment, it follows, is to protect and enhance the public's ability to govern itself; an individual's opportunity to be heard publicly warrants First Amendment protection only because it contributes to what Alexander Meiklejohn calls the "public understanding" essential to self-government.

From a Meiklejohnian interpretation of the free press clause, the First Amendment is not intended to promote "unregulated talkativeness"; what is crucial, Meiklejohn argues, is "not that everyone shall speak" but that "everything worth saying shall be said."[53] Meiklejohn's theory of the First Amendment is fundamentally poitical; appropriately, it appears in a work entitled Political Freedom. There is, however, an important corollary to Meiklejohn's theory, a cultural interpretation of the goals and objectives of the First Amendment.

From a cultural perspective, a Meiklejohnian interpretation of the free press clause would call for a robust and uninhibited press not for purposes of accommodating an enlightened electorate but for purposes of accommodating a plurality of cultural assocations. If the

political goal of the free press clause is an informed citizenry, its cultural goal is a citizenry firmly rooted in what John Dewey described as the "principles of associated life"; for as Dewey reminds us, democracy is more than a type of government: democracy is primarily a form of association, a kind of "conjoint communicated experience."[54]

By "conjoint communicated experience" Dewey means to emphasize that "a clear consciousness of a communal life, in all its implications, constitutes the idea of democracy."[55] Only a culturally plural society, in Dewey's view, can embody the spirit of democracy; and only the spirit of democracy can nourish a sense of community and an appreciation for the integrity of diverse cultures. Dewey's understanding of the connection between democracy and community is founded on the premise that "community is inherently democratic, and democracy is inherently communal."[56]

In the context of broadcasting, a commitment to cultural pluralism translates into First Amendment protection for truly pluralistic programming. In contrast to the kind of cultural oligarchy resulting from an advertiser-dominated system of broadcasting, pluralistic programming is programming designed to reflect and thus enhance cultural diversity; pluralistic programming, to borrow sociologist Robert Nisbet's distinction, responds to individual listeners as "indistinguishable from a culture" rather than as "simply a numerical aggregate" regarded for "administrative purposes as discrete and socially separated."[57]

Although the Supreme Court appeared to have recognized the importance of pluralistic programming when in Red Lion in 1969 it made reference to the listener's First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,"[58] Justice White in WNCN made it clear that the Red Lion Court "did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs."[59] Thus the failure of WNCN--at least from a cultural point of view--is the failure of the Court to see any connection between Red Lion and the FCC's format policy; and the failure of the FCC's policy is the failure of the Commission to look beyond the marketplace for the standards with which to assess program diversity.

The FCC's format policy is inherently flawed if only because it views diversity in strictly economic terms, what the Court of Appeals describes as a "mechanistic deference" to free enterprise.[60] Since the Commission's format policy safeguards the broadcaster's right to compete, not the listener's right to "receive suitable access" to a sufficiently diverse range of programming, the FCC appears to be willing to settle for whatever diversity competition might yield. In practice, the FCC thus accepts competition--not diversity--as the goal of the First Amendment. In fact, the only standard used by the Commission to define and measure diversity is the ideal of "free" competition.

When measured against the standard of "free" competition, the FCC readily admits that the marketplace for radio is structurally

deficient (for the reasons outlined earlier)--but not deficient to the point where government intervention would be required. Remarkably, the FCC's understanding of the deficiencies of the marketplace is limited to the marketplace's economic imperfections; at no time has the Commission extended its inquiry into the marketplace's cultural imperfections. If the Commission is reluctant to decide whether competition brings about "insufficient diversity because "insufficient" raises a cultural and thus normative issue, it is administratively and politically comfortable with its laissez-faire approach to format allocation because its marketplace model is portrayed as an entirely empirical, apolitical, and value-free resolution of the diversity issue.

Competition, Diversity, and Pluralistic Programming

That the FCC's conception of diversity is inextricably wedded to competition in the marketplace is, however, striking evidence of the Commission's bias, not its impartiality. Principally, it is a bias in favor of free enterprise, not consumer welfare; a bias in favor of the broadcaster, not the listener; and a bias in favor of competition, not diversity. To no avail, former FCC Commissioner Nicholas Johnson tried to call attention to the Commission's bias when he argued that the "conclusion of the marketplace advocates that the pricing mechanism produces the most equitable and efficient allocation of resources is itself a normative, not an empirical, judgment";

furthermore, Johnson wrote,

> To assume that market allocation of a good is a normal situation, to be departed from only in exceptional situations, is to determine an industry's goals and principles by considering only economic factors and ignoring the social impact of the industry.
>
> The market allocation proposal ignores public policy considerations in its failure to encourage "good" use of the spectrum.[61]

It is ironic tha the FCC's expressed interest in diversity turns out to be a commitment to competition; for as Owen goes to great lengths to explain, competition has very little to do with diversity. Actually, Owen--who the Commission cites with approval--sees diversity as "at best irrelevant and at worst seriously debilitating to the consumer interest."[62]

Inevitably, when consumer welfare is defined economically instead of culturally, variety will be mistaken for diversity. And this is precisely what has happened in radio broadcasting: the marketplace for formats has failed to distinguish between intra-format diversity, which is mere variety, and inter-format diversity, which comes closer to the goal of pluralistic programming. As the FCC puts it, there "exists no economically rational basis" for deciding whether intra-format or inter-format diversity best serves the public interest.[63] In other words, when diversity is defined solely in terms of competition, there would appear to be no meaningful distinction

between, say, a market with 12 unique formats and a market with one format duplicated by 12 stations. In many markets, therefore, pluralistic programming may give way to a great variety of essentially similar programs--and in Owen's and the Commission's view, consumer welfare would be the better for it.

To fully appreciate the folly of the FCC's conception of diversity--and to better illustrate the importance of the distinction between variety and diversity--consider the marketplace for automobiles. Should automobile manufacturers limit their production to only subcompacts but design an impressive variety of subcompacts (analogous to only intra-format diversity), would consumer welfare would be as well served as when automobile manufactures produce a diversity of models--from subcompacts to full-size cars--but offer only one design for each size model category (analogous to only inter-format diversity)? Given limited resources, if automobile manufacturers had to limit either variety or diversity, which would be the higher priority? In its most stark terms, is it more important to allow consumers to choose between a yellow, a blue, or a green subcompact or between a subcompact and, say, a nine-passenger station wagon?

The difference between variety and diversity is, essentially, the difference between wants and needs. Wants are typically private and idiosyncratic; they focus on personal perference and individual gratification. Needs, however, are typically public and shared; they transcend individual preference and focus instead on purposes and

interests common to class of people. Whereas wants emerge from a fundamentally hedonistic calculation of pleasure and pain, needs emerge in response to a desire to achieve or maintain a reasonably comfortable quality of life.[64] There is indeed an important difference between the need of low-income families for a small, fuel-efficient car and one family's preference for a particular package of options.

Just as automobile diversity is essential if automobile manufacturers expect to meet the needs of a society increasingly dependent on private transportation, format diversity is essential if broadcasters expect to meet the needs of society committed to the ideal of cultural pluralism. And if there is a lesson to be learned from the automobile industry, it is that economic incentives alone often mitigate against diversity: without government intervention, variety tends to displace diversity and the consumer is left with the illusion of choice. Be they automobiles or radio programs, it is a fundamental economic maxim that "wherever there is a demand for diversity of product, pure competition turns out to be not the ideal but a departure from it."[65]

In sum, to advocate greater diversity in radio programming is not to advocate diversity for the sake of diversity. Rather, pluralistic programming is programming intended to sustain the cultural diversity in an given market; it is what Jacklin calles "representative diversity," programming diverse enough to correspond to the diversity in the community.[66] As a practical matter, the goal of diversity in

radio broadcasting is no more unworkable than the goal of fuel-efficiency in the automobile industry. It will require corrective measures but not the kind of insidious state control that would suppress expression. On the contrary, a restructuring of the marketplace for radio[67] could bring about a greater diversity of communication and thus extend to listeners the freedom of choice to which they are entitled under the First Amendment and the Communications Act of 1934. As the Court of Appeals recognized over a decade ago, "it is surely in the public interest, as that was conceived by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly--owned public resources whenever that is technically and economically feasible."[68] That goal is certainly technically feasible and would be economically feasible if legal and structural issues were not defined soley in terms of marketplace forces. The important point is not that the marketplace for radio is structurally deficient because it is a departure from the ideal of competition but that competition itself is a departure from the ideal of pluralistic programming.

[1]For a review of the history of the Communications Act, see the FCC's Notice of Inquiry and Notice of Proposed Rulemaking: Deregulation of Radio, 44 Fed. Reg. 57636, 57637-57639 (October 5, 1979).

[2]FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475, (1940).

[3]Communications Act of 1934, 47 U.S.C., Sections 303, 307, 309, 310(d) (1976).

[4]Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

[5]National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943).

[6]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[7]Sanders Brothers, 390 U.S. at 474.

[8]Through the FCC's recent efforts to deregulate radio, non-entertainment programming guidelines have lost much of their specificity. See generally Report and Order, FCC 81-17, 46 Fed. Reg. 13888 (February 24, 1981). "Rather than specify precise actions," the Commission explained, "we have sought to define broad obligations, leaving the fulfillment of those obligations to the operation of a broadcaster's good faith discretion. See Memorandum Opinion and Order, In the Matter of Deregulation of Radio, BC Docket 79-219 (FCC 81-366), paragraph 40, released August 28, 1981.

[9]FCC v. WNCN Listeners Guild, 101 S. Ct. 1266, 1279 (1981).

[10]"Our opinions have repeatedly emphasized that the Commission's judgment regarding how the pubic interest is best served is

entitled to substantial judicial deference." WNCN, 101 S. Ct. at 1275. See also FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 793 (1978) and FCC v. WOKO, Inc., 392 U.S. 223, 229 (1946).

[11]For example, a recent study of commercial radio formats, written by a broadcast consultant and two broadcast educators, offers this advice to professionals and students: "Each format should be designed to provide, if not an unique service, at least one that is markedly different from those already in use. This is easy if there is no All-News, no classical, no Contemporary, no MOR. One simply fills the void." Edd Routt, James B. McGrath, and Fredric Weiss, The Radio Format Conundrum. New York: Hastings House, 1978, p. 33.

[12]Peter O. Steiner, "Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting," Quarterly Journal of Economics, 66 (May 1952): 194-223.

[13]According to figures released by the FCC in 1976, for example, there are more stations in Chicago using the same format (16 using a "middle-of-the-road" format) than there are distinctive formats (13). Figures reported in Bruce M. Owen, "Regulating Diversity: The Gase of Radio Formats," Journal of Broadcasting, 21 (Summer 1977): 308.

[14]The fact that the FCC receives complaints from citizens groups is ample evidence that the range of formats does not entirely satisfy consumer preferences.

[15]Consumer dissatisfaction is only a necessary--not a sufficient--condition of a structurally deficient marketplace because even in an ideal marketplace not every consumer is likely to be fully satisfied.

[16]Bruce M. Owen, Economics and Freedom of Expression. Cambridge: Ballinger 1975, p. 114.

[17]Ronald H. Coase, "The Federal Communications Commission," Journal of Law and Economics, 2 (October 1959). Excerpted in Douglas H. Ginsburg, Regulation of Broadcasting. St. Paul: West, 1979, pp. 47-48.

[18]Ibid., p. 50.

[19]Owen, Economics and Freedom of Expression, p. 114.

[20]Memorandum Opinion and Order, 41 Fed. Reg. 32950, 32952 (August 6,1976).

[21]Ibid. (emphasis added).

[22]Ibid. at 32953.

[23]For a review of the conflict between the FCC and the D.C. Court of Appeals, see John H. Pennybacker, "The Format Change Issue: FCC vs. U.S. Court of Appeals," Journal of Broadcasting, 22 (Fall 1978): 411-424.

[24]Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974). Excerpted in Ginsburg, pp. 300, 305.

[25]Ibid. at 301.

[26]In addition to WEFM, see Citizens Committee to keep Progressive Rock v. FCC, 478 F.2d 926 (1973); Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919 (1973); and Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263 (1970).

[27]WNCN, 101 S. Ct. at 1270.

[28]WNCN Listeners Guild v. FCC, 610 F.2d 838, 851 (D.C. Cir. 1979).

[29]610 F.2d at 843.

[30]These criteria logically apply to renewal as well as transfer applications. WNCN, 101 S. Ct. at 1270, n.6. For a worthwhile review of these criteria, see Pennybacker, pp. 414-421.

[31]Section 309(a) of the Communications Act of 1934 provides that citizens may petition the FCC to deny a broadcast license if granting the license would be inconsistent with the Act's public interest standard. 47 U.S.C. Section 309(a)(1976).

[32]Quoted in WNCN, 610 F.2d at 845.

[33]Memorandum Opinion and Order, 41 Fed. Reg. at 32953.

[34]Ibid., n.8.

[35]WNCN Listeners Guild, Classical Radio for Connecticut, and The Office of Communication of the United Church of Christ.

[36]WNCN, 610 F.2d at 858.

[37]Ibid. at 855.

[38]Ibid.

[39]WNCN, 101 S. Ct. at 1269

[40]Ibid. at 1275.

[41]Ibid. at 1277.

[42]Ibid. at 1276.

[43]Ibid at 1281, n.11.

[44]Memorandum Opinion and Order, 41 Fed. Reg. at 32953.

[45]WNCN, 101 S.Ct. at 1279.

[46]Ibid. at 1274

[47]Ibid. at 1275

[48]WNCN, 610 F.2d at 847-849.

[49]NBC v. U.S., 319 U.S. 190 (1943); U.S. vs. Storer Broadcasting, 351 U.S. 192 (1956).

[50]WNCN, 101 S.Ct. at 1278, n. 44.

[51]Thomas I. Emerson, The System of Freedom of Expression. New York: Random House, 1970, p. 6.

[52]Melville B. Nimmer, "Is Freedom of the Press a Rundundancy?" Hastings Law Journal, 26 (1975): 639-658; excerpted in D.L. Brenner and W. L. Rivers (eds.), Free but Regulated: Conflicting Traditions in Media Law. Ames: Iowa State University Press, 1982, p. 28.

[53]Alexander Meiklejohn, Political Freedom. New York: Oxford University Press, 1965, p. 26.

[54]John Dewey, The Public and Its Problems. Chicago: Swallow Press, 1927, pp. 145-154. For a more general discussion of the values of a culturally plural society, see M.M. Tumin and W. Plotch (eds.), Pluralism in a Democratic Society. New York: Praeger, 1977.

[55]Dewey, p. 149.

[56]Lary Belman, "John Dewey's Concept of Communication," Journal of Communication, 27 (1977): 35.

[57]Robert A. Nisbet, The Quest for Community. New York: Oxford University Press, 1953, p. 249.

[58]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[59]WNCN, 101 S.Ct. at 1279.

[60]WEFM, 506 F.2d at 268.

[61]In Ginsburg, pp. 69,70.

[62]Bruce M. Owen, "Diversity in Broadcasting: The Economic View of Programming," Journal of Communication, 28 (Spring 1978): 43.

[63]Memorandum Opinion and Order, 41 Fed. Reg. at 32957. Intra-format diversity refers to diversity within a particular format category; inter-format diversity refers to diversity among distinctive formats.

[64]For an argument in favor of the "recognition of the limits of resources and the priority of needs" over wants, see Daniel Bell, The Cultural Contraditions of Capitalism. New York: Basic Books, 1976.

[65]E.H. Chamberlin, "Product Heterogeneity and Public Policy," American Economic Review, 40 (May 1950): 92.

[66]Phil Jacklin, "Diversity in Broadcasting: Representative Diversity," Journal of Communication, 28 (Spring 1978): 43.

[67]For a proposal to restructure the marketplace for radio for purposes of increasing program diversity, see Harvey C. Jassem, Roger J. Desmond, and Theodore L. Glasser, "Pluralistic Programming and

Radio Diversity: A Review and a Proposal," Policy Sciences, 14 (August 1982): 347-364.

[68]Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263, 269 (D.C. Cir. 1970).