Globalization of the Mass Media

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GLOBALIZATION OF THE MASS MEDIA

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EXECUTIVE SUMMARY

The products of the U.S. electronic mass media industry -- films, video and radio programming, and recorded music -- are vehicles through which ideas, images, and information are dispersed across the United States and throughout the world. As such, these mass media can be a powerful agent for political and social change.

The electronic mass media industry is also a major sector of the U.S. economy. Like other domestic industries, it has been profoundly affected by the internationalization of its marketplace. In 1991, for example, foreign sales accounted for about thirty-nine percent of U.S. film and television industry revenues. Moreover, mass media firms are investing across national borders. As a result, mass media firms that have traditionally been thought of as "U.S.-based" face competition from, and partner with, a variety of international firms.

This report reassesses U.S. communications and mass media policies in light of the increasingly global nature of the electronic mass media. A basic theme of this report is that the United States cannot afford to be complacent about the success of U.S. media firms in international markets. Recent regulatory and technological changes require U.S. policy makers to continue to adapt in order to promote the development of international mass media markets that are open and competitive -- the type of markets in which U.S. firms historically prosper.

The first part of this report discusses why and how globalization of the mass media is occurring. It describes globalization trends by analyzing U.S. exports of and foreign direct investment in mass media products, and discusses the strategies that firms employ to enter foreign markets.

The report then examines possible changes in U.S. communications policies that could enable U.S.-based mass media firms to compete more efficiently and effectively in international and domestic markets. It recommends changes to the U.S. restrictions on foreign ownership of broadcasting stations in order to permit greater participation by U.S. firms in foreign broadcasting markets, as well as potentially increasing sources of investment in U.S. broadcasters. It discusses the importance of effective international copyright protection for U.S. mass media firms.

The report emphasizes the competitive effects of domestic U.S. mass media regulations, particularly those affecting radio and television broadcasters, as well as the video programming and sound recording industries, and recommends a variety of modifications to existing U.S. rules regarding crossownership restrictions on several types of communications and mass media firms, and the multiple ownership restrictions on U.S. broadcasters. It discusses the effects of the Federal Communications Commission's financial interest and syndication rules, adopted in 1991, on the global competitiveness of the U.S. programming industry. It also investigates the effects of the FCC's localism policies in an era of increasing international dissemination of information.

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SUMMARY of FINDINGS and RECOMMENDATIONS

Chapter 1: INTRODUCTION

Chapter 2: GLOBALIZATION TRENDS

Findings

In economic terms, "globalization" is a process by which firms attempt to earn additional profits through entry into foreign markets. Firms enter foreign markets by foreign direct investment (FDI) or exports, as well as licensing.

By engaging in FDI in the United States and in other countries, a number of firms have grown to be large global media conglomerates, capable of providing a variety of mass media products in multiple countries.

Entry through acquisition has been the prevalent recent form of FDI in the U.S. motion picture industry. The advantages derived from acquiring an established distribution network or valuable film library, as opposed to creating these assets from scratch, make existing U.S.-based mass media firms natural candidates for foreign joint ventures and FDI.

Since 1977, globalization through FDI has proceeded at a faster rate in the U.S. motion picture industry than in the overall U.S. economy. In 1990, the last year for which data are available, just over ten percent of the U.S. motion picture work force was employed by a U.S. affiliate of a foreign-based firm, up 553% since 1977. In contrast, just over five percent of the total U.S. work force was employed by a U.S. affiliate of a foreign-based firm in 1990, up nearly 184% over the same period.

While FDI in the U.S. mass media industry poses some controversial issues, FDI appears to provide a net benefit to the U.S. economy. FDI may lead to increased specialization and a more efficient use of the world's resources by encouraging international trade -- that is, the

transfer of resources among countries -- which improves the economic welfare of all countries.

Exports have played a major role in the trend toward the globalization of the mass media industries, and the U.S. mass media industry has been a major participant in this process.

"Country-based" and "firm-based" methods of measuring international trade address two complementary but different economic activities. By recording the payments that the United States makes and receives as a result of trade, the country-based approach measures a country's international trade performance in mass media products. The firm-based approach measures the extent to which U.S.-based firms are participating in the global market for mass media products.

Data compiled by the U.S. Department of Commerce's Bureau of Economic Analysis, which uses the country-based approach, indicates that U.S. exports of motion picture and television programming exceeded imports by $2.1 billion in 1991. Data collected by the Motion Picture Association of America, which uses the firm-based approach, indicates that the U.S. motion picture and television programming industry exported, on a worldwide basis, over $7 billion of motion picture and television programming in 1991.

Production communities outside of the United States have had limited success distributing motion pictures and television programming internationally. This situation is beginning to change in response to the worldwide growth in demand for film and television programming, with production communities in Asia, Latin America, and Europe increasingly producing programming for international distribution.

Chapter 3: WORLDWIDE CHANGES AFFECTING GLOBALIZATION

Findings

The development of new distribution systems provides potential additional sources of supply for all types of media products. Today, in

addition to terrestrial broadcast systems, firms deliver their media products to consumers through cable systems, multichannel multipoint distribution systems, and direct broadcast satellites. Satellite transmission systems have greatly facilitated the delivery of television and, to a lesser extent, radio programming both domestically and internationally. Fiber-based transmission systems can potentially play a significant role in the international delivery of audio and video programming.

Both satellite and cable-based transmission media are relying increasingly on digital technologies. As breakthroughs in digital signal compression techniques permit the transmission of the same or higher quality signals in smaller bandwidths, digital delivery systems are likely to become more commonplace.

Technological innovation in consumer electronics has affected "traditional" products, such as television and radio receivers, and created new ones, such as videocassette recorders, compact disc players, digital audio tape players, and home satellite receiving dishes. Technological innovation has often enhanced quality and reduced the prices of these products, providing unambiguous evidence of an increase in consumer welfare. The development of new delivery systems and more affordable consumer electronics is enabling individuals to exert additional control over their consumption of media products.

The standardization process has not been the same for all mass media products. In the international arena, standardization has often occurred through industry's cooperative efforts or through the dominant position of a single firm or set of firms. Despite the benefits often derived from standards, worldwide standards do not exist for all mass media products. The absence of such standards may be due to the costs that standards sometimes impose on individual users.

Government agencies can play an important role in the globalization process, based on their ability to affect numerous aspects of the

international competitive environment. In some instances, government action may result in the opening of media markets by allowing more competition and less regulation. In other instances, government action may have the effect of closing markets, through import quotas, domestic content or work requirements, hiring or immigration regulations, foreign ownership regulations, foreign exchange remittance restrictions, screen quotas, and custom duties.

Numerous other factors affect the supply and demand of mass media products to some extent, including linguistic differences, the amount of leisure time, and pop culture. The effect of these factors varies as personal taste and lifestyles differ among individuals.

Recommendations

Governments should explicitly recognize the numerous worldwide changes affecting the globalization process when designing their regulatory and economic policies for their mass media industries.

By implementing policies that either foreclose competitive entry or raise its cost, governments can, under certain conditions, skew the globalization process in favor of firms to which they play host. The United States should work with the governments of other countries to eliminate such policies for the long-term benefit of all countries.

Chapter 4: FIRM BEHAVIOR AND GLOBALIZATION

Findings

There are three main methods by which the electronic mass media and other markets become globalized: "complementary expansion," "horizontal expansion," and "vertical expansion."

"Complementary expansion" occurs when a firm is engaged in the production of complementary products in different countries. (Two products are considered complements when a price increase in one causes a decrease in the quantity demanded of the other.) Complementarities exist over a wide range of media products, with the firms that produce such complementary products typically located

around the world. Such complementarity may induce FDI and, therefore, globalization, as media firms may have incentives to engage in merger, acquisition, or joint venture in order to internalize demand externalities.

"Horizontal expansion" occurs when a firm serves at least two different foreign markets through either FDI or exports and sells the same product in each.

- In some instances, firms engage in FDI if they possess firm-specific competitive advantages. The "host" country for a firm's FDI must have some locational advantages, such as the presence of a large number of other firms engaged in similar activities (known as "agglomeration economies"). In other instances, FDI appears to be motivated more by strategic reasons.
- Each country specializes in the production of those mass media products for which it has the lowest opportunity cost of production or, equivalently, the greatest "comparative advantage." Globalization through international trade results, in part, from changes in comparative advantages among countries.
- International trade in mass media products also is due to the "public good" nature of these products: because the incremental cost of allowing an additional person to view or listen to the product is nearly zero, producers can reduce the per viewer (or per listener) cost of production by distributing their products as widely as possible.

Globalization through "vertical expansion" occurs when a firm is engaged in successive stages of the production chain through either FDI or long-term contracts, when one or more of those stages are located in different countries.

- Many mass media firms have engaged in globalization through vertical expansion. Such firms may have incentives to integrate vertically in order to minimize transaction costs and eliminate "vertical externalities."

- Mass media firms often enter into long-term contracts between the production and distribution stages.

Globalization resulting from the search for economies of scale can substantially enhance economic welfare because firms are able to produce products at lower costs.

Recommendation Policymakers should move to eliminate government regulations that prevent firms from achieving such economies of scale in broadcasting -- and other mass media industries.

Chapter 5: THE ROLE OF COMMUNICATIONS POLICIES IN A GLOBAL MARKETPLACE

Chapter 6: THE FOREIGN OWNERSHIP RULES

Findings The level of U.S. investment in foreign broadcast markets is negligible. Similarly, the level of foreign investment in broadcast properties in the United States is low. A major reason for this is the existence in most countries of laws limiting the amount of foreign investment permitted in broadcast properties.

The major U.S. statutory impediment to FDI in U.S. broadcast properties is Section 310(b) of the Communications Act ("the foreign ownership rules").

The restrictions of Section 310, at least as now applied by the FCC, provide no incentives for foreign governments to open their broadcast markets to greater foreign participation. The United States has the most extensive, well developed, and competitive broadcast industry in the world. Were entry barriers to foreign firms in broadcasting liberalized around the globe, it is likely that the opportunities for foreign expansion for the U.S. broadcast industry would exceed any concomitant risks in the U.S. market.

In many countries, broadcasting is performed solely by the government. In these countries, private individuals and companies, regardless of their nationality, cannot own broadcasting stations. Of the countries that permit private ownership of broadcast stations, many have foreign ownership rules that are similar to those of Section 310(b). Regulations on foreign ownership of cable facilities tend to be less restrictive than those that apply to broadcasting.

Section 310(b)'s limitation on foreign investment has the potential of handicapping the broadcast industry in the current video marketplace in other ways. Today, broadcasters face unprecedented competition from multichannel video providers, and yet broadcasting is the only mass medium prevented by statute from realizing the potential benefits of FDI, which could result in a more efficient allocation of resources within the industry and the ability to better serve their communities.

The original justification for Section 310(b), protection of United States' national security, is no longer as persuasive as it was when the precursors of the existing rules were enacted in 1912 and 1927. The American media system is sufficiently large and diverse to withstand an attempt to subvert the will of the American people through foreign-owned broadcasting. Furthermore, NTIA believes that legitimate public policy concerns can be addressed by other approaches.

The prospects for relaxation of foreign ownership rules in countries other than the United States vary. Despite some new developments designed to attract needed foreign investment, most countries in the world continue to maintain significant restrictions on foreign ownership of broadcast and cable television systems.

Section 310(b) as written gives the FCC some flexibility in granting broadcast licenses that it has not fully exercised. Under Section 310(b)(4), the FCC is authorized not to grant a license to a corporate applicant if its parent company is more than twenty-five percent foreign controlled, "if the Commission finds that the public interest will be served by the refusal or revocation of such license."

Recommendation The FCC should begin a rulemaking to determine how to exercise the authority it has under Section 310(b)(4) to allow foreign investment of greater than twenty-five percent in the parent company of a broadcast licensee unless the public interest would be served by the refusal or revocation of such a license.

Chapter 7: INTERNATIONAL COPYRIGHT ISSUES

Findings The unauthorized use or duplication of U.S. mass media products -- film and television programming and sound recordings -- is a major obstacle to efficient distribution to overseas markets. Although such abuses have long hampered the film and music industries, advances in technology have made the problem particularly acute today. As a result, one of the most pressing concerns of the U.S. mass media industry is the international protection of copyright.

The most common forms of copyright violations for video products today involve duplication and sale of videocassettes of films or television programs without permission of the copyright holder and unauthorized reception and retransmission of program-carrying satellite signals.

Adherence to, and full implementation of, the Berne Convention for the Protection of Literary and Artistic Works demonstrates an important U.S. commitment to adequate copyright protection and provides a departure point for strengthening copyright protection worldwide.

In addition to Berne, the United States is seeking to achieve adequate international copyright protection through a variety of international fora, such as the General Agreement on Tariffs and Trade (GATT) and regional and bilateral negotiations with other countries, and through trade laws of the U.S. government.

Recommendation

The United States should maintain its efforts to promote a well-functioning international copyright system. NTIA urges U.S. industry and the Congress to support these initiatives.

Findings

In response to unauthorized use of satellite signals by cable systems, Berne signatory countries such as Canada, Austria, and Denmark have established compulsory licensing schemes for cable operators, so that cable operators make fixed payments to a government agency that distributes the proceeds to copyright holders. These are similar to the cable compulsory license scheme adopted in the United States in 1976, which was a response to competitive and intellectual property concerns of program producers, cable operators, and broadcasters.

While these systems have had the positive effect of limiting the detrimental economic effects of unauthorized use, they create substantial distortions in markets for video programming, because compulsory payments are not likely to equal the payments that would be made in an unregulated market.

The principal reason for implementing the U.S. cable compulsory licensing scheme was to enable cable operators to obtain programming transmitted by broadcasters. This policy is no longer valid in today's domestic marketplace for U.S. programming, because programmers are becoming increasingly dependent on cable operators for additional revenues.

The retransmission consent provision in the recently enacted Cable Television Consumer Protection and Competition Act of 1992 enables broadcasters, if they so elect, to authorize cable operators to retransmit their signals, presumably for some compensation. Because this provision, however, does not provide market-based compensation to copyright holders of the programs transmitted by broadcasters and cable systems, the elimination of the U.S. cable compulsory license remains an important public policy objective.

The importance of foreign markets to the U.S. programming industry provides an additional reason for the United States to reexamine its own cable compulsory licensing scheme. Market-based compensation for the distribution of U.S. video programming in foreign countries is in the interest of the United States.

Recommendation The United States should eliminate its cable compulsory licensing scheme, both to realize the economic benefits of a market approach and to serve as a model for market-based approaches abroad.

Chapter 8: THE CROSSOWNERSHIP RULES

1. The Network-Cable Crossownership Rule

Findings To the extent that elimination of the FCC's network-cable crossownership rule would permit greater vertical integration between the program packaging functions of a network and the distribution functions of a cable system, efficiency gains could result.

Removal of the network-cable crossownership rule would also permit the broadcast networks to achieve greater economies of scope through horizontal expansion in the packaging and distribution of television programming.

Diversification into cable system ownership could allow the networks to gain access to additional revenue sources, which could strengthen their ability to develop a greater diversity of programming, thereby benefitting the viewing public.

Concerns about networks "bypassing" their broadcast affiliates by providing programming directly to cable firms rather than those affiliates are speculative at best. Any such strategy would result in a significant loss of audience for the network cable owner and thus would be contrary to the economic interests of the networks.

Removal of the network-cable crossownership rule could increase the incentives of foreign-based firms to enter the U.S. market. To the extent there are benefits to be derived from owning both a broadcast network and a cable company, investment in such a firm would be more attractive for both U.S. and foreign-based firms, thereby potentially stimulating further investment in important U.S. businesses.

Repeal of the network-cable crossownership restriction could increase FDI by U.S. firms abroad. In particular, the efficiencies that the broadcast networks and cable operators are likely to achieve from crossownership in the United States are likely to benefit the international operations of those firms.

It is uncertain whether the efficiencies that a firm might achieve from network-cable crossownership in the United States would enable that firm to obtain or produce higher quality programming (i.e., programming with greater audience appeal) more suitable for export.

While repeal of the network-cable crossownership rule may have some impact on the globalization of mass media firms, the benefits of removing this rule largely accrue from its domestic effects.

Recommendations The network-cable crossownership rule should be eliminated.

To the extent there remain concerns over the potential for "affiliate bypass," it would be preferable to address such concerns, if necessary, by adopting a requirement that networks maintain an affiliation with a local broadcast station in markets where they own cable systems, rather than by limiting networks from acquiring cable systems representing more than fifty percent of the homes passed in an Arbitron Area of Dominant Influence.

2. The Cable-Telephone Company Crossownership Prohibition

Findings The Administration has supported elimination of the statutory cable-telco crossownership restriction in order to stimulate competition in the

video marketplace and to provide incentives for U.S. infrastructure development. There also are reasons based on international conditions for removing this restriction.

U.S. telephone companies have invested in foreign cable properties for a variety of reasons. While these firms in part have been motivated by a desire to explore investment opportunities from which telephone companies are restricted in the United States, such investments also represent a deliberate corporate strategy to seek diversified opportunities for growth. As a consequence, it is difficult to predict whether the level of foreign cable investment would decline if the current domestic restrictions were lifted.

To the extent that lifting domestic restrictions leads to greater demand for video programming in the United States, there could well be a net increase in the flow of video programming across international borders, both to and from the United States.

Recommendation This prohibition should be eliminated for both domestic and international policy reasons.

3. The Broadcast-Cable Crossownership Prohibition

Findings The effect of the statutory broadcast-cable crossownership restriction on the flow of programming across international borders is mixed.

- On the one hand, removal of this restriction could allow U.S. firms to realize greater efficiencies from combined operations, thereby strengthening their financial position; such firms, in turn, might increase their demand for programming, which could be met by both U.S. and foreign-based firms.

- On the other hand, repeal of the ban would not likely have a significant impact on the export of U.S. programming abroad. Local broadcasters do not produce a significant amount of programming, and the programming they do produce is most likely

to be locally oriented news and public affairs programming, which would not be suitable for export.

Elimination of the broadcast-cable crossownership restriction might result in more FDI in the United States. In particular, to the extent that firms anticipate greater efficiencies from consolidated operation of a broadcast station and a cable company, there could be increased investment in such properties, both from U.S. and foreign-based firms.

With respect to FDI by U.S. firms abroad, to the extent that U.S. firms are able to derive additional efficiencies from the combined operation of a broadcast station and a cable system, their overall financial position would be strengthened, which could affect their ability to expand and diversify, both in the United States and abroad.

Because the effect of modification of this rule on the globalization of mass media firms is uncertain, the major basis for recommending repeal lies primarily in the anticipated domestic, as opposed to international, benefits.

To the extent that the broadcast-cable crossownership prohibition affects the competitiveness of mass media firms, it has some international consequences, as would its modification. Nonetheless, the case for providing the FCC with a broader waiver authority in this area primarily rests on potential domestic benefits.

Recommendation

Congress should repeal the statutory ban on broadcast-cable crossownership as the FCC has recommended. A second-best solution is for Congress to give the FCC the authority to grant a waiver of the crossownership rule when the benefits of waiver appear likely to outweigh any costs associated with lessened competition and diversity. In particular, a waiver may be warranted if the proponent of a proposed broadcast-cable combination can demonstrate that, if granted, either a sufficient number of independent media voices would remain in the market after the combination so as to maintain diversity, or merger

would enable an economically failing broadcast station to remain on the air.

4. The Broadcast-Newspaper Crossownership Ban

Findings

Co-ownership of broadcast and newspaper outlets in the same market may produce beneficial domestic effects, such as realization of efficiencies from consolidated operation, greater financial stability, and an enhanced ability to provide news and informational programming.

It is questionable whether the FCC's current prohibition on broadcast-newspaper crossownership is appropriate in today's marketplace. The explosive growth of U.S. media outlets -- both broadcast and non-broadcast -- has been well documented. In those markets where an abundance of media outlets exists, the need for an outright prohibition on crossownership seems speculative at best. In those instances, the benefits of co-ownership -- to both broadcast stations and newspapers -- might well outweigh the incremental benefits associated with having an "additional voice" in the community.

The effect of modifying the broadcast-newspaper crossownership policy on the globalization of the mass media appears to be mixed.

- Modification of the broadcast-newspaper crossownership rule is unlikely to have a significant effect on the flow of programming across international borders.
- Changing the broadcast-newspaper crossownership prohibition is unlikely to affect the investment patterns of U.S. broadcasters abroad.
- The broadcast-newspaper crossownership rule, coupled with the U.S. foreign ownership rules, may impede foreign-based firms from assembling diversified media holdings in the United States.

Recommendation Congress should consider whether to permit the FCC to take into account, when reviewing waiver requests, the number and diversity of media voices in the local community.

Chapter 9: THE NATIONAL MULTIPLE OWNERSHIP RULE

Findings The domestic mass media industry is sufficiently diverse so that the concerns about undue economic concentration and diversity that provided the original basis for the rule have lessened substantially.

- On a national basis, the radio and television industries comprise many firms.
- Viewpoint diversity has grown dramatically since the FCC adopted its Twelve Station Rule for all broadcast services in 1984.

Group owners realize significant efficiencies from horizontal expansion, enabling them to produce and present superior programming.

The present national multiple ownership rule limits the extent to which group owners may vertically integrate program production and distribution activities, by limiting the number of owned-and-operated stations that they may acquire.

A more flexible multiple ownership policy could result in new entry into programming, or the development of new networks or network-like organizations, if groups were permitted to expand to the levels needed to support such activities.

Greater vertical integration between the networks and their affiliates may benefit those affiliates, and through them, viewers of those local stations.

Elimination of the national multiple ownership rule could increase the incentives of all firms, whether U.S. or foreign-based, to invest in diversified U.S. media businesses that own U.S. broadcast stations as

well as other interests. To the extent that such diversified U.S. firms could realize additional efficiencies from group ownership, they would be more attractive for investment purposes to both U.S. and foreign-based firms. Such increased investment in U.S. media firms, in turn, would be beneficial, both by increasing the flow of capital into the industry and by spurring U.S.-based firms to operate more efficiently in a more competitive domestic marketplace.

Elimination of the national multiple ownership rule could strengthen the overall financial position of U.S. broadcast station group owners, such as the broadcast networks, which could strengthen their ability to invest in foreign media ventures.

It is unlikely that elimination of the national multiple ownership rule would have much impact on the incentives of firms to import programming into the United States.

Elimination of the national multiple ownership rule would have a mixed effect on the export of programming by U.S. group owners.

- It does not appear that elimination of the national multiple ownership rule would have much impact on the ability of radio group owners to export U.S. programming, as radio group owners generally do not produce much programming for wide distribution even in the U.S. market, and much of the programming that they do produce for wide distribution in the United States -- largely news and sports -- would not be suitable for export.
- To the extent that television group owners realize efficiencies from greater integration of television program production and distribution in the United States, they would be better able to produce programming with greater mass appeal, which could lead to a greater flow of television programming across international borders.

While the major impetus for change comes from the domestic benefits associated with repeal, repeal could also promote the globalization of mass media firms.

Recommendation The national multiple ownership rule should be eliminated or substantially relaxed for both the radio and television services.

Chapter 10: THE FINANCIAL INTEREST AND SYNDICATION RULES

Findings The FCC's former financial interest and syndication rules, adopted in 1970 to prevent anticompetitive activities by the U.S. broadcast television networks, limited the ability of these U.S.-based firms to export programming through foreign syndication and to enter into co-production ventures with foreign entities.

In 1991, the FCC significantly modified the rules by eliminating some restrictions, relaxing others, and adding new limitations. During the proceeding that led to the 1991 rules, NTIA proposed that the FCC significantly relax the rules, while adopting certain narrowly tailored safeguards. In NTIA's view, the market for video programming had changed substantially since the 1970 rules were adopted, indicating a decrease in the market power of the television networks. NTIA found that ambiguities in both the data and theoretical economic analyses regarding the video programming marketplace raised the prospect that some forms of anticompetitive conduct by the networks could continue. In 1990, NTIA thus recommended that some safeguards were appropriate and attempted to narrowly target those safeguards to permit active participation by the networks in program production and distribution with limitations only on those specific areas in which concerns about possible anticompetitive conduct had some credibility.

On November 5, 1992, the U.S. Court of Appeals for the Seventh Circuit vacated the FCC's 1991 rules. On December 7, 1992, the court stayed that order for 120 days to permit the FCC to reexamine the rules. With that review in mind, NTIA discusses certain international effects of the 1991 rules.

As the FCC noted in adopting the 1991 rules, the former foreign syndication restriction had precluded network participation in

international markets even as the worldwide demand for U.S. programming was rapidly increasing and the networks' competitors were entering the international programming market. Indeed, from 1981 to 1988, foreign syndication revenues tripled, reaching $1.2 billion, and some have estimated that they will reach $4 billion in 1995.

Under the FCC's 1991 rules, the networks could better respond to the growing worldwide demand for programming by syndicating programming in foreign markets. We agree with the FCC that, regardless of what one thinks of the networks' participation in domestic syndication markets, there is no reason not to permit them to be fully active participants in foreign markets.

In order to be globally competitive, particularly in the growing programming market, the United States should field as many unencumbered players as possible. The current rules permit the networks to develop and deploy programming and packaging skills that could increase the returns to U.S. firms.

In today's global marketplace for programming, co-production ventures with foreign entities have emerged as one of the most effective means of competing in the international arena.

Co-production arrangements with foreign firms can allow U.S. companies to gain entry to otherwise restricted markets. Due to the imposition of program quotas in the EC Broadcast Directive, there is a strong incentive for U.S. firms, including U.S. networks, to enter into coproduction ventures with EC producers.

These ventures can also bring foreign capital and the promise of additional foreign distribution outlets to U.S. producers, at a time when program production costs are increasing and the networks' advertising revenues are flat.

The 1970 rules restricted U.S. television networks from engaging in co-productions with foreign producers. Under the 1991 financial interest

and syndication rules, the networks can now participate in these co-production ventures.

The 1991 rules make the networks much more attractive coproduction partners for foreign production companies because they allow the networks to offer potential co-producers, among other things, distribution through their U.S. broadcast affiliates.

While the 1991 rules governing foreign syndication and coproduction by the networks have direct implications for U.S. global competitiveness in programming markets, the impact on global competition of those provisions in the 1991 rules that govern domestic syndication is less clear.

The 1991 rules not only are more than adequate to address concerns about network power in the acquisition and distribution of video programming, they could unduly restrict future development of the networks' role as program producers.

Recommendation The FCC should consider the international effects of possible financial interest and syndication rules in detail. The major changes now occurring in distribution methods, technology, and the market structure of the television industry could well justify further modifications to the 1991 rules.

Chapter 11: LOCALISM

Findings Until the early 1980s, the FCC imposed relatively extensive programming guidelines upon broadcast licensees to ensure that they met the needs of their communities. The FCC eliminated many of these guidelines in 1981 and 1984, reasoning that marketplace incentives ensure that broadcasters provide programming that responds to community needs. Today, broadcasters may use their discretion, subject to only limited regulatory requirements, to determine how best

to provide programming that responds to the needs of their communities.

Under Section 307(b) of the Communications Act, the FCC seeks to ensure, through the licensing process, that as many communities as possible receive local broadcast service.

According to several studies, U.S. communities continue to demand their own particular blends of news and entertainment, even as the international mass media business changes. Even if demand decreases somewhat, the market is better equipped to respond to that decreased demand due to the greater number of media outlets available today.

Generally, firms will continue to provide the local programming desired by local communities because it makes economic sense to do so. We caution, however, that due to competitive pressure and economies of scale associated with nationwide distribution of syndicated programming, some broadcasters, particularly in smaller communities, may provide less programming directed solely to the local community.

The programming policy can be seen as an extension of the Section 307(b) policies -- as a "safety net" to ensure that broadcasters, once licensed by the FCC to serve the localized needs of particular communities, actually do so, even if a thriving market for local news and information does not exist in a particular community. Although such market failure may be increasingly rare in today's multimedia environment, the FCC's programming policy provides additional, non-intrusive assurance that broadcasters will continue to provide local programming demanded by their local communities. As such, the policy neither threatens the competitiveness of U.S. broadcasters or program producers nor is itself threatened by globalization.

Recommendations

Because radio and television broadcasting continue to be the most pervasive electronic sources of local news and information, there is no need to change policies that seek to promote local availability of broadcasting service.

Because Section 307(b) policies have been quite successful in promoting availability of broadcast service nationwide, they do not need to be altered.

PART I

Chapter 1
GLOBALIZATION OF THE MASS MEDIA

I. Introduction

Since the founding of the Republic, the mass media industry has held a special place in American society. The products of this industry -- films, video and radio programming, and recorded music, as well as books, magazines, and newspapers -- provide the vehicles through which ideas, images, and information are dispersed across the United States and throughout the world. In so doing, the mass media industries continuously replenish the "marketplace of ideas" that is essential to informed self-government. Through their instantaneous and broad-ranging dissemination of pictures, words, and music to all parts of the country, media firms also help build the shared experiences that perpetuate a sense of community and nationhood within the increasingly heterogeneous population of the United States.

At the same time, the mass media can be a powerful agent for political and social change. Many observers have noted, for example, that the East German government's efforts to control life behind the Berlin Wall were finally shattered by glimpses of a better future provided by West German television. The Chinese government's attempts to cover up its suppression of the 1989 pro-democracy movement were thwarted by the ability of student protesters to send and receive information about the government's activities via facsimile machines. In each of these cases, and in many others, the presence of the media added momentum to the underlying forces of change.

Finally, the mass media industry is also a major sector of the U.S. economy. Like other domestic industries, it has been profoundly affected by the internationalization of economic markets. Although U.S. media products have long been marketed overseas, the importance of international markets has grown steadily over the past decade. In 1991, for example, foreign sales accounted for approximately thirty-nine percent of U.S. motion

picture and television industry revenues, as compared with approximately thirty percent in 1986.[1]

Further, mass media firms are investing across national borders. Foreign investors have purchased U.S.-based program producers. U.S.-owned or located firms have expanded overseas through partnerships with foreign-based production companies, contributing to the growth of these companies. As a result, mass media firms that have traditionally been thought of as "U.S.-based" both face competition from, and partner with, a variety of international firms.

To a degree, the increasingly international distribution pattern of mass media products reflects their "public good"[2] nature: because the marginal costs of delivering information through the mass media to additional viewers are low, firms have an incentive to distribute their products widely. But the steady internationalization of the mass media industry is also attributable to expanded market opportunities. Advanced distribution technologies, such as fiber optics and satellites, have fostered a dramatic increase in multichannel video and radio services for consumers in many countries, via cable television, direct broadcast satellite (DBS) service,[3] and satellite sound broadcasting. Plans are being made to increase substantially the number of movie theaters in many countries.[4] The virtually ubiquitous availability of consumer electronic equipment has also increased the demand for recorded music, television programming, and videocassettes. Developing technologies such as digital

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1/ Motion Picture Association of America, Estimated Worldwide Revenues by Media for All U.S. Companies, 1980-1991 (Nov. 25, 1992) (MPAA Estimates). For purposes of compiling revenue data for the motion picture and television industries, the Motion Picture Association of America (MPAA) includes the following industry segments: theatrical box office receipts, television programming sales, pay TV programming sales, and home video sales.

2/ A "public good" is one in which the incremental cost of providing the good to an additional person is nearly zero.

3/ DBS service uses more powerful transponders than conventional satellites to transmit signals directly to inexpensive home receivers without the aid of a community or ground transmitter. DBS systems are commercially used in Japan and in Europe. DBS service to U.S. homes is projected to begin in early 1994. Lambert, Thomson Will Build Hughes DBS Receivers, Broadcasting, Feb. 10, 1992, at 10.

4/ See Citron, Hollywood Goes Boffo Overseas, L.A. Times, Mar. 30, 1992, at A1 (Hollywood Goes Boffo).

audio broadcasting (DAB)[5] and Advanced Television (ATV)[6] promise greater availability of even more sophisticated mass communications.

At the same time, many governments outside the United States have removed or relaxed barriers to commercial or privately-owned broadcasting. Countries from France to Bolivia have privatized existing state-owned television channels, while other countries, like the United Kingdom and Germany, have allocated spectrum for additional television channels. The democratization of the Eastern European countries and the republics of the former Soviet Union should lead to additional media outlets in those countries. The result of these technological and governmental changes is an explosion in the number of outlets for the dissemination of media products. That growth in outlets will inevitably stimulate worldwide demand for the products themselves, which should lead to growth in mass media industries around the globe.

NTIA undertook this report in order to reassess U.S. communications and mass media policy goals in light of the increasingly international nature of the electronic mass media industries. This report is based on the Notice of Inquiry[7] that we released in February 1990 and the record that we assembled in response to the Notice.

5/ DAB is a new digital broadcasting technology that may be provided by both traditional terrestrial radio broadcasters and by satellite systems. Digital cable radio is a service that beams radio signals to a cable headend for distribution through the cable facility. See Moshavi, Digital Audio Off and Running, Broadcasting, Dec. 2, 1991, at 38.

6/ The term ATV refers to a group of technologies that represent major advancements to broadcast television audio and video over the existing National Television Systems Committee (NTSC) television broadcast system. As such, it encompasses both improvements to NTSC -- enhanced definition television (EDTV) -- as well as high definition television (HDTV). HDTV systems are ATV technologies that aim to offer approximately twice the vertical and horizontal resolution of NTSC receivers and to provide picture quality that rival 35 mm film in clarity and definition and audio quality equal to that of compact discs. Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Notice of Proposed Rulemaking, 6 FCC Rcd 7024, 7024 n.1 (1991).

7/ See Comprehensive Study on the Globalization of Mass Media Firms, 55 Fed. Reg. 5792 (Feb. 16, 1990) (Notice). NTIA received comments from 26 parties, and reply comments from eight. See Appendix A. An alphabetical list of acronyms and abbreviations for the commenters is set forth in Appendix B.

Although the mass media industries historically have been among America's strongest, particularly in their ability to compete internationally, a basic theme of this report is that we cannot afford to be complacent about the success of U.S. media firms in international markets. Recent regulatory and technological changes require policymakers to adapt to these developments. Indeed, U.S. policy makers should be vigilant to promote the development of international mass media markets that are open and fully competitive -- the types of markets in which U.S. firms historically prosper. A principal focus of this report is an examination of possible changes in U.S. communications policy that could enable U.S.-based firms to compete more efficiently and effectively in international as well as domestic markets. In making our policy recommendations, NTIA seeks to emphasize the competitive effects of domestic U.S. mass media regulations, particularly those affecting radio and television broadcasters and the film and sound recording industries.

An open international marketplace not only serves U.S. trade goals, which are the principal responsibility of the Office of the United States Trade Representative and the International Trade Administration of the Department of Commerce, but it is fundamental to the continued vitality and diversity of the domestic U.S. mass media industry, a major goal of U.S. communications policy. An open international marketplace, in which the electronic mass media industry ties the nations of the world together, also can foster the growth of freedom and democracy worldwide.

II. DEFINITIONAL FRAMEWORK

In this report we discuss "globalization" as an economic and cultural phenomenon. In economic terms, globalization is a process by which firms attempt to earn additional profits through entry into foreign markets. Firms enter foreign markets either by foreign direct investment (FDI) or exports. Globalization is also a cultural phenomenon. Technology has eroded the barriers to communication previously posed by time, space, and national boundaries, resulting in rapid and pervasive sharing of information around the world. With improved communication has come greater cultural and political interdependence among other nations.

This report focuses on the electronic mass media -- motion picture and television programming, sound recording, broadcasting, and their associated delivery systems. Although we recognize that print media interests often constitute substantial portions of global media firms' portfolios, we emphasize electronic media, which are subject to more

comprehensive regulation within the United States and in other countries. Moreover, the technological changes affecting the various electronic mass media -- for example, the introduction of new delivery systems -- are sufficiently striking to justify the attention that we place on them in this report. In doing so, we often distinguish between the "hardware," or equipment, used to distribute and receive information through the mass media, and the "software," or programming, transmitted using the hardware.

Due to the increasingly international nature of many mass media firms, the identity of a firm's nationality is, in many cases, difficult to determine. As we acknowledged in the Notice, this trend is rendering descriptions of the national identity of such firms less meaningful.[8/] However, there are still cases, particularly in determining export and import activity and in considering regulations such as rules governing foreign ownership of media properties in which a firm's national origin can affect policy analysis. Many factors could be used to describe the national identity of a media firm: the nationality of a firm's owners, the physical location of the headquarters of the firm, the physical location of particular facilities, the nationality of the work force, the nationality of managerial control, and the degree to which a company is subject to a given national jurisdiction.

For purposes of this report, however, NTIA believes that a firm's nation of origin, loosely described as its "base" (as in "U.S.-based"), is best described as the country in which it acquires its essential competitive advantages.[9/] In particular, we consider a firm's base to be where its competitive strategy is established and where its core products are created or controlled. According to this convention, Time Warner is a U.S.-based firm because the creative and technical control of its products, despite its recent joint ventures with European partners, resides in the United States.[10/] On the other hand, the nationality of Columbia Pictures is less clear given recent attempts by its parent firm, Sony Corp. to exert greater control over its filmmaking subsidiary.[11/] Finally, if a firm provides multiple media

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8/ Notice, 55 Fed. Reg. at 5794-95, paras. 21-24.

9/ See M. Porter, The Competitive Advantages of Nations 19 (1990).

10/ For a discussion of these ventures, see Roberts, Time Warner Makes Progress in Talks in Effort to Recruit European Partners, Wall St. J., May 11, 1992, at B5. For a further description of Time Warner, see infra Appendix C at C-14.

11/ Brown, Sony Presses Shops Over Creative, Fees, AdWeek, Apr. 6, 1992, at 1, available in LEXIS, Nexis Library, CURRNT File. For a further description of Sony,

services, and if it derives its competitive advantages for each in different countries, that firm could be considered to have multiple bases. In adopting this convention, we recognize that national "labels" for firms, while useful for some purposes, are increasingly problematic, and we acknowledge that the approach described above may not be the best in all circumstances.

III. DESCRIPTION OF THE REPORT

The first part of this report discusses why and how globalization of the mass media is occurring, and then addresses the policy implications of globalization. Chapter 2 describes globalization trends by analyzing U.S. exports of and FDI in mass media products. Chapter 3 examines the international technological and regulatory changes that have affected the globalization trend. Chapter 4 considers why mass media globalization is occurring and focuses on the strategies that firms employ to enter foreign markets.

The report then examines the role of U.S. communications policies in this internationalized industry. As noted above, we believe that markets should be open for competition among all firms, regardless of national origin. At the same time, U.S. policymakers should seek to remove regulatory policies that inhibit the efficient participation of U.S.-based firms in the global marketplace. We have seen that U.S. governmental agencies concerned with international trade are seeking to make international markets function better by eliminating barriers to entry (such as program quotas), and promoting adequate protection for intellectual property.

Chapter 6 analyzes the U.S. restrictions on foreign ownership of broadcasting stations and recommends ways of modifying the rules to encourage greater participation by U.S. firms in foreign broadcasting markets as well as potentially increasing sources of investment for U.S. broadcasters. Chapter 7 discusses the importance of adequate and effective copyright protection to the commercial success and international competitiveness of U.S. mass media firms. We find that market-based compensation for the distribution of U.S. video programming in foreign countries is in the interest of the United States. As such, we encourage the United States to eliminate its cable compulsory licensing scheme both to realize the economic benefits of a market approach and to take the lead in combatting non-market-based approaches overseas.

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see infra Appendix C at C-12.

This report also examines the U.S. domestic regulatory structure for mass media firms. We do so seeking to ensure that such regulations do not impede the ability of firms that have a substantial presence in the United States to compete domestically and abroad. We also evaluate the role of the traditional goals of U.S. domestic communications policy -- diversity and localism -- in an era of globalization.

Chapter 8 assesses the role of the crossownership restrictions -- the network-cable, cable-telco, broadcast-cable, and broadcast-newspaper prohibitions -- in the international mass media marketplace. We conclude that to varying degrees, modification of each crossownership restriction could have some impact on the globalization of mass media firms, although the major justification for repeal lies in domestic considerations.

Chapter 9 examines whether the national multiple ownership rule, which limits the degree of horizontal concentration among broadcast firms, affects the international competitiveness of media firms, both U.S. and foreign-based. We conclude that although there may be some reasons based on international conditions for repeal of the national multiple ownership rule, the major impetus for change comes from its domestic benefits.

Chapter 10 discusses the effects of the current financial interest and syndication rules, adopted by the Federal Communications Commission (FCC) in 1991, on the global competitiveness of the U.S. programming industry. Although the U.S. Court of Appeals for the Seventh Circuit vacated these rules in November 1992, it stayed the effect of its ruling in order to permit the FCC to evaluate the need for new rules or modification or reinstatement of the 1991 rules.

Finally, Chapter 11 investigates whether the FCC's localism policies should be continued or modified in an era of increasing international dissemination of information. NTIA believes that these rules, which seek to promote the local availability of broadcasting service, should be retained.

Chapter 2

GLOBALIZATION TRENDS

I. INTRODUCTION

Two principal approaches that firms have adopted to satisfy international demand for mass media products are foreign direct investment (FDI) and exports.[12] As a major producer and consumer of mass media products, the United States has been at the center of these developments. In this chapter, we describe the role that mass media firms based[13] in the United States and elsewhere have played in the globalization of the mass media industry.

II. TRENDS IN FOREIGN DIRECT INVESTMENT

Under one federal statute, FDI in the United States is defined as the ownership by a foreign person or business of ten percent or more of the voting securities (or equivalent equity for an unincorporated business) of a firm located in the United States.[14] The U.S. Department of Commerce has estimated that, on a book value basis, FDI in the United States in all parts of the U.S. economy grew almost fivefold from 1980 to 1991, from $83 billion to $408 billion.[15]

12/ Licensing of products is another means of conducting international trade.

13/ See supra text accompanying note 9.

14/ International Investment and Trade in Services Survey Act, Pub. L. No. 94-472, § 3(10), 90 Stat. 2059, 2060 (1976) (codified as amended at 22 U.S.C. §§ 3101, 3102(10) (1988)). The firm acquired or established through FDI in the United States is commonly referred to as a U.S. affiliate of a foreign-based firm.

15/ See Bureau of Economic Analysis, U.S. Dep't of Commerce, 72 Survey of Current Business (1992). The Department of Commerce also has current-price or "economic value" estimates of FDI in the United States, but only the book value estimates have been disaggregated by country or industry.

A. FDI Involving U.S. Mass Media Firms

By engaging in FDI in the United States, a number of foreign-based firms have grown to be large global media conglomerates.[16] The foremost examples of this trend are Sony's acquisition of Columbia Pictures in 1989 and Matsushita's purchase of MCA in 1990.[17] The manner in which foreign-based firms enter the U.S. mass media industry is as important as their decision to do so. A prospective entrant has two means of investing. A firm can enter a country by "acquisition" -- that is, the purchase of an existing business. A firm can also enter by making a "greenfield" investment, one in which the entrant builds a presence in a host country "from the green field up" -- that is, without acquiring a business already located in that country.

As demonstrated by Sony's acquisition of Columbia Pictures and Matsushita's acquisition of MCA, entry through acquisition has been the prevalent recent form of FDI in the U.S. motion picture industry. A recent example in the television industry is the 1992 purchase of Univision Television Network, the United States' largest Spanish-language television network, by an investor group that includes, as a minority investor, Mexico's largest media company, Grupo Televisa.[18] In contrast, there have been few examples of foreign "greenfield" investment in the U.S. mass media industry.

Foreign-based firms' preference for acquisition over greenfield investment as their mode of entry in the U.S. strongly suggests that existing U.S.-based mass media firms possess assets, such as proven creative talents, that are more costly to develop through a greenfield

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16/ Foreign-based firms have also engaged in FDI outside the United States. For example, Bertelsmann has acquired financial interests in RTL Plus (a satellite television (TV) station based in Luxembourg that serves much of Europe), Premiere, a joint venture with Canal Plus for a pay TV service in Germany, and book and record clubs in approximately 11 European countries, Latin America, North America, New Zealand, and Australia. For a further description of Bertelsmann, see infra Appendix C at C-1.

17/ For a further description of Sony, see infra Appendix C at C-12. For a further description of Matsushita, see infra Appendix C at C-7.

18/ See Keenan, Mexican, Venezuelan Channels Buy U.S.'s Univision, Reuter Lib. Rept., Apr. 8, 1992, at 1. This acquisition was approved by the Federal Communications Commission (FCC) on September 30, 1992. See Applications of Univision Holdings, Inc. and Perenchio Television, Inc., Memorandum Opinion and Order, 7 FCC Rcd 6672 (1992).

investment. These assets also make U.S.-based mass media firms natural candidates for foreign joint ventures.[19] For instance, despite unfavorable financing conditions in Japan, C. Itoh and Co., Ltd. and Toshiba Corporation signed a financial agreement with Time Warner in October 1991, to establish a new entertainment partnership, named Time Warner Entertainment (TWE), that will engage in film and television production and distribution, as well as cable system programming and operation. Press reports indicate that the Japan-based partners will contribute $1.0 billion to TWE, while Time Warner will grant TWE the right to distribute some of Time Warner's most valuable software (e.g., Home Box Office (HBO), television programs) in Japan.[20]

Many other U.S. companies are participating in joint production with foreign partners and are engaging in foreign direct investment abroad. For instance, CBS has entered into a co-production agreement with Granada Television, located in the United Kingdom.[21] Similarly, Hanna Barbera has signed an agreement with Montreal-based Cinar and France Animation to co-produce thirteen half-hours of the animated Young Robin Hood.[22]

B. FDI Data

The previous examples of FDI provide only a partial picture of the magnitude of the globalization process in the U.S. mass media industry. To provide a more complete view, we have attempted to measure the extent to which globalization via FDI has occurred in the U.S. mass media industry. While conceptually straightforward, this task is complicated by several fundamental problems.

19/ Among the competitive advantages enjoyed by the existing mass media firms recently acquired by foreign investors are established distribution networks and valuable film libraries.

20/ See Connor, Time Warner Gets $1 Billion From 2 Japanese Partners, Reuter Bus. Rpt., Oct. 29, 1991, at 1. For a further description of Time Warner, see infra Appendix C at C-14.

21/ See New World TV Order Evident at MIP, Broadcasting, Apr. 29, 1991, at 23 (New World TV). For a further description of CBS, see infra Appendix C at C-5.

22/ New World TV, supra note 21, at 24. In another region, Time Warner, in partnership with US West, currently provides cable television service, including Time Warner's HBO pay television channel, to subscribers in Hungary.

For example, there are four principal measures of FDI, each of which has important weaknesses as well as strengths.[23] The most commonly used measure, the cumulative stock of FDI in the United States as recorded in the U.S. Balance-of-Payments Tables,[24] has the limitation of measuring the "book value," rather than "economic value," of the investment.[25] Because these two metrics will rarely coincide, this measure of FDI will typically not provide the best information regarding the true level of FDI in the mass media industry. Moreover, the Balance-of-Payments Tables lump the mass media industry with numerous other service industries, such as computer and data processing, health, engineering and architectural services, thereby obscuring the amount of FDI occurring in the mass media industry.

An alternative method of measuring FDI is to calculate the total assets of the U.S. affiliates of foreign-based firms. Yet another alternative measure of FDI is the value added by U.S. affiliates of foreign-based firms. Finally, FDI in the United States can be measured in terms of the share of the U.S. work force employed by U.S. affiliates of foreign-based firms. Each of these methods of measuring FDI has the weakness of failing to capture the increase in FDI resulting from a foreign firm's increase in its stake in its own affiliates.

For present purposes, the share of the U.S. work force employed by U.S. affiliates of foreign-based firms appears to provide the most accurate measure of FDI in the U.S. mass media industry. First, because it is not expressed in monetary terms, this measure does not

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23/ See E. Graham & P. Krugman, Foreign Direct Investment in the United States 11-19 (2d ed. 1991).

24/ The Balance of Payments Tables are a statistical summary of international transactions. These transactions are recorded using the double-entry principle used in business accounting, wherein each transaction produces two offsetting entries, a debit and a credit. See Bureau of Economic Analysis, U.S. Dep't of Commerce, The Balance of Payments of the United States at xiii (May 1990). The cumulative stock of FDI is described in those tables as the "foreign direct investment position in the United States." It is calculated largely based on balance of payment flows, but itself is not part of the balance of payments.

25/ As mentioned supra in note 15, although the U.S. Department of Commerce maintains aggregate current price or "economic value" estimates of FDI in the United States, these estimates have not been disaggregated by trading partner or industry.

present discrepancies between "book value" and "economic value" of investments. Second, employment data is available on a highly disaggregated basis.[26]

Industry employment data for foreign-based and U.S.-based firms are available on a International Surveys Industry (ISI) codes basis from the Bureau of Economic Analysis of the U.S. Department of Commerce.[27] These codes are closely related to the Standard Industrial Classification (SIC) codes used widely by the U.S. government. While there is no set of ISI code numbers that corresponds to the collection of industries that we have referred to generally as the "mass media industry," employment data are nonetheless available for one of the constituent parts of our definition. Specifically, ISI #780 includes the motion picture and television production industries, including theaters, drive-ins, video tape and video disk rental industries.

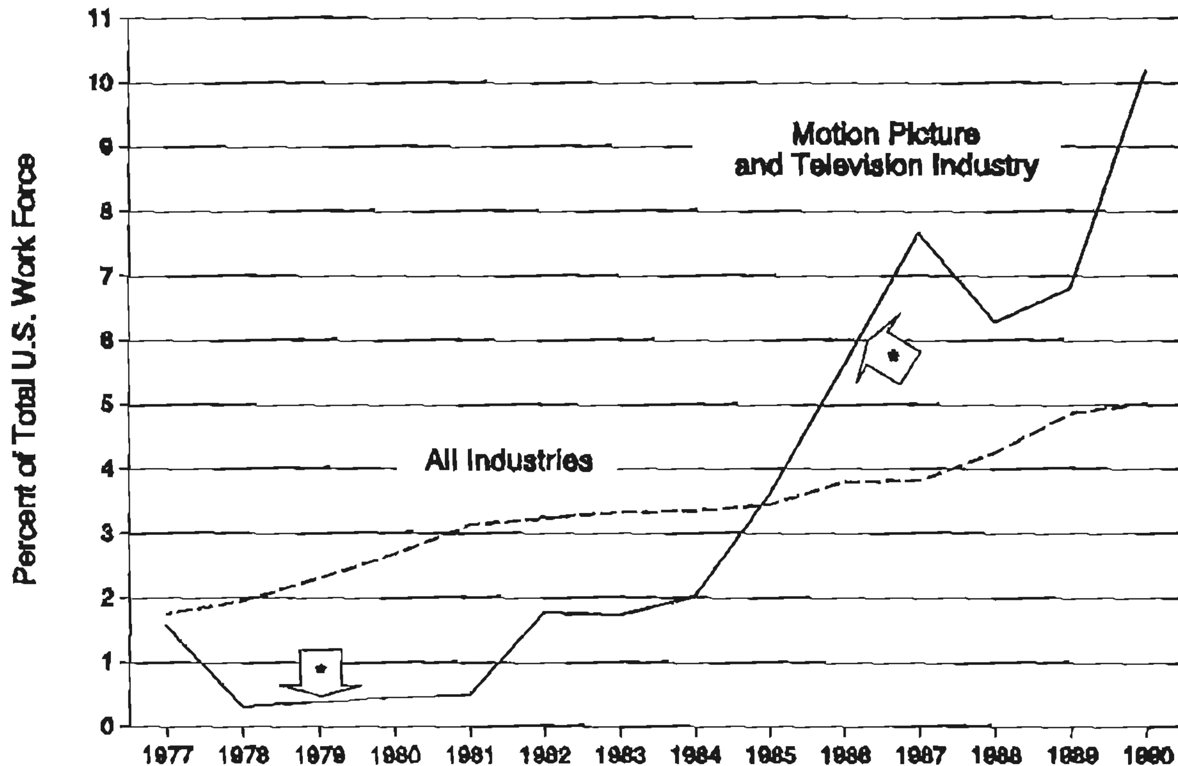
The above data makes it possible to calculate the share of U.S. domestic work force employed by U.S. affiliates of foreign-based firms in the motion picture and television production industries.[28] This is presented in Chart 2.1. This chart indicates that for the period 1977-1990, FDI in this industry proceeded at a rapid rate, with the greatest increase occurring since 1984. As of 1990, U.S. affiliates of foreign-based firms employed just over ten percent of the motion picture and television production industries's work force, up 553% since 1977.[29]

26/ While this same level of disaggregation is available on a book value basis, these estimates may diverge from current price or economic value estimates of FDI.

27/ See Bureau of Economic Analysis, U.S. Dep't of Commerce, Guide to Industry and Foreign Trade Classifications for International Surveys (1987).

28/ Annual data on the full and part-time employment by U.S. affiliates of foreign-based firms in the motion picture and television production industries were collected for the period 1977-1990. Annual data were also collected on full and part-time employment in the U.S. motion picture and television production industries. Division of the former by the latter yields the share of U.S. domestic work force employed by foreign affiliates in the U.S. motion picture and television production industries.

29/ The employment data presented in Chart 2.1 for 1989 and 1990 may not fully reflect Sony's acquisition of Columbia Pictures and Matsushita's acquisition of MCA because of the classifications used by BEA in organizing that data. BEA collected the employment data of Chart 2.1 on a "primary industry of sales" basis -- that is, it identifies any given firm with a particular industry or line of business. When one firm is acquired by another, the employee totals of the acquired firm are assigned to the acquiring firm's primary industry. Thus, the employees of the acquired motion picture



* BEA has not provided employment data for the Motion Picture and Television Industry for 1979 and 1986. The observed values for these data are interpolated.

Source: Bureau of Economic Analysis, U.S. Dep't of Commerce. Includes part- and full-time employment for private industries, excluding banks and private households.

Chart 2.1: Share of U.S. Domestic Work Force Employed by U.S. Affiliates of Foreign-Based Firms

To compare the globalization trend in the U.S. motion picture and television production industries with the overall U.S. economy, we have obtained employment data for both U.S.

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studios may be classified under the primary industries of the acquiring firms, which may not be motion picture or television production. However, BEA does not make public the primary industry of sales of any firm for confidentiality reasons.

Measuring FDI in the U.S. mass media industry on a book value or other basis would provide a different estimate.

affiliates of foreign-based firms and U.S.-based firms for all U.S. industries.[30] Since 1977, globalization through FDI has proceeded at a faster rate in the U.S. motion picture and television production industries than in the overall U.S. economy. Chart 2.1 indicates that just over five percent of the total U.S. work force was employed by a U.S. affiliate of a foreign-based firm in 1990, an increase of 184% from 1977.[31]

C. Economic Consequences of FDI

The rise in importance of U.S. affiliates of foreign-based firms in the U.S. mass media industry has attracted widespread attention at two levels. First, a debate exists concerning the causes of FDI generally. Some have argued that the observed increase in FDI in the U.S. over the past decade is attributable to the economic problems of the United States, among the more important of which are a general decline in U.S. economic competitiveness and the decline in the U.S. dollar.[32]

Second, FDI in the U.S. mass media industry has sparked public controversy in large part because it provides foreign investors with direct managerial control over some of this country's most visibly "American" products,[33] which also are the source of much of the information publicly available in the United States.

Despite these issues, there exists a consensus among economists that FDI provides, in general, a net benefit to the U.S. economy. For instance, FDI can enable the domestic work

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30/ This data is found each year in the May issue of the Survey of Current Business published by the Bureau of Economic Analysis, U.S. Department of Commerce.

31/ Because of concerns over maintaining data source confidentiality, the Bureau of Economic Analysis does not publicly provide much of the employment data for U.S. affiliates of foreign-based firms for the U.S. motion picture industry. See Bureau of Economic Analysis, U.S. Dep't of Commerce, Foreign Direct Investment in the United States Table F-3 (1992). Consequently, NTIA does not have data on which foreign country has the largest FDI position in the U.S. motion picture industry.

32/ See Graham & Krugman, supra note 23, at 57-84.

33/ The equity threshold of 10% mentioned above, see supra text accompanying note 14, is considered the minimum needed for any entity to have some direct managerial control over a firm.

force to acquire new management and technical skills.[34] FDI may also lead to increased specialization and a more efficient use of the world's resources by encouraging international trade -- that is, the transfer of resources between countries. By facilitating economic activities across national boundaries, firms that engage in FDI also transfer resources between countries. If the coordination capabilities of such firms are superior to the market's, FDI will facilitate trade between countries, thereby improving the economic welfare of all countries. Finally, by sometimes adding to the number of firms operating in a country, FDI may improve the market structure of a domestic industry.[35] This procompetitive effect may even occur when the mode of entry is through acquisitions, because acquisition candidates are sometimes the least competitive firms.[36]

In some cases, however, FDI may pose some problems for the economy of the host country. For example, concerns have been raised that U.S. affiliates of foreign-based firms may worsen the U.S. trade deficit due to an apparently higher propensity to purchase abroad, compared to their U.S.-based counterparts. Despite this concern, trade specialists generally believe that FDI, on balance, provides a net gain to the host country.[37]

III. Trends in Mass Media Exports

Exports have played a major role in the trend toward the globalization of the mass media industry, and the U.S. mass media industry has been a major participant in this process.[38]

34/ Moreover, these benefits grow if the newly-trained workers bring their new skills to different jobs and begin training additional workers.

35/ See Dunning, The United Kingdom, in Multinational Enterprises, Economic Structure and International Competitiveness 13-53 (J. Dunning ed., 1985). For a discussion of the possible anticompetitive effects of FDI, see Graham, Foreign Direct Investment and Market Structure, 4 Int'l Trade 82 (1990).

36/ The absence of any strong empirical test makes the proposition that FDI via acquisition has procompetitive effects the most controversial of the benefits listed.

37/ See Graham & Krugman, supra note 23, at 57.

38/ An export is a transaction between two parties that transfers a product or service across national boundaries. Exports occur at the distribution stage of the process. In the film and video industries, distributors manage the flow of films and video products through exhibition "windows" or outlets. U.S.-produced feature films may be distributed

A. U.S. Exports

U.S.-based mass media firms' participation, via exports, in the globalization of the mass media industry can be measured in two different ways. The first, "country-based" approach considers trade in entertainment software from a "country" perspective. This approach identifies, for instance, the origin of exports by the country that earns the foreign exchange receipts. Similarly, this approach identifies the importing country as the country that remits the payment.[39] Therefore, for example, this approach would consider as a U.S. export the receipts Disney earns through its export of "The Little Mermaid" videocassettes from the United States to an unaffiliated foreign distributor. In analogous fashion, this approach would consider, as a U.S. import, the payments Disney makes as the result of its acquisition of the U.S. distribution rights of a foreign produced film.

The second approach of measuring the globalization of the mass media industry via exports involves examining the export of entertainment software on a "firm" basis. This approach considers the firm, and not the country, as the unit of analysis. It identifies the origin of export not by which country earns foreign exchange receipts, but rather by the location of the "base" of the exporting company.[40] For example, this firm-based approach would consider the receipts that a Disney foreign affiliate earns through its sale of the

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through at least eight exhibition windows: domestic theatrical, foreign theatrical, pay-per-view, worldwide home video, pay-TV, foreign TV, network TV, and television syndication. Distribution of film and video product to foreign theatrical, foreign TV, and worldwide home video are forms of export. The channels for distribution to these various windows can vary. Foreign distribution often occurs through international sales organizations, owned by relevant studios in many cases. Rights may also be sold directly to foreign distributors and exhibitors.

In the television programming industry, the major program distributors are the television networks, cable networks, film and television studios, and independent distributors. Subject to various restrictions, these firms export programming to foreign broadcast television stations, cable networks, pay-per-view channels, and cable systems.

In the sound recording industry, the largest record companies and, to a lesser extent, independent record companies distribute domestically and internationally to retailers and packagers. Many major U.S. record companies have subsidiaries abroad, which distribute records, tapes, and compact discs (CDs) overseas.

39/ This approach is used in the construction of the U.S. balance of payments statistics.

40/ See supra text accompanying note 9.

distribution rights of "The Little Mermaid" to a foreign unaffiliated distributor as a U.S. "export" since Disney is headquartered in the United States.[41] Similarly, it would also consider, as a U.S. "import," the payments made by a Disney affiliate located in a foreign country for the purchase of the foreign distribution rights of a foreign film, again, because Disney is headquartered in the United States.[42]

The firm-based and country-based approaches to international trade measure two complementary but distinctly different economic activities. By recording payments the United States makes and receives as a result of trade in mass media products, the country-based approach measures a country's international trade performance.[43] On the other hand, the firm-based approach measures the extent to which the U.S.-based firms, such as film studios, are participating in the international market for mass media products. As discussed below, the differences in the economic activities being measured are reflected in the large disparity in the annual values of the two measures.

1. U.S. Trade in Motion Picture and Television Programming[44]

Films produced by studios located in the United States are shown in more than a hundred countries, and U.S. television programming is broadcast in more than ninety international markets.[45] The U.S. motion picture industry provides the vast majority of prerecorded video programs for the world's home video market, and is the primary supplier

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41/ In contrast, because the receipts of the exchange go to the foreign country in which Disney's affiliate is located, this transaction would not be recorded as a U.S. export under the country-based approach.

42/ Because the unit of analysis under this approach is the firm, the terms "export" and "import" take on meanings different from those usually associated with the country-based approach.

43/ A measure of such performance is important to our analysis because changes in a country's international trade performance sometimes have important fiscal and monetary impacts in the domestic economy. For a discussion of these impacts, see, e.g., T. Grennes, International Economics 423-53 (1984).

44/ For purposes of this section, the "motion picture and television programming industry" includes the following industry segments: theatrical box office receipts, television programming sales, pay television programming sales, and videocassette sales.

45/ See U.S. Dep't of Commerce, U.S. Industrial Outlook '92, at 31-1 (1992).

of filmed entertainment for pay television services, such as cable television and television via satellite.[46] As noted above, the percentage of revenues derived from foreign markets for the U.S. motion picture and television programming industry increased substantially from 1986 to 1991.[47]

The U.S. Department of Commerce's Bureau of Economic Analysis (BEA) follows the "country" approach in measuring exports. To this end, BEA compiles annual data on export receipts and import payments for the motion picture and television programming industry. These data reflect the receipts and payments for film and tape rentals[48] and broadcasting and recording of live events.[49] This data appears in Table 2.1. According to BEA, exports of motion pictures and television programs generated over $2.2 billion in revenues in 1991. These receipts contributed to a total net export[50] of $2.1 billion that year, thereby providing a substantial positive contribution to the overall U.S. balance of payments. Over the five-year period from 1987 to 1991, net exports for the motion picture and television programming industry showed nearly a twofold increase.

46/ Id.

47/ In 1991, the percentage of box office receipts earned from foreign markets declined to 44% from 47% in 1990. See Murphy, The 15 Major Export Markets for American Films in 1991, Daily Variety, June 9, 1992, at 24 (15 Major Export Markets).

48/ Such receipts and payments include "royalties, rentals, license fees, and other funds received or paid, including those from outright sales and purchases, for the rights to display, reproduce, or distribute material pre-recorded on motion picture film or television tape [for uses] including theatrical, cable, broadcast television, and non-theatrical" performance. Bureau of Economic Analysis, U.S. Dep't of Commerce, Annual Survey of Royalties, License Fees, and other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons 2 (Form BE-93, rev. 9/90).

49/ Such receipts and payments would include "rights to record and/or broadcast "'live'" performances, such as sports events. Id. BEA bases its annual figures on data collected in quarterly surveys of inward and outward direct investment, which collect information on transactions between parents and affiliates, and in an annual survey of transactions with unaffiliated foreigners.

50/ A "net export" occurs if exports exceed imports. Conversely, a "net import" results if imports exceed exports.

	1987	1988	1989	1990	1991
Exports	1,152	1,144	1,740	2,219	2,203
Imports	62	505	111	112	81
Net	1,090	639	1,629	2,107	2,122

Source: Bureau of Economic Analysis, Survey of Current Business, September 1990 and September 1992, tables 4-5.

Table 2.1: Exports and Imports of U.S. Firms -- Motion Picture and Television Programming Industry, 1987-1991 (in millions of dollars)

The firm-based approach to measuring exports and imports is reflected in the data compiled by the Motion Picture Association of America (MPAA).[51/] Table 2.2 presents export data for film and tape rentals and broadcasting and recording of live events as compiled by the MPAA. According to the MPAA, the U.S. motion picture and television programming industry exported, on a worldwide basis, over $7 billion worth of film and television programming in 1991.

	1987	1988	1989	1990	1991
Exports	3,512	4,656	5,275	7,514	7,016

Source: MPAA Worldwide Market Research, Estimated Worldwide Revenues by Media for All U.S. Companies, Nov. 25, 1992, and unpublished data.

Table 2.2: Worldwide Sales -- Motion Picture and Television Programming Industry, 1987-1991 (in millions of dollars)

2. U.S. Trade in Recorded Music

Recorded music (e.g., CDs, cassettes, and vinyl records) produced in the United States is among the most listened-to music in the world.[52/] The import and export data for records, tapes, and other recorded media compiled by the Census Bureau of the U.S. Department of Commerce provides a measure of the global popularity of U.S.-produced recorded music. This data, which uses the country-based approach to exports and imports, is

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51/ MPAA obtains its export and import data from its member companies (10 major production companies) as well as from the members of the American Film Marketing Association (AFMA), which includes approximately 110 independent production companies.

52/ See The Patent Pirates are Finally Walking the Plank, Bus. Wk., Feb. 17, 1992, at 125.

shown in Table 2.3.[53] As indicated, exports of records, tapes, and other recorded media rose forty-seven percent during the period 1989 to 1991, from $286 million to $419 million. On the other hand, imports of records, tapes and other recorded media increased thirty-six percent over the same period, from $101 million to $137 million. As a result of these individual trends, net exports for this product group rose fifty-three percent over the same time period.

	1989	1990	1991
Exports	286	372	419
Imports	101	121	137
Net	185	250	283

Source: Compiled from the U.S. Dep't of Commerce's Bureau of the Census.

Table 2.3: Exports and Imports of Records, Tapes and other Recorded Media, 1989-1991 (in millions of dollars)

B. Non-U.S. Exports

Most production communities around the world, other than the United States, have had limited success distributing mass media products internationally.[54] However, this situation is beginning to change in response to the growing demand for film and television programming. By providing niche programming for a specific market and collaborating with other production communities for both expertise and financial resources, production communities in Asia, Latin America, and Europe are increasingly producing quality programs that have international appeal. The development of more productive and competitive indigenous industries is largely the result of technological innovation in the marketplace, but in some instances, governments are encouraging indigenous production through protective policies and through a variety of grant programs.

53/ The primary recording industry representative, the Recording Industry Association of America, Inc. (RIAA), also uses the country-based approach, rather than the firm-based approach as used by MPAA. RIAA acquires its export and import data from the U.S. Department of Commerce.

54/ According to one source, the United States, France, Italy, the United Kingdom, and Germany supply approximately 80% of all films that all countries import in the world. United Nations Educational, Scientific, and Cultural Organization, World Communication Report 160-61 (1989). Percentage applies to programming imports to non-socialist countries before the disintegration of the Soviet Union.

In an effort to protect and promote European film and television production, the EC adopted several subsidy programs in 1990.[55] These programs, collectively referred to as the MEDIA Program, have a combined five-year budget of $256 million and are being used to stimulate European production and distribution of film and television programming.[56] The EC believes that policies promoting European production and distribution are necessary because local firms have been unable to distribute more than twenty percent of their product beyond their country of origin[57] and films and television programming produced by European-based firms face substantial competition from imports.[58] Indeed, over the past fifteen years, the American market share for theatrical films in Europe has increased fifty percent, accounting for sixty percent of the European box office.[59]

55/ MEDIA provides training for cinema and television professionals. See Ilott, Priming the Euro Pipeline, Variety, June 8, 1992, at 37 (Priming). The MEDIA program also seeks the formation of a European distribution cooperative to assist in the dissemination of European films throughout the EC. Films of EC origin qualify for distribution advances (to be repaid by the films' producers) provided they present a coherent distribution scheme including cinema, video, and television releases. See A Fresh Boost for Culture in the European Community: Commission Communication to the Council and the Parliament COM(87)603 final at 6.

56/ See Priming, supra note 55, at 37-38. The EC and the Council of Europe planned to disburse approximately $70 million in film and television subsidies by the end of 1992. Funds were distributed for production, distribution, vocational training, conservation of old prints, and conferences on technology and script writing. This does not include subsidies by national governments. See Producers Vie for $70 Mil in Film, TV Subsidies, Variety, Feb. 10, 1992, at 41 (TV Subsidies).

57/ Although firms based in Europe typically produce about 600 feature-length films a year, 80% of these films do not leave their country of origin. See TV Subsidies, supra note 56, at 41.

58/ For example, 70% of the French box office receipts are earned by films produced by firms headquartered outside of France. See Alderman, Buying Pieces of Hollywood, Variety, Mar. 16, 1992, at 47. U.S. films earned 95% of the box office receipts in the United Kingdom in 1991. See Ilott, Brits Following Hollywood's Lead, Variety, Oct. 19, 1992, at 70.

59/ TV Subsidies, supra note 56, at 41.

The EC's plan to stimulate program production includes, among other things, promoting business partnerships, providing tax breaks to program producers,[60] removing barriers to trans-European broadcasting, and requiring European broadcasters to reserve a majority of their transmission time for European works.[61] In some instances, governments are requiring companies to invest in European film production. France's Canal Plus is obligated to spend ten percent of its annual expenditures to local film production.[62] In addition to government assistance, some European program producers are seeking co-ventures with and financing from non-European sources,[63] many of which are located in the United States[64]

60/ France is providing monetary incentives for production in the form of tax-exempt investment companies. Priming, supra note 55, at 37.

61/ See Council Directive 90/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 (Broadcast Directive). Chapter III of the Broadcast Directive states that "Member States shall ensure where practicable and by appropriate means that broadcasters reserve for European works . . . a majority proportion of their transmission time . . . ." Id. at 26, art. 4, para. 1. A "European work" can be a co-production between EC and non-EC participants based on a formula of creative, technical, and financial contributions. A production or co-production may be counted as a European work under the Broadcast Directive if it is made by a producer "established in one or more of those [EC] States," or the work is "supervised and actually controlled" by a producer established in an EC state, or "the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside these States." Id. at 26, art. 6.

This quota does not apply to time allocated to news, sports events, games, advertising, and teletext services, which can originate from any country. An additional 10% of air time must be reserved "for European works created by producers who are independent of broadcasters." Id. at 27, art. 5.

62/ For a further description of Canal Plus, see infra Appendix C at C-3.

63/ In France, nearly one out of every two films is co-produced with a foreign producer. See Fewer and Larger Companies are Producing French Films, Variety, Mar. 16, 1992, at 47. Non-French funds now account for one-fourth of the country's television production budgets. See French Program Output Rises While Funds Fall, Eur. Media, Mar. 2, 1992, at 3.

64/ Time Warner, for example, is a partner with Bertelsmann in the German network Westschienenkanal. It also has begun a movie channel in Hungary, is a founding shareholder in French-based media venture capital fund Com 2i, and intends to play a larger role in a Scandinavian pay TV channel. See Groves, Time Warner Forages in

in response to the competitive challenge posed by U.S.-based studios. CIBY 2000 and Canal Plus are two such European program producers investing in U.S. program productions.[65/]

In Latin America, increasing economic stability and government subsidies are encouraging the growth of television program production.[66/] Firms located in Brazil, Venezuela, and Argentina are becoming important regional suppliers of television programming and are making inroads in Europe, particularly in Spain and Italy, and on Hispanic stations in the United States.[67/] Firms in these countries have been very successful in producing telenovelas (television soap-operas). In fact, world demand for telenovela programming is so strong that some U.S. program producers are investing in Latin American studios.[68/] New cable ventures in Latin America are also growing, but thus far, the majority of programming shown on Latin cable is from the United States.[69/]

Euro Media Field, Variety, Mar. 16, 1992, at 1, 80. Time Warner also has an 18% interest in Initial Groupe, a French film buying agency.

65/ See Grantham, Euromoguls, Forbes, Dec. 9, 1991, at 140-46.

66/ To encourage film production, Brazil is offering tax incentives to industries investing in "culture." Brazil and Argentina are granting subsidies to local film industries. See Besas, The South Rises Again: DBS and Cable Fuel Latin Showbiz Surge, Variety, Mar. 23, 1992, at 73, 104 (South Rises Again).

67/ Venevision, the largest television network in Venezuela, is engaged in foreign syndication in European countries such as Turkey, Greece, Italy, and Spain. GrupaTelevisia, which owns three of Mexico's television networks, is estimated to derive 10% of its revenues from the sale of television programming abroad. See Univision's Big Brothers South of the Border, Broadcasting, Oct. 26, 1992, at 62. According to the President of Venevision, Latin American countries are increasingly producing their own programming, which is displacing U.S.-made programming. See Coe, Discovering the U.S. Hispanic Viewers, Broadcasting, Oct. 26, 1992, at 70.

In 1991, the foreign sales of Globo TV (a Brazilian program producer/distributor) increased 10%, totaling more than $20 million. See Besas, Globo Grabs the TV Jackpot in Brazil, Variety, Mar. 23, 1992, at 82.

68/ South Rises Again, supra note 66, at 104; see also Coe, Maxi-Series Make Prime Time Inroads, Broadcasting, June 22, 1992, at 26 (U.S. producer entering into co-production alliances with Europeans to produce Americanized telenovelas for worldwide distribution.)

69/ Total billings by U.S. companies for programming on cable in Latin America are around $1.5 million per month and growing. Sorting Out Numbers and Prices on

Asia, led by firms based in India, Japan, and Hong Kong, has been the world's largest regional producer of motion pictures, in terms of numbers of feature films produced, since the 1960s.[70] However, few Asian films are widely distributed outside of Asia, while the increasing presence of foreign, primarily U.S. production, in the region continues to erode local production and audience levels.[71] Similarly, although producers headquartered in India continue to produce the largest number of feature films in the world, Indian film producers have found it difficult to export their films beyond Asian countries where there are large communities of Indian expatriates.[72]

Cable, Variety, Mar. 23, 1992, at 92.

HBO-Olé, the prime supplier of feature films to cable systems in Latin America, acquires rights to the films it distributes from Warner Bros., Fox, and U.S. independents. Besas, HBO-Olé Muscles In, Variety, Mar. 23, 1992, at 96.

70/ Since 1960, Asia, Europe (including the former Soviet Union), North America, Latin America, and the Caribbean have been the first, second, third, and fourth largest regional producers of motion pictures, respectively. See United Nations Educational, Scientific, and Cultural Organization, Statistical Yearbook 1991 Chart 6.5 (1991) (UNESCO).

In 1989, Asia produced 63.6% (2,935 motion pictures) of the world's total number of films (4,615). Europe produced 920 motion pictures, North America produced 395, and Latin America and the Caribbean produced 235. Id.

In 1989, the world's top film producing countries were India with 781, Japan with 777, the United States with 345, the former Soviet Union with 156, Hong Kong with 137, France with 136, Italy with 114, and the former Republic of Germany with 68. Id. at Chart 8.1.

71/ See Murdoch, Far East Producers Fear U.S. Domination, Variety, Sept. 14, 1992, at 34.

72/ India produced 396 motion pictures in 1970 and 781 in 1989. UNESCO, supra note 70, at Chart 8.1. Net box office receipts for the year 1989 were 6.8 billion Rupees (in 1989 one U.S. dollar equaled 16.226 Rupees.) In 1988, such receipts were 6.3 billion Rupees. See International Motion Picture Almanac 696 (62d ed. 1991).

Indian producers export film to the United Kingdom, Singapore, Dubai, Indonesia, Fiji, the United States, Mauritius, Kenya, and to other countries where there are large Indian population groups. Id.

Demand for Japanese films, other than for animated programming, is limited both internationally and domestically.[73] In contrast, demand for foreign features in Japan continues to grow. In 1990, foreign features in Japan earned $306 million, up sixteen percent from 1989. Rentals in Japan of domestically-produced films were down six percent for 1990, totalling $216.2 million.[74] However, export revenues earned from Japanese films have risen from $7,110,148 in 1981 to $17,307,000 in 1991, although this is still a relatively small figure compared to the revenues earned by foreign films in Japan.[75]

Hong Kong film producers have been increasingly successful in exporting theatrical films to Taiwan and Southeast Asia, markets that account for between one-half to two-thirds of their total revenue. Hong Kong-made films are also finding new audiences in Japan and South Korea.[76] The success enjoyed by Hong Kong film producers, particularly in Asia, has been attributed to the fact that they produce action films that are popular in Asia.[77]

As demonstrated in the data presented earlier, despite the growth of program production in communities outside the United States, foreign demand for U.S. programming appears to be growing substantially. Over the long term, the increase in foreign production capabilities may eventually challenge the United States's pre-eminent position in the global entertainment

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73/ Japan exports television programming and motion pictures to markets in Europe, Asia, and North America. In 1990, approximately 57.3% of Japan's motion picture exports went to Europe, 19.3% to Asia, and 11.2% to North America. Export Markets Resist Japanese Feature Films, Variety, Sept. 16, 1991, at 50.

Although demand for Japanese films is limited, Japanese film production is increasing. Japan produced 423 motion pictures in 1970 and 777 in 1989. UNESCO, supra note 70, at Chart 8.1.

74/ See U.S. Pics Pick Up Share in '90; Domestic Rentals Down, Variety, Sept. 16, 1991, at 46. In 1991, the majority of revenues earned abroad were from two films, Rhapsody in August and Aurora (a Japanese/Russian co-production), and various animated films. See Japanese Motion Pictures Producers Association (1992).

75/ See Eisenstodt, A Cozy Japanese Near Monopoly, Forbes, Sept. 30, 1991, at 52.

76/ Taiwan is the biggest single market for Hong Kong films, accounting for 50% of overseas sales; Singapore and Malaysia generally take another 30%. The rest is divided among Japan, South Korea, United States, Canada, and Europe. See Goldstein, Hongkong's Screen Test, Far East Econ. Rev., Feb. 8, 1990, at 40-42.

77/ Id. at 40.

industry. In the shorter term, however, it appears that the growing numbers of broadcast and cable channels will accommodate the growth in both U.S. and non-U.S. programming. Moreover, many emerging production communities are looking to the United States for expertise and finance, creating more opportunities for U.S. program producers. In the near term, the threat of intellectual property rights violations and the imposition of program quotas by foreign governments are perhaps a greater concern to U.S. program producers than the emergence of production communities in other countries.[78/]

78/ For a discussion of the problem of international copyright protection, see infra Chapter 7 at p. 93.

Chapter 3

WORLDWIDE CHANGES AFFECTING GLOBALIZATION

I. Introduction

A variety of factors influence both the demand for and supply of media products. The development of new delivery systems, complemented by technological innovation in consumer electronics, has facilitated the supply of media products to consumers on a global basis. Governments also affect the worldwide market for media products, both by opening new markets and by creating barriers to entry. In addition, other factors, such as linguistic differences, leisure time, and the development of pop culture, have an impact on the dissemination of media products.

II. The Role of Technology and Standards

The development of new communications technologies has revolutionized the mass media industry worldwide, changing the way media products are delivered from media packagers to distributors (for instance, from broadcast networks to local broadcast stations) and from distributors to the consumer.[79] These technologies have expanded the sources of supply of media products to meet increased consumer demand for such products on a global level. As global media markets develop, future technological developments will play an increasingly important role in shaping the viewing and listening options available to consumers.

A. Distribution Systems

Historically, consumer access to television and radio programming depended on terrestrial broadcast stations. The development of new distribution systems has greatly expanded the potential sources of supply for all types of media products. Today, for instance, media firms deliver television programming to viewers through distribution systems

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79/ A media packager is an entity that assembles the output of media producers and delivers a bundle of such media to a distributor (e.g., cable system, broadcast station). Examples of media packagers are cable networks and broadcast television networks. In some cases, firms may engage in both activities (e.g., cable operators).

that include terrestrial broadcasting, cable systems, multichannel multipoint distribution systems (MMDS), and direct broadcast satellite (DBS) service.[80/]

The development of these new systems has also had a significant impact on how media products are delivered from program packagers to distributors. Historically, broadcast stations obtained their programming through terrestrial radio signals, wireline facilities, and microwave relays, supplemented by a process colloquially known as "bicycling," the physical movement of tapes, films, and records from place to place. Today, satellite transmission systems have greatly facilitated the delivery of television and, to a lesser extent, radio programming from program packagers to distributors, both domestically and internationally.[81/] In the United States, for instance, satellites deliver feeds from the broadcast television networks to many of their local affiliates, which then broadcast that programming over-the-air.[82/] Satellites also deliver cable network programming to local cable systems, which then distribute that programming to subscribers through coaxial or fiber

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80/ A cable system's headend receives video and audio signals either off-the-air, via microwave, or via satellite. These signals are subsequently transmitted via coaxial cable or, increasingly, a combination of fiber optic and coaxial cable, to the home.

MMDS systems (commonly referred to as "wireless cable") use microwave radio frequencies to deliver audio, voice, data, or video signals to roof-top antennas located on homes or multihousehold dwellings such as apartment buildings. MMDS systems typically provide less diverse and fewer programming choices than cable systems, but greater diversity and more programming than available over-the-air from broadcast stations.

For a description of DBS, see supra note 3.

81/ Video traffic transmitted over domestic transponders accounts for 60% of U.S. domestic satellite utilization. Satellite distribution of cable and broadcast programming to affiliates accounts for half of this video traffic. The remaining half is composed of "backhauls" (routing back live events to a distribution site), business television, satellite newsgathering, and distance learning. See Howes, Fiber Versus Satellites, Via Satellite, Mar. 1992, at 86.

82/ Most regional radio networks in the United States use satellite transmission to distribute their programming. Some even distribute national network programming via satellite to their members. However, radio networks continue to use telephone company facilities when satellite capacity is not available and when frequencies become crowded during special events. See Herbst, Networking the Networks, Network World, Apr. 24, 1989, at 29 (Networks).

optic cable.[83] Domestic satellite capacity continues to grow, in terms of number of satellites in orbit and transponders used for television signal transmission.[84]

Live transoceanic transmission of television programming is now routine using geostationary satellites, which have evolved dramatically since 1965, when the International Telecommunications Satellite Organization (INTELSAT) launched its first low-earth-orbiting satellite, Early Bird.[85] INTELSAT and a variety of other satellite systems provide international delivery of video and audio programming.[86] The use of satellites to provide coverage of fast-breaking news events, such as the Persian Gulf war in 1991, has made more people aware of the possibilities of this technology than ever before.[87]

83/ According to the National Cable Television Association (NCTA), all of the top 50 multiple system operators are deploying fiber. See Karpinski, Fiber: Not Just for Telcos Anymore; Telephone Companies and Cable TV Telephony's Transmission Special: Building the Infrastructure Supplement, Telephony, Dec. 2, 1991, at S6.

84/ For example, as of year end 1991, there were more than 31 commercial satellites serving the United States. In the early to mid-1980s, there were approximately 19 commercial satellites serving the United States. See FCC, In-Orbit United States Domestic Fixed-Satellite Systems List (Dec. 16, 1991); see also Chien, U.S. Satellite Scene and Overview, Via Satellite, Apr. 1992, at 38. There are approximately 750 transponders in the United States. See Boeke, Pacific Possibilities: Satellite Solutions in Southeast Asia, Via Satellite, Jan. 1992, at 42 (Pacific Possibilities).

85/ Established in 1964, INTELSAT is a 125 member-nation cooperative that provides global satellite communications to all countries. INTELSAT is an important international carrier of television programming signals.

86/ Some other systems include: Eutelsat (European Telecommunications Satellite Organization), Europe's DBS system (Astra), Arabsat, AsiaSat, and PanAmSat. See Phillips Publishing, Inc., The 1992 World Satellite Directory 1-976 (1992). PanAmsat has launched a satellite over the Atlantic Ocean and plans to launch three hybrid C-Ku-band satellites to achieve worldwide coverage. If these plans are fulfilled, PanAmsat will be the first private satellite system with global coverage. See Pacific Possibilities, supra note 84, at 42.

87/ This awareness has significantly affected regional and domestic demand for satellite-delivered television, directly to home dishes and through cable companies, particularly in the Middle East and Asia. See generally Chase, A Look Ahead A Look Behind: Key Events of 1991 and Trends for the Decade, Via Satellite, Jan. 1992, at 20.

Satellites have played a significant role in the development of the cable television industry in the United States.[88] Satellites provide cable networks such as HBO and Entertainment and Sports Programming Network (ESPN) a low-cost method of networking thousands of cable systems in the United States. In turn, these and other cable networks have stimulated the demand for cable television in the United States. This phenomenon is being replicated in other regions of the world.[89] Satellite broadcast services are growing rapidly in Europe today. The first European television satellite service began in 1982, enabling cable networks throughout Europe to provide two hours a day of programming. By 1988, this service was reaching twenty million homes in about twenty European nations, providing eighteen hours a day of television programming.[90] DBS service began in Europe in 1989, providing Europeans with another medium for receiving programming.[91]

Outside of Western Europe and the United States, satellite technology is expanding consumer access to media products as well, although more slowly. The most dramatic changes are occurring in Asia. Before Hong Kong-based AsiaSat was launched in April of 1990, Southeast Asia had one regional satellite system, Indonesia's Palapa, launched in 1976.[92] Both Palapa and AsiaSat are primarily used to fulfill domestic telephony

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88/ In 1975, Home Box Office (HBO) first began delivering commercial uninterrupted programming via satellite to U.S. cable systems. See National Telecommunication and Information Administration, U.S. Dep't of Commerce, NTIA Telecom 2000: Charting the Course for a New Century 550 (1988) (Telecom 2000).

89/ For penetration rates of cable television in several foreign markets, see National Cable Television Association, Facts at a Glance: International Cable 1 (Oct. 1992) (NCTA Facts at a Glance); Siwek, The Dimensions of the Export of American Mass Culture 37 (Mar. 10, 1992) (conference paper, presented at the American Enterprise Institute) (U.S. Exports).

90/ See Gallagher, New Satellite Services Satisfying Consumer Demand, in The Center For Strategic and International Studies, The New Europe and Satellite Smorgasbord: Dishing up the Policies, Politics and Technologies of the 1990s 70 (S. Bruno ed., 1992).

91/ Consumer demand is demonstrated by growth in the number of home receiving dishes. After two years of DBS service, there were 1.5 million home dishes in the United Kingdom alone. Id. at 70. A second DBS satellite was launched to meet demand, and two more are to be launched by 1994. Together, these four DBS satellites will provide 48 channels of programming.

92/ Palapa serves the Philippines, Thailand, Malaysia, Singapore, and Papua New Guinea.

requirements but, more and more, programmers are leasing capacity to provide pan-Asian television services direct to homes, apartment buildings, and hotels.[93/]

A number of Asia/Pacific countries, such as Japan, Republic of Korea, Malaysia, Thailand, and Australia, have decided that domestic demand warrants acquiring their own satellite systems.[94/] Japan has a fleet of domestic satellites designed for numerous broadcasting applications. In particular, Nippon Hoso Kyokai (NHK), Japan's public broadcasting corporation,[95/] and Japan Satellite Broadcast Corporation provide DBS to Japanese homes.[96/]

Fiber optic cable is another means of distributing programming from program sources to distributors. Fiber-based transmission systems can potentially play a significant role in the international delivery of audio and video programming.[97/] In the United States, for instance, some radio and television networks are already using fiber to interconnect broadcast studios and earth stations.[98/] Internationally, the number of submarine fiber cables is

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93/ The ESPN and Cable News Network (CNN) have signed leases on Palapa to deliver sports and news programming to Asia. See Pacific Possibilities, supra note 84, at 46. For a further description of CNN, see infra Appendix C at C-17.

94/ Japan and the Republic of Korea plan to launch two small domestic satellites in 1995. Malaysia plans to launch its own satellite in 1994. Australia already has three satellites, and Thailand plans to launch two satellites in the near future, one in 1993 and the other in 1994. See Update News, Via Satellite, Jan. 1992, at 13, 14.

95/ For a further description of NHK, see infra Appendix C at C-11.

96/ Satellite applications in Japan are centered around video and television broadcasting, satellite newsgathering, television and cable distribution, direct-to-home and DBS broadcasting, high definition television (HDTV) transmission, and business and educational television.

97/ Fiber optic cables transmit voice, data, and video signals by short bursts of light through glass filaments. Fiber optic transmission facilities can offer much greater information-carrying capacity than other delivery systems.

98/ In many cities, the Bell Operating Companies and other communications providers maintain local fiber networks that interconnect switching centers, teleports, television and radio studios, and sites that frequently host remote broadcasts. Most of radio networks' use of fiber facilities is used for program backhauls and some distribution. The television networks use 45 Mbps fiber for video backhauls between New York and Washington. See Networks, supra note 82, at 29.

growing, but so far these cables have been used almost exclusively for voice and data transmissions, rather than television signals.[99] As international fiber cables become more widely available, they will become another significant transmission medium for television and radio programming.[100]

Both satellite and cable-based transmission media are relying increasingly on digital technologies.[101] As breakthroughs in digital signal compression techniques permit the transmission of the same or higher quality signals in smaller bandwidths, digital delivery systems are likely to become more common. Digital technologies also offer potential improvements in reception quality and lower signal power levels. This shift to digital systems may have a major impact on traditional outlets for programming, particularly broadcasting. For example, digitizing the broadcast signal can allow greater and more flexible use of the broadcast delivery medium to provide a variety of services.

Digital technologies already enhance analog delivery systems. For example, the Radio Broadcast Data System (RBDS), which allows FM radio stations to transmit digital data on their subcarrier frequencies, has found consumer acceptance in Europe and is expected to be introduced shortly in the United States.[102] Digital technologies may soon even replace analog technologies altogether in distribution systems for television and radio services. In June 1990, General Instrument announced a prototype, fully ATV transmission system for

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99/ There are 15 international submarine fiber cables, and 43 additional cables have been proposed. These cables have generally not been used to deliver television programming internationally. See AT&T, WorldWide Intelligent Network: Submarine Systems Status Report to USG Executive Branch Interagency Group Table of Contents (July 3, 1991).

100/ Telephone companies and equipment manufacturers are developing integrated services digital network software for fiber optic cables that can carry video. See National Telecommunications and Information Administration, U.S. Dep't of Commerce, NTIA Special Pub. No. 91-26, The NTIA Infrastructure Report: Telecommunications in the Age of Information 97-109 (Oct. 1991) (NTIA Infrastructure Report).

101/ Digitization also has changed media production, to the point where audio and video production, editing, and storage equipment increasingly resemble, and sometimes are indistinguishable from, computers.

102/ See Bunzel, RBDS Technology Will Transmit Data Via FM Radio, Broadcasting, Feb. 17, 1992, at 42. RBDS sends data to receivers capable of decoding and displaying information such as station format, or weather traffic reports.

consideration by the Federal Communication Commission's (FCC) Advisory Committee on Advanced Television (ATV) Service as the U.S. transmission standard for terrestrial broadcasting.[103] Since that time, all but one of the ATV proponent systems that the FCC is considering have reconfigured their systems and are now fully digital. These events have altered the direction of ATV research in the United States, and have apparently caused firms in both Europe and Japan to evaluate their analog ATV systems in light of advances in digital transmission.

Digital audio broadcasting (DAB) is a new digital technology for radio broadcasting that offers superior reception to that currently provided by AM and FM broadcasters, as well as sound quality that will rival compact discs (CDs). DAB has the potential to be the most significant advance in audio broadcasting quality since the development of FM radio. It can be provided by traditional terrestrial AM and FM radio stations or through satellite systems directly to consumers' receivers. The recent World Administrative Radio Conference (WARC-92) allocated spectrum for satellite DAB and complementary terrestrial DAB.[104] While some question whether terrestrial broadcasters will readily embrace DAB,[105] market acceptance of CDs seems to indicate that there is demand for high quality sound.

103/ See Compression: Changing the World of Television?, Broadcasting, June 11, 1990, at 68.

104/ Although, in theory, WARC-92 established a worldwide allocation for DAB in the L-band (1452-1492 MHz), and thus paved the way for DAB to become a viable worldwide service, several countries throughout all three International Telecommunication Union regions indicated that until 2007 they would offer such services only on a secondary basis. See International Telecommunication Union, Final Acts of the World Administrative Radio Conference (WARC-92) fn.722AAA (Malaga-Torremolinos, 1992) (WARC-92 Final Acts). In addition, several countries have allocated on a primary basis the 2500 MHz band for DAB. Id. at 23. Furthermore, in order to protect the military aeronautical telemetry services already operating in that band, the United States has an alternative allocation in the L-band, and instead, along with India, plans to use 50 MHz in the S-band (2310-2360) for DAB. Id. at 20. See also Jessell, WARC Moves DAB Step Closer to Reality, Broadcasting, Mar. 9, 1992, at 40.

105/ See Lambert, In-Band DAB Makes Design Leaps, Broadcasting, Apr. 20, 1992, at 32. U.S. broadcasters are exploring the possibility of an "in-band" DAB system that would operate in existing FM spectrum.

B. Consumer Electronics

Technological innovation in consumer electronics has affected "traditional" media products, such as television and radio receivers, and created new ones, such as videocassette recorders (VCRs), CD players, digital audio tape (DAT) players, and home satellite receiving dishes. Technological innovation has often enhanced the quality and reduced the prices of these products, providing unambiguous evidence of an increase in consumer welfare.[106/]

One determinant of the size of this welfare gain is the increase in consumer demand for these products and associated programming software. For example, CDs, which offer a significant improvement in sound quality over cassettes and vinyl records, are largely credited for the 11.1% increase in the value of world recording sales from 1989 to 1990.[107/] Another potential source of consumer welfare gain is HDTV, which promises, among other things, to provide superior video picture clarity.

The development of new delivery systems and more affordable consumer electronics is enabling individuals to exert additional control over their consumption of media products, rather than relying on limited programming choices that, in many countries, are controlled by the government. Technological change has provided the individual consumer, whether cable subscriber, video tape renter, or satellite dish owner, with more viewing and listening options. For instance, in countries where VCR penetration is relatively low, such as Pakistan and some parts of Latin America, "video parlors" have sprung up where viewers watch films on television sets and VCRs for a small admission fee. As discussed below, the growth of such viewing and listening options causes difficulties in enforcing the intellectual property rights of program producers.[108/] In many remote corners of the world, home satellite dishes are enabling individuals to receive mass entertainment programming for the

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106/ For example, home satellite dishes that formerly sold for more than $10,000 in the United States are now available for between $2000-3000.

107/ See International Federation of the Phonographic Industry, Press Information: World Sales 1990 (Oct. 1, 1991).

108/ See infra Chapter 7 at p. 93.

first time. Because the reach of a satellite's "footprint"[109] is usually quite broad, citizens of one country are increasingly able to receive programming from neighboring countries.

C. Standards

Although compatible technical standards for media distribution can facilitate the dissemination of programming, standards have not developed in the same way for all mass media products.[110] In some instances, a de facto standard has evolved through the uncoordinated behavior of users, while in other instances standards have been adopted through formal agreements among industry groups, sometimes under the auspices of government.

Regardless of the process, the adoption of a standard for a mass media product can enhance both consumer and producer welfare. For example, television viewers benefit from being able to receive every local broadcast television station using the same television set.[111] A standard can also lead to lower consumer prices for complementary inputs, thereby improving consumer welfare.[112] Manufacturers of mass media products can benefit from a standard to the extent that it reduces consumer concerns over "premature" technological obsolescence, thereby stimulating the demand for their products.[113]

109/ A satellite footprint is the area within which transmissions beamed to the ground can be received.

110/ For present purposes, a "standard" is a set of technical specifications adhered to by manufacturers or service providers, either tacitly or as a result of a formal agreement. For a discussion of the economics of standards, see P.A. David & S. Greenstein, The Economics of Compatibility Standards: An Introduction to Recent Research, 1 Econ. Innov. New Tech. 3 (1990).

111/ For a discussion of the benefits of standards, see S.M. Besen & L. Johnson, Compatibility Standards, Competition, and Innovation in the Broadcasting Industry 98 (The Rand Corporation, Nov. 1986) (prepared under a grant from the National Science Foundation).

112/ See M. Katz & C. Shapiro, Network Externalities, Competition, and Compatibility, 75 Am. Econ. Rev. 424-40 (1985).

113/ See S. Berg, Duopoly Compatibility Standards with Partial Cooperation and Standards Leadership, 3 Info. Econ. & Policy 35-53 (1988).

On the other hand, some argue that a "premature" standardization process can hinder innovation, thereby reducing consumer welfare. A particular standard, once set, can be extremely difficult to change. Furthermore, where the technologies of competing standards are "owned" by firms through patents, each firm will want its technology to emerge as the standard. In such instances, the "best" standard (i.e., the standard that maximizes consumer and producer welfare) may not be adopted.[114/]

Many of the issues regarding standardization apply in world markets. Global standards can help to increase a product's revenue potential. Such global standards can also result in lower prices to consumers. However, changing existing standards can be difficult in a worldwide market.[115/]

Many worldwide standards exist for media products. For instance, international communications satellite standards facilitate the distribution of programming to broadcast and cable intermediaries for retransmission to consumers. Similarly, although improvements in the quality of theatrical film have caused the product of the 1990s to be vastly different from the product of the 1920s, for more than six decades 35 mm film at 24 frames per second has been the de facto worldwide standard for studio film productions.

In the international arena, standardization has often occurred through industry's cooperative efforts or through the dominant position of a single firm or set of firms. For instance, producers of analog audio recordings quickly realized they could expand the demand for their product by setting, through a formal cooperative agreement, worldwide standards of 78, then 45, and 33 rpm. In the latest generation of audio standards, the two major companies that developed the underlying CD technology, Philips and Sony, cooperated in setting the so-called "Red Book" standard for audio CD, three years prior to the

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114/ See Besen & Johnson, supra note 111, at 14.

115/ There may be strong incentives to retain existing standards. For example, although technological change may provide improved quality of television and radio services, it can also disrupt the status quo and impose costs on millions of individuals that have receivers built to the existing transmission standards. The larger the group that is affected by a change to a new standard, the higher the cost, both economic and political, the more difficult the change, and the more likely that governments will have to be involved to facilitate the change.

introduction of the first audio CD player in 1983.[116] In contrast, today's de facto consumer videotape standard, VHS, resulted almost solely from competition among market participants.

Because of the difficulty in coordinating the interests of either the respective users or manufacturers, worldwide standards do not exist for all mass media products. Television transmission standards, which resulted from extensive government deliberation, are not globally compatible. Although there are communications satellite standards for program delivery to broadcast and cable intermediaries, DBS systems are not globally compatible.

For a variety of reasons, including economic status, national technical needs, balance of payments, history and experience, some nations may prefer to adopt standards that are not compatible with those of other nations.[117] National or regional differences in mass media standards may be driven by differences in standards in other related technologies. For example, the difference in "frame rate" among the current worldwide color television transmission standards is a result of the international differences in the frequency of electrical current frequency,[118] which make conformance to a worldwide standard costly.

Another reason why standards may not emerge is that firms and governments often attempt to use standards as a strategic tool to develop a new market or expand or revive a

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116/ See Fox, Multimedia in a Muddle, New Scientist, Sept. 21, 1991, at 35, 38.

117/ See R. Crane, The Politics of International Standards: France and the Color TV War 8 (1979) (Politics of International Standards). Crane suggests that "the introduction of compatible standards between different countries may not always be a desired end . . . . Furthermore, domestic, political and economic interests may oppose attempts at establishing compatible standards . . . . [T]he economic revenue or political prestige . . . from having a domestic standard internationally adopted may outweigh the benefits to be gained from . . . compatibility." Id.

118/ Countries operating on a 50 Hz electrical system adopted television systems that transmit video at 50 fields per second, while those operating on 60 Hz electrical power adopted a television system based on transmission of 60 fields per second. Current television standards are "interlaced" -- that is, each frame comprises two fields, resulting in a frame rate of 30 frames per second for 60 Hz countries and 25 frames per second for 50 Hz countries. Although some suggest that the underlying reason for this difference is no longer viable, it appears likely that the next generation of television standards will retain this difference.

mature market.[119] Such strategies may have influenced the development of color television standards. Some have concluded that "the differences in [television] standards were more a result of industrial and commercial interests than technical considerations."[120] As a result, while ninety-five percent of the components of the NTSC, PAL, and SECAM color television standards are based on the original American patents,[121] the systems are still essentially incompatible, requiring special processing in order to share programming.[122]

119/ A firm seeking new sources of revenue may view implementation of a new standard based on its proprietary technology as an opportunity to capture increased revenues in a stagnant or slow-growth market, or as a means to block entry of other firms. Some have suggested that such reasoning may have motivated JVC and other companies to support the Super VHS format to replace the VHS standard for VCRs. See Chittock, Television Standards Upset by Influx of Recording Formats: Film and Video, Fin. Times (London ed.), July 7, 1987, at 33. Moreover, just as firms might use standards as a strategic tool to deter competitive entry by other firms, so too can governments use standards strategically. Some question the value of a strategy of using standards to protect or gain international markets, suggesting that achieving worldwide agreement is possible only if that nation's standard is seen as clearly superior. See Besen & Johnson, supra note 111, at 98. In the absence of such a superior technology, some maintain that such a strategy will likely result in multiple standards worldwide. Id.

120/ Politics of International Standards, supra note 117, at 16. Prior to the introduction of color television in Europe, organizations responsible for program distribution hoped that each country would adopt the same color television system because of the technical difficulties in distributing programs to countries with different systems. In the late 1950s, the French adopted the Sequential Memory (SECAM) system, rather than U.S. color television system, National Television System Committee (NTSC), apparently as a result of the French government's desire to develop a domestic television industry. The French also attempted to have SECAM adopted as the European standard. However, in 1962, after discontinuing negotiations with the French to license patents for the SECAM system, the Germans developed the Phase Alternation by Line (PAL) system. In the 1960s, the International Radio Consultative Committee attempted to reach agreement on worldwide, or at least regional, standards. The attempt failed, however, and, as a result, there are now three color television standards in use worldwide and two color television standards in use in Europe. See Besen & Johnson, supra note 111, at 95-98; see generally Politics of International Standards, supra note 117.

121/ See Politics of International Standards, supra note 117, at 18.

122/ Id. at 14.

For a variety of reasons, therefore, including their pervasive role in managing the radio spectrum, governments have typically been involved in broadcast transmission regulation,[123] including the development of standards. In choosing a broadcast standard, governments often seek to protect consumer investment by requiring that new transmission systems, and associated television and radio receiver standards, be compatible with existing systems.[124] The U.S. Government followed this approach in the 1950s with regard to color television.[125] In Europe, where there were numerous incompatible black and white television standards,[126] the various governments adopted one of two color television standards, PAL and SECAM, that were compatible with all existing black and white systems.[127]

Similar debates are occurring over possible means of lessening the financial impact on consumers of the next generation of television and radio standards. This concept has affected, to some degree, the European Community's efforts to establish a unified advanced television standard[128] and the discussions regarding worldwide compatibility of the next generation of video standards.

123/ See discussion infra Section III, at pp. 42-48.

124/ Standards adopted through a market-based approach often recognize the economic importance of maintaining compatibility with an earlier standard.

125/ In 1953, after it had chosen as a standard a color television system developed by CBS that was incompatible with the existing black and white standard, the FCC reconsidered its decision and selected another standard, the NTSC color television system, that was backward compatible with the existing black and white system. See Besen & Johnson, supra note 111, at 89-92. Thus, the U.S. color television standard, which is nearly 40 years old, is based on an even older black and white standard. However, any change to the current NTSC transmission standard will in turn affect the nearly 200 million television receivers in use in the United States.

126/ Politics of International Standards, supra note 117, at 12.

127/ See Besen & Johnson, supra note 111, at 97.

128/ The European-proposed HD-MAC standard is 1250 lines of resolution, broadcast at 50 fields per second, providing an easy upward compatibility with PAL and SECAM, which are both 625 lines of resolution (one-half of 1250) at 50 fields per second.

III. The Role of Government and Regulatory Change

Government agencies can play an important role in the media globalization process, based on their ability to affect numerous aspects of the international competitive environment. In some instances, governmental action may result in the opening of media markets; in other instances, governmental action may have the effect of closing markets.

A. Opening Markets

Historically, many nations have had state-owned broadcast systems that provided relatively limited services.[129/] Over the past two decades, a combination of forces -- political, economic, cultural, and technological -- have moved the international mass media industry toward more competition and less regulation on a global basis. Many of the countries that are undergoing privatization of the mass media are moving toward mixed broadcast environments, similar to the United Kingdom, France, Germany, and Italy, in which state-owned broadcasters coexist with private broadcasters. Poland, Mexico, Argentina, Bolivia, Hungary, Sweden, Thailand, and the former Czechoslovakia are some of the many countries that are either privatizing their mass media industries or awarding more concessions to commercial television and radio networks. Although privatization is a slow process, it generally has created new business opportunities for program providers and has improved the viewing choices of consumers.[130/]

129/ The U.S. situation differs from most other countries in that both television and radio broadcasting have developed in a commercial environment.

130/ According to one estimate, between 1984 and 1988, the number of foreign television channels doubled. See Comments of CapCities/ABC at 17-18.

Although broadcast reform has led to an expansion in television and radio channels, few countries' program production industries have the capability to fill their demand for programming. As a result, many domestic television broadcasters and cable networks have had to rely on imported programming. This has contributed to the increased foreign demand for U.S. programming. See Amdur, MIPCOM Lesson: No Country is an Island, Broadcasting, Oct. 19, 1992, at 6; Coe, L.A. Screenings Becoming A Worldwide Draw, Broadcasting, June 15, 1992, at 19; Amdur, Dealing in Monte Carlo: Monte Carlo Television Market and Festival, Broadcasting, Feb. 17, 1992, at 31.

Media liberalization in Western Europe has led to the gradual introduction of independent, commercial television stations in the United Kingdom, France, Spain, Germany, Portugal, and Italy.[131] The use of satellites in the late 1980s to deliver programming both to cable systems and directly to viewers with home dishes increased the number of channels available in Western Europe. While in 1980 there were a total of 38 television channels in Europe, that number was estimated to be more than 125 in 1991.[132]

In many Central and Eastern European countries, since the collapse of the Soviet regime, there has been a shift away from total state control of the media (especially the print media) to some reliance on the market. However, the degree and pace of change varies by country.[133] Several governments in Eastern Europe seem to agree that some reliance on the market is desirable, but financial difficulties and the lack of a well defined strategy for implementing these desires, along with political instability, is impeding progress in this direction.[134] The most progress, in terms of privatization of broadcasting, has occurred in the former Czechoslovakia, which adopted broadcast laws in 1991 that allow for commercial

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131/ Independent Television (ITV) in the United Kingdom was among the first commercial European television systems. The first ITV programs began in 1955. See Reference Services, Central Office of Information, Government of the United Kingdom, Broadcasting in Britain: Recent Developments 6 (May 1991).

For more information regarding the mass media in Western Europe, see infra Appendix D, which describes media regulations for the seven industrialized countries and Mexico and provides statistics on the number of broadcast stations and the penetration of various distribution technologies in each of these countries. See also A. Lensen, Concentration in the Media Industry: The European Community and Mass Media Regulation (The Annenberg Washington Program, 1992).

132/ See Shapiro, Television: Lust-Greed-Sex-Power, N.Y. Times, June 2, 1991, at B29.

133/ See Sparks, From State to Market: What Eastern Europe Inherits from the West, 3 Media Dev. 12-13 (1991) (State to Market).

134/ Poland and Bulgaria, for example, have experienced extensive delays in developing and enacting media legislation, due to political turmoil and a lack of cooperation from government leaders. See Independent Radio in Eastern Europe Faces Myriad Problems, Woodrow Wilson Ctr. Rep., Apr. 1992, at 4.

broadcasting.[135/] To date, a number of commercial radio licenses have been granted; in early 1992, there were two state-owned television channels and one private television channel.[136/] The private television channel offers programming obtained from foreign sources including CNN, CapCities/ABC's ScreenSports, and U.S. Information Agency's Worldnet.[137/] Similarly, Poland has granted temporary broadcast licenses to nineteen television and radio stations while it considers a new broadcasting law that would permit private broadcasting.[138/] And in Bulgaria, although the constitution of July 1991 mandates private broadcasting, Bulgaria has no laws regarding private broadcasting. In fact, the existing law (passed by the old regime) does not permit such activities. In spite of this dichotomy, two private radio stations have begun to broadcast without government licenses.[139/]

Media privatization in Latin America and the accompanying introduction of free market principles have led to a rise in private television and radio stations. In Bolivia, for instance, the government ended its monopoly over television in 1984. By 1986, Bolivia had thirty-five new private television channels. In Chile, the first privately owned television station went on the air in October 1990. Venezuela's largest cable operator, Omnivision, signed a joint venture in 1991 with Home Box Office to launch a Spanish-language movie service for Latin America and the Caribbean. Mexico's Televisa and Brazil's TV Globo have long been large privately-held conglomerates, participating in the production, sales, and distribution of

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135/ See Clark, Split-up and Competition Rattle Czechoslovak TV, Variety, Feb. 3, 1992, at 70. It remains to be seen whether these laws remain in effect following the breakup of the former Czechoslovakia.

136/ Id.

137/ See Czechoslovakia: Redrawing Media Boundaries, Broadcasting, July 16, 1990, at 90.

138/ See Gov't to Curb Radio and TV Piracy, PAP, Polish Press Agency, PAP News Wire, Nov. 9, 1992, available in LEXIS, Nexis Library, CURRNT File. The Polish postal service reportedly has already received 600 applications for new radio licenses and 120 applications for new television licenses. See Private B'casting For Poland?, Variety, Oct. 26, 1992, at 34.

139/ See Meyer, Media and the Law in Bulgaria: After the Constitution 5 (Central and East European Law Initiative, American Bar Association, Nov. 19, 1991).

television, video, film, radio and sound recordings for domestic and foreign markets.[140] Privatization in Argentina and Mexico, which has led to the divestment of state-owned telecommunication utilities, is also creating opportunities for commercial television program producers and distributors. Similar trends are expected to continue in Venezuela and Uruguay.[141]

Until recently, programming opportunities have been limited in Asia. Many Asian governments have sought to control the flow of news and information in their countries in order to protect their domestic, mainly state-owned, terrestrial broadcasters.[142] They also have been restricting the growth of cable. However, recent media reforms in Singapore, Malaysia, Thailand, Indonesia, the Philippines, Brunei, and Papua New Guinea are enabling new commercial program providers to enter those markets.[143] In Indonesia, Malaysia, and the Philippines, commercial entities are increasingly obtaining licenses to operate both public

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140/ See E. Fox, U.S. Information Agency, Latin American Broadcasting: The Balance of the Past, the Challenge to Come 1-20 (working paper, June 1991).

141/ See Chase, The Latin America Market: Growing up Fast, Via Satellite, Jan. 1992, at 24.

142/ Many Asian countries forbid the reception of satellite television. Others restrict, to some extent, the type of information available, and some have strict standards of program and advertising content. See Seddon, Meeting the Challenge in the Asia-Pacific, Via Satellite, Jan. 1992, at 74.

For example, both Singapore and Malaysia have prohibited the sale of satellite dishes to individual homes, and the Japanese government has prevented its domestic cable industry from taking broadcasts off foreign satellites. See Tanzer, The Asian Village, Forbes, Nov. 11, 1991, at 58 (Asian Village).

143/ In May 1989 and June 1990, Thailand's Ministry of Transport and Communications (MOTC) awarded two fifteen-year concessions to commercial cable TV networks (International Broadcasting Corporation and Siam Broadcasting & Communication Co.). In September 1991, MOTC awarded a thirty-year concession to Shina Watra Computer and Communications Company to launch Thailand's first commercial satellite. See U.S. Embassy, Bangkok, Industry Sector Analysis-Thailand 4-5 (Oct. 1991).

In 1988, the state-run Radio-TV Malaysia embarked on a ten-year program to introduce HDTV and DBS, by beginning the operation of the Komsar satellite complex, consisting of three dishes capable of receiving signals from PALAPA (Indonesia's satellites). See U.S. Dep't of Commerce, Malaysia - Telecommunications Factsheet 5 (July 1991).

and private Very Small Aperture Terminal (VSAT) networks.[144] Program providers in Asia now have a choice of either using the Palapa satellite system (owned and operated by the government of Indonesia) or AsiaSat I (owned by Hong Kong-based HutchVision Group) for space capacity.[145]

The media reforms taking place in some Asian countries are having an impact across national borders, in some instances overwhelming the efforts of neighboring countries to control the flow of programming. In particular, because individuals often are able to receive satellite-delivered programming from neighboring countries (even when such programming is restricted in their own country), they are increasingly (and sometimes illegally) investing in satellite dishes in order to access such programming. Furthermore, as more people are becoming aware of the alternative programming available in neighboring countries, it becomes increasingly difficult for governments to justify and enforce restrictive broadcast policies.[146]

144/ VSAT refers to small earth receivers, usually with antenna diameter below 2.5m, which can be installed at a user's premises to receive satellite-distributed programming.

145/ AsiaSat, the first pan-Asian TV satellite, has already made several channels available to Asians, including Prime Sports (an all sports channel), MTV Asia, a Mandarin Chinese-language channel, and a 24-hour English-language news channel (a joint venture with BBC World Service television). Its footprint stretches from Cairo, Egypt to Hokkaido, Japan, encompassing 37 countries with a potential audience of 2.7 billion people. See Asian Village, supra note 142, at 58; Pomfret, Asians Worry that Western TV Erodes Culture, The Sunday Herald, Feb. 9, 1992, at 4C (Asians Worry).

146/ Singapore still forbids private individuals from owning satellite dishes, while in nearby Indonesia, privately-owned dishes have increased over the past ten years.

In Taiwan, the three national television stations are state-run. However, an estimated 300 cable television companies have begun over the past five years, even though cable television is still technically illegal in Taiwan. "We are breaking the government's media monopoly," says Lai Mao-chou, owner of one such station serving 7,000 households in the industrial city of Taichung. See Asians Worry, supra note 145, at 4C.

Despite government attempts to restrict consumption of foreign broadcasts, Chinese people watch HutchVision's STAR TV, and are investing in satellite equipment so they can receive foreign programming regardless of government restrictions. See Pacific Possibilities, supra note 84, at 42.

B. Barriers to Entry

Public regulation also can have the effect of limiting entry in domestic markets, thereby impeding the media globalization process. Regulations that limit entry of foreign media products into domestic markets include import quotas,[147] domestic content or work requirements,[148] hiring or immigration regulations,[149] foreign ownership regulations,[150] foreign exchange remittance restrictions,[151] "screen quotas,"[152] and customs duties.[153]

The rationale behind government barriers to entry for mass media products varies, but largely focuses on protecting indigenous industry and culture. For example, import restrictions can, under certain circumstances, prevent foreign firms from competing away

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147/ Import quotas place limits on the numbers of each kind of product that may enter the importing country. By limiting imports of media products such as television shows or prerecorded video tapes, a country may attempt to stimulate local production, while exposing its population to more local works.

148/ Domestic content or work requirements mandate that if a cultural product such as a film is to be shown in a country, a certain percentage of the creative and production effort that went into making it must have been conducted in that country. Such requirements seek to ensure that the local industry receives a portion of the economic interest or reward from the final work.

149/ Hiring or immigration regulations restrict the number of foreign workers on a cultural project or artistic team. Such restrictions are aimed at increasing economic return or creative control for local participants.

150/ Foreign ownership regulations are aimed at limiting foreign holdings in assets deemed important for national security, such as broadcasting, and preserving local culture.

151/ Foreign exchange remittance restrictions influence whether a foreign-based media company will produce or exhibit in a country. These regulations can prevent the foreign firm from taking profits out of the country.

152/ Screen quotas mandate that a percentage of films exhibited in a country must be of local origin.

153/ Customs duties levied on imported media, such as records, tapes, compact discs, and videos, are designed to direct media consumption to local artists by raising the effective price of foreign cultural products.

supra-competitive profits earned by domestic firms in their "home" market.[154] Moreover, if economies of scale exist, import restrictions, by providing a larger market share for the "domestic" firm, may lead to increased profits for it in unprotected foreign markets. Consequently, by implementing policies that either foreclose competitive entry or raise its cost, governments can under certain circumstances skew the globalization process in their attempts to favor firms to which they play host.[155]

Many governments treat the media industries, including film, music, and broadcasting, as instruments to further national culture.[156] With respect to the latter, governments, as an act of social choice, actively promote these "cultural industries" through artistic grants, subsidies, and government purchases of cultural products.[157] In addition to these promotional measures, some countries use "protectionist" trade policies to limit competition from foreign media sources. Barriers limiting foreign-produced cultural works are a common tool to deter entry into the concerned country. However, these barriers also inhibit the free flow of information and entertainment around the world.

IV. Other Factors Affecting the Demand and Supply of Mass Media Products

Numerous other factors affect the supply and demand of mass media products. For instance, increased travel and trade across international borders, stimulated in part by improved and more affordable transportation, have facilitated the distribution of video and cassette programming worldwide, particularly in the developing world. Other factors with a less clearly defined impact on international mass media markets include linguistic differences,

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154/ International trade models exist that describe the linkage between import protection and export promotion. See Krugman, Import Protection as Export Promotion: International Competition in the Presence of Oligopoly and Economics of Scale, in Monopolistic Competition and International Trade (H. Kierzkowski ed., 1984).

155/ For a game-theoretic discussion of how actions by public authorities may skew the competitive process, see Appendix E.

156/ For a discussion of the role of government in the efficient allocation of resources to the arts, see McCain, Game Theory and Cultivation of Taste, 12 J. Cult. Econ. 1-15 (1986).

157/ See supra note 55 and accompanying text.

the amount of leisure time, and pop culture. Such factors are nevertheless worth considering because they play some role in changing world trends.[158]

A. Linguistic Differences

Language can be an important factor affecting consumer demand for media product on a worldwide basis. In general, consumers find media materials presented in their native language more appealing than dubbed, subtitled, or translated products.[159] On the other hand, familiarity with or exposure to other languages can create a preference for viewing foreign films in the language in which they were originally produced. For example, many people around the world prefer to view American films and television programming in English regardless of whether English is their native tongue. However, lack of exposure to or knowledge of a foreign language can also result in less demand for foreign-produced films and programs than for films and programs in the consumer's native language.[160]

The size and economic prosperity of the English-speaking world has historically facilitated the international success of the U.S. film industry. Among market economies, the combined population of countries where English is spoken is greater than the combined

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158/ It appears that there has been a trend for adults in the United States to devote an increasing amount of time to mass media products. In the United States, adults spent 1,226 hours per year watching television in 1970 compared to 1,550 in 1988; 872 hours listening to the radio in 1970 and 1,160 in 1988; 68 hours listening to records and tapes in 1970 and 220 in 1988; 10 hours watching movies in 1970 and 12 in 1988; the number of hours per year spent watching home videos was unrecorded in 1970 but reached 60 by 1988; and three hours attending cultural events in 1970 compared to five in 1988. See H. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis 11, Table 1.3 (1990).

159/ See Siwek, EC 1992 and Beyond: Aspects for U.S. Film and Television Employment, in EC 1992: Implications for U.S. Workers 82 (Center for Strategic and International Studies Significant Issues Series Vol. 12, No. 6, Dec. 1990).

160/ The United States imports less than two percent of its programming from abroad. See Beale, Finding a Niche for Foreign Films: The Struggles to Support Small Movies, Wash. Post, Jan. 5, 1992, at G1, G10. Although a large number of foreign-language films are released in the U.S. market, their success is limited at the box office. And of the foreign national films imported, most are from the United Kingdom. See S. Wildman & S. Siwek, International Trade in Films and Television Programs 24-26 (1988).

population of any other linguistic group.[161] In addition to affluent native English speaking population groups, many people speak English as a second language, which gives U.S. media products an advantage in the global marketplace. Furthermore, the English-language market, measured by total income, is the largest market in the world.[162] Such factors may help stimulate the demand for English language films, videocassettes, and television programming.

B. Leisure Time

Some link the demand for media products to the availability of leisure time and disposable income. This linkage is based on the obvious fact that people must spend both time and money to go to the movies, watch television or a video, or listen to records or the radio. It is generally acknowledged that the work week in most industrialized Western countries has declined since the Industrial Revolution, increasing the amount of time available for leisure activities. However, since 1940, the work week has decreased at more modest rates in the West, and in some cases may have even increased.[163] In other areas of the world, it is unclear whether leisure time is increasing, as many countries do not keep statistics on this topic or do so on a sporadic basis.[164] Nevertheless, as productivity is

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161/ See U.S. Exports, supra note 89, at 48. Some countries where English is the official language include the United States, Canada, the United Kingdom, Australia, South Africa, Nigeria, Zimbabwe, and New Zealand. Id.

162/ See id.

163/ According to data gathered by the International Labour Organization (ILO), the number of work hours per week in Europe for non-agriculture, manufacturing, and construction sectors declined from 42.95 in 1971 to 38.59 in 1990. In United States, the Bureau of Labor Statistics calculates that the average U.S. work week in the private sector has declined from 37.8 hours in 1968 to 34.5 hours in 1990. See Monthly Labor Review, Dec. 1984, at 66; Monthly Labor Review, Sept. 1991, at 64. However, a recent study on the subject shows that Americans worked 163 more hours in 1989 than in 1969, and more women and teenagers are working. See Kinsley, Lazy He Calls Us, Wash. Post., Jan. 30, 1992, at A27 (citing J. Schor, The Overworked American (1991)).

164/ According to statistics from the ILO, the number of hours worked per week in Africa for the non-agriculture, manufacturing, and construction sectors increased from 48.05 hours in 1971 to 58.47 hours in 1990. Asia, however, shows a decline for the same sectors from 45.84 hours in 1971 to 43.76 hours in 1990. Compare International Labour Organization, Yearbook of Labour Statistics 1990 at Hours of Work Statistical Tables 11-15 (1990) with International Labour Office, Yearbook of

enhanced by technological innovation around the world, it is likely that more leisure time will become available through reductions in the work week.[165]

C. Pop Culture and World Youth Populations

Another factor that affects the supply and demand of media products on a worldwide basis is the relatively youthful nature of the world's population. Demand for popular media items such as the latest films, videos, and recorded music is generally strong among young people. The U.S. film industry has long relied on young viewers for ticket purchases, and has structured plots and release schedules around young audiences.

Many of the music and film products in demand in the United States soon become popular with young audiences worldwide, which watch the United States intently for the latest pop culture trend. Some even argue that a single global youth culture exists.[166] U.S. Census data indicate that among the twenty largest countries in the world (measured in terms of economic growth), nine countries have large population groups between the ages of fifteen and thirty.[167] These countries are the People's Republic of China, India, Indonesia, Sri Lanka, South Korea, Taiwan, Thailand, and Turkey.[168] Base on these population characteristics, the next generation of youth-intensive media markets could emerge outside the United States.

Labour Statistics 1971 at Hours of Work Statistical Tables 11-15 (1981).

165/ See Vogel, supra note 158, at 10.

166/ See Huey, America's Hottest Export: Pop Culture, Fortune, Dec. 31, 1990, at 50, 52.

167/ All data is taken from Bureau of the Census, U.S. Dep't of Commerce, Statistical Outlook of the U.S. (1991).

168/ While these countries exhibit a number of the characteristics deemed likely to support growth in media demand, some of them limit exhibition of foreign (primarily U.S.) audiovisual works through trade barriers. As discussed in the previous section of this chapter, supra at pp. 47-48, some countries impose barriers and quotas to secure a greater share of industry profits, protect or subsidize local industries, and defend language and culture against a perceived threatening foreign culture. See U.S. Dep't of Commerce, U.S. Industrial Outlook 1992-Entertainment 31-32 (1992).

Chapter 4

FIRM BEHAVIOR AND GLOBALIZATION

I. Introduction

As discussed earlier, "globalization" is the competitive process by which firms attempt to acquire a larger share of the profits available in international markets. This definition of globalization is consistent with the view of some international business specialists that sophisticated business strategists compete internationally by taking into account rivals' likely responses when evaluating alternative courses of action.[169] This chapter describes the competitive strategies adopted by mass media firms and seeks to explain their relationship to globalization.[170]

II. Modes of Globalization

There are three main methods by which firms have globalized the electronic mass media and other markets: "complementary expansion," "horizontal expansion," and "vertical expansion." We describe and provide examples of each below. Because of varied business opportunities, individual firms often engage in more than one mode of globalization.

A. Complementary Expansion

"Complementary expansion" occurs when a firm is engaged in the production of "complementary products" in different countries.[171] Two products are considered complements when a price increase (or decrease) for one product causes a decrease (or increase) in the quantity demanded for the other product. Product complementarity arises

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169/ See, e.g., Porter, supra note 9, at 34.

170/ While the unit of analysis in this chapter is the firm, government agencies also play an important role in the globalization of industries. See supra Chapter 3 at p. 42.

171/ This analysis uses the term "production" in two different ways. In some instances, it refers to any stage of the process by which mass media products are produced. In other instances, the term refers to a specific stage in the making of a film. Which of these two meanings is intended in particular instances in this analysis should be clear from the context.

when the utility or satisfaction that a consumer receives when "consuming" two products together is greater than the utility it receives when consuming those products individually. Videocassette recorders (VCRs) and videocassettes are an example of complementary goods. Because both are needed to enjoy the benefits of viewing films at home, an increase in the price of one will reduce the demand for the other, and vice versa.

The complementary nature of some goods may sometimes induce firms that manufacture these products to merge. The complementary relationship between VCRs and programming for videocassettes implies that a "demand externality" exists when different firms produce them. In general, a demand externality exists whenever the market demand for one firm's products is influenced, positively or negatively, by the decisions made by another firm and, moreover, the latter firm cannot fully realize the benefits or costs of these decisions. As a result, from the perspective of the first firm, the second firm will have "incorrect" incentives to make the proper decision.

For example, a VCR manufacturer's pricing, promotional, and technological (e.g., quality) decisions may affect the consumer demand for programming on videocassettes due to complementarity in demand. Decisions that increase (or decrease) consumer demand for videocassettes can create an incremental profit (or loss) for the videocassette manufacturer. However, because a VCR manufacturer, in maximizing its own profit, does not take into account an unaffiliated videocassette manufacturer's profit (or loss), the VCR manufacturer may make production decisions that lead to a reduction in the profitability of producing videocassettes.[172/]

The existence of a demand externality implies that there may be additional "producer surplus" available in the market.[173/] One method by which firms can obtain this additional surplus is through merger. For example, a merger between the VCR manufacturer and the

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172/ The externality can also apply in the other direction. The pricing decisions made by videocassette producers may affect an independent VCR manufacturer's profits. Because the videocassette producer does not take into account the effect of its pricing or other decisions on the profits of the VCR producer, too little hardware may be sold from the VCR producer's perspective.

173/ Producer surplus is the difference between the firm's total revenue and total cost. See, e.g., W. Baumol, Economic Theory and Operations Analysis 499 n.5 (4th ed. 1977).

video programming manufacturer[174] would induce the VCR manufacturer to take into account the effect of its production decisions on the profitability of producing videocassettes. A merger, therefore, "internalizes" the externality attributable to the demand complementarity between VCRs and videocassettes.[175]

It is easy to see how such complementarity may induce foreign direct investment (FDI) and, therefore, globalization. Complementarities exist over a wide range of media products (e.g., computers and software programs, compact discs (CDs) and players, and cameras and film). Moreover, the firms that produce such complementary products are typically located around the world. Media firms may attempt to capture additional producer surplus by internalizing the demand externality through merger, acquisition, or joint venture.[176]

Two firms that appear to have undertaken complementary expansions into new product lines are Sony, with its acquisitions of CBS Records in 1987 and Columbia Pictures in 1989, and Matsushita, with its acquisition of MCA in 1990.[177] One possible motive behind these acquisitions is the desire to have control over the price and supply of "software," or programming inputs for their "hardware" or manufacturing businesses.[178]

174/ A related issue is the amount of the currently uninternalized producer surplus that the two firms can expect to earn. The amount depends on the number of firms (i.e., market structure) in each market. At one extreme, if each producer were a monopolist, all the available producer surplus could be captured. At the other extreme, if each producer operated in a robustly competitive market, much of the producer surplus would be unrecoverable.

175/ Appendix F provides additional insights into the economics of mergers between such firms.

176/ As discussed infra at p. 57, a foreign-based firm will engage in FDI only if it has a "firm-specific" advantage over its domestic rivals.

177/ For a further description of Sony, see infra Appendix C at C-12. For a further description of Matsushita, see infra Appendix C at C-7.

178/ Because hardware and software are necessary for the display of an audio or video product, consumers tend to consume them together.

B. Globalization Via Horizontal Expansion

Firms can sometimes acquire a larger share of the profits available in the global market through "horizontal expansion," which occurs when a firm serves at least two different foreign markets through either FDI or exports (i.e., international trade) and sells the same product in each.

1. Foreign Direct Investment

As noted in Chapter 2, one U.S. law defines FDI in the United States as the ownership by a foreign person or business of ten percent or more of the voting equity, or equivalent for an unincorporated business, of a firm located in the United States.[179] "Horizontal FDI" occurs when a firm produces the same product in a number of different countries.[180]

FDI specialists have observed that, unlike other forms of foreign investment (i.e., portfolio investment[181]), foreign direct investment is the product of corporate strategy and the struggle to obtain competitive advantage.[182] Thus, for instance, these analysts have observed that firms that engage in FDI have firm-specific competitive advantages over their

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179/ See supra note 14.

180/ In contrast, "vertical FDI" occurs when a firm is engaged in successive stages of the production process chain and one or more of those stages are located in different countries. See Pugel, The United States, in Multinational Enterprises, Economic Structure and International Competitiveness 57 (J. Dunning ed., 1985).

181/ "Portfolio investment" is defined as the ownership by a foreign person or business of less than 10% of the voting equity of a firm located in the United States. It also includes the purchase by such entities of corporate bonds and U.S. government securities. See Bureau of Economic Analysis, U.S. Dep't of Commerce, Foreign Direct Investment in the United States, 1987 Benchmark Survey, Final Results 1 (Aug. 1990). Because an equity share of less than 10% is typically believed to fall short of significant direct managerial influence or control of a U.S.-based firm, portfolio investment is deemed to be motivated for purely financial reasons (i.e., the act of allocating resources in search of the highest return).

182/ See Graham, Foreign Direct Investment in the United States and U.S. Interests, 254 Science 1740, 1742 (1991).

rivals, including resident firms.[183] If these advantages did not exist, each country's markets would be serviced exclusively by resident firms. The nature of these advantages vary over time among firms. For instance, they may be the product of firm-sponsored research and development, which can lead to technological innovations that sometimes bring about important performance and cost advantages.[184] In other cases, the firm-specific advantages may arise from superior management skill or a complex distribution network that permits low-cost entry into a foreign market.

In addition to a firm-specific advantage, many specialists believe that a firm must also possess "economies of internalization" in order for FDI to be successful.[185] These economies exist if it is more efficient for the firm to use its advantages internally, within its own organization, rather than to "lease" or license them to others. In particular, a firm may choose to locate operations in a foreign country, rather than licensing its products to a firm in that country, if it is difficult to transfer a firm-specific advantage across national boundaries, or if doing so compromises other firm-specific advantages.[186] For example, rather than using independent foreign distributors, a number of major movie studios (such as Paramount and Universal Pictures) perform the international distribution function internally. Such a decision could be based on a firm's belief that it can better capitalize on certain firm-specific advantages (e.g., in the case of movie studios, economies of scope from engaging in both production and distribution) if the distribution function is performed internally. Performing the international distribution function may, therefore, allow major movie studios to acquire a competitive advantage over their rivals.

183/ The term "resident" is used to emphasize the difficulty of identifying, in some instances, the nationality of a firm that operates in more than one country. See E. Graham & P. Krugman, Foreign Direct Investment 8 (1989).

184/ Moreover, in some instances these advantages may persist for an extended period because "learning" is cumulative and once a innovation is adopted, it is likely to generate additional learning-by-doing performance enhancements. See, e.g., T.M. Jorde & D.J. Teece, Innovation and Cooperation: Implications for Competition and Antitrust, 4 J. Econ. Persp. 75 (Summer 1990).

185/ See P. Buckley & M. Casson, The Future of the Multinational Enterprise (1976).

186/ For example, recent evidence suggests that most U.S. industries have difficulties keeping proprietary knowledge from "leaking" to competitors. See Levin, Klevorick, Nelson, & Winter, Appropriating the Returns from Industrial Research and Development, Papers on Econ. Activity 3 (1987); Teece, Toward an Economic Theory of the Multi-product Firm, 3 J. of Econ. Behav. & Organ. 39-63 (1982).

While firm-specific advantages and economies of internalization explain why firms engage in FDI, they do not explain why firms invest in some countries and not in others. To explain this, FDI specialists believe that the "host" country for a firm's FDI must have some "locational" advantages such as a large market size or low labor or other costs.[187/] For instance, economists theorize that firms located in areas where there are large numbers of other firms with similar activities can achieve production economies that are unavailable to firms located in less "populated" areas. These "agglomeration economies"[188/] result from scale efficiencies in input markets, marketing, communications, transportation, and public service provision.[189/] This may, in part, explain why Hollywood (more accurately Southern California) is the film capital of the world.[190/]

The operations of Canal Plus are an example of the globalization of the media industry via horizontal FDI. As the only subscription television service in France, Canal Plus is available to eighty-seven percent of all French television households, with fifteen percent of these households subscribing.[191/] Canal Plus has taken this experience and launched pay-

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187/ In addition, firms may engage in FDI in multiple countries because of uncertainties regarding where in the world future production costs will be lowest. Establishing production facilities in multiple countries allows the firm to relocate production to the lowest cost locations once operating costs are known. See De Meza & Van Der Ploeg, Production Flexibility as a Motive For Multinationality, 35 J. Indus. Econ. 343 (1987).

188/ Michael Porter refers to geographic areas that have a high concentration of firms within a specific industry as "clusters." See Porter, supra note 9, at 164-65. "Agglomeration economies" are the economic forces that promote the clustering of a nation's industries.

189/ If too many firms enter a specific geographic area, agglomeration economies may diminish or even turn negative. However, if agglomeration economies succeed in attracting many firms in an industry and, following entry, these economies still exceed those available in other locations, then the firms in that location may end up dominating the market. See, e.g., Vernon, The Location of Economic Activity, in Economic Analysis and the Multinational Enterprise 89 (J. Dunning ed., 1974).

190/ A multinational enterprise's decision regarding the location of its FDI is explored further in Appendix G.

191/ See Cross Border Profile: Canal +, Eur. Media Bus. & Fin., Mar. 18, 1991, at 10. As discussed infra in Appendix C at C-3, Canal Plus also has interests in France's largest cable operators, and its own film and television production company.

TV service in many other European countries. In these countries, Canal Plus offers films, talk shows, and sporting events via either subscription television, cable television, or direct broadcast satellite (DBS) service. With 1991 net earnings of more than 1.05 billion francs ($187 million),[192] horizontal expansion has allowed Canal Plus to become one of the world's most profitable pay-TV services.

There are many reasons for Canal Plus's successful horizontal expansion. For instance, given that it already incurs the cost of acquiring program exhibition rights in France, the incremental cost that Canal Plus incurs from acquiring such rights for other countries appears to be relatively low. Moreover, there are likely to be other sources of scope economies in the provision of programming to more than one country. For example, Canal Plus typically use satellites to transmit programming to cable headends that it owns or to its non-cable distribution "affiliates." In Europe, the "footprint" of these satellites often extends across the geographic boundaries of several countries, resulting in an economy of scale.[193] Consequently, the additional distribution cost of transmitting a signal into countries adjacent to France appears to be small.[194]

192/ See Canal Plus 1991 Net Profit 1.05 Bln FFr, Up 15 Pct, AFP-Extel News, Feb. 3, 1992, at 12.

193/ See supra note 109.

194/ Globalization through horizontal expansion is evident in other parts of the mass media industry, in addition to pay television. For example, in the recorded music industry, six companies control over 60% of the world's production:

- Time Warner: Atlantic, Elektra, Warner Bros, WEA;
- Sony: CBS, Columbia, Epic, Masterworks;
- Philips: A&M, Decca, Deutsche Grammophon, Island, London, Mercury, Polydor, Polygram;
- Bertelsmann: Ariola, Arista, RCA;
- Matsushita: Geffen, MCA, Motown;
- EMI: Angel, Blue Note, Capitol, Manhattan.

See Meet the New Media Monsters, The Economist, Mar. 11, 1989, at 65. These firms have expanded horizontally; they all have subsidiaries that produce similar products; and they are international both in their ownership and the location of their holdings. None of these firms is solely in the music business; their music divisions are all part of larger entertainment and electronics concerns. Each of the parents also has a record distribution arm for its own or others' labels.

2. Export Theory

According to economic theory, international trade in mass media products arises from differences among countries in the "opportunity cost" of producing these products. In general, the "opportunity cost" of producing a good is the amount of another good that could have been produced with the factors used to produce the first good. According to traditional international trade theory, economic welfare would be maximized if each country specializes in the production of those goods for which it has the lowest opportunity cost of production or, equivalently, the greatest "comparative advantage."[195] A country is said to possess a "comparative advantage" in the production of a good if its opportunity cost of producing a good is less than another country's opportunity cost of producing the same good.

More recent models of international trade attempt to explain why the opportunity cost of producing goods varies across countries. In the basic Hecksher-Ohlin theory of international trade, a sufficient reason for these cost differences is the existence of non-identical relative "factor endowments" within the countries.[196] According to this theory, countries that possess, for example, a large pool of creative talent for the production of television programming will have, all things being equal, a lower cost of creative talent than a country with a smaller endowment of creative talent. This translates into a low opportunity cost of producing films and a high opportunity cost of creating those products that use scarcer resources. Because of these cost differences, according to theory, countries with a relatively large pool of creative talent in films will export them, while importing products that use large amounts of their relatively scarce factors.

In addition to differences in comparative advantage among countries, international trade in film and television and radio programming is due to the "public good" nature of these products. For example, television programs are "public goods" because one person's

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195/ See Ricardo, Principles of Political Economy and Taxation, in The Works and Correspondence of David Ricardo 1 (P. Sraffa ed., 1953).

196/ See Heckshner, The Effect of Foreign Trade on the Distribution of Income, Economisk Tidskrift (1919), reprinted in Readings in the Theory of International Trade (Ellis & Metzler eds., 1950); see also B. Ohlin, Interregional and International Trade (1933).

viewing of a program does not restrict another person's ability to view the same program.[197] As a result, the incremental cost to a broadcast station of allowing an additional person to view or listen to the programs on its signal is nearly zero. Theatrical release films are "public goods" for similar reasons. The incremental cost of an additional viewer is, up to a point, zero. Indeed, the production costs of a theatrical release seen by one million viewers are nearly the same as those of one seen by forty million viewers.[198]

Because of the public good nature of these products, producers can reduce the per-viewer (or per-listener) cost of production by distributing their products as widely as possible. Moreover, because per-viewer production cost decreases with increases in distribution, films and television programming that are distributed widely may be more expensively produced and, arguably, of better quality than those distributed on a more limited basis. All other things being equal, such programming will have greater viewer appeal than its less widely distributed counterparts.[199] U.S. motion pictures and television producers, with their domestic market being by far the largest in the world, are well situated to take advantage of these public good aspects of their products as they enter the international marketplace.

197/ A "pure" public good is one in which the cost of providing the good to an additional person is zero, and for which it is impossible to exclude those that do not pay for the good. See Samuelson, The Pure Theory of Public Expenditure, 36 Rev. Econ. Stat. 387 (1954).

198/ While the costs of distributing (e.g., making a new tape) and marketing a theatrical film can be substantial, and increase with audience size, the production costs of the film are insensitive to the number of theaters in which the film is shown.

199/ Of course, globally-viewed films or television programming may not always be more popular, or profitable, than non-globally viewed counterparts because of diverse viewer preferences. A film produced for one culture may be less appealing to individuals from a different culture. In some instances, therefore, a domestically produced, yet not widely distributed film may be more popular than a globally available, less desirable counterpart.

Foreign ratings data have indicated that in the larger European countries, the most popular domestically produced programs consistently outperform the leading U.S. television programs. See Waterman, World Television Trade: The Economic Effects of Privatization and New Technology, 21 Telecomm. Policy 141, 144 (1988).

From the perspective of traditional trade theory, globalization can be viewed as resulting, in part, from changes in comparative advantage among countries. One determinant of a country's comparative advantage is its level of economic development. As economic development proceeds, a country's stock of such factor endowments as capital and skilled labor increases. According to the Hecksher-Ohlin theory, changes in the supply of these factors over time will change a country's comparative advantage and, therefore, the structure of international trade.

Economic growth has affected trade in media products by, for instance, expanding the "infrastructure" used to support the mass media industries -- cinemas in the case of films or, in the case of television, advertiser revenues and subscription fees paid by viewers. Such growth has affected trade in media products in two ways. First, it has given numerous countries the opportunity to develop their own film and television program production capabilities. Second, it has increased the value of foreign exhibition rights by providing their owners with an additional exhibition outlet.

Some countries have attempted to minimize the second effect by imposing restrictions on imports of foreign produced television programming. For instance, the European Community's (EC) Broadcast Directive[200/] imposes broad limitations on importation of television programs produced outside the EC. Such restrictions may have helped motivate the recent joint ventures between U.S.-based television producers and partners located in the EC. For instance, in January 1991, Time Warner announced its participation in a joint venture with three European concerns to produce and distribute at least twenty movies. The three partners are Canal Plus (the French pay-TV company), Scriba & Deyhle (a German production and distribution company), and Regency International Pictures (a Dutch-owned firm controlled by producer Arnon Milchan).[201/] Confronted with restrictions like the Broadcast Directive, firms resort to methods of competing internationally that are geared

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200/ See Broadcast Directive, supra note 61.

201/ Regency is producing the films, and with Canal Plus, is financing film production. Time Warner's Warner Bros. unit is advancing all marketing and distribution costs, and is retaining all distribution rights for North America, as well as all international theatrical and home video rights. See Williams, Canal Plus Springs a Leak, Variety, Oct. 5, 1992, at 1, 101; Landro, Time Warner Unit, European Partners Set Movies Deal, Wall St. J., Jan. 15, 1991, at B8. For a further description of Time Warner, see infra Appendix C at C-14. For a further description of Canal Plus, see infra Appendix C at C-3.

toward minimizing the effects of these regulations. Similarly, according to Time Warner, its participation in its joint venture with C. Itoh & Co. and Toshiba Corporation is motivated, in part, by its desire to gain access to the Japanese market as a cable operator,[202] which will be facilitated, it believes, by forming a joint venture with Japanese partners.

As discussed earlier, the ability of media firms to distribute their products abroad is also limited by cultural differences that sometimes lead to differences in consumer preferences. While foreign media firms may attempt to compensate for these differences by adapting or recasting their products to suit better the preferences of a different culture, firms face an important trade-off in doing so. A product that is better suited to a foreign audience may be less suited to the firm's domestic audience. Therefore, in deciding whether to improve a product's sales potential, a media firm must compare the increase in revenue earned from a foreign market against the decrease in revenue earned from the domestic market.

C. Globalization Via Vertical Expansion

Globalization through "vertical expansion" occurs when a firm is engaged in successive stages of the production chain through either FDI or long-term contracts,[203] when one or more of those stages are located in different countries.

1. Vertical FDI

A theoretical model of globalization can be developed from a combination of the economics of vertical integration (i.e., the combining of successive stages of the production process in one firm) and, because such combination occurs in a foreign country, the general theory of FDI as advanced by FDI specialists.[204] It is well established that vertical

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202/ See Time Warner, Toshiba and C. Itoh Create Strategic Partnership 2 (Time Warner News Release, Oct. 29, 1991) (attachment to letter from N.J. Nicholas, Jr. & Steven J. Ross, Time Warner, to Janice Obuchowski, Administrator, NTIA (Oct. 29, 1991)) (on file at NTIA).

203/ A "long-term contract" is any agreement between two parties in which they both commit, for a lengthy period. Such contracts limit, for the length of the agreement, each party's concern that the other party will behave non-cooperatively.

204/ See supra notes 180, 181.

integration may, under certain circumstances, improve economic efficiency.[205] Specifically, some transactions are more efficiently completed within the governance structure of a single firm rather than through a market. The costs of managing such transactions include the costs of writing, monitoring, and enforcing different types of contracts to enforce cooperation among parties.[206] A single firm may be more efficient than a market at minimizing such transaction costs because it can limit, through its internal management structure, the amount of non-cooperative behavior between transacting parties. Thus, for example, a movie studio's cost of contracting with an independent distributor may be sufficiently high that it may be more efficient to combine the program production and distribution functions within the same firm.

A firm may also wish to integrate vertically to eliminate, for instance, a "vertical externality." An important feature of a vertical production chain is the existence of interdependence among firms operating at the various stages of the chain. Specifically, the profitability of a firm operating at one stage of the production process may depend upon the decisions made by a firm operating at an adjacent stage. For example, cable operators often provide services, such as promotional activities, that make cable networks (e.g., Cable News Network, Entertainment and Sports Programming Network, Turner Network Television) more attractive to cable viewers. The extent to which a cable operator advertises a cable network depends upon the cable operator's private gains. In determining the level of promotion, the cable operator has little reason to take into account the increased profit that an unaffiliated cable network earns due to increased cable promotion. From the perspective of the cable network, therefore, the cable operator may have "too little" incentive to promote the cable network's programming.[207]

205/ See, e.g., R. Blair & D. Kaserman, Law and Economics of Vertical Integration and Control (1983); O. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975); Klein, Crawford & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & Econ. 297, 302 (1978). In general, this literature states that vertical integration can either improve or reduce economic efficiency, depending on the purpose for which it is undertaken.

206/ Such transaction costs arise because of the vast number of contingencies that contracting parties may face or because of the inability of parties to foresee and, as a result, be protected from, all possible contingencies.

207/ It may also be the case that vertical integration can permit firms to share efficiently the risk from certain business activities. For example, some have argued that

One method by which a program supplier can ensure that the cable operator has the "correct" incentive to promote its product is by providing a financial payment to the cable operator.[208/] Such payment ensures that the cable operator takes the program supplier's private gains into account when evaluating the level of program promotion. Another method of eliminating the vertical externality is through vertical integration, which merges the financial interests of the cable operator and the cable network. Such a merger will ensure that the cable operator's decision to promote the programming of its upstream partner will reflect the private gains of both segments.[209/]

Many firms have engaged in globalization through vertical expansion.[210/] Time Warner, Paramount and MCA are building movie theaters in Japan, the United Kingdom, Germany, and Austria in part because of the absence of adequate exhibition facilities.[211/] Such a strategy, consistent with the foregoing analysis, allows such firms to enhance profits and lower their financial risk by eliminating a vertical externality. Conversely, being affiliated with a major film studio is important to theaters, because affiliation typically guarantees theaters rights to first-run exhibition of the affiliated studio's films.[212/]

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prohibitions on U.S. television network acquisition of program syndication rights increase the cost of producing such programs by forcing less efficient bearers of the risk of program development to assume such risk. Under these arguments, vertical integration would improve economic efficiency. See Stanley M. Besen et al., Misregulating Television: Network Dominance and the FCC 113 (1984).

208/ One such payment is the cable networks' purchase of advertising time on cable systems.

209/ See NTIA Infrastructure Report, supra note 100, at 236-40.

210/ Some argue that the recent increase in vertical integration in the video entertainment industry reflects the attempts of some firms to stifle competition. See, e.g., Adams & Brock, Vertical Integration, Monopoly Power, and Antitrust Policy: A Case Study of Video Entertainment, 36 Wayne L. Rev. 51 (1989).

211/ Matsushita and Sony acquired theater chains for exhibiting films as well as film and television production facilities as part of their acquisitions of MCA and Columbia, respectively.

212/ In addition to movie theaters, Time Warner also has equity interests in a pay cable network (HBO), and studios that participate in film production and distribution, cable programming, and home video.

Vertical expansion has also occurred in the television broadcast industry.[213/] For example, in 1985 a company owned by Rupert Murdoch and, through several intermediate holding companies, News Corp., purchased six Metromedia television stations and launched a fourth broadcast network; News Corp. also purchased Twentieth Century Fox Film Corp., a film and television studio.[214/] In 1992, News Corp. established a new division, Fox Basic Cable, which plans to launch one or more basic cable networks.[215/] As a result, News Corp. performs television program production, distribution and transmission. News Corp. is also a partner in an European satellite venture, British Sky Broadcasting (BSkyB), which transmits movies, sports, and news on six channels to home satellite dish owners in the United Kingdom.[216/]

Moreover, vertical expansion has occurred in the recorded music industry. For example, many music recording studios also distribute their products (e.g., records, tapes, and compact discs). As mentioned above, six major recording companies, Time Warner, Sony, Bertelsmann, Philips, Matsushita, and EMI, conduct distribution both for their own labels, and independent producers.[217/]

2. Long-Term Contracts

Long-term contracts between firms at different stages of the vertical production chain can also improve efficiency. For many of the media sectors discussed in this report, including film and video, vertical long-term contracts are evident between the production and distribution stages. Distributors purchase the right to distribute a film in specific markets from producers. These could be, for example, rights to distribute in a certain geographic

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213/ NTIA has previously examined vertical integration in the cable industry. See Comments of the National Telecommunications and Information Administration (filed Mar. 1, 1990) in Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600.

214/ See discussion infra in Appendix C at C-9.

215/ See Fox To Create Basic Cable Service, Broadcasting, Mar. 16, 1992, at 56.

216/ See BSkyB Claims Trading Profit For First Time, Fin. Times, Mar. 10, 1992, at 23.

217/ See supra note 194.

area (e.g., the "North American rights"), or rights to exhibit through a particular medium or distribution "window" (e.g., home video rights). Frequently, producers will work with one distributor consistently, developing a long-term relationship. This is particularly true for independent producers that must seek distribution contracts for each film produced.

For example, Majestic Films, a U.K.-based independent film distributor, is attempting to establish relationships with film studios worldwide.[218/] It has won Japanese backing to purchase the international distribution rights of films made anywhere in the world. The new venture, called NewComm, involves Majestic and three Japanese companies that have committed approximately $50 million over the next two years for the distribution of six to eight films.[219/] According to one of the co-founders, film studios in the United States and the United Kingdom are under consideration.[220/] The venture may also undertake the direct funding of film production in order to secure international distribution rights, as it did with Dances With Wolves.

As in film, long-term contracts in the recorded music vertical chain are evident in agreements between producers and distributors. Many of these involve artists or recording labels in the United States and distributors within foreign headquarters that are implementing contracts for a variety of world markets. For example, in September 1991, Motown Records, a U.S.-based record label owned by a group of international investors, entered into a distribution agreement with PolyGram[221/] under which PolyGram will distribute

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218/ See Snoddy, Majestic Wins Japanese Backing in Film Venture, Fin. Times, June 15, 1991, at 4.

219/ The Japanese firms are (i) Media International Corporation, a Japanese consortium, (ii) the commercial arm of NHK, the national public broadcaster, and (iii) KSS, a Japanese film, television, and video production company. For a further description of NHK, see infra Appendix C at C-11.

220/ See Snoddy, supra note 218, at 4.

221/ See PolyGram is, in turn, 80% owned by Netherlands-based Philips Electronics, N.V.

Motown's music in the U.S. market.[222] Motown's international distribution is now managed by Bertelsmann, a German media firm.[223]

III. Policy and Economic Effects of Globalization

By affecting the pattern of competitive behavior in the international market, globalization has important economic and public policy effects. The forces that produce the behavior we recognize as globalization result in changes in international production and trade of mass media products among nations. Those countries that develop a comparative advantage in the production of such products will increase the economic welfare of their inhabitants. In contrast, countries that do not develop such comparative advantages because of, for instance, unfavorable macroeconomic policies such as the creation of a large budget deficit, will experience a reduction in their economic welfare.

At the level of the firm, globalization resulting from the firm's search for economies of scale can substantially enhance a firm's economic welfare because such effects allow it to produce products at lower cost.[224] To the extent that government regulation prevents firms from realizing such economies, economic welfare will suffer. Thus, policymakers should move to eliminate such restrictions in cases where the potential for realizing such economies is being suppressed.[225]

222/ See R. Turner, Motown Agrees To Let PolyGram Distribute Records, Wall St. J., Sept. 24, 1991, at A8.

223/ For a further description of Bertelsmann, see infra Appendix C at C-1.

224/ By creating differences among countries in comparative advantage, the realization of such economies of scale will stimulate and enhance the gains from international trade, thereby improving global economic welfare. See Krugman, Scale Economies, Product Differentiation, and the Pattern of Trade, 70 Am. Econ. Rev. 950 (1980); Lancaster, Intra-industry Trade Under Perfect Monopolistic Competition, 10 J. Int'l Econ. 151-75 (1980).

225/ However, at the extreme, economies of scale can provide firms with market power, and, depending on the particular industry, certain global markets could be dominated by oligopolies of multinational firms. Such a situation does not appear to exist in the mass media industry sectors that we have been examining, but policymakers should be mindful of this possibility. Because of economies of scale and other market characteristics, some markets will yield substantially higher risk-adjusted returns than others. Governments, therefore, may have the incentive to take unilateral measures to secure a larger share of these sectors by attracting the

PART II

Chapter 5
THE ROLE OF COMMUNICATIONS POLICIES IN A GLOBAL MARKETPLACE

I. INTRODUCTION

As we have seen in the previous chapters, governments and mass media firms have participated actively in the globalization of the electronic mass media industry. Mass media firms engage in foreign direct investment (FDI) and export their products all over the world. Moreover, they contribute to the globalization process through their adoption of technological innovations that provide new ways of providing a product or make possible the delivery of an entirely new service. Governments in Europe, Asia, and Latin America have privatized state-owned broadcast television enterprises, allocated new spectrum to additional channels, and opened up their markets for multichannel video delivery systems, such as cable television and direct broadcast satellite delivery systems. These reforms have increased the worldwide demand for commercial television programming.

Part II of this report examines how the U.S. government should adapt to these environmental changes when setting policies for the electronic mass media industry. We believe that two fundamental principles inform our analysis. One is that international mass media markets should be open to competitive entry, including FDI and exports, and that restrictions on foreign participation in such markets, whether in the name of "cultural sovereignty" or economic protectionism, should be removed or relaxed. The second is that existing U.S. rules that affect the structure of the domestic mass media industry should be designed so as not to hamper the ability of domestic firms to compete effectively internationally.

Governments should seek to foster, through FDI and exports, the international integration of their economies because such integration can benefit all participating countries. Trade permits countries to specialize and to take advantage of their different factor

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establishment of the firms prospering in these markets -- which may in fact be oligopolist -- on their territory. See Jacquemin, International and Multinational Strategic Behavior, 42 Kyklos 495, 510 (1989).

endowments. By permitting specialization, trade also allows firms to achieve higher and more efficient levels of production. Finally, as a means of competitive entry, FDI may result in lower domestic prices and higher quality services for consumers.

The next two chapters in Part II of the report discuss the importance of making international markets for mass media products function better by removing various barriers to entry and promoting intellectual property protection. Governmental barriers to open competition take many forms. With respect to FDI, the most direct entry barriers are laws that restrict foreign ownership of domestic media properties. Moreover, the failure of some public authorities to provide adequate intellectual property protection for mass media products reduces competition by lowering the incentive of firms to create the entertainment and informational programming -- the software -- that fuels the mass media industry. Thus, in Chapters 6 and 7, we discuss the U.S. rules that set limits on foreign ownership of U.S. broadcast and certain other radio licenses, and international copyright issues.

The second goal that we have mentioned is that existing domestic rules and policies should no longer impede the ability of U.S.-based firms to compete effectively internationally. Leading analysts contend that promotion of competition among firms in domestic markets will enhance the international competitiveness of those firms. According to these arguments, domestic rivalry forces firms to become efficient and innovate, thus putting them in a better position to be more effective competitors abroad.[226/]

One focus of recent FCC proceedings has been to evaluate the effects of longstanding FCC rules on the ability of radio and television broadcasters, television networks, and cable operators to participate in the highly competitive domestic mass media marketplace.[227/] This report emphasizes the effect of the FCC's rules on mass media firms' ability to compete internationally. In Chapters 8 through 10, we reexamine several of the FCC's mass media crossownership restrictions, its broadcast national multiple ownership rule, and its financial

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226/ Porter, supra note 9, at 117-22.

227/ Review of the Policy Implications of the Changing Video Marketplace, Notice of Inquiry, 6 FCC Rcd 4961 (1991); Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd 2755 (1992); Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 586 (1991).

interest and syndication rules to ascertain their effect on U.S. global competitiveness. In Chapter 11, we discuss the U.S. policy of "localism" in light of these international concerns.

Generally, NTIA's recommendations are designed to encourage a free, open, and competitive marketplace, to ensure that the mass media in the United States provide all U.S. citizens with the information and entertainment they need. Competition in an open marketplace is the best guarantor of both diversity and affordability for consumers.

Government's role in encouraging free and open markets is to move aggressively to eliminate regulations that are simply inhibiting the development of competition and to reform or refocus regulations that may be playing some role in preventing anticompetitive conduct or serving some other important public purpose, but are doing so in an unnecessarily restrictive, efficiency-reducing fashion.

Often, incumbent industry players have vested interests in maintaining the regulatory status quo and fight the removal or reform of regulations that may be limiting competition in their markets. In these circumstances regulators often hesitate to act until an industry is in jeopardy, at which point changes in regulations may only have a limited effect. We think the better course is for government to actively review its regulatory structures, and weed out those elements that are unduly restrictive and are preventing consumers from realizing the full benefits of competition, while maintaining regulatory restrictions only when shown to be necessary. In the international arena, this analysis is complicated by the market-closing activities of other countries. Although the United States is working vigorously to eliminate unwarranted and anticompetitive governmental restrictions in other countries, NTIA believes it is necessary to remove such restrictions where they exist in U.S. regulations, as well.

Chapter 6

THE FOREIGN OWNERSHIP RULES

I. INTRODUCTION

As we discussed in Chapter 2, one of the more noteworthy characteristics of the recent globalization of mass media is the dramatic increase in the incidence of foreign direct investment (FDI) in both the United States and abroad. This activity has occurred in varying degrees in virtually all sectors of the mass media industry. Some of the more prominent recent examples of FDI in the United States include the purchases by Sony and Matsushita of major Hollywood studios. On the other side of the equation, FDI by U.S.-based firms abroad has taken place in cable systems in the United Kingdom, Israel, Sweden, and France, and in joint ventures with European programmers.[228/]

In contrast, FDI in broadcasting has been extremely limited. Although the European Community (EC) and countries in other areas are privatizing their broadcast industries, the level of U.S. investment in foreign broadcast markets is negligible.[229/] Similarly, the level of foreign investment in broadcast properties in the United States is very low.[230/] A major reason for this is the existence in most countries, including the United States, of laws limiting the amount of foreign investment permitted in broadcast properties.[231/]

The focus of this chapter is to analyze the effects of the one major statutory impediment to FDI in broadcasting in this country. Section 310(b) of the Communications Act ("the foreign ownership rules") limits the amount of foreign investment permitted in broadcast

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228/ See infra Chapter 8 at note 459; infra Appendix C at C-5, C-6, and C-17. For a discussion of ownership interests and activities of a number of global media companies, see infra Appendix C.

229/ Foreign Ownership: Salvation or Selling Out?, Broadcasting, July 15, 1991, at 36.

230/ Alfred Sikes, Chairman, FCC, Globalization of the Telecommunications Market: Foreign Investment Issues 4 (remarks before the European Institute's Conference on "European Investment in the United States: Unity and Fragmentation in the American Market") (Sept. 23, 1991) (Sikes Speech).

231/ Another reason for the limited amount of U.S. investment in foreign broadcast properties is that most countries have very few private broadcast stations. For a profile of other countries' mass media industries and laws, see infra Appendix D.

properties.[232] In the United States, broadcasting is the only mass medium subject to these restrictions.

This limitation on foreign investment has the potential of handicapping the broadcast industry in the current video marketplace. Today, broadcasters face unprecedented competition from multichannel video providers, and yet broadcasting is the only mass medium prevented by statute from realizing the potential benefits of FDI. These benefits could include increased opportunities for U.S. broadcasters and related firms to invest in foreign markets, as well as increased capital for U.S. broadcasters, resulting in a more efficient allocation of resources within the industry, and the ability to better serve their communities. Although currently there is little foreign investment in cable television in the United States,[233] in the future, the disparate treatment these rules create could potentially burden broadcasters vis-a-vis their cable competitors in attracting capital. Because the television networks are themselves major broadcasters, the current prohibitions disable them from attracting the type of foreign investment that the major studios and other program producers can attract.

Moreover, these restrictions in the U.S. broadcast market, at least as routinely and as conservatively applied as they currently are, provide no incentives for foreign governments to open their broadcast markets to greater foreign participation. For a number of reasons, the United States has the most extensive, well developed, and competitive broadcast industry in the world. Were entry barriers to foreign firms in broadcasting liberalized around the globe, it is likely that the opportunities for the U.S. broadcast industry would exceed any concomitant risks in the U.S. market. To the extent that U.S. regulators' current interpretation of the limits on foreign ownership in Section 310(b) is inhibiting such broader liberalization, we may simply be "shooting ourselves in the foot" by undermining the development of international opportunities in an industry in which U.S. broadcasters are uniquely well suited to compete.

232/ 47 U.S.C. § 310(b) (1988).

233/ Although there are some instances of foreign investment in cable, these instances are few in number. For example, the Canadian company Maclean Hunter Cable TV serves over 500,000 cable subscribers in New Jersey, Florida, and Michigan. Another Canadian company, Rogers American Cablesystems Inc., owns two systems in Alaska. 60 Television & Cable Factbook, Cable & Services Vol., Pt. 1, at D-1900, D-1917 (1992 ed.).

The original justification for imposing the foreign ownership rules, protection of U.S. national security, is no longer as persuasive as it was when the precursors of the existing rules were enacted in 1912 and 1927. While other rationales are sometimes advanced for the rules, NTIA believes that legitimate public policy concerns underlying such restrictions (including remaining national security concerns) can be addressed by approaches that offer greater opportunities for FDI than the present rules provide, at least as applied currently.

In light of these anomalies, NTIA believes that the FCC should conduct a rulemaking to liberalize its application of the current restrictions. Section 310(b)(4) restricts the granting of licenses to companies if the parent company of a corporate applicant is more than twenty-five percent foreign controlled, "if the Commission finds that the public interest will be served by the refusal or revocation of such license."[234/] Thus, the FCC has the discretion to allow foreign interests to control more than twenty-five percent of a holding or parent company of an applicant unless the public interest would otherwise be served. In doing so, the FCC would conform more closely to the plain language of the statute. We propose that the FCC's rulemaking should outline the principles under which it can use its discretion under Section 310(b)(4) to allow investment by foreign entities in broadcast properties in the United States.

This chapter first analyzes the legislative history of Section 310(b) and compares the restrictions of Section 310(b) to similar broadcasting restrictions in other countries. We then discuss whether the national security concerns that originally animated passage of the foreign ownership rules continue to justify application of the rules to broadcasting, and analyze the benefits and costs that may result from liberalizing the application of the rules.

II. The Foreign Ownership Limitations of Section 310(b)

Section 310(b) restricts foreign ownership interests in certain types of radio licenses -- broadcast, common carrier, aeronautical en route, and aeronautical fixed services.[235/]

234/ 47 U.S.C. § 310(b)(4).

235/ Section 310(b) of the Communications Act provides that:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;

Because this report addresses mass media globalization, this chapter focuses on the restriction as it applies to broadcast licenses.[236]

> (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b).

236/ Section 310(a) prohibits "any foreign government or the representative thereof" from holding any "station license required under this chapter." 47 U.S.C. § 310(a) (1988). One of the problems of interpretation with respect to Section 310(a) is the lack of a clear definition of "foreign government or representative thereof." Due to privatization of broadcasting and common carrier entities worldwide, and the emergence of an increasing number of communications entities with a partial governmental interest, the application of Section 310(a) may increasingly be invoked to block certain investments by foreign entities that were not contemplated at the time the statute was drafted.

The FCC requires foreign (and domestic) news organizations to obtain authorization from the FCC to operate satellite newsgathering (SNG) terminals in the United States. News organizations use SNG terminals to send, via satellite, audio and video news reports to their home offices for broadcast to their viewers and listeners. The FCC typically licenses use of these terminals to independent, private news organizations, which allows them to operate their SNG terminals in the United States to cover events requiring occasional or short-term transmission. However, if a news organization is a representative of a foreign government, Section 310(a) prohibits the FCC from granting it a license to operate its SNG terminal in the United States.

The FCC may have some flexibility in interpreting what constitutes a "representative" of a foreign government under Section 310(a); however, such flexibility is legally untested. Moreover, U.S. newsgathering organizations express concerns that the FCC does not have sufficient flexibility to consider more appropriate treatment of some foreign government-controlled news organizations that have no autonomy or editorial license (e.g., in China, Jordan, Saudi Arabia).

Sections 310(b)(1) and (2) bar an alien or a foreign corporation from obtaining a U.S. broadcast license. However, foreigners can hold interests in corporations that hold licenses. Under Section 310(b)(3), an alien or foreign corporation can hold up to a twenty percent interest in a corporation that holds such a license.

As noted above, Section 310(b)(4), the so-called "holding company" provision, states that no license shall be granted if more than twenty-five percent of the capital stock of the holding company or parent company controlling[237/] the licensee is owned of record or voted by aliens "if the Commission finds that the public interest will be served by the refusal or revocation of such license."[238/] This provision seems to contemplate a permissive regime in which foreign ownership of a holding company is allowed unless the FCC makes an affirmative finding that the public interest will be served by restricting the grant of a license to a holding company arrangement in which foreign interests own more than twenty-five percent of the holding company. In practice, however, applicants controlled by a holding company with more than twenty-five percent foreign ownership essentially have been deemed to need a "waiver" of the twenty-five percent limitation. Even construed in this

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Therefore, it may be reasonable to interpret Section 310(a) to allow all foreign-owned newsgathering organizations to be licensed to operate their own SNG terminals in the United States, so long as the original national security concerns that animated passage of the prohibition are not implicated. The FCC appears to be moving in this direction. Recently, the FCC and the Canadian Department of Communications reached a mutual understanding under which the authorization procedures for use of SNG equipment between the two countries will be greatly streamlined. See, e.g., FCC and Canadian Department of Communications Reach Understanding on Cross-Border Roaming of Satellite Newsgathering Units, Mimeo No. 24377 (FCC News Release, Aug. 12, 1992).

237/ For purposes of Section 310(b)(4), the FCC views a "controlling" interest as a majority interest, i.e., 50% or more, in the licensee. Peoria Community Broadcasters, 79 FCC 2d 311, 317 (1980).

In some cases, alien ownership is not permitted even though it does not exceed the statutory benchmarks of Sections 310(b)(3) and (b)(4). These cases occur when the FCC determines that "the alien will exercise de facto control over the licensee." Millicom Inc., 4 FCC Rcd 4846 (1989).

238/ The provision also prohibits any alien from serving as an officer of such holding company or parent company and does not allow more than 25% of the directors of the board of such a company to be an alien. 47 U.S.C. § 310(b)(4).

manner the FCC has much discretion to permit holding company ownership interests of more than twenty-five percent.[239]

III. LEGISLATIVE HISTORY OF SECTION 310(b)

Congress first regulated foreign ownership of radio licenses in the Radio Act of 1912 (the 1912 Act). National security concerns animated passage of the foreign ownership restrictions. Prior to passage of the 1912 Act, there were no restrictions on radio, and any transmitter could be blocked by a more powerful transmitter in the same area. In the event of war or strained relations between the United States and a foreign country, it was thought that a foreign-controlled radio station could present a serious national security risk by its ability to interfere with American communications.[240]

In response to this concern, Section 2 of the 1912 Act permitted issuance of U.S. radio licenses only to American citizens. The limitations of this provision quickly became obvious. It failed to prevent foreign entities from obtaining de facto control of radio companies operating within the United States.[241]

In order to address the shortcomings of the 1912 Act, Section 12 of the Radio Act of 1927 (the 1927 Act) contained more comprehensive restrictions on foreign ownership of radio licenses. It provided that:

239/ See, e.g., Data General Corp. and Digicom, Inc., 2 FCC Rcd 6060 (1987); Applications for Consent to Transfer of Control of Hughes Communications, Inc. from an Independent Voting Trust to General Motors Corp., 59 Rad. Reg. 2d (P&F) 502 (1985).

240/ Ennis & Roberts, Foreign Ownership in US Communications Industry: The Impact of Section 310, 19 Int'l Bus. Law. 243, 243 (1991) (citing A Bill to Regulate Radio Communication, Hearing on HR 15357 before the House Committee on the Merchant Marine and Fisheries, 62nd Cong., 2d Sess. 70 (1912) (statement of Lt. Comm. David W. Todd)).

241/ See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 53 (1934) (statement of Sec. of the Navy) ("[t]he wording of this section failed to prevent foreign ownership of radio companies operating within the United States") (Hearings on H.R. 8301).

> The station license required hereby shall not be granted to, or after the granting thereof of such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capitol stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.[242/]

Like Section 2 of the 1912 Act, Section 12 was primarily based "upon the idea of preventing alien activities against the Government during the time of war."[243/] One event appears to have been important in shaping this provision. In the opening days of World War I, German-controlled "wireless telegraph" stations had communicated with German naval vessels off the East coast of the United States and warned them to seek cover.[244/] Although the legislative history is sparse, it does indicate that other incidents occurred. Regarding the 1927 Act, the Secretary of the Navy testified before Congress that:

> [T]he lessons that the United States had learned from the foreign dominance of the cables [telegraph] and the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the [First World] war brought about the passage of the Radio Act of 1927, which was intended to preclude any foreign dominance in American radio . . . .[245/]

In the same hearings, the Director of Communications Division, Office of Naval Operations, remarked:

242/ Pub. L. No. 69-632, ch. 169, § 12, 44 Stat. 1162, 1167 (1927) (repealed 1934).

243/ 68 Cong. Rec. 3037 (1927) (statement of Sen. Burton K. Wheeler).

244/ See Ennis & Roberts, supra note 240, at 243 (citing Opens Wireless Today, N.Y. Times, Sept. 10, 1914, at 6).

245/ See Hearings on H.R. 8301, supra note 241, at 26.

> Due to the lessons of the World War, the Navy Department . . . recommended Government ownership of all radio. Congress did not approve this, but in lieu thereof enacted legislation [i.e., the 1927 Act] requiring private ownership and operation, with positive assurance that radio would be owned by United States citizens, that directors and officers of radio companies would be United States citizens, and that four fifths of the stock would be in the hands of United States citizens.[246/]

The foreign ownership rules adopted as Section 310(a) of the Communications Act of 1934 (the 1934 Act) (now Section 310(b)) were essentially the same as Section 12 of the Radio Act of 1927, except for two significant changes. Section 12 had prohibited the granting of a station license to a company "of which more than one-fifth of the capital stock may be voted by aliens."[247/] The 1934 Act limited the scope of this prohibition by providing that no license would be granted to a company in which more than one-fifth of the capital stock "is owned of record or voted by" aliens or their representatives. The purpose of this change was, in part, to "guard against alien control and not the mere possibility of alien control."[248/] The "owned of record" language was designed to limit application of the statute to record ownership of a corporation's stock as shown on its books.[249/]

Second, a new provision, Section 310(a)(5) (now Section 310(b)(4)), was added. The section sought to prevent alien-controlled parent companies from circumventing the section's national security goals by creating domestic wholly-owned subsidiaries that were allowed to hold licenses. The section also permitted foreign ownership interests of holding companies to exceed twenty percent to avoid "seriously handicap[ping] the operation of [holding companies] that carry on international communications and have large interests in foreign

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246/ Id. at 23.

247/ Radio Act of 1927, § 12, 44 Stat. at 1967.

248/ S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934).

249/ Watkins, Alien Ownership and the Communications Act, 33 Fed. Comm. L.J. 1, 8 (1981) (citing Hearings Before the Comm. on Interstate Commerce of the United States Senate on S. 2910, 73d Cong., 2d Sess. 122-25 (1934)).

countries in connection with their international communications."[250] Thus, Congress recognized in 1934 that because U.S. firms are involved in international telecommunications markets, their interests should be taken into account.

Since adoption of the 1934 Act, only minor changes to Section 310(b) have been made. In 1964, Section 310 was amended to allow licensing of alien amateur radio operators within the United States under certain circumstances.[251] In 1974, the statute was amended to narrow the types of licenses -- broadcast, common carrier, aeronautical en route, and aeronautical fixed services -- to which Section 310(b) applies, and to exempt safety and special and experimental radio services -- such as truckers, shippers, and microwave relay station operators -- from the restrictions.[252]

In 1976, the FCC rejected a proposal to apply the foreign ownership rules of Section 310 to cable television systems.[253] The FCC found that foreign investment in cable was limited and posed no threat to national security or to the development of cable.[254] The FCC distinguished cable operators from broadcasters on the ground that "the totality of a

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250/ S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934). Section 310(a)(5) provided that no license was to be granted or held by:

> [a]ny corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Communications Act of 1934, Pub L. No. 73-416, § 310(a)(5), 48 Stat. 1064, 1086 (1934) (codified as amended at 47 U.S.C. § 310(b)(4) (1988)).

251/ Act of May 20, 1964, Pub L. No. 88-313, 78 Stat. 202 (1964).

252/ Act of Nov. 30, 1975, Pub. L. No. 93-505, 88 Stat. 1576 (1974). Many cable system operators had been subject to the foreign ownership restrictions due to their status as licensees of microwave relay stations.

253/ Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, Report and Order, 59 FCC 2d 723 (1976) (Cable Television Citizenship Requirements).

254/ Id. at 726.

cable operator's program content control does not approach that required of a broadcaster."[255] At that time, most programming viewed by cable subscribers was supplied by broadcast stations.[256]

IV. OTHER COUNTRIES: FOREIGN OWNERSHIP RESTRICTIONS

In many countries, broadcasting is performed solely by the government. In these countries, private individuals and companies, regardless of their nationality, cannot own broadcasting stations.

Of the countries that permit private ownership of broadcast stations, many have foreign ownership rules similar to those of Section 310(b). Table 6.1, below, summarizes the foreign broadcast and cable ownership restrictions of the seventeen countries, including the United States, with the largest gross national products in 1990.[257] As Table 6.1 demonstrates, eleven of the seventeen countries permit some degree of foreign ownership of broadcast facilities, ranging from a low of fifteen percent in Australia to the regimes of the United Kingdom, and Italy, which permit foreign ownership of a "non-controlling"[258] or non-majority interest in broadcast properties.[259] Several countries permit a degree of

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255/ Id. at 727.

256/ Id. at 726.

257/ The World Bank, The World Bank Atlas 1991, at 6-9 (1991).

258/ The definition of "control" varies by country. In the United Kingdom, for example, control is defined as more than a 50% ownership interest, but an ownership interest of 30% or more creates a rebuttable presumption of de facto control. See The Broadcasting Act, 1990, schedule 2, part 1. In Italy, foreigners are not allowed to own a majority of shares in a licensee. 6 Euromedia Regulation, Oct. 22, 1990, at 8.

259/ As Table 6.1 shows, Germany and Sweden have no formal restrictions on foreign ownership, although NTIA knows of no commercial stations in those countries that are controlled by foreign interests. In Germany, no entity, foreign or domestic, is permitted to own more than a 49% interest in a broadcast property. Telephone conversation with Peter H. Ziemons, U.S. Embassy, Bonn, Germany (Dec. 2, 1992). In Sweden, there is only one commercial broadcast station, TV4. The license for that station restricts foreign ownership to 30%. Letter from Louise Bonbeck, First Secretary, Ministry of Culture of Sweden, to National Telecommunication and Information Administration 1 (Apr. 6, 1992) (on file at

Country	Foreign Ownership Permitted		Percentage of Foreign Ownership Permitted	
	Broadcast	Cable	Broadcast	Cable
United States	Yes	Yes	20-25%(a)	100%
Japan	Yes	Yes	20%	20%
Germany, Fed. Rep. of	Yes	No	(b)	N/A
France	Yes	Yes	20%(c)	100%
Italy	Yes	(d)	non-controlling(e)	N/A
United Kingdom	Yes	Yes	30-50%(f)	100%
Canada	Yes	Yes	20%(g)	20%(g)
China	No	No	N/A	N/A
Brazil	Yes	Yes	30%	N/A
Spain	Yes	(d)	25%	N/A
India	No	No	N/A	N/A
Australia	Yes	No(h)	15-20%(i)	N/A
Netherlands	No	No	N/A	N/A
South Korea	No	No	33%	N/A
Switzerland	No	No(j)	N/A	N/A
Mexico	No	No(k)	N/A	N/A
Sweden	Yes(l)	Yes	(m)	(m)

Source: compiled from individual country sources and embassies, where available; otherwise, ITA and the Library of Congress.

(a) See supra at p. 77.
(b) There are no formal restrictions. The 16 German Laender grant licenses independently.
(c) Generally, the foreign ownership rules of France and other EC-member countries apply only to entities of non-EC member countries.
(d) The cable industry is not regulated.
(e) Only non-EC foreign owners are restricted to a non-controlling interest.
(f) Control is defined as an interest of more than 30 to 50%, depending on the circumstances.
(g) No single foreign shareholder may own more than 10% of the stock of a broadcasting or cable company.
(h) Cable has not been introduced in Australia.
(i) No individual foreigner may own more than 15% of the issued capital or voting rights in a broadcast company and aggregate foreign ownership in a broadcast company may not exceed 20%.
(j) Virtually all TV broadcast transmission takes place over a cable system operated by the state monopoly.
(k) A recently passed law that would allow up to a 49% foreign ownership interest of cable facilities has not yet gone into effect.
(l) The first private station went on the air Jan. 1, 1992.
(m) No formal restrictions exist. The license of the only commercial broadcast station, TV4, restricts foreign ownership to 30%.

Table 6.1: Foreign Ownership Restrictions

NTIA).

foreign ownership similar to the twenty to twenty-five percent permitted in the United States. For instance, Japan, France, and Canada permit a twenty percent foreign ownership interest, and Spain permits a twenty-five percent interest, in broadcast properties.

All of the countries that allow foreign ownership of broadcast facilities also allow foreign ownership of cable companies. As Table 6.1 demonstrates, regulations on foreign ownership of cable facilities tend to be less restrictive than those that apply to broadcasting. The United States and the United Kingdom have no restrictions on foreign investment in cable systems.[260/] In Spain and Italy cable is not regulated. As a result, some foreign investors apparently have made investments in cable facilities in those countries in the hope that future regulation will not include restrictive foreign ownership rules.[261/]

The prospects for relaxation of foreign ownership rules in countries other than the United States vary. Switzerland, which currently has a state-run monopoly broadcasting service, is considering legislation that would allocate new broadcast frequencies for commercial use, and would repeal foreign ownership restrictions.[262/] In addition, Eastern European countries are formulating broadcast regulations designed to attract much needed investment, presumably by foreigners, to their antiquated broadcasting services. Hungary recently adopted broadcasting legislation that, when it takes effect, would permit partial foreign ownership of previously government-owned broadcast and cable licenses.[263/] Despite these developments, most countries in the world continue to maintain significant restrictions on foreign ownership of broadcast and cable television systems.[264/]

260/ The United Kingdom liberalized its foreign ownership restrictions with respect to cable in 1990.

261/ In other countries, restrictions on foreign investment in broadcast or cable are not always clearly defined as an element of national policy. For example, in Germany there is no national regulatory agency that manages the issuing of broadcast licenses or cable franchises.

262/ Telephone conversation with Yvana Ensler, Embassy of Switzerland (Dec. 2, 1992).

263/ Telephone conversation with Howard Clark, Second Secretary, U.S. Embassy, Budapest, Hungary (Oct. 1992).

264/ As discussed in the next section, the growth of video channels has minimized the national security concerns that many of these restrictions originally sought to address.

V. Liberalization of the Foreign Ownership Rules

A. Need for the Rules: National Security Issues

An initial question is whether there is a need for the foreign ownership restrictions in the United States. As a general principle of public policy, absent a demonstrable need such as the protection of national security, foreign investment restrictions should be avoided, because they reduce efficiency in the marketplace and impede the introduction of new technologies.[265]

At the time of the passage of the foreign ownership restrictions of the 1927 Act, its drafters were principally concerned that U.S. radio facilities had been used to communicate with German ships during World War I.[266] The drafters wanted to prevent this type of national security breach in the future. In today's world, the risks posed by a foreign-owned broadcaster using its facilities to communicate with an enemy of the United States during wartime are remote. First, under the Communications Act, the President has the authority to close or use any U.S. radio stations, including broadcast stations, during wartime or a national emergency, in the interest of national security or defense.[267] Second, those wanting to communicate from within the United States have many means of doing so other than broadcasting, including the use of private radio licenses, which are not restricted by the Act.

The other primary purpose of the foreign ownership rules of the 1927 Act -- to prevent foreigners from using broadcast facilities to spread propaganda in time of war -- has also

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265/ Prohibitions or restrictions on foreign investment generally tend to restrict the creation and exchange of goods, services, and innovative techniques. As such, restrictions on foreign investment hamper the ability of countries to specialize in particular industries or skills, allocate resources more efficiently, and attract foreign capital. See, e.g., Graham & Krugman, supra note 23, at 45-47.

266/ The concern that animated the foreign ownership restrictions of the 1912 Act, the ability of a foreign-controlled radio station, in an unregulated environment, to block the transmission of a less powerful station, is not relevant today. Under the Communications Act and FCC regulations, the FCC is prohibited from issuing licenses to applicants that would interfere with existing broadcast stations. See 47 U.S.C. § 303(f)(1988); 47 C.F.R. § 73.606 (1992).

267/ See 47 U.S.C. § 606(c)(1988).

decreased in relative importance.[268] At the time of the 1927 Act, there were only a few hundred broadcast radio stations in the United States,[269] and commercial television did not exist. Today, there are over 11,000 broadcast radio stations and over 1,500 broadcast television stations.[270] The fear that some fraction of these stations could somehow spread propaganda in such a way as to threaten national security is unrealistic. The American media system is sufficiently large and diverse to withstand an attempt to subvert the will of the American people through foreign-owned broadcasting. The thousands of other electronic and print media outlets would also be heard.[271] Moreover, to the extent such risks exist during wartime or national emergency, the President's ability to seize or use broadcast stations during these times addresses them.[272]

Some may argue that foreign control of a broadcast television network, such as ABC, NBC, or CBS, could pose a propaganda risk in non-wartime situations. These concerns seem largely speculative. In the United States, foreign ownership is permitted in all other forms of mass media. Foreigners may invest in cable operators, program producers, newspapers, magazines, or any other form of mass media to any extent they wish. While there is much debate about the quality of television programming, there has not been credible

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268/ Although the legislative history expresses concern that foreign-owned stations during World War I posed the danger of spreading propaganda, it does not elaborate on the extent of this danger or whether such propaganda was actually disseminated, although it is worth noting that commercial radio broadcasting in the United States did not begin until 1920. See Hearings on H.R. 8301, supra note 241, at 8.

269/ See National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 211 (1943) (there were almost 600 stations in 1925).

In 1912, when the original foreign ownership rules were enacted, broadcasting did not exist.

270/ Broadcast Station Totals as of November 30, 1992, Mimeo No. 30979 (FCC News Release, Dec. 15, 1992).

271/ There are currently over 11,000 cable systems and 1,600 daily newspapers in the United States. National Cable Television Association, Cable Television Developments 4-A (Oct. 1992); American Newspaper Publishers Association, Facts About Newspapers '91, at 2 (1991) (1990 data).

272/ See 47 U.S.C. § 606(c), discussed supra at text accompanying note 267.

evidence that foreign owners of program production firms located in the United States are engaging in "propaganda."[273]

Although FCC members have spoken forcefully of the need to eliminate the current foreign ownership restrictions for broadcasters,[274] earlier FCC decisions had extended application of the restrictions beyond the original congressional intent. These cases expanded the original notion of "national security" to include concerns about protecting some unspecified cultural values associated with broadcasting. For example, in Wilner & Scheiner, the FCC said that "Section 310(b) reflects the broader purpose of 'safeguard[ing] the United States from foreign influence' in the field of broadcasting."[275] The FCC's expanded interpretation -- beyond national security concerns -- of the purpose of Section 310(b) resulted in use of the statute to prevent investment in broadcast properties that were "passive" or "insulated" from control of the properties, such as limited partnerships, trusts, and preferred stock.[276] The reasons that the FCC invoked to apply the foreign ownership restrictions to such passive investment are similar to the "cultural sovereignty" arguments that the United States has opposed when the EC sought to justify imposition of program

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273/ Although some have alleged that MCA, the producer of "Mr. Baseball," changed the film's script after Matsushita purchased MCA to portray Japanese baseball players more favorably, the making of these changes does not constitute the spreading of propaganda. See, e.g., Cinema Meets the Real World, Chi. Trib., Nov. 30, 1991, at C22.

274/ Sikes Speech, supra note 230, at 4-8.

275/ Request for Declaratory Ruling Concerning Citizenship Requirements of Sections 301(b)(3) and (4) of the Communications Act, as amended, 103 FCC 2d 511, 516-17 (1985) (interpreting Sections 310(b)(3) and (b)(4)) (citing Kansas City Broadcasting Co., 5 Rad. Reg. (P&F) 1057, 1093 (1952)) (Wilner & Scheiner), cited with approval in Primemedia Broadcasting, Inc., 3 FCC Rcd 4293, 4294 (1988) (interpreting Sections 310(b)(3) and (b)(4)) (Primemedia); Seven Hills Television Co., 2 FCC Rcd 6867, 6875-76 (1987) (interpreting Section 310(b) generally).

276/ See, e.g., Primemedia, 3 FCC Rcd at 4295; Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, 1 FCC Rcd 12 (1986); Wilner & Scheiner, 103 FCC 2d at 511.

"Insulated" or "passive" investments are those in which the investor functions essentially as a subordinated lender and has no control over the corporate affairs of the licensee.

quotas in its Broadcast Directive. Given the clear congressional intent of protecting national security when it enacted the foreign ownership restrictions, the legal basis on which these cases rest is questionable.

We thus conclude that the Section 310(b) restrictions no longer are needed for their original purposes. We now analyze further the benefits of altering this prohibition.

B. Potential Benefits of Liberalizing the Foreign Ownership Rules

Modifying the application of the foreign ownership rules, to the extent it sets an example for similar liberalization in other countries, could offer major opportunities for expansion by U.S. broadcasters into foreign markets. The United States has the best developed, most sophisticated commercial broadcasting system in the world. The substantial experience and expertise that U.S. broadcasting firms have gained over the years could be brought to bear in the large number of foreign markets, including both developed and developing countries, that are just beginning to move toward, or are substantially expanding, their commercial broadcasting system.

The rules, at least as they are currently applied, may indirectly hamper the ability of U.S. broadcasters to invest in mass media properties in other countries. As the previous section demonstrates, most countries have foreign ownership restrictions applicable to broadcasting, and in many cases, to cable. Although American broadcasters are uniquely situated to compete in the world broadcasting market, the U.S. foreign ownership rules provide a disincentive to other countries to liberalize their foreign ownership rules. In fact, Table 6.1[277/] indicates that the foreign ownership rules of many countries seem to be modeled on the twenty percent foreign ownership restriction of the U.S. rules. Rather than maintain the status quo, the United States could encourage other countries to liberalize their foreign ownership rules by liberalizing its own. The foreign ownership rules of other countries limit consumer welfare in those countries as the U.S. rules do in the United States. Further liberalization of foreign broadcast ownership restrictions would promote economic efficiency and innovation in the international broadcast marketplace, while providing greater opportunities for U.S. investment overseas.

277/ See discussion supra at p. 83.

As noted above, the U.S. television broadcast industry faces powerful competition from multichannel video providers, while the U.S. radio industry is experiencing financial difficulties.[278] Liberalization of the foreign ownership rules raises at least the potential for injecting increased capital into the American broadcasting industry.[279]

Because broadcasting is the only U.S. mass medium to which the foreign ownership rules apply, liberalizing the rules would permit the market to operate more freely by providing an opportunity for foreign investment in broadcasting as well as some of its mass media competitors, such as cable and DBS. In the Cable Television Citizenship Requirements proceeding,[280] the FCC justified its decision not to apply the foreign ownership rules to cable systems, in part, on potential benefits to the cable industry from having access to foreign capital.[281] This argument applies with equal force to the broadcast industry today. By acting as a barrier to entry to potential investors, the rules limit the possibility that such investors could increase the efficient operation of the broadcast industry.[282] The fact that there has not been substantial foreign investment in cable systems to date may indicate that even if the FCC's foreign ownership rules are liberalized, substantial foreign investment in broadcasting is not likely. However, it may simply suggest that fears about extensive foreign ownership of U.S. broadcasting are overstated.

In addition, liberalization of the rules could result in improved programming quality, to the benefit of U.S. viewers and listeners. An infusion of capital, whether from domestic or foreign sources, into broadcast operations may increase broadcasters' ability to obtain more desirable national or local programming. This, of course, would enhance a broadcaster's

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278/ See Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd 2755, 2758-61 (1992); Majority of Radio Stations Operating at Loss, Broadcasting, Aug. 26, 1991, at 17.

279/ For a further discussion of the economic consequences of FDI, see supra Chapter 2 at pp. 15-16.

280/ 59 FCC 2d 723 (1976).

281/ Id. at 727.

282/ Chairman Sikes of the FCC has also emphasized that international investment will increase competition in the domestic marketplace, encouraging firms to become more efficient and innovative. Sikes Speech, supra note 230, at 7.

ability to serve its community, as well as its profits. Any improved profitability might enable a broadcaster to expand its operations.[283]

Foreign investment would not harm the strongly "local" nature of U.S. broadcasting. One of the common criticisms of FDI in other industries is an asserted tendency on the part of foreign-owned firms to keep the "good" jobs home or shift complex activities such as research and development to their home country.[284] If foreigners are allowed to purchase a greater share of broadcast properties, the potential for these effects is very small. A U.S. broadcast licensee by its very nature is bound to its community. The FCC requires each broadcaster to provide programming that meets the needs of its audience, to reach with its signal its entire community of license, and to locate its studio within the contours of its community of license. The practical effect of liberalizing these rules is that at least some U.S. stations could have a stronger financial basis to serve their communities and provide employment for U.S. broadcast workers.

C. NTIA's Proposal

As the discussion above demonstrates, the benefits of removing the foreign ownership restrictions in Section 310(b), in terms of potential increases in investment opportunities overseas in foreign media markets, sources of investment in domestic broadcast firms, and quality of programming, substantially outweigh the security concerns that first animated adoption of these restrictions. The current restrictions provide a convenient rationale for other countries to retain their foreign ownership restrictions on broadcasting, as well as on other "cultural" activities. Modification of how the FCC applies these restrictions provides an opportunity for the United States to take a proactive stance and encourage foreign governments to relax their foreign ownership restrictions.

Section 310(b) as written gives the FCC some flexibility to liberalize application of the foreign ownership restrictions. As noted above, the plain language of Section 310(b)(4) provides that foreign investment in holding companies above the twenty-five percent statutory limitation is permitted unless the FCC makes a public interest finding that such investment

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283/ See, e.g., Network TV: An $8 Billion Nonprofit Institution, Broadcasting, July 8, 1991, at 23.

284/ Graham & Krugman, supra note 23, at 47-52.

should be denied.[285] Thus, while the FCC has applied Section 310(b)(4) more strictly than its language seems to contemplate, the FCC clearly can modify its approach to make its activities more consistent with the statutory language.

We propose that the FCC initiate a rulemaking to determine how best to apply 310(b)(4) to permit domestic broadcasters to realize the benefits of foreign investment and to encourage the opening of mass media markets internationally. Through such a rulemaking, the FCC can pursue the liberalization of Section 310(b) in a manner that best promotes the public interest in maintaining a financially sound broadcast industry while encouraging the opening of international markets.[286] Because changes in the application of Section 310(b) could potentially implicate national security, foreign policy, and trade issues, as well as regulatory concerns, the FCC should work closely with the Executive branch in the course of the rulemaking prior to adopting any particular reform.[287]

285/ See discussion supra at p. 77.

286/ See Regulation of International Accounting Rates, First Report and Order, 7 FCC Rcd 559, 561 (1991); fONOROLA Corp. and EMI Communications Corp., Memorandum Opinion, Order and Certification, 7 FCC Rcd 7312 (1992), petition for recon. filed (Dec. 4, 1992).

287/ See e.g., Letter from Carla A. Hills, United States Trade Representative, to Alfred Sikes, Chairman, FCC (Sept. 10, 1992) (discussing trade policy implications of international dominant carrier matters).

Chapter 7

INTERNATIONAL COPYRIGHT ISSUES

I. INTRODUCTION[288]

We have seen that overseas markets for film and television programming and sound recordings are important to U.S.-based mass media companies.[289] The worldwide demand for U.S. music, film, and television programming can be expected to increase as home electronics become less expensive and the number of broadcast and cable channels in Europe and other parts of the world grows.

However, a major obstacle to the efficient distribution to overseas markets of U.S. mass media products is the unauthorized use or duplication of that material on a commercial scale without compensation (commonly known as "piracy"). Although such abuses have long hampered the film, sound recording, and music industries, advances in technology have made the problem particularly acute today. The widespread availability of videocassette recorders (VCRs) and audio cassette recorders has allowed easy reproduction of films, television programming and sound recordings. Growing use of satellite transmission for distributing programming also has led to increased piracy. As a result, one of the most pressing concerns of the U.S. mass media industry is international copyright protection. While international copyright matters are complex, with intricacies beyond the scope of this report, this chapter provides a brief outline of the topic to emphasize its importance to mass media markets.

Fundamentally, copyrights are grants of exclusive rights to reproduce, adapt, or publicly perform or exhibit a protected "work."[290] A commonly accepted "bundle" of adequate

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288/ NTIA wishes to thank Michael K. Kirk, Michael S. Keplinger, and Susan O. Mann of the U.S. Patent and Trademark Office for their advice on and contributions to the discussion of international copyright issues.

289/ See supra text accompanying note 1 and p. 21.

290/ All of the aforementioned rights are recognized under the U.S. Copyright Act. Section 106 of the Copyright Act provides:

> Subject to sections 107 through 120 [which contain limitations on rights], the owner of copyright under this title has the exclusive rights to do and to

rights permits markets for copyrighted works to function fairly and efficiently. Such rights also encourage creativity by giving authors control over the dissemination of their work and the opportunity to profit from it. This profit incentive encourages new creations, thereby increasing quality of life and enhancing economic growth.

Although the U.S. copyright system is highly developed and well enforced, U.S. copyright laws have no direct extraterritorial application. Instead, adequate and effective protection of copyrighted works of U.S. authors abroad depends both on a "point of attachment" for those rights in other countries by virtue of some multilateral or bilateral commitment and on strong domestic laws in other countries and their strenuous enforcement.

As we discuss in this chapter, because piracy is an increasing international problem, the United States should continue to promote international intellectual property protection and eliminate other barriers to the worldwide distribution of U.S. intellectual property. Such action is needed to preserve and strengthen the global competitiveness of the U.S. entertainment industries. In seeking to promote strong international standards for intellectual property rights, in 1989 the United States joined the Berne Convention for the Protection of

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> authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

See 17 U.S.C. § 106 (1990).

Under the U.S. Copyright Act, copyright protection extends to "original works of authorship" that are "fixed in a tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device." See id. § 102(a).

Literary and Artistic Works (Berne),[291] the backbone of the international copyright system.[292] Virtually every major country, except the republics of the former Soviet Union, is a signatory of Berne, which is administered by the World Intellectual Property Organization (WIPO). The United States is also seeking to promote adequate international copyright protection through other international fora, such as the General Agreement on Tariffs and Trade (GATT)[293] and regional and bilateral negotiations with other countries, including Special 301 proceedings under the Omnibus Trade and Competitiveness Act of 1988 (Competitiveness Act of 1988).[294]

II. Summary of Comments

In the Notice, NTIA sought comment on the significance of international copyright protection for the global growth of media firms.[295] Specifically, the Notice sought

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291/ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

292/ See The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.). Until U.S. accession to the Berne Convention in 1989, the Universal Copyright Convention (UCC) had provided the most significant source of copyright protection for U.S. nationals under foreign laws. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, revised, Paris, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

293/ General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

294/ Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303(b), 102 Stat. 1179 (codified at 19 U.S.C. § 2242 (1988)) ("Special 301").

295/ See Notice, 55 Fed. Reg. at 5804, para. 88. The Notice also sought comment on the effect on the global growth of U.S. mass media firms of amendments to the Copyright Act, pending at the time of the release of the Notice, that would recognize "moral rights". See id. at 5804, para. 90 (citing S. 1198, S. 1253, H.R. 2690, 101st Cong., 1st Sess. (1989)). Berne requires signatories to protect certain non-economic, "moral rights" of authors. These rights include the author's right to be acknowledged as the author of his or her work and to object to any distortion, mutilation or other modification of that work that would affect the author's honor or reputation adversely. See Berne, supra note 291, art. 6bis.

When the United States acceded to Berne, it did not amend the Copyright Act to provide express moral rights, concluding that the totality of existing U.S. law --

comment on whether U.S. adherence to Berne provides adequate protection for U.S. media firms, and, if not, what additional steps the United States should take to ensure adequate protection for the intellectual property rights of U.S. copyright holders.[296/]

Several commenters stressed the importance of adequate and effective intellectual property protection to the commercial success and international competitiveness of U.S. mass media firms.[297/] Such commenters stated that although U.S. accession to Berne was an important step in promoting adequate copyright protection for U.S. works in foreign markets, the United States needs to take additional steps to further strengthen international standards of protection.[298/] Commenters stressed the importance of achieving a multilateral agreement on intellectual property in the GATT,[299/] continuing bilateral negotiations with foreign governments,[300/] and enacting legislation such as the Special 301 provision of the 1988 Competitiveness Act.[301/] Many commenters expressed their opposition to amending the Copyright Act to expand the "moral rights" of authors. These parties stressed that modification of current U.S. practice in this area could, for example, restrict the ability of

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including Section 43(a) of the Lanham Act, certain state law rights of privacy and publicity, contract law, and the common law tort of defamation -- is sufficient to comply with its Berne obligations. Senate Judiciary Comm., The Berne Implementation Act of 1988, S. Rep. No. 352, 100th Cong., 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3714. In 1990, Congress passed the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended at 17 U.S.C. § 106A (1990)), which expressly grants moral rights protection to visual artists.

296/ See Notice, 55 Fed. Reg. at 5804, para. 89.

297/ See Comments of CBS at 27-30; Comments of MPAA at 21-27; Comments of Time Warner at 64-65; Comments of RIAA at 3-14.

298/ Comments of MPAA at 21-23; Comments of CBS at 29; see also Comments of Time Warner at 74 (the UCC and Berne "have proved to be ineffective in the battle against international piracy"); Comments of RIAA at 3.

299/ See Comments of MPAA at 22; Comments of RIAA at 13; Comments of Time Warner at 75-76.

300/ See Comments of RIAA at 13.

301/ 19 U.S.C. § 2242. See Comments of MPAA at 22.

U.S. mass media firms to adapt a work from one medium to another, and thus could limit their ability to distribute their products in the most economical way.[302]

III. Losses From Copyright Violations

The International Intellectual Property Alliance (IIPA) estimated that worldwide intellectual property rights violations in 1991 in 23 "problem countries" against American film and video programming accounted for at least $1.02 billion in lost revenue.[303] IIPA estimates that such violations in the sound recording industry resulted in at least $679 million

Country	Estimated Losses in 1991 ($ Millions)
Italy	307
Germany	100-130
Cyprus	100
Mexico	88
Brazil	50
Saudi Arabia	50
Egypt	42
India	40
Russia and the C.I.S.	40
Turkey	40
Greece	35
Poland	20
Thailand	20
Korea	15
Philippines	15

Sources: IIPA; MPEAA

Table 7.1: Industry Estimates: 1991 Losses Due to Unauthorized Use of U.S. Video Product on a Per Country Basis

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302/ See Comments of Time Warner at 77-78; Comments of CBS at 29-30; Comments of MPAA at 23-27; Comments of NAB at 11-13; Comments of Committee for America's Copyright Community at 3-21.

303/ IIPA, Request for Written Submissions: Section 182 of the Omnibus Trade and Competitiveness Act of 1988 app. A (Feb. 25, 1992) (IIPA Special 301 Request). This estimate is based on a composite of estimates by the Motion Picture Export Association of America (MPEAA) and IIPA of losses due to copyright violations in individual countries in the film, videocassette, television, and cable industries.

in lost revenue.[304] Table 7.1 lists film industry estimates for 1991 of the heaviest losses due to copyright violations.

A. Videocassettes

One often-cited form of "piracy" occurs from the duplication and sale of videocassettes of films or television programs without permission of the copyright holder. Unauthorized transactions in videocassettes are the most widespread copyright problem that U.S. film and video producers face, in part because of the ease and cheapness of videocassette duplication. Worldwide, 248 million households owned VCRs as of mid-1992, an increase of approximately 48 million from mid-1990.[305] Even in countries where household VCR penetration is relatively low, video parlors and coffee houses equipped with VCRs offer

Country	Estimated Percentage of Videocassettes Allegedly Pirated in 1991
Bahrain, Caribbean, Central American countries, Indonesia, Kuwait, Lebanon, Pakistan, Saudi Arabia, Syria, former republics of the Soviet Union	100 percent
Cyprus, Czechoslovakia (currently the Czech Republic and the Slovak Republic)	90-99 percent
Hungary, Poland	80-89 percent
Mexico	50-59 percent
Italy	40-49 percent
Greece, Taiwan	30-39 percent
Netherlands	20-29 percent

Source: MPEAA

Table 7.2 Industry Estimates: 1991 Percentage of Videocassettes Duplicated Without Authorization

304/ Id.

305/ Compare Letter from Marcia Robbins, Director, Home Video & Pay Television, MPEAA, to Cheryl Glickfield, NTIA (Dec. 18, 1992) (mid-1992 data) (on file with NTIA) with MPAA, Mid-1990 Worldwide VCR Population, Memo No. 90-22 (June 26, 1990). For a discussion of the effects of technological innovation in consumer electronics, see supra Chapter 3 at pp. 36-37.

unauthorized performances, often of pirated videocassettes, to the public.[306] Table 7.2 illustrates some estimated videocassette piracy rates in different markets.

According to IIPA, countries such as Cyprus and the United Arab Emirates are major exporters of unauthorized videocassettes. In the United Arab Emirates, IIPA claims, state-of-the art unauthorized tape plants supply Saudi Arabia and other Arab and African states. One audio-tape plant in Dubai is estimated to be capable of producing 200,000 units of unauthorized product per month.[307] IIPA estimates that during the summer of 1990 alone, Cyprus exported approximately 1.2 million unauthorized videocassettes to the Middle East, Africa and Europe.[308]

B. Satellite Signals

Unauthorized interception and retransmission of program-carrying satellite signals have grown in recent years as satellite technology has developed.[309] Indeed, as more programming is distributed via satellite throughout the world and as more countries become wired for cable systems, it is likely that unauthorized retransmission of program-carrying satellite signals will increase.

Cable systems, home viewers, and private establishments such as bars, hotels, and apartment complexes often receive without authorization satellite programming or broadcast signals transmitted via satellite. MPAA states that in Ireland and Portugal, for example, a major problem is the unauthorized retransmission of programming by hotels for their guests

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306/ Motion Picture Export Association of America, Inc., Trade Barriers to Exports of U.S. Filmed Entertainment: 1992 Report to the United States Trade Representative 7, 9, 42, 46, 51 (Feb. 1992) (MPEAA 1992 Trade Report).

307/ IIPA Special 301 Request, supra note 303, at 45.

308/ Id. at 52.

309/ For a discussion of the development of satellite transmission systems, see supra Chapter 3 at pp. 29-33.

based on interception of satellite signals.[310] In Taiwan, according to MPEAA, there are 200 illegal cable operators serving about 500,000 subscribers.[311]

The unauthorized interception and retransmission of program-carrying satellite signals by cable systems and broadcasting organizations is a growing problem. It is particularly acute in the Caribbean Basin and in parts of South America where satellite signals intended for the U.S. market can be readily intercepted because of the size of their footprint. The IIPA reports that the unauthorized interception and retransmission of such signals causes significant losses for the motion picture industry in Argentina, Colombia, Costa Rica, El Salvador, Honduras, Nicaragua, Peru, and Venezuela. For example, Guatemala is reported to have the largest cable industry in Central America, transmitting programming without authorization into an estimated 300,000 homes.[312]

This problem also is occurring in some countries that have recently privatized their broadcasting industry. For instance, MPAA estimates that in Italy, about ten percent of the programs broadcast on hundreds of local private television stations are unauthorized.[313] MPEAA says that state-owned Iraq TV has been broadcasting programming without seeking authorization, and in Greece, public and private television stations air U.S. products without authorization.[314]

The U.S. government has taken steps to address this problem. For example, the Caribbean Basin Initiative legislation makes the provision of adequate and effective intellectual property protection for satellite broadcasts a factor to be considered in continuing grants of Generalized System of Preferences (GSP) benefits.[315] Also, recent bilateral

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310/ MPEAA 1992 Trade Report, supra note 306, at 71, 109. Such operations also use pirated videocassettes.

311/ Id. at 128.

312/ IIPA, Copyright Piracy in Latin America: Trade Losses Due to Piracy and the Adequacy of Copyright Protection in 16 Central and South American Countries 16 (Sept. 16, 1992).

313/ MPEAA 1992 Trade Report, supra note 306, at 75.

314/ Id. at 52, 68.

315/ For a discussion of GSP benefits under the Generalized System of Preferences Act, see infra note 377 and accompanying text.

agreements and multilateral initiatives, such as the North American Free Trade Agreement (NAFTA), include provisions specifically intended to prohibit the unauthorized interception and retransmission of program-carrying satellite signals.

IV. Improvements in U.S. Copyright Law

A. Berne Adherence

For many years, the United States was unable to join Berne because of several fundamental inconsistencies between U.S. copyright law and Berne. Berne prohibits member countries from conditioning eligibility for copyright protection for works originating from other member states on "formal" requirements, such as registration or publication of a copyright notice.[316] U.S. copyright laws had historically included such formalities. The 1976 revision of the U.S. Copyright Act brought U.S. law closer to Berne's standards, but some differences remained.

Since 1976, the copyright laws have been amended in several ways as part of U.S. adherence to Berne. First, as an initial step in readying the United States for membership in Berne, the U.S. government embarked on a major program to ensure that the so-called "manufacturing clause" of the copyright law would expire on schedule on July 1, 1987. This provision, which required the U.S. printing of certain works in the English language as a condition of full copyright protection, was one of the last vestiges of the formalities that had barred the U.S. from Berne adherence since the 1890s.

A second step was to determine the changes to U.S. domestic law that were necessary to permit Berne accession. The U.S. government, including the Copyright Office and joined by private sector representatives, conducted a major study to determine the points of incompatibility between the Berne standards and U.S. law, which identified several areas

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316/ M.B. Nimmer & D. Nimmer, Nimmer on Copyright §17.01[B], at 17-7 (1991) (Nimmer on Copyright). Like Berne, the UCC requires signatories to provide national treatment to copyright claimants from all other signatories and to provide certain minimum rights to nationals of signatories. UCC, supra note 292, art. II, 25 U.S.T. at 1345. Unlike Berne, however, the UCC permits signatories to require the use of a copyright notice as a condition to copyright protection. Id. art. II, 25 U.S.T. at 1345-46.

where legislation would be required. These included implementation of the rule of simultaneous publication, elimination of the requirement of registration as a condition of eligibility to sue for foreign works, replacement of the jukebox compulsory licensing system by a system of voluntarily negotiated licenses, and provisions to insulate U.S. law from any possible self-execution provisions of Berne. In adopting such changes in legislation, Congress recognized that it might be necessary to revisit some of the Berne requirements pertaining to architectural works, moral rights and the protection of existing works as well as any changes that might be necessary to keep U.S. law in step with the needs of the marketplace.

Accession to Berne has provided the United States with a number of benefits. First, participation in the Berne Union and the Berne Executive Committee gives the United States the ability to shape international copyright policy development at the highest levels in the WIPO. Second, membership deflects arguments previously made by some developing countries that belong to Berne that before the United States should raise copyright issues with them, the United States should first join Berne. U.S. membership in Berne and active participation in the Berne policy-making process have allowed the U.S. government to directly address problems without being faced with the Berne non-membership issue. Further, as a technical matter, Berne guarantees U.S. copyright owners a higher level of protection in its member countries than would be guaranteed by the UCC because Berne's substantive standards are higher.

B. Further Improvements to U.S. Copyright Law

In the years since Berne adherence, legislation has been adopted to make further improvements in U.S. copyright law. Rental rights have been extended to sound recordings[317/] and computer programs to safeguard them from the copying that can arise from rental of these works in readily copyable media. Specific and more extensive protection has been accorded to architectural works to fully comply with the requirement to protect such works under Berne. The moral rights of visual artists were specifically addressed and the most recent change has been to substantially increase the level of criminal penalties available to deter infringement for all works.

317/ For a further discussion of the adoption of the Record Rental Amendment Act, see infra at p. 107.

Another significant development has been the establishment of a system to compensate sound recording and music copyright owners and performers for the home copying of their works. This legislation provides that digital audio recording devices must include a system to limit the serial copying of sound recordings in all digital formats. This Serial Copy Management System (SCMS) permits any digital audio recording device to copy original digitally encoded sound recordings, but it encodes the copies in a manner so that they cannot be further copied. It also requires the payment of a royalty on each digital audio recording device and on all recording media for use in such machines. This royalty, which is limited only to digital audio systems, will be collected by the Copyright Office and distributed by the Copyright Royalty Tribunal. This legislation is particularly important for two reasons. First, it gives the United States the ability to argue with our trading partners for appropriate shares of similar royalties arising under their reciprocity-based systems and second, it includes the first statutory recognition of performers' rights in U.S. copyright legislation.[318/]

V. Intellectual Property Issues Under Berne

A. Overview of Berne: Exclusive Rights

Because adequate copyright protection is the foundation for curbing piracy worldwide, we now describe Berne, the most comprehensive international copyright treaty to date, to illustrate the benefits and shortcomings of the existing international copyright system. Berne is based on two basic principles -- "national treatment" and "minimum rights." Under Berne, signatories must provide protection to the works of copyright owners from all other signatory nations on the same basis as that which is provided to their own nationals. All signatories must also provide certain minimum rights to such Berne authors. Berne requires member states to provide the "authors" the exclusive rights to reproduce, adapt, perform,

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318/ The Audio Home Recording Act of 1991, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (to be codified at 17 U.S.C.), took effect in late 1992, amending the Copyright Act to require implementation of a SCMS for digital audio tape recording equipment.

and broadcast their work.[319] These rights are designed to provide incentives for creators to continue to develop original works of authorship.

1. The Reproduction Right

The reproduction right, the right to authorize the copying of a work, is the most fundamental of an author's rights under copyright law. Berne explicitly requires signatories to recognize this right.[320]

2. The Adaptation Right

Under Berne, signatories must recognize the right of the author to authorize the adaptation, arrangement, or other alteration of a work.[321] Examples include producing a film version of a novel or play, and translating a book from one language to another.

3. The Distribution Right

Berne does not explicitly recognize a distribution right, except with respect to "cinematographic" works -- that is, theatrical releases.[322] According to the WIPO Guide to Berne, the right to distribute works covered under Berne, other than cinematographic works, derives from the reproduction right, which some Berne states have interpreted to permit an author to specify conditions governing the distribution of a work, such as the extent of copies and the countries in which a work may be distributed.[323] Holders of

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319/ Berne does not define the term "author," leaving it to the laws of member states to decide. S.M. Stewart, International Copyright and Neighboring Rights § 5.29, at 113 (2d ed. 1989). Common law countries recognize individuals and other legal entities, such as corporations and partnerships, as authors. Id. §4.47 at 76. Civil law countries may only recognize individuals as authors. Id. § 4.47 at 77.

320/ Berne, supra note 291, art. 9.

321/ Id. art. 12.

322/ See, e.g., Stewart, supra note 319, § 5.11, at 105, § 5.47, at 128.

323/ Id. § 4.20, at 62 n.2 (citing WIPO Guide to Berne, para. 9.4). The WIPO Guide to Berne, however, is not binding on Berne signatory countries.

distribution rights can authorize the sale or lease of creative works as they choose, thus, for example, specifying that copies of their work may be sold in some countries but not in others.

4. The Public Performance Right

Berne explicitly requires signatories to recognize the right of an author to authorize the performance of a work in public.[324/] This right embraces both live performances by actors and singers, and recorded performances of music or film.[325/]

5. The Broadcasting Right

Under Berne, member countries must grant authors of literary and artistic works the exclusive right to authorize the broadcasting of their works. The WIPO Guide to Berne states that broadcasting is the transmission of a work by any means of wireless diffusion that is intended to be directly received by the public,[326/] which includes both terrestrial and satellite broadcasting, although the extent of this right as it applies to satellite broadcasting is unclear.[327/] Under Berne, the author has a right to authorize the initial broadcast of a work, whether by sound or television,[328/] and also controls secondary rights, including retransmission by cable and rebroadcasting.[329/]

324/ Berne, supra note 291, art. 11.

325/ See id. arts. 11(1)(i), 14(1)(ii).

326/ See Stewart, supra note 319, §§ 4.28 -.295, at 67 (citing WIPO Guide to Berne, para. 11bis(3)).

327/ See infra at pp. 109-110.

328/ See Berne, supra note 291, art. 11bis.

329/ The right to authorize the original transmission of a work by cable is treated by Berne as part of the public performance right. Id. art. 11 (1)(ii).

B. Specific Issues Under Berne

1. Adequacy of Copyright Laws

Despite the benefits of Berne, international violations of the copyrights of U.S. media firms continue to increase.[330] Although commenters view the growing availability of new technologies for the delivery of video and audio as the primary cause for the increase in such violations,[331] some also express the view that improvements to the protections of Berne might ameliorate the situation. For instance, some express concern about the clarity of some of the substantive provisions of Berne. As a result, signatories can interpret Berne in varying ways. Commenters also caution that Berne may not sufficiently provide for reproduction and distribution rights in light of evolving new mass media technologies.[332]

330/ For instance, MPEAA's estimates of its member companies' annual losses due to worldwide piracy indicate that from 1989 to 1991 these losses increased. Compare MPEAA, MPAA and Its International Allies Launched 6,653 Raids Worldwide Against Video, Satellite and Film Pirates in 1990 1 (News Release, Apr. 2, 1991) (annual losses estimated at $1.2 billion); MPEAA, MPEAA Spotlights Indonesia as Particularly Onerous in Terms of Trade Barriers in Report to USTR 1 (News Release, Apr. 16, 1990) (annual losses estimated at $988 million to $1.104 billion); and MPAA, MPEAA Documents Between $886 Million and $987 Million in Losses Overseas Due to Trade Constraints 1 (News Release, Mar. 23 1989).

331/ Because of the ease of copying intellectual property, legal solutions are only partially effective. Increasingly, governments and industries are developing technological methods of preventing unauthorized copying. These methods include better coding of films and videos to enable tracking of an illicit copy back to the source; increasingly sophisticated encoding and decoding to prevent unauthorized satellite reception; and development of technical features for digital audio tape recording equipment that would prevent or inhibit copying, such as the SCMS.

In response to the proliferation of videocassette piracy, other countries have applied a surcharge on the sale of blank videocassettes and recording equipment. Theoretically, the proceeds are to be distributed among the holders of rights to pirated programs as compensation for their losses. All too often, however, governments use this money to finance unrelated activities. MPEAA 1992 Trade Report, supra note 306, at 7, 9, 42, 46, 51.

332/ See, e.g., Stewart, supra note 319, § 5.68, at 142; Wolfhard, International Trade in Intellectual Property: The Emerging GATT Regime, 49 Toronto Fac. of L. Rev. 106, 108 (1991).

The following are examples of the issues that arise under Berne of concern to holders of intellectual property rights in film and television programming and sound recording.

a. Sound Recordings

Berne does not address the protection of sound recordings.[333] RIAA recommends that Berne (and GATT) should be amended to enact stricter copyright measures for such products.[334] The State Department, the International Trade Administration and the Patent and Trademark Office of the Department of Commerce, the United States Trade Representative (USTR), and the U.S. Copyright Office are actively involved in negotiations to secure strong copyright protection for sound recordings, bilaterally and multilaterally, consonant with U.S. practice. NTIA strongly supports these efforts.

In 1984, the United States adopted the Record Rental Amendment Act,[335] which gives copyright owners of sound recordings the exclusive right to authorize or prevent the rental of their works. Neither Berne, the Rome Convention, or the Geneva Phonograms Convention requires the provision of a "rental right" for any work. However, rentals of sound recordings can undermine the ability of copyright owners to realize the value of their work.[336] U.S. sound recording interests would like to secure the adoption of an

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333/ See Berne, supra note 291, art. 2(1) (Berne's mandatory provisions apply to musical works, i.e., compositions, but not sound recordings). Although the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 (Rome Convention), and the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309 (Geneva Phonograms Convention), require only a limited 20-year protection against unauthorized reproduction, neither of these treaties has as large an international membership as Berne.

334/ Comments of RIAA at 4, 8-14.

335/ See 17 U.S.C. § 109(b) (1990).

336/ Until recently, rentals of CDs in Japan were a serious problem for U.S. record companies. See Digest, Wash. Post, Dec. 26, 1991, at D1; Ono, U.S., Japanese Confer on CD Rental, Wall St. J., Dec. 13, 1991, at B6. The problem has been abated by passage of a law that grants a one-year rental right with respect to sound recordings. Japan's Record-Rental Tide Ebbing, Billboard, July 25, 1992, available in LEXIS, Nexis Library, CURRNT File. See also Nimmer on Copyright, supra note 316, § 8.12[B][7], at 8-146.

international obligation that would include an explicit rental right at least with respect to sound recordings.[337] According to them, this rental right should be exclusive, as it is in the United States, so that rental of sound recordings cannot be made subject to a compulsory licensing scheme.[338]

b. Public Performance Right

Although, as we have seen, Berne includes a right to publicly perform a work, it does not define "public."[339] As a result, some Berne signatories define "public performance" more narrowly than the United States. For example, some countries treat videocassette exhibition in trains, buses, hotels, and other "public" places to be a form of private showing, for which copyright holders are not compensated.[340] In contrast, such performances would be "public" if they occurred in the United States.

337/ Explicit recognition of a distribution right may not provide sufficient protection. Traditionally, the distribution right extends only to the initial circulation of a work. After the first sale of a particular copy, the distribution right is "exhausted," and purchasers of the copy are free to sell or rent the copy. Countries that recognize a rental right with respect to sound recordings, videocassettes, or computer software typically view the right as a limited exception to the first sale or exhaustion doctrine. See Stewart, supra note 319, §§ 4.20-4.21, at 62-63.

338/ Comments of RIAA at 8.

339/ Article 11 of Berne states:

> (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
>
> (i) the public performance of their works, including such public performance by any means or process;
>
> (ii) any communication to the public of the performance of their works.

Berne, supra note 291, art. 11.

340/ IIPA, Trade Losses Due to Piracy and Other Market Access Barriers Affecting the U.S. Copyright Industries; A Report to the United States Trade Representative on 12 "Problem Countries" 90 (1989) (court decisions defined the term "public presentation" so as not to include exhibition in viewing rooms).

c. Satellite Transmission Right

Satellite technology has revolutionized the way in which video programming is distributed around the world. Satellites increasingly deliver video programming directly to the home and to cable operators, which retransmit programming to home viewers, and even to broadcasters. International intellectual property law is grappling with how to assure that programmers and distributors receive the full value of their programs in this changing environment.

Although Berne provides a "broadcasting" right,[341] how that right applies to satellite broadcasting is unclear. There are two types of satellite broadcasting: direct broadcast satellite (DBS) and fixed service satellite (FSS). DBS operates at relatively high power for direct reception by the public. FSS systems transmit signals at much lower power, and was originally intended as a point-to-point service. For broadcasting purposes, FSS systems are typically used to transmit signals to a earth station for subsequent distribution to the public via broadcasting or cable. Recently, however, antenna and receiver technology has advanced to allow direct reception of FSS signals by the public. Some countries are permitting direct reception of FSS signals.[342]

As noted above, under Berne, broadcasting is understood to include the transmission of signals intended to be received directly by the public.[343] Thus, under Berne, providers of DBS signals possess "broadcast" rights, because the signals are intended to be received directly by the public. It is unclear, however, whether transmissions from FSS systems are also considered to be broadcasting under Berne. An FSS transmission to an earth station arguably is not intended for direct reception by the general public. Moreover, some argue that Berne excludes FSS signals from protection even when they are intended for broadcast directly to the home.[344]

341/ Berne, supra note 291, art. 11bis.

342/ EC, Draft Proposal for A Council Directive on the Coordination of Certain Rules Concerning Copyright and Neighboring Rights Applicable to Satellite Broadcasting and Cable Retransmission, Part I, para. 11, at 10 (1991) (on file at NTIA) (EC Draft Proposal).

343/ See supra text accompanying notes 326-327.

344/ EC Draft Proposal, supra note 342, Part I, para. 30, at 21.

The EC's Proposed Satellite/Cable Directive[345] attempts, in part, to resolve, among the EC member states, the ambiguity of Berne with respect to the extent of the broadcasting right applicable to satellite communications,[346] consistent with the EC's stated aim of creating a unified market. The Proposed Satellite/Cable Directive, if it takes effect, will guide the laws of EC member countries, and may well influence the laws of other countries as well. It proposes that the satellite broadcasting right shall exist regardless of the satellite technology -- DBS or FSS -- used.[347] Thus, different forms of satellite transmission, whether DBS or FSS, are within the EC's proposed scope of copyright. As such, satellite broadcasters are required to obtain consent from, and equitably compensate, copyright holders for the programs they transmit via satellite.[348]

345/ Proposal for A Council Directive on the Coordination of Certain Rules Concerning Copyright and Neighboring Rights Applicable to Satellite Broadcasting and Cable Retransmission, 91/276, Part II, 1991 O.J. (C 255) 3 (EC Proposed Satellite/Cable Directive).

346/ Id. at 4, para. 14 ("[t]he application of [Berne] Article (bis)(1) to the transmission of protected works via satellites raises a series of questions").

347/ Id. at 3, para. 6.

348/ Id. at 6, art. 5.

Berne also does not address some choice-of-law issues with respect to satellite broadcasting. These questions arise when satellite broadcasters uplink from one country and downlink to several countries, which is possible because the footprint of the satellite typically covers a wide area. Under the EC's Proposed Satellite/Cable Copyright Directive, a satellite transmission, even if it can be received by several member states, would be subject only to the copyright law of the state where "the broadcaster takes the single decision on the content and the transmission by satellite of programme carrying signals." Id. at 5, art. 1(b). Under this so-called emission theory, the governing law for copyright purposes is usually that of the state where the headquarters of the broadcasting organization is located. The EC reasoned that if a satellite broadcaster had to acquire broadcasting rights in all the receiving countries, a rights holder in one country could refuse to grant a broadcaster the right to transmit its work, effectively obstructing the broadcaster's ability to transmit the work throughout the EC. Id. at 3, para. 7. An emission theory theoretically could create incentives for satellite broadcasters to "country shop" for locations in which the copyright laws are most favorable. In response to this concern, the EC Proposed Satellite/Cable Directive also seeks to establish certain minimum satellite-related intellectual property rights across the EC. Id. at 4, para. 18. For instance, it provides that compulsory licensing schemes may not be applied to cable retransmission or satellite transmission.

d. Cable Compulsory Licensing Schemes

Berne permits "compulsory licensing" under its broadcasting right.[349/] Thus, Berne signatory countries may substitute for the broadcasting rights granted under Article 11bis a system of compulsory licensing.

Some Berne signatory countries such as Canada, Austria, and Denmark have established compulsory licensing schemes for cable retransmission of broadcast programming, so that cable operators make payments to a government agency that distributes the proceeds to copyright holders. These are broadly similar to the cable compulsory license scheme adopted in the United States in 1976, which was a response to competitive and copyright concerns of program producers, cable operators, and broadcasters.[350/] While these systems have had the positive effect of limiting the economic effects of unauthorized use, they do not allow the intellectual property right holder to receive a free market price for its product. The government-mandated fees rarely match the true value of the program. Quite often, these schemes are used to "subsidize" a mass media industry by assuring the availability of low cost programming. As a result, the price paid under a compulsory license for the product is typically below the actual market value. Even if a market rate is intended, a government-imposed rate will generally miss the mark, with inefficient results.

For example, the current U.S. cable compulsory licensing scheme authorizes cable systems to retransmit television broadcast signals by paying fees established by the Copyright Royalty Tribunal (CRT) to the Copyright Office. The CRT then distributes the proceeds to copyright holders.[351/] Several years ago, Congress extended the compulsory license to

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349/ See Berne, supra note 291, art. 11bis (2). Under a compulsory license, use of a work is permitted without specific authorization from the copyright holder so long as the user pays a royalty to the copyright holder or to a governmental entity that distributes fees to copyright holders.

350/ See National Telecommunications and Information Administration, U.S. Dep't of Commerce, NTIA Spec. Dep. No. 88-233, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations 115-24 (June 1988) (Video Study) (description of the U.S. compulsory licensing scheme).

351/ Carriage of these signals must be permissible under FCC rules. See 17 U.S.C. § 111(c)(1)-(2) (1988).

domestic U.S. satellite carriers.[352/] In January, 1992, the Copyright Office extended the cable compulsory license to satellite master antenna television systems.[353/]

NTIA has argued in the past that, in the United States, cable compulsory licensing is a needless regulatory intrusion into the economic relationship between cable operators and those who hold the copyrights to programs transmitted by broadcast stations.[354/] As we have stated, the principal reason for implementing the U.S. compulsory licensing scheme, to enable cable operators to obtain programming transmitted by broadcasters, is no longer valid in today's domestic marketplace for U.S. programming, because programmers are becoming increasingly dependent on cable operators for additional revenues. The U.S. cable compulsory license creates substantial distortions in the domestic market for video programming, because payments to the CRT under a compulsory licensing scheme are not likely to equal the payments that would be made in an unregulated market.

Recognizing the need to reform the present U.S. cable compulsory license scheme and seeking to address the issue of whether broadcasters should be able to receive compensation from cable companies for the retransmission of broadcast signals (an issue known as "retransmission consent"), in recent debates over cable legislation, the Bush Administration supported the grant of a retransmission consent right for broadcasters, coupled with repeal of the U.S. cable compulsory license.[355/]

352/ Satellite Home Viewer Copyright Act of 1988, 17 U.S.C. § 119 (1988).

353/ Cable Compulsory License; Definition of a Cable System, 57 Fed. Reg. 3284 (1992) (to be codified at 17 C.F.R.).

354/ Comments of National Telecommunications and Information Administration at 34-36 (filed Mar. 1, 1990) in Competition, Rate Deregulation and the Commissions's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600.

355/ See Office of Management and Budget, Statement of Administration Position, S-12 -- Cable Television Consumer Protection Act of 1991, at 2 (Jan. 27, 1992 -- Senate).

The Administration's position was not adopted in the "retransmission consent/must carry" provision in the recently enacted Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act). That provision prohibits U.S. cable systems (or other multichannel video distributors) from retransmitting the signal of a broadcasting station unless the broadcaster either elects to have a cable system carry its signals under the 1992 Cable Act's "must carry" provisions or

The importance of foreign markets to the U.S. programming industry provides an additional reason for the United States to reexamine its own cable compulsory licensing scheme. Market-based compensation for the distribution of U.S. video programming in foreign countries is in the interest of the United States. Countries that are just now developing cable or similar distribution media will probably examine existing compensation schemes for the retransmission of broadcast signals to determine which is best for them. By eliminating the compulsory license and reforming the U.S. compensation system, the United States could serve as a model to the rest of the world of the best way to provide such compensation.

While compulsory licensing schemes have been a creditable step to compensate intellectual property rights holders, a worldwide market system that respects well-defined intellectual property rights is a better approach, because it will allow program producers to receive the true market value for their programs. In recommending the development of such a system, NTIA urges the United States to eliminate its compulsory licensing scheme, both to realize the economic benefits of a market approach and to take the lead in combatting non-market-based approaches overseas.[356/]

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chooses to negotiate with the cable system to authorize it to carry the broadcast signal, presumably for a fee. See Pub. L. No. 102-385, § 6, 106 Stat. 1462, 1482 (1992). To the extent that this provision encourages broadcasters to negotiate for cable retransmission rights with cable operators, and copyright holders realize some of the proceeds from such negotiations, it could reduce some of the inefficiencies associated with the cable compulsory license. Because the 1992 Cable Act provides broadcasters a choice between such negotiations and mandatory carriage of their signals under the "must carry" provisions, it does not provide a market-based solution to the question of compensation for broadcast signal retransmission. Because the retransmission consent provision of the 1992 Cable Act does not address the copyright problems associated with the cable compulsory license, the elimination of the cable compulsory license remains an important public policy objective.

356/ The EC's Proposed Satellite/Cable Directive would require cable operators to obtain consent to retransmit broadcasting programming from "collecting societies" composed, in part, of program producers. EC Proposed Satellite/Cable Directive, supra note 345, at 6, art. 3.

While the ideal policy would be a market-based approach, the EC's proposal is a positive step in many respects. It establishes a right for cable retransmission and emphasizes the importance of equitable remuneration to the programmer by prohibiting the use of compulsory licensing schemes. The proposed collecting

e. Other Concerns with Berne Standards

As discussed in the foregoing sections, there are some concerns with the precision of the statement of some of the specific rights provided under Berne. There are also problems that arise from the interpretation of the extent of the national treatment obligation under Berne and the extent of the subject matter required to be protected under Berne. For example, as explained earlier, Berne does not require the protection of sound recordings.[357/] Consequently, most countries following the Continental legal tradition protect sound recordings under "neighboring rights" laws. The Rome Convention permits the rights accorded to sound recording producers to be conditioned on the basis of reciprocity. This permits countries that wish to limit the flows of royalties to foreigners to avoid paying shares of royalties derived from newly-created rights to U.S. sound recording copyright owners because the United States does not belong to the Rome Convention, or because it has not yet implemented such a right in U.S. domestic law.

In addition, there are some structural problems that arise because Berne must accommodate both the Continental "droit d'auteur," or "authors' rights," approach to protection of authorship and the copyright approach. In part, because of this accommodation, Berne does not provide that juridical entities, such as corporations, can be authors, and it does not deal with the contractual conditions under which a work may be created. This causes conflicts between U.S. law, under which an employer may be considered the author of a work created in the course of employment, and laws under which only a natural person can be regarded an author. Additionally, Berne does not deal with other conflict-of-laws problems that can arise out of rules for the interpretation of contracts

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society compensation arrangement would operate more like a market-based system than most compulsory licensing schemes, because cable systems would negotiate with collecting societies for the retransmission fee.

Under the Proposed Directive, however, it is still unclear how effectively programmers will be able to enforce their rights. A cable operator may retransmit a program regardless of whether the copyright holder is a member of the collecting society, which may negotiate on behalf of a non-member program producer. Id. at 7, art. 11(2). It is imperative that in the final approach adopted by the EC that all rights holders be adequately represented in these collection societies, irrespective of national origin, and funds collected by the collection societies must be used to remunerate those rights holders.

357/ See discussion supra at note 333 and accompanying text.

and the manner in which some continental laws establish special rules for the interpretation of contracts that transfer authors' rights. Also, in some cases, there are strict limitations on the rights that can be transferred, and the manner in which such transfers can be accomplished.

The resolution of these issues is a high priority objective of the United States. So far, the Trade Related Aspects of Intellectual Property Rights (TRIPS)[358] negotiations in the GATT have been unable to conclude a satisfactory agreement that deals with these problems. For example, the present Dunkel Text[359] includes provisions that explicitly permit the application of the Rome Convention rules on reciprocity and has only a limited national treatment provision.

2. Adequacy of Enforcement Mechanisms Under Berne

Inadequate enforcement is a serious problem in the exercise of intellectual property rights in foreign markets. Commenters state that some signatories to Berne do not adequately enforce their Berne obligations under their domestic intellectual property laws. These commentators state that Berne, like other intellectual property conventions, does not require implementation of enforcement mechanisms that allow victims of copyright infringement in Berne signatory countries to address adequately their grievances.[360]

Berne requires that member countries adopt measures necessary to give effect to its provisions.[361] If a member fails to honor its Berne obligations, or if a dispute arises over the interpretation of the convention, Berne provides for the parties to settle their dispute by negotiation. If negotiations fail, a country may take its case to the International Court of Justice.[362] Since this provision was included in Berne in 1948, no dispute has been referred to the International Court. Moreover, because the International Court's opinions are

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358/ See Ministerial Declarations on the Uruguay Round, GATT Min. Dec. 7-8 (Sept. 20, 1986).

359/ See infra notes 369-370 and accompanying text.

360/ See, e.g., Comments of Time Warner at 74.

361/ Berne, supra note 291, art. 36.

362/ Id. art. 33.

enforceable only by agreement of the parties appearing before it, the effect of any judgment may be limited.

In light of Berne's limited enforcement procedures, the means of protecting intellectual property rights depends on the enforcement of the laws in individual member countries. Enforcement mechanisms in many Berne countries are often alleged to be ineffective. According to data provided to the International Trade Commission (ITC), international training and resources for the enforcement of intellectual property rights in other countries allegedly are often inadequate and procedures unreasonably slow.[363] MPEAA says that in Austria the maximum penalty for copyright infringement is six months, but it is rarely imposed.[364] According to MPAA, civil penalties in many countries, such as Greece, Hungary, Japan, and Turkey, are largely symbolic and do not have deterrent effect.[365] MPAA also states that even when the remedies are adequate, litigation is so onerous in many countries that aggrieved parties choose not to exercise their rights. MPEAA mentions Thailand as a country where evidentiary and documentation requirements at trial are particularly demanding.[366] Similarly, MPEAA claims that in India, procedural requirements make proof of copyright ownership and infringement exceedingly onerous.[367] However, improved enforcement can dramatically affect a country's market for media products.

363/ U.S. International Trade Commission, Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade, Report to the United States Trade Representative 3-4 to 3-5 (Feb. 1988) (ITC Report). The most serious offenders, according to MPEAA and IIPA, are the Philippines, Thailand, Brazil, and India. IIPA Special 301 Request, supra note 303, at 1-2, 3-5, 7-9; MPEAA 1992 Trade Report, supra note 306, at 13.

364/ MPEAA 1992 Trade Report, supra note 306, at 7.

365/ Id. at 53, 55, 78, 131. In Greece, the laws are constantly changing, and the litigation procedures are inadequate. When a litigant goes to court and enjoins an offender from improperly duplicating copyrighted material, Greek law provides no penalty for non-compliance with an injunction. Id. at 53.

366/ Id. at 130.

367/ Id. at 58.

VI. Other International Initiatives for Intellectual Property Protection

As is evident from the preceding discussion, Berne alone is not sufficient for U.S. or other media firms to secure adequate international copyright protection. The United States should continue its efforts to create an improved international intellectual property system. It is doing so on several fronts, via multilateral negotiations and bilateral negotiations. NTIA believes that these efforts contribute to the important U.S. policy goal of protecting intellectual property rights internationally. We strongly urge U.S. industry and the Congress to support these initiatives.

A. Multilateral Treaties: GATT and WIPO

The United States is pursuing improved copyright protection in the negotiations on TRIPS in the GATT. The United States is also participating in WIPO activities that may lead to a protocol to Berne and a new instrument on the protection of performers' rights and the rights of producers of phonograms.

1. GATT: TRIPS Negotiations

In 1986, as part of the Uruguay round of the GATT, the United States began negotiation on TRIPS. The purpose of the TRIPS negotiations is to improve the standards of protection of intellectual property rights, including patents, trademarks, copyrights, semiconductor chip layout designs, and trade secrets, and to provide for more effective enforcement for these rights.

The United States seeks to extend GATT dispute settlement to the TRIPS agreement. Because GATT agreements involve an exchange of concessions among Members, the GATT mechanisms for dispute resolution and rulemaking can provide significant improvements over those provided in Berne.[368/] Under the Understanding on Rules and Procedures on Dispute Settlement, which also was negotiated during the Uruguay Round, an aggrieved Member can withdraw trade concessions negotiated under other GATT agreements if another Member is judged by a dispute resolution panel to have violated TRIPS standards for adequate

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368/ R.M. Gadbaw & T.J. Richards, Intellectual Property Rights: Global Consensus, Global Conflict? 40 (1988).

intellectual property protection and the other Members authorize such withdrawal of concessions.[369]

In the copyright area, U.S. negotiators are seeking protection for computer programs as literary works under Berne and improved protection for sound recordings. The text issued by GATT Director General Dunkel in December 1991 incorporates the economic rights of Berne into the TRIPS agreement.[370] The economic rights are the bundle of rights for which the copyright holder is entitled to compensation -- such as reproduction, adaptation, public performance and broadcasting rights. The Dunkel text explicitly excludes moral rights from dispute settlement under the agreement. The United States seeks the exclusion of such rights because they are not trade related and, therefore, should not be subject to GATT dispute settlement. MPAA has noted that countries that emphasize moral rights protection might challenge U.S. program producers if their actors or film directors objected to colorization or interruption during broadcasts for commercials, or the adaptation of their films to different formats, such as from film to video.[371]

As discussed, a principal issue that is yet unresolved is the scope of the national treatment obligation in TRIPS, and the addition of a provision to require members to broadly respect contracts that transfer rights, especially in respect of the creation of works under conditions of employment.[372]

369/ Dunkel Draft Agreement on Trade Related Aspects of Intellectual Property Rights, GATT Doc. MTN.TNC/W/FA, Dec. 20, 1991, § S, at S.1-S.23.

370/ Id., Annex III, art. 9.1, at 61.

371/ Comments of MPAA at 23-27.

372/ See discussion supra at p. 114.

2. WIPO

WIPO is actively pursuing a program aimed at ensuring that the level of protection provided under the Conventions that it administers meets the needs of the global economy and ensures the adequate protection of creators of all types of intellectual property. In the copyright area, there are two current projects of particular relevance: the possible establishment of a protocol to Berne to deal with some of the issues discussed in this report, and the possibility of establishing a new international instrument to better protect the interests of producers of sound recordings and performers. Work on these projects is proceeding as this report is being prepared. WIPO is planning to issue documents outlining the scope of a possible protocol and the new instrument in early March of 1993. Meetings of Committees of Experts to address the issues presented in those documents will be convened at WIPO from June 21 until July 2, 1993. The U.S. government is actively participating in the development of a position to ensure that the issues of critical importance to U.S. mass media interests are appropriately included in this process.

B. Bilateral Approaches and Trade Laws

One focus of U.S. efforts to combat international copyright violations has been through multilateral treaties, but bilateral agreements can sometimes be more effective in dealing with specific problems. Because of the lengthy nature of the GATT negotiations, bilateral agreements and actions under the trade laws have also been used by the U.S. government as an effective means of addressing problems abroad involving U.S. copyrighted works.

1. Bilateral Approaches

In recent years the United States has engaged in bilateral intellectual property negotiations with numerous countries, such as those in Southeast Asia, Central America, in Eastern Europe, and in the Near East. As a result of negotiations with Saudi Arabia and Malaysia, the Saudis enacted their first copyright law in January, 1990,[373/] and in 1990, Malaysia acceded to Berne.[374/] Negotiations for effective intellectual property protection often occur in the context of larger trade negotiations, such as for bilateral investment

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373/ IIPA Special 301 Request, supra note 303, at 72.

374/ MPEAA 1992 Trade Report, supra note 306, at 88.

treaties and free trade zones. For example, in the negotiations with Canada and Mexico on the North American Free Trade Agreement, the United States has gained increased protection of intellectual property rights.

2. Improving Intellectual Property Rights Protection Through Trade Laws

Several laws enacted in the last decade condition trade benefits provided by the United States on the protection that a foreign country affords to the intellectual property rights of U.S. nationals. For example, the Caribbean Basin Economic Recovery Act (CBERA)[375] ties certain trade benefits to the extent to which Caribbean countries protect intellectual rights of foreigners. Caribbean countries' concerns that cable operators' unauthorized activities may jeopardize CBERA benefits have motivated many cable operators to participate in a "quitclaim program" developed by MPEAA. Through the program, MPEAA collects a monthly fee from cable operators throughout the satellite footprints that cover the Caribbean basin and redistributes these funds to participating program suppliers. In exchange MPEAA agrees not to pursue further remedies against these operators.[376]

More importantly, the U.S. Generalized System of Preferences Renewal Act of 1984[377] authorizes the grant to developing countries of duty-free import privileges, based in part upon the level of protection the countries provide intellectual property rights. Moreover, Section 301 of the Trade Act of 1974, as amended, allows the Trade Representative to take action against countries that violate provisions under trade agreements or that otherwise burden or restrict U.S. commerce.[378] In 1984, Title III of the Trade and

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375/ Pub. L. No. 98-67, 97 Stat. 3847 (1983) (codified at 19 U.S.C. § 2701 et seq. (1988)).

376/ MPEAA, MPEAA Quitclaim Program (MPEAA informational material, June 8, 1991). Although this program obviously is not the most preferable way of dealing with unauthorized use, it is an improvement over a totally noncompensatory situation.

377/ General System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, §§ 501-508, 98 Stat. 3018-24 (1984) (codified at 19 U.S.C. § 2461 (1988)).

378/ Competitiveness Act of 1988, § 1301(a), 102 Stat. at 1164-65 (codified at 19 U.S.C. § 2411 (1988)).

Tariff Act[379] recognized the growing problem of foreign violations of U.S. copyright, defined "unreasonable" trade practices as policies that deny "fair and equitable . . . protection of intellectual property rights,"[380] and strengthened Section 301 of the Trade Act of 1974 by broadening the President's authority to retaliate against unfair foreign trade practices.[381] Specifically, the Trade and Tariff Act amended the timetables and procedures needed to initiate and complete an investigation of alleged burdensome trade practices.[382]

The Competitiveness Act of 1988[383] further strengthened Section 301 by creating the "Special 301" procedure. In that procedure, the USTR is required to identify countries that do not provide adequate and effective intellectual property protection to U.S. rights owners or that deny market access to U.S. products whose value is based on protection of intellectual property rights.[384] If the USTR determines that a country's intellectual property rights practices, including lack of protection of U.S. works, is onerous and egregious, the Trade Representative must initiate an investigation under section 301 and complete negotiations within six months (which can be extended to nine months in certain cases).[385] In implementing the Special 301 provisions, USTR created two separate lists of countries, a "Priority Watch List" and a "Watch List," in addition to naming "priority foreign countries," which is required by the statute. The USTR has initiated investigations into the practices of several "priority foreign countries" (such as China and India) and has negotiated extensively with those countries named to the two lists -- the priority watch list for

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379/ International Trade and Investment Act, Pub. L. No. 98-573, §§ 301-308, 98 Stat. 3000-18 (1984) (codified as amended at 19 U.S.C. §§ 2101 et seq. (1988)).

380/ Id. § 304(f)(2), 98 Stat. at 3005 (codified as amended at 19 U.S.C. § 2411(d)(3)(B)(i)(II) (1988)).

381/ Id. § 304(a), 98 Stat. at 3002-03 (codified as amended at 19 U.S.C. § 2411 (1988)).

382/ Id. § 304(d), 98 Stat. at 3003-04 (codified as amended at 19 U.S.C. § 2412 (1988)).

383/ Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 19 U.S.C.).

384/ Id. § 1303(b), 102 Stat at 1179-80 (codified at 19 U.S.C. § 2242(a)(2) (1988).

385/ 19 U.S.C. § 2414(a)(3)(A) (1988).

countries with more severe problems and the watch list for countries with less serious problems.

Chapter 8
THE CROSSOWNERSHIP RULES

I. INTRODUCTION

Various structural restrictions prevent U.S. firms from diversifying into certain media activities. Such rules operate to limit both the degree of vertical integration and horizontal concentration among domestic media firms, which may impede their ability to compete globally. Given the importance of our system of free, over-the-air broadcast television, and the concerns of some that the future of the broadcast industry is uncertain, we believe that policymakers should scrutinize carefully the restrictions now in place on the various players in the industry.

In this chapter, we look at a number of laws and FCC regulations that limit the crossownership of domestic media outlets. In 1992, the Federal Communications Commission (FCC) modified its former rule that effectively prevented national broadcast television networks, such as ABC, CBS, and NBC,[386] from owning cable systems (or vice versa)[387] to allow network-cable crossownership under certain circumstances.[388] The Cable Act of 1984 (1984 Cable Act) codified FCC rules adopted in 1970 that bar all telephone companies (telcos) from providing cable service to subscribers in their local service area.[389] In addition, until 1991, the regional Bell operating companies (BOCs) were independently precluded from providing cable service anywhere in the country by the terms

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386/ It is unclear whether Fox Broadcasting Company (Fox) is subject to this crossownership restraint, as the FCC's rules contain no definition of a "network" for purposes of this rule. Fox has stated it may not be subject to the rule. See Comments of Fox Broadcasting Company at 18 n.44 (filed Nov. 21, 1991) in Review of the Policy Implications of the Changing Video Marketplace, MM Docket No. 91-221 (Fox Television NOI Comments).

387/ 47 C.F.R. § 76.501(a)(1) (1991).

388/ Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Report and Order, 7 FCC Rcd 6156 (1992) (Network-Cable Crossownership Report and Order).

389/ 47 U.S.C. § 533(b) (1988); 47 C.F.R. §§ 63.54 - 63.58 (1991).

of the 1982 AT&T consent decree, which barred the BOCs from providing information services.[390] The 1984 Cable Act also bars common ownership of both a broadcast station and a cable system in the same community.[391] The FCC's broadcast-newspaper crossownership rule prohibits common ownership of broadcast and newspaper outlets in the same community.[392]

In the Notice, NTIA invited comment on the implications of the various crossownership rules in light of the apparent trend toward globalization of media firms. In particular, we asked whether these restrictions restrained the growth of domestic firms that would otherwise become more globally competitive. We also inquired whether the domestic benefits of retaining such prohibitions might outweigh any concerns that such policies retard the global competitiveness of U.S. firms.[393]

In this chapter, we conclude that, to varying degrees, modification of each crossownership restriction could have some impact on the globalization of the mass media. While the primary impetus for modification of each restriction lies in domestic considerations, the potential impact on firms operating in a global environment adds further support to our recommendation that firms should be afforded greater flexibility to determine the business arrangements under which they distribute television programming, unencumbered by governmental restrictions.

390/ In July 1991, the court that administers the consent decree issued an opinion and order lifting the information services restriction, but stayed that order until completion of the appellate process, United States v. Western Elec. Co., Inc., No. 82-0192 (D.D.C. July 25, 1991), appeal docketed, No. 91-5263 (D.C. Cir. Aug. 30, 1991). However, the Court of Appeals for the District of Columbia Circuit subsequently lifted the stay, No. 91-5263 (D.C. Cir. Oct. 7, 1991), so that the BOCs now are free to provide cable service anywhere outside of their local service areas. On October 30, 1991, the Supreme Court declined to reimpose the stay. American Newspaper Publishers Ass'n v. United States, 112 S. Ct. 366, 116 L. Ed. 2d 317 (1991). The removal of the restriction remains under appeal.

391/ 47 U.S.C. § 533(a)(1988); 47 C.F.R. § 76.501(a)(2) (1991).

392/ 47 C.F.R. § 73.3555(c) (1991).

393/ Notice, 55 Fed. Reg. at 5797, para. 39.

II. SUMMARY OF COMMENTS

CBS and News Corp. addressed certain aspects of the crossownership restrictions.[394/] In general, they agree that the rules serve no valid purpose, but disagree as to whether they have any impact on globalization.

CBS addresses only the network-cable crossownership prohibition, arguing that this prohibition has restricted competition for local cable outlets and has imposed costs on the public by preventing broadcast networks from attaining the efficiencies associated with vertical integration. CBS relies on the 1980 report of the FCC's Network Inquiry special staff,[395/] the report on cable ownership prepared in 1981 by the FCC's Office of Plans and Policy (OPP),[396/] and the comments of the Department of Justice in response to the 1981 Cable Report.[397/] CBS asserts without elaboration that the network-cable crossownership rule and other domestic restrictions prevent the television networks from achieving their full competitive potential in domestic and foreign markets.[398/]

News Corp. argues generally that the crossownership rules have no bearing on the trend toward globalization of the media, without specifically addressing any particular crossownership rule. It states that the rules "do not inhibit the growth of U.S. media firms operating in a global market any more than they affect foreign firms operating in a global market."[399/] It suggests that the rules do not impose a differential burden on U.S. firms because they apply to the operations of all firms -- domestic or foreign -- within the United

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394/ Comments of CBS at 20-22; Comments of News Corp. at 22-23.

395/ 1 Final Report of the Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation 432 (1980) (Network Inquiry).

396/ K. Gordon, J. Levy & R. Preece, FCC Policy on Cable Ownership 122 (Staff Report, Office of Plans and Policy, 1981) (1981 Cable Report).

397/ Comments of the U.S. Dep't of Justice at 12 (filed Jan. 21, 1982) on the 1981 Cable Report.

398/ Comments of CBS at 20.

399/ Comments of News Corp. at 22.

States.[400] However, as a general matter, News Corp. questions whether the crossownership rules still can be justified, particularly now that the growth in media outlets has largely undermined the original justification for the rule, i.e., lack of diversity. Accordingly, it supports FCC efforts to relax restrictions on broadcast ownership. It also notes that no rules bar print or broadcast crossownership of direct broadcast satellites or multi-point distribution services, and it concludes that concerns about concentration in the domestic media can be addressed through the antitrust laws.

III. Impact of the Crossownership Prohibitions on Globalization

In this part of our analysis, we examine the relationship, if any, between each crossownership restriction and the trend towards media globalization. For each rule, we first review its history and rationale for adoption. Then, we describe briefly the effect of the prohibition on the domestic marketplace. We conclude that there are sound domestic reasons to modify each crossownership restriction. Finally, we discuss the likely effect of removing the restriction on the globalization of mass media products. In particular, we analyze whether the U.S.-based firms presently affected by each crossownership prohibition would be more likely to engage in foreign direct investment (FDI) or to export programming abroad in the absence of that restriction. We also consider whether elimination of each prohibition would be likely to have an effect on the incentives of foreign-based firms to enter U.S. markets, either through FDI or exports.

A. The Network-Cable Crossownership Rule

1. History of the Rule

The FCC adopted a complete ban on broadcast television network-cable crossownership in 1970 in the course of a comprehensive proceeding in which it considered and adopted a host of rules governing the cable industry.[401] The original rule effectively prohibited

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400/ We note that because Section 310(b) of the Communications Act, the foreign ownership rule, independently restricts foreign ownership of broadcast stations or telephone companies, the crossownership rules as a practical matter have little impact on the U.S. operations of foreign firms. See 47 U.S.C. § 310(b) (1988).

401/ Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory

network-cable crossownership by providing that no cable television system could carry the signal of any television broadcast station if that system directly or indirectly owned, operated, controlled, or had an interest in a national television network.[402]

In adopting the 1970 network-cable crossownership rule, the FCC accepted without extensive discussion several arguments made by parties that opposed such crossownership. In particular, the FCC concluded that: (1) crossownership would reduce the diversity of programming that cable systems otherwise might provide because network-owned cable systems would have financial incentives to carry the signals of affiliated broadcast stations (and presumably would limit carriage of other broadcast signals or cable-originated programming); and (2) permitting networks to own cable systems might impede the development of new cable networks and thereby "have a dampening effect on potential programming competition on the national level as well."[403] The FCC also expressed general concern that the television networks had "a predominant position nationwide through their affiliated stations in all markets, their control over network programming presented in prime time, and their share of the national television audience."[404]

In the years that followed, a number of parties argued that the FCC should repeal its network-cable crossownership rule. In 1980, the FCC's Network Inquiry staff concluded that the prohibition served no valid purpose, and, by eliminating networks as potential entrants into the cable industry, operated to restrain competition and diversity in that

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Policy and/or Legislative Proposals, Second Report and Order, 23 FCC 2d 816 (1970) (Cable Crossownership).

Unlike the broadcast-cable and the cable-telco crossownership rules, which the FCC also adopted in 1970, Congress never codified the network-cable crossownership rule. However, networks are statutorily barred from owning cable systems in the same market as their network owned-and-operated stations by the 1984 Cable Act's broadcast-cable crossownership restriction, 47 U.S.C. § 533(a).

402/ 47 C.F.R. § 76.501(a) (1991). While on its face the rule effectively prohibited cable systems from having an interest in television networks, it was clear that the intent of the FCC in adopting this rule was to bar networks from having an interest in cable systems. See Cable Crossownership, 23 FCC 2d at 821.

403/ Id. at 819.

404/ Id. at 821.

industry.[405] The following year, OPP concurred that the prohibition was unwarranted in its 1981 Cable Report, concluding that the original rationale for the rule could not be supported in the existing video marketplace.[406]

In 1982, the FCC initiated a rulemaking in which it proposed to repeal the rule, suggesting that it was not sound in light of current market conditions and might in fact impose significant costs on the public.[407] In 1988, NTIA released a study that, among other things, urged the FCC to repeal the network-cable crossownership rule.[408] In

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405/ Network Inquiry, supra note 395, at 431. In particular, the staff concluded that unless a broadcast network were to acquire a substantial number of cable outlets, it would be extremely difficult for it to foreclose the development of cable networks, and that broadcast networks would have incentives to increase demand for cable service by providing a diverse array of programming. Id. at 434. The staff viewed network ownership of cable systems as a form of conglomerate expansion because it assumed that cable systems were not in substantial competition with broadcast stations in any relevant market. Id. at 430 n.254. It concluded that network entry into cable could result in the "efficient transfer of technical and marketing knowledge across traditional media industry lines," id. at 432, which "could enhance efficiency and lower the price and increase the quality of cable service to advertisers and viewers." Id. at 435.

406/ 1981 Cable Report, supra note 396, at 107-08, 124-25. OPP found that the possibility of anticompetitive behavior by network owners of cable systems would be limited by strong consumer demand for cable services, regulatory intervention on the part of local franchising authorities, and the availability of non-cable video program sources (e.g., over-the-air broadcast signals) in most markets. Id. at 107-08. OPP characterized network ownership of cable systems as a form of vertical integration, and concluded that permitting such crossownership could result in substantial benefits. In particular, OPP concluded that "cable-network crossownership . . . could reduce the risk associated with new programming, allow appropriate adjustment to unexpected changes in the market, improve information flow between stages, and perhaps exploit the programming expertise of the network at the local level." Id. at 122.

407/ Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Notice of Proposed Rulemaking, 91 FCC 2d 76 (1982) (Network-Cable Crossownership NPRM). However, the FCC took no further action in that proceeding for a number of years.

408/ See Video Study, supra note 350, at 64. In the Video Study, we concluded that the FCC's concerns about the predominant position of the broadcast networks had been substantially mitigated since 1970, as network audience shares (and, ultimately,

response to changes in the video marketplace and NTIA's Video Study, in 1988 the FCC released a Further Notice of Proposed Rulemaking in its Network-Cable Crossownership proceeding to obtain additional comments.[409]

In 1991, the FCC initiated a broad inquiry into the state of the video marketplace.[410] While the FCC did not specifically refer to the network-cable crossownership rule in its Television NOI, it did seek comment on which rules and policies hamper the ability of networks to compete with multichannel delivery systems,[411] and a number of parties addressed the network-cable crossownership rule in their comments.[412]

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advertising revenues) were on the decline due to a rise in independent broadcast stations, growth in cable subscribership, and the advent of numerous cable networks. Moreover, we suggested that a broadcast network owner of cable systems would not have the ability to foreclose competing cable networks, and that even if a broadcast network could acquire a significant number of cable outlets, its incentives to favor its own broadcast affiliates in carriage decisions would be no different than the incentives of vertically integrated multiple system operators (MSOs) to carry affiliated programmers. Id. at 72. We also found that the rule imposed costs on the public by denying networks the ability to realize potential efficiencies stemming from consolidated operations, such as the use of programming units for both cable and broadcast operations. Id. at 73.

409/ Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Further Notice of Proposed Rulemaking, 3 FCC Rcd 5283 (1988) (Network-Cable Crossownership Further NPRM).

410/ Review of the Policy Implications of the Changing Video Marketplace, Notice of Inquiry, 6 FCC Rcd 4961 (1991) (Television NOI).

411/ Id. at 4962.

412/ See, e.g., Comments of National Broadcasting Company, Inc. at 46-52 (filed Nov. 21, 1991) in Television NOI (NBC Television NOI Comments); Comments of Capital Cities/ABC, Inc. at 10-19 (filed Nov. 21, 1991) in Television NOI; Fox Television NOI Comments, supra note 386, at 18 n.44; Comments of the National Cable Television Association, Inc. at 16 (filed Nov. 21, 1991) in Television NOI; Comments of the National Association of Broadcasters at 41-43 (filed Nov. 21, 1991) in Television NOI (NAB Television NOI Comments); Comments of the Association of Independent Television Stations, Inc. at 18-23 (filed Nov. 21, 1991) in Television NOI (INTV Television NOI Comments); Comments of the Network Affiliated Stations Alliance at 9-39 (filed Nov. 21, 1991) in Television NOI (Affiliate Television NOI Comments); Comments of the Motion Picture Association

In December 1991, the FCC released a Second Further Notice of Proposed Rulemaking in its Network-Cable Crossownership proceeding, seeking further comment on the continued validity of the rule.[413/] Recognizing the concerns expressed by a number of commenters earlier in the proceeding that repeal of the rule could undermine diversity and competition, the FCC also sought comment on various options that would alter, rather than completely repeal, the rule, such as a requirement that network ownership of cable systems only be permitted in large or competitive markets, a national subscriber limit on network ownership of cable systems, a "must carry" requirement, and an antidiscrimination requirement.[414/]

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of America, Inc. at 18-21 (filed Nov. 21, 1991) in Television NOI (MPAA Television NOI Comments).

413/ Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 586 (1991) (Network-Cable Crossownership Second Further NPRM).

In their comments, the networks supported complete repeal of the rule, arguing that the rule could no longer be justified in today's marketplace. See Comments of National Broadcasting Company, Inc. (filed Mar. 23, 1992) in Network-Cable Second Further NPRM; Comments of Capital Cities/ABC, Inc. at 1-33 (filed Mar. 23, 1992) in Network-Cable Second Further NPRM (CapCities/ABC Second Further Network-Cable Comments); Second Further Comments of CBS Inc. (filed Mar. 23, 1992) in Network-Cable Second Further NPRM. The National Cable Television Association (NCTA) stated it was not opposed to total elimination of the rule. See Comments of the National Cable Television Association, Inc. at 2 (filed Mar. 23, 1992) in Network-Cable Second Further NPRM.

The parties opposing elimination of the rule -- including the National Association of Broadcasters (NAB), the network affiliates, and the Association of Independent Television Stations, Inc. (INTV) -- generally agreed that the rule had outlived its original purpose of protecting the cable industry, but argued that it should be retained in order to protect local broadcasters from potential discrimination by network-cable conglomerates. See, e.g., Comments of the National Association of Broadcasters at 3 & app. A (filed Mar. 23, 1992) in Network-Cable Crossownership Second Further NPRM; Comments of the Network Affiliated Stations Alliance at 7-9 (filed Mar. 23, 1992) in Network-Cable Crossownership Second Further NPRM (Affiliate Stations Second Further Network-Cable Comments); Comments of the Association of Independent Television Stations, Inc. at 26-27 (filed Mar. 23, 1992) in Network-Cable Crossownership Second Further NPRM (INTV Second Further Network-Cable Comments).

414/ Network-Cable Crossownership Second Further NPRM, 7 FCC Rcd at 588-89.

In August 1992, the FCC revised its network-cable crossownership rule to allow networks to participate to some degree in the ownership and operation of cable systems.[415] Under the revised rule, a network now is free to own cable systems so long as those systems do not represent more than ten percent of the homes passed by cable systems nationwide, or more than fifty percent of the homes passed by cable systems in an Arbitron Area of Dominant Influence (ADI).[416] The FCC announced that it would review the continued necessity of its revised rules in three years, i.e., by June 1995.

In reaching its decision, the FCC concluded that network ownership of cable systems would enable networks to diversify their operations and gain access to additional revenue sources, which could enable them to develop greater diversity of programming, thereby benefitting the viewing public.[417] The FCC also concluded that the public would benefit if networks were allowed to apply to cable systems their expertise in distributing programming to consumers, producing news broadcasts and other programming, and coordinating operations with affiliates.[418]

2. Effect of the Network-Cable Crossownership Rule on the Domestic Marketplace

As noted above, the network-cable crossownership rule, even as modified in August 1992, limits the ability of television networks to acquire an ownership interest in cable

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415/ This decision remains subject to petitions for reconsideration at the time of this publication.

416/ However, the local ownership cap does not apply in any market in which the network-owned cable system faces a competing cable system. Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6169. In addition to these structural limits, the FCC decided to allow broadcasters to petition for special relief to remedy any specific instances of anticompetitive conduct by a network-owned cable system (e.g., deleting or repositioning local broadcast signals). Id. at 6170-73.

417/ Id. at 6163, 6164. In its Network-Cable Crossownership Second Further NPRM, the FCC had noted that, according to a 1991 OPP study, declining advertising revenues would force the networks to develop supplementary revenue streams. 7 FCC Rcd at 587 (citing F. Setzer & J. Levy, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996 (FCC Office of Plans and Policy Working Paper No. 26, 1991) (Broadcast Television Report)).

418/ Id.

systems or multiple system operators (MSOs). Conversely, the rule also limits the ability of any cable operator, or MSO, to acquire a television network.

The significance of this restriction can only be appreciated if one recognizes the various complementary and competing roles that television networks and cable systems play today. The television broadcast networks primarily act as "program packagers": they acquire the right to air programs produced by studios, which they package into a network schedule that is distributed to local broadcast stations, both owned-and-operated stations and affiliates, in exchange for the right to sell advertising time within that schedule.[419] In addition, to a lesser extent, the networks produce their own programming for distribution to their local affiliates and owned-and-operated stations.[420] Under the FCC's current financial interest and syndication rules,[421] the networks now have greater latitude to acquire ownership interests in the programming they distribute and to produce their own programming, if they so choose.[422] Finally, the networks' owned-and-operated stations also distribute programming directly to viewers.[423]

419/ See Broadcast Television Report, 6 FCC Rcd at 4084-85; Notice, 55 Fed. Reg. at 5794, paras. 15, 18.

420/ As discussed more fully infra in Chapter 10 at note 655 and accompanying text, until 1990, a series of consent decrees limited the amount of in-house production for broadcast airing that networks could engage in to 5 hours per week of prime-time programming and 19 hours per week of daytime or fringe hour programming. In addition, for many years, FCC rules effectively made it uneconomical for networks to produce programming in-house by barring them from engaging in domestic syndication. Under the present financial interest and syndication rules, which are the subject of ongoing litigation, the networks are permitted to syndicate in the domestic market all programs aired on their own network that they produce themselves.

421/ As discussed in greater depth infra in Chapter 10 at p. 199, the status of those rules is uncertain at the time of this publication.

422/ Under the FCC's current financial interest and syndication rules, the networks are free to produce in-house up to 40% of their prime-time entertainment schedule and up to 100% of their prime-time non-entertainment and non-prime-time schedule. Moreover, the financial rewards of producing programming in-house are greater now that the networks may syndicate such programming in the domestic market.

423/ As discussed infra in Chapter 9 at p. 167, the networks, like other group owners, are limited by the FCC's national multiple ownership rule, 47 C.F.R. § 73.3555(d) (1991), to owning no more than 12 broadcast television stations nationwide, or

In contrast, local cable systems package and distribute video programming directly to the ultimate viewer. Cable operators assemble a multichannel package of programming consisting of retransmitted local and distant broadcast signals (including signals from network affiliates), satellite-delivered cable networks (both general and specialized), pay cable, and locally-originated cable channels, which is distributed to cable subscribers. Cable operators derive their revenues primarily from subscription fees and, to a much lesser, but growing, extent, from cable advertising.[424]

In recent years, many of the larger cable MSOs (and three of the broadcast networks) have acquired equity interests in cable networks that supply program services to local cable systems.[425] In many respects, cable networks function similarly to the broadcast television networks, in that they obtain programming from studios and syndicators, assemble that programming into a schedule, sell advertising time within that schedule, and distribute the package to local cable systems.[426] However, unlike the broadcast networks, the cable networks face no limitations on producing their own programming in-house. Consequently, by acquiring ownership interests in cable networks, the MSOs have been able to integrate

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stations with a combined nationwide audience reach of 25%.

424/ Broadcast Television Report, 6 FCC Rcd at 4047.

425/ The network-cable crossownership rule only limits the extent to which the broadcast networks may acquire interests in local cable systems, and not in suppliers of programs to cable systems. CapCities/ABC has interests in three domestic cable television networks: ESPN (80% interest), Arts & Entertainment (33.3% interest), and Lifetime (33.3% interest). Capital Cities/ABC, Inc., 1991 Annual Report and Form 10-K at 11-12 (1992) (CapCities/ABC Annual Report). For a further description of CapCities/ABC, see infra Appendix C at p. C-4. NBC operates the Consumer News and Business Channel. General Electric Company, 1991 Annual Report 15 (1992) (GE Annual Report). For a further description of NBC, see infra Appendix C at C-8. In 1992, CBS acquired Midwest Cable & Satellite, which operates the Midwest Sports Channel, a supplier of regional cable sports programming. CBS, CBS Annual Report to the Shareholders 1991, at 58 (1992) (CBS Annual Report). For a further description of CBS, see infra Appendix C at C-5. In 1992, Fox created a new division, Fox Basic Cable, which is developing cable network programming channels. The News Corporation Limited, A Global Media Company: Annual Report 1992, at 11 (1992) (News Corp. Annual Report). For a further description of Fox, see infra Appendix C at C-9.

426/ Local cable operators pay for cable network programming on a monthly per-subscriber basis.

vertically at three stages:[427] through their cable networks, they act as producers and packagers of programming for local cable systems, and through their local cable systems, they act as packagers and distributors of programming to the ultimate viewer.

NTIA agrees with the FCC that an absolute network-cable crossownership ban is not warranted in today's marketplace, and that allowing networks to own cable systems would produce public interest benefits.[428] In addition to the reasons noted by the FCC for relaxing the rule,[429] the efficiencies that could result from network-cable crossownership could have both vertical and horizontal dimensions. To the extent that the FCC's recent revision of the rule will permit greater vertical integration between, for example, the program packaging functions of a network and the distribution functions of a cable system, efficiency gains may result.[430] Moreover, the public should benefit if networks are

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427/ However, under the recently enacted Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 11, 106 Stat. 1460, 1487 (1992) (1992 Cable Act), the FCC is required to adopt rules by October 1993 imposing "reasonable limits" on the degree to which cable operators may vertically integrate. The 1992 Cable Act also requires the FCC to adopt reasonable limits on the number of subscribers that an entity may reach nationwide through commonly owned cable systems. See New Cable Ownership Rules Proposed; Inquiry Begun, MM Docket No. 92-264 (FCC News Release, Dec. 10, 1992).

428/ Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6163.

429/ See discussion supra at p. 131.

430/ In particular, as discussed supra in Chapter 4 at p. 64, firms may integrate vertically in order to eliminate "vertical externalities" induced by high transactions costs. In the network-cable context, it may be advantageous, for instance, for a broadcast network to integrate vertically with a cable operator so that the operator has the "correct" incentive to promote the product of the network.

Moreover, relaxation of the rule should enable broadcast networks to reduce the risks associated with producing cable-exclusive programming by permitting them to acquire an assured outlet for such programming.

However, as discussed supra note 427, the FCC is required under the 1992 Cable Act to adopt rules limiting vertical integration by cable operators, which could reduce the extent to which a broadcast network might attain such efficiencies.

allowed to achieve greater economies of scope through horizontal expansion in the packaging and distribution of television programming.[431]

While there is general agreement that a total prohibition would no longer serve its original purpose, a number of parties raised new arguments in recent years in support of retaining a complete ban on network-cable crossownership, claiming such a ban is necessary to preserve the viability of our system of free, local, over-the-air broadcast stations. In particular, broadcast stations affiliated with the networks have argued that network-owned cable systems would be able to bypass local affiliates by providing network programming directly to cable subscribers over their owned cable systems or by importing distant signal affiliates. As a consequence of this ability, the affiliates argue, the networks would be able to exert undue leverage over those affiliates in negotiations over clearance of programs and network compensation.[432]

NTIA agrees with the FCC that these new arguments deserve careful consideration. The free, over-the-air television broadcast system has played a critical role in the American way of life for more than forty years. However, we conclude that the potential actions by the networks that parties raise as objections to elimination of the rule are speculative and, in many instances, contrary to the economic interests of the networks. On balance, NTIA

431/ Indeed, broadcast networks may be able to realize efficiencies from packaging programming for distribution to both local over-the-air affiliates and local cable outlets.

432/ See Affiliate Stations Second Further Network-Cable Comments, supra note 413, at 7-9, 17-18; Reply Comments of the Network Affiliated Stations Alliance at 7-8 (filed Apr. 7, 1992) in Network-Cable Crossownership Second Further NPRM; Affiliate Television NOI Comments, supra note 412, at 21-26.

In addition, INTV has argued that repeal of the rule would enable network-owned cable systems to favor their own broadcast affiliates (and affiliated cable program services) and discriminate against independent broadcast stations in terms of carriage and channel position. See INTV Second Further Network-Cable Comments, supra note 413, at 26; see also INTV Television NOI Comments, supra note 412, at 18-19. Those concerns would appear to be largely met by passage of the 1992 Cable Act, which enables broadcast stations to elect between retransmission consent and "must carry" status. Pub. L. No. 102-385, §§ 4-5, 106 Stat. at 1471-83. The "must carry" provisions in the 1992 Cable Act are currently subject to court challenge on constitutional grounds. See, e.g., Turner Broadcasting v. FCC, Civ. Action No. E 92-2247 (D.D.C. filed Oct. 5, 1992).

believes the better course is to allow broadcast networks and cable operators flexibility to determine the business arrangements under which they distribute television programming, unencumbered by governmental restrictions. We are confident that the additional efficiencies derived from such diversification will improve the overall economic health and stability of the U.S. television industry, and that the networks will remain committed to our system of over-the-air broadcasting.

NTIA believes that concerns about "affiliate bypass" are speculative at best. Any such strategy would result in a significant loss of audience for the network cable owner. On the national level, cable systems cannot presently provide the coverage -- and audience share -- comparable to that of the broadcast affiliate system. While cable passes over ninety percent of all television households, about sixty percent of all television households subscribe.[433/] In contrast, each of the three major broadcast networks reaches ninety-eight percent or more of all television households through their owned-and-operated and affiliated stations,[434/] and the broadcast signals carried by the network affiliates remain the advertising vehicle of choice for advertisers seeking a broad national audience.

Moreover, a network engaging in "bypass" would not necessarily have access to all cable subscribers in a particular local market. In many markets, there are several separately owned cable systems. Even if no limitations on crossownership existed, there is some question as to whether a network would necessarily be willing or able to acquire all of the cable systems in a given market. A network thus would have no assurance that its programming would even reach all cable subscribers. Finally, any attempt to import the signal of a distant affiliate in lieu of a local affiliate would likely lead to viewer dissatisfaction, and potential decline in cable subscribership, because local broadcast affiliates typically are the stations most valued by cable subscribers.[435/]

433/ Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6162.

434/ Joint Comments of the ABC, CBS, and NBC Television Affiliates Association at 9 (filed Oct. 24, 1988) in Network-Cable Crossownership Further NPRM (refiled on Dec. 3, 1991 by the Network Affiliated Stations Alliance in Television NOI); CapCities/ABC Second Further Network-Cable Comments, supra note 413, at 11-12 & n.24.

435/ Local affiliates provide local news and other local programming that is highly valued by television viewers. See infra note 755; Broadcast Television Report, 6 FCC Rcd at 4087. Such programming cannot be replaced by the importation of a distant affiliate. Cf. Monday Memo, Broadcasting, Jan. 20, 1992, at 63 (local

As a consequence of these factors, a network cable owner that "bypassed" its local broadcast affiliates would effectively be trading its broad base of over-the-air viewers for a smaller number of cable subscribers, and thereby be jeopardizing its attractiveness as a national advertising vehicle. Moreover, while bypassing network affiliates could increase demand for cable service among some viewers (because they would have to subscribe to cable to receive that network's programming), there could be a countervailing reduction in demand among other viewers (because the cable system would no longer provide the local programming and other value added by the local affiliate). Such a strategy would be irrational unless the network could realize additional revenues in cable subscriber fees from such an approach to distributing its product, and that increase, coupled with savings in affiliate compensation, outweighed the decline in advertising revenues it would experience as a result of the net loss in national audience. Although it is conceivable that, at some point in the future, the networks could find it more profitable to distribute their programming exclusively through cable systems, rather than affiliates,[436/] it is more likely that networks and cable systems would engage in numerous different types of business arrangements that would not necessarily threaten the viability of over-the-air affiliates.[437/]

In attempting to respond to concerns about network bypass of affiliates, the FCC's cap on local ownership of cable systems prohibits networks from purchasing cable systems serving more than fifty percent of the homes passed by cable in a given market. Because we believe that concerns about affiliate bypass are speculative at best, such a safeguard could well be unnecessary. As the FCC reexamines its decision, both on reconsideration and in 1995, we urge it to consider whether the local ownership cap it has adopted would, as a practical matter, impose inefficiencies that outweigh its putative benefits, by precluding the networks from purchasing MSOs without being required to divest themselves of a significant

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viewers in five communities persuaded cable not to drop signal of local NBC affiliates).

436/ See Broadcast Television Report, 6 FCC Rcd at 4099.

437/ The 1992 Cable Act could affect this question, as network owners of cable systems could have an additional incentive to end an affiliation with a local broadcast station in lieu of carriage of a distant network owned-and-operated station in order to avoid paying the local affiliate for retransmission consent. However, this would not necessarily occur because networks would face countervailing pressures from viewers to carry the signals of local affiliates. See supra note 435. Networks affiliated with cable companies might instead seek to reduce affiliate compensation in those markets where required to pay for retransmission consent.

portion of those MSOs' holdings.[438] To the extent there remain lingering concerns over the potential for "affiliate bypass," our preference would be to adopt a requirement that networks maintain an affiliation with a local broadcast station in markets where they own cable systems.[439] Such a measure would address concerns about bypass without significantly impeding network entry into cable.

The debate on this issue boils down to whether there should be a presumption in favor of retaining, or repealing, limits on network-cable crossownership. Given the importance of our system of free over-the-air television, and the concerns of some that the future of the broadcast industry is uncertain,[440] we believe that policymakers should scrutinize carefully the restrictions now in place on the various players in this industry, including the broadcast networks. On domestic policy grounds alone, NTIA believes that a strong case can be made for complete elimination of any restrictions on network-cable crossownership.[441] As the FCC evaluates its network-cable crossownership decision on reconsideration and in 1995, we urge it to avoid retaining restrictions that would make network entry into cable (or vice versa) so cumbersome for the parties involved that few would have an incentive to so invest.

438/ NBC has argued that the combined effect of the 50% local ownership cap and the statutory broadcast-cable crossownership ban would be to preclude it from purchasing all but five or six of the top 25 MSOs. See Petition for Reconsideration of National Broadcasting Company, Inc. at 5 & Exhibit I (filed Sept. 9, 1992) in Network-Cable Crossownership, MM Docket 82-234. See also Flint, FCC's Next Cable Dereg Decision: 25% or 50%?, Broadcasting, June 15, 1992, at 10 (ABC would have to divest between 23% and 68% of the cable systems owned by selected MSOs to comply with 50% cap and statutory broadcast-cable crossownership ban).

439/ The FCC declined to adopt various behavioral restrictions proposed by the network affiliates and INTV (which included a requirement that networks affiliate with a broadcast station in each market where they owned cable systems), believing them to be "unnecessary" in light of the safeguards it did adopt. Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6173, 6186. The FCC did not explain why it believed a local ownership cap to be preferable to an affiliation requirement.

440/ See, e.g., Broadcast Television Report, 6 FCC Rcd at 4097-4104.

441/ See Letter from Thomas J. Sugrue, Acting Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Alfred C. Sikes, Chairman, Federal Communications Commission (filed May 13, 1992) in Network-Cable Second Further NPRM.

3. Effect of Lifting the Network-Cable Crossownership Prohibition on Globalization

NTIA believes that repeal of the network-cable crossownership rule can be justified solely on the basis of domestic concerns. However, for purposes of this study, an important question is whether repeal would have an impact on media firms that participate in a global marketplace. In particular, would repeal of this rule have any impact on the competitiveness of U.S. firms in international markets? For example, would complete repeal of this rule have any impact on either the incentives or the ability of the U.S. broadcast television networks or cable MSOs to engage in FDI?[442/] And would a jointly-owned television network-cable MSO be in a better position to produce, package or distribute television programming abroad?

It is possible that repeal of the network-cable crossownership restriction could increase FDI by U.S. firms abroad. In particular, the efficiencies that the broadcast television networks and cable MSOs are likely to achieve from crossownership in the United States are likely to benefit the international operations of those firms. The U.S. broadcast networks have begun to expand their operations internationally, engaging in various production and distribution activities.[443/] The more expertise that a jointly-owned network/cable firm

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442/ Repeal of the network-cable crossownership rule could have some impact on FDI in the United States. Foreign-based firms are independently precluded from acquiring more than a 25% interest in any of the U.S. broadcast networks by the foreign ownership restriction of the Communications Act, 47 U.S.C. § 310(b), as each network holds a number of broadcast licenses. See discussion supra in Chapter 6 at p. 77. Removal of the crossownership rule by itself could increase the incentives of foreign-based firms to acquire interests in the U.S. market under the 25% threshold, while elimination of the rule, if coupled with liberalization of the U.S. foreign ownership restrictions, would create even greater incentives for FDI by foreign-based firms. In particular, to the extent there are benefits to be derived from owning both a broadcast network and a cable company, investment in such a firm would be more attractive for both U.S. and foreign-based firms, thereby potentially stimulating further investment in important U.S. businesses. We argue in Chapter 6 that a regulatory approach that permitted greater participation by foreign firms in U.S. broadcasting would likely serve the public interest, and we recommended that the FCC use the flexibility it has under the Communications Act to implement such an approach.

443/ For instance, CapCities/ABC has invested in three European television production and distribution companies, has a major interest in Worldwide Television News, and, through ESPN, owns 50% of the European Television Networks. For a

develops in producing, packaging, and distributing programming in the United States, the greater its ability and inclination to take advantage of opportunities in similar ventures overseas, and the stronger a competitor it will be abroad.

It is difficult to predict whether repeal of the network-cable crossownership restriction would have any impact on the flow of programming abroad. Elimination of the rule would enable cable companies and television networks to become more robust competitors in the U.S. program production marketplace, as they benefit from the efficiencies associated with integrated operation.[444] Such integrated firms would have economic incentives to distribute their product as widely as possible in order to reduce the per viewer cost of that product, similar to those of a broadcast television network or cable firm operating alone. However, it is uncertain whether the efficiencies that a firm might achieve from crossownership in the United States would enable that firm to obtain or produce higher quality programming (i.e., programming with greater audience appeal) more suitable for export. Thus, in our view, the benefits of removing this rule largely accrue from its domestic effects.

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further description of CapCities/ABC, see infra Appendix C at C-4. NBC International distributes video and television programming abroad. For a further description of NBC, see infra Appendix C at C-8. CBS Enterprises has licensed CBS-owned programming to more than 240 foreign broadcasters in 77 countries, and has entered into joint ventures with a British firm to co-finance made-for-television films and with Tokyo Broadcasting Systems to share newsgathering resources and programming. For a further description of CBS, see infra Appendix C at C-5.

444/ Given that a number of major studios have been acquired by foreign-based firms, one could argue that it is especially anomalous for U.S. regulatory policy to impose inefficient restrictions on vertical integration on two industries that are almost exclusively U.S.-based -- broadcast networks and cable operators. Such restrictions may handicap U.S. firms to the extent they compete against foreign-based firms that are not similarly restricted in their home countries. For a discussion of regulation of media crossownership in Europe, see Lensen, supra note 131, at 14-17, 33.

B. The Cable-Telco Crossownership Prohibition

1. History of the Prohibition

In 1970, the FCC adopted rules barring all telcos from providing video programming to subscribers in their local service area, either directly or indirectly through an affiliate, with waiver for good cause available only under limited circumstances.[445] The FCC's restriction was a broad one, barring telcos from having any sort of business or financial relationship with cable operators other than a carrier-user relationship.[446]

When these rules were adopted, cable was, relatively speaking, in its infancy. At the time, the FCC was concerned that telcos would -- absent such restrictions -- be able to engage in improper cross-subsidization, block the development of new broadband cable services, and use their control of telephone poles and conduit space to prevent or hinder competition from independent cable companies.[447]

When Congress enacted the Cable Act in 1984, it codified the FCC's cable-telco crossownership prohibition, although the statutory language is not as restrictive as the FCC's rules. The 1984 Cable Act prohibits a telco from providing cable service to its customers, either directly or indirectly through an affiliate effectively controlled by that telephone

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445/ See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 FCC 2d 307 (Section 214 Certificates), recon., 22 FCC 2d 746 (1970), aff'd, General Tel. Co. of S.W. v. U.S., 449 F.2d 846 (5th Cir. 1971). Those restrictions are currently set forth at 47 C.F.R. §§ 63.54-63.58.

In 1981, the FCC created a blanket exemption from its crossownership rules for telcos proposing to serve rural areas, defined as communities with populations of less than 2500. Telephone Co. CATV Cross-Ownership, 88 FCC 2d 564 (1981), recon. denied, 91 FCC 2d 622 (1982), aff'd sub nom. National Cable Television Ass'n v. FCC, 747 F.2d 1503 (D.C. Cir. 1984). Originally, the FCC required that telcos intending to serve rural areas demonstrate that no other cable system was in existence or under construction; when Congress codified the FCC's rules in the 1984 Cable Act, it made the exemption automatic for communities that satisfy the FCC's definition of "rural."

446/ 47 C.F.R. § 63.54 Note 1.

447/ Section 214 Certificates, 21 FCC 2d at 323-24.

company.[448] That Act also provides that the FCC may waive its provisions in areas where the provision of video programming "demonstrably could not [otherwise] exist" or upon other showing of "good cause."[449]

In addition, for a number of years, the BOCs were precluded from diversifying into cable by the terms of the AT&T consent decree, which settled the Justice Department's antitrust suit against AT&T, spinning off the Bell companies and mandating their reorganization into seven regional holding companies. Among other things, that decree barred the BOCs from providing "information services," which were universally assumed to include cable service. This restriction -- which applied only to the BOCs and not to independent telcos -- was broader than that contained in the FCC's rules or the 1984 Cable Act, as it barred the BOCs from entering the cable business anywhere in the country, not just within their own local service areas. As previously noted,[450] however, the court administering the consent decree lifted this restriction in 1991 so that the BOCs now are free to own and operate cable systems located outside of their local service areas, although that decision remains subject to appeal.

In 1987, the FCC initiated a proceeding to examine its cable-telco crossownership restriction,[451] which culminated in a decision released in August 1992 that modified the cable-telco crossownership prohibition in several significant respects.[452] First, with support from NTIA,[453] the FCC modified its rules to allow telcos to offer "video dialtone"

448/ Thus, under the 1984 Cable Act, telcos are permitted to provide cable service outside of their telephone service areas. 47 U.S.C. § 533(b)(1).

449/ 47 U.S.C. § 533(b)(4).

450/ See supra note 390.

451/ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Notice of Inquiry, 2 FCC Rcd 5092 (1987) (1987 Telco-Cable Crossownership).

452/ Telephone Company-Cable Television Cross-ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (1992 Cable-Telco Crossownership).

453/ See Comments of National Telecommunications and Information Administration (filed Feb. 3, 1991) in Telephone Company-Cable Television Cross-ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266.

-- that is, to provide video distribution facilities to unaffiliated video programmers and packagers on a non-discriminatory, common carrier basis, while providing customers with access to those services through telco gateways. In addition, the FCC revised its rules to increase from one percent to five percent the level of permissible noncognizable financial interests that telcos may hold in video programmers.[454] In the FCC's view, it could implement both changes consistent with the confines of the current statutory scheme.[455] Second, the FCC decided to recommend to Congress that the statutory cable-telco crossownership restriction be repealed so that telcos would be permitted to provide video programming directly to subscribers, subject to safeguards.[456] Third, in a Second Further Notice of Proposed Rulemaking, the FCC proposed to amend the population threshold for the "rural" exemption to the statutory crossownership ban to permit telcos to provide video programming directly to subscribers in areas of less than 10,000 persons.[457]

454/ 47 C.F.R. § 63.54 Note 2. This 5% level parallels the threshold for a cognizable interest in the FCC's broadcast rules.

455/ In 1991, the FCC concluded that the statutory cable-telco crossownership restriction does not apply to interexchange carriers, and that when a telco is providing video dialtone service, neither the telco nor the programmer customers are required by the 1984 Cable Act to obtain a local cable franchise. Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (1991 Telco-Cable Crossownership). The FCC upheld that latter interpretation of the 1984 Cable Act on reconsideration in 1992. Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992).

456/ The FCC had previously tentatively decided in 1988 to recommend to Congress that it eliminate the statutory crossownership ban, concluding that telcos should be allowed to provide cable service subject to nonstructural safeguards to prevent carrier anticompetitive conduct. See Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849 (1988) (1988 Telco-Cable Crossownership).

457/ NTIA filed comments supporting this proposed change. See Comments of National Telecommunications and Information Administration (filed Nov. 12, 1992) in Telephone Company-Cable Television Cross-ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266.

2. Effect of Lifting the Cable-Telco Crossownership Restriction on Globalization

We strongly support the FCC's decision in 1992 to amend its rules to permit telcos to have a greater role in the distribution of video programming, as well as its recommendation to Congress to repeal the cable-telco crossownership prohibition. However, the net effect of the prohibition in the 1984 Cable Act, even in light of the FCC's recent actions, is to preclude telcos from vertically integrating the stages of video production, packaging, and distribution.

We have stated in detail elsewhere our position that the current cable-telco crossownership prohibition in the 1984 Cable Act and FCC rules should be removed in order to stimulate competition in the video marketplace and promote efficient telecommunications infrastructure development.[458] Those views need not be repeated here. Rather, the critical question for purposes of this study is whether this prohibition has any impact on the globalization of mass media activities. In particular, is there any relationship between the foreign investment activities of U.S. telcos and the existence of domestic restrictions limiting their involvement in cable? And, as a logical corollary, how, if at all, would lifting those restrictions change the incentives of U.S. firms to engage in FDI? If domestic restrictions on telco involvement in cable were lifted, would that stimulate the flow of programming across international borders, both into and out of the United States?

An initial question is whether the existence of domestic restrictions on entry into cable has caused U.S. telcos to invest in cable abroad. Our analysis proceeds from the assumption that U.S. firms are motivated to invest abroad only if those investment opportunities will enable such firms to earn a greater return than opportunities available in the United States. Moreover, we assume that firms may be willing to undertake foreign investments that are relatively risky or unprofitable in the short term, if they believe those investments ultimately will provide them with some strategic advantage in the long term, either in domestic or foreign markets.

458/ NTIA Infrastructure Report, supra note 100, at 226-46.

The evidence suggests that a variety of factors has contributed to the decisions of a number of U.S. telcos -- all BOCs -- to invest in cable abroad.[459] On the one hand, it seems very likely that the existence of domestic restrictions on entry into cable has played a role, as the BOCs' opportunities to diversify in the United States have been limited.[460] On a number of occasions, the BOCs have recognized that foreign cable investments provide them with opportunities lacking in the United States.[461]

Other factors suggest that the BOCs would be investing in cable abroad even in the absence of domestic restrictions on their entry into cable. First, most of the BOCs have aggressively pursued international ventures in a number of different fields, both in markets where competition is limited and in markets where competition is becoming increasingly robust.[462] For instance, in 1990, Southwestern Bell entered into a consortium that purchased an interest in Telmex,[463] the Mexican state telephone company, while Ameritech and Bell Atlantic (along with two local firms) purchased New Zealand's state

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459/ For instance, BellSouth and US West have invested in cable franchises in France; NYNEX, Pacific Telesis, Southwestern Bell, and US West have invested in cable franchises in the United Kingdom; Southwestern Bell has an interest in cable in Israel; and US West is a partner in a company with cable interests in Norway and Sweden. NCTA Facts at a Glance, supra note 89, at 8-26.

460/ See Taylor, The World is Becoming the RHCs' Oyster, Telephony, Aug. 27, 1990, at 44, 46 (RHCs' Oyster).

461/ See, e.g., Hackel, Telecom Companies Discover a World of Opportunity in International Markets, Phone +, Dec. 1992, at 25 (Telecom Companies) (BellSouth executive notes that "[t]he international arena allows us to try things that we are prohibited from doing here in the United States"); The Baby Bells Take Their Show on the Road, Bus. Wk., June 25, 1990, at 104 (Show on the Road) (BOCs assert that overseas ventures provide best opportunity to grow); The Baby Bells Scramble for Europe, N.Y. Times, Dec. 10, 1989, at C1 (Scramble for Europe) (BOC executives note that cable is one technology they are trying out in Europe that they are forbidden to offer in the United States); International Telecommunications 14; Competitive Ding-Dong Among the Bells, Fin. Times, July 19, 1989, Survey, at XIV (International Telecommunications) (BOCs see foreign markets as places to learn new skills which they are not allowed to offer in the United States).

462/ See generally RHCs' oyster, supra note 460, at 44 (BOCs engaged in at least 25 activities in more than 36 countries).

463/ Southwestern Bell Corporation, 1991 Annual Report 3, 7-8 (1992) (Southwestern Bell Annual Report).

telephone company, New Zealand Telecom.[464] In 1991, BellSouth won a license to become Australia's second telecommunications carrier,[465] while Bell Atlantic and Ameritech entered into a partnership with two major U.S. cable MSOs -- Tele-Communications Inc. (TCI) and Time Warner -- to acquire a majority stake in Sky Network, which provides programming to three UHF television channels in New Zealand.[466] The BOCs all have interests in foreign firms that are developing, or already offer, cellular telephone service.[467] US West is constructing a nationwide PCN network in Great Britain.[468]

The BOCs have repeatedly asserted a desire to become "global players."[469] They are

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464/ Ameritech, Annual Report 1991, at 21 (1992) (Ameritech Annual Report); Ma Bell and Seven Babies Go Global, Fortune, Nov. 4, 1991, at 119 (Ma Bell).

465/ BellSouth, Managing Change: BellSouth Answers the Tough Questions, Annual Report 1991, at 21 (1992) (BellSouth Annual Report).

466/ See Ameritech Annual Report, supra note 464, at 21; Bell Atlantic, Investors Reference Guide April 1992, at 52 (1992) (Bell Atlantic Investors Guide). According to Bell Atlantic, this investment may be a "'platform . . . [for] . . . similar opportunities in other Asian and Pacific Rim markets.'" Phone, Cable Companies Hook Up in New Zealand, Wall St. J., May 3, 1991, at B4.

467/ See US West, US West Fact Book and Statistical Summary 1991, at 18-19 (1992) (US West Fact Book); Southwestern Bell Annual Report, supra note 463, at 7-8; Ameritech Annual Report, supra note 464, at 21; Bell Atlantic Investors Guide, supra note 466, at 60; Pacific Telesis Group, 1991 Summary Annual Report 23 (1992); NYNEX Corporation, 1991 Annual Report 14 (1992); BellSouth Annual Report, supra note 465, at inside cover.

468/ US West Fact Book, supra note 467, at 18.

469/ See Ameritech Annual Report, supra note 464, at 21 (Ameritech sees "long-term strategic wisdom of being a multinational player"); Show on the Road, supra note 461, at 105 (Southwestern Bell asserts that "If you want to be a major player in telecommunications, you have to go international"); Scramble for Europe, supra note 461, at 1 (NYNEX notes "Our primary business is still here within the region, but the marketplace is increasingly becoming a global one"); International Telecommunications, supra note 461, at XIV (BellSouth argues "telecommunications is increasingly a global business so [its] future lies in learning how to do business abroad").

The BOCs are not the only telcos seeking to become global players. For instance, in late 1991, a GTE-led consortium acquired 40% of Venezuela's telephone

reported to perceive greater opportunities for growth from overseas ventures than from their regulated domestic telephone businesses,[470] and they increasingly expect to derive a significant portion of future revenues from foreign ventures.[471] Viewed in this light, foreign cable interests may be but a small part of a corporate strategy to seek diversified, profitable activities related to telecommunications across the globe.

Second, the BOCs are not the only firms that have invested in foreign cable systems; a number of cable MSOs, such as TCI, Comcast, and Time Warner, also have financial interests in cable franchises abroad.[472] Obviously, no domestic restrictions bar those firms from investing in cable in the United States. Rather, as the U.S. cable market has matured, a number of large U.S. cable firms have looked abroad for new business opportunities, in the belief that investments in nations where cable still is in its infancy will yield large returns in the long run.[473] Such FDI by the cable firms suggests that the foreign investment

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company. GTE, Annual Report 1991, at 2 (1992) (GTE Annual Report). At the time, GTE's Chairman stated that the "bid supports [the] company's strategy to seek international opportunities" and "is [a] great business opportunity." GTE-LED Consortium Wins $1.885-Billion Venezuelan Phone Bid, Comm. Daily, Nov. 18, 1991, at 1. GTE also has interests in foreign telephone operations in Canada and the Dominican Republic, and cellular telephone companies in Japan. GTE Annual Report, supra at 3, 9.

470/ See RHCs' Oyster, supra note 460, at 44; Scramble for Europe, supra note 461, at 1 (NYNEX recognizes that "the opportunities for growth are greater outside the United States than within"). But cf. Sweeney, Regional Bells Refocus Their International Investments, CommunicationsWeek, Nov. 16, 1992, at 41 (RBOCs refocusing their international efforts on specific geographic markets and technologies) (RBOCs Refocus).

471/ See The Condo Approach to Telco Entry, Broadcasting, Feb. 3, 1992, at 26, 28 (Telco Entry) (US West hopes eventually to derive 25% of revenues from international ventures); Show on the Road, supra note 461, at 104 (Bell Atlantic expects international sales to account for 10% of revenues by mid-decade; NYNEX expects to earn 20% of revenues abroad by the year 2000).

472/ NCTA Facts at a Glance, supra note 89, at 2-14. In late 1991, US West and TCI merged their respective cable interests in the United Kingdom into a joint venture. See TCI and US West Merge U.K. Cable Interests in $750-Million Deal, Comm. Daily, Dec. 19, 1991, at 2 (TCI-US West Deal).

473/ See RBOCs Refocus, supra note 470, at 41 (US West seeks international investments in high growth areas or emerging applications); US West Pays to Play in Wide-Ranging International Markets, Telephone Week, Sept. 7, 1992, available

activities of the BOCs are an effort to obtain a larger share of the profits available in the global marketplace stemming from communications-related businesses.

Decisions by several MSOs to withdraw from foreign cable operations also may demonstrate that a desire to obtain a larger share of global profits is a key motivation for firms investing in cable abroad. In March 1991, Maclean Hunter Cable, a Canadian-based MSO, ceased investing in U.K. cable franchises, noting that because early cable penetration levels were well below expectations, it appeared that U.K cable would be a long-term investment with big up-front losses.[474/] In September 1991, TeleCable, a U.S.-based MSO, also decided to withdraw from the U.K. cable market, concluding that investments in U.S. systems would be more profitable for it, and that the only way for U.K. cable to be profitable in the immediate term would be for firms to provide telephony in conjunction with cable in order to generate cash flow during the initial start-up phase.[475/]

The fact that the BOCs may continue to invest in cable abroad, while some cable companies are finding the returns on such investments to be unacceptably low, is not surprising. Some countries permit firms to offer cable and telephone service on an integrated basis,[476/] and in those cases, telephony represents an available revenue stream while firms

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in LEXIS, Nexis Library, CURRNT File (US West feels start-up costs for foreign cable and cellular interests justified by potential for long-run returns). But see US West's Overseas Caution Led to the Breakdown of C&W Talks, FinTech Telecom Markets, Oct. 15, 1992, available in LEXIS, Nexis Library, CURRNT File (increasing foreign investment by telecommunications companies could lead to downgrading in credit rating by Moody's due to fears about delays in obtaining an adequate return).

474/ Number 3 U.K. Cable Winner Halts Development, Citing Low Penetration, Comm. Daily, Mar. 14, 1991, at 5.

475/ Telecable is 2d American MSO to Pull Out of U.K. Cable, Comm. Daily, Sept. 19, 1991, at 5.

476/ In 1991, the United Kingdom decided to introduce greater competition into the telecommunications marketplace by, among other things, allowing cable operators to provide telephone service to their customers. See Department of Trade and Industry, Telecommunications -- Peter Lilley Sets Agenda for the 90's 4-5 (Press Release, Mar. 5, 1991).

US West and Nynex are aggressively pursuing telephone customers in the United Kingdom. US West also views Hungary, Norway, Sweden, and France as nations

work to build customer acceptance of cable service.[477] Obviously, telcos have greater expertise than cable firms in providing telephone service, so telcos are in a better position to provide such service during the start-up phase. Indeed, in some nations, U.S. telcos may be purchasing cable franchises as an entree into foreign telephony itself.[478]

Telcos also may have strategic incentives to maintain their investment in foreign cable properties even when those investments are not particularly profitable because they hope that the knowledge they thereby gain about the cable business will prove valuable to them as cable competitors in the United States, if and when the current domestic restrictions on entry into cable are lifted.[479] In particular, the expertise that firms develop from the joint provision of telephony and cable service abroad may be usefully applied to their domestic operations.

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where it potentially may be able to offer telephone as well as cable service. See Gary Bryson, President, US West Cable Communications, Remarks before the 1991 Donaldson, Lufkin & Jenrette Telco-Cable Faceoff Conference (Dec. 4, 1991) (Bryson Telco-Cable Faceoff Remarks); Despite Rough Going in Cable Service Sales, U.K. Ventures See Cause for Hope in Unexpectedly High Telephone Buy Rates, The Cable-Teleco Rep., June 1991, at 5.

477/ According to US West, the provision of telephony provides a greater revenue base to support cable service. See Bryson Telco-Cable Faceoff Remarks, supra note 476; Telco Entry, supra note 471, at 26, 28.

478/ Similarly, this may be one reason why TCI entered into a joint venture with US West in 1991 to develop cable interests in the United Kingdom. According to TCI President John Malone, the partnership represented a way for TCI to enter the telephone business, and would "increase 'real operating and commercial synergies' between cable and telephony." TCI-US West Deal, supra note 472, at 2. See also U.S. Phone Companies Get Foot in U.K. Market Through Cable TV, Reuters Lib. Rep., Sept. 23, 1990, available in LEXIS, Nexis Library, LBYRPT File; A Clearer Line to Markets Abroad, Fin. Times, Mar. 6, 1990, at 20 (Clearer Line).

479/ See, e.g., Southwestern Bell Annual Report, supra note 463, at 11 (experience as cable operator in U.K. could be useful in U.S. if company allowed to provide cable); Clearer Line, supra note 478, at 20; Scramble for Europe, supra note 461, at 1.

It is difficult to predict how the investment patterns of the BOCs might change if and when current domestic restrictions are lifted.[480] Many believed when the court removed the consent decree restriction on the provision of information services in 1991 that the BOCs would not enter the domestic cable market outside of their regions to any significant extent, but would instead wait for the 1984 Cable Act crossownership ban to be lifted.[481] NYNEX has stated that it is not interested in providing cable service outside of its territory; it wants to provide service in the Northeast where it has customers and knows the market.[482] Opportunities to enter cable abroad, especially where firms can offer

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480/ A related question is whether lifting current domestic restrictions would have any impact on the activities of the independent telcos. At present, none of the independents have invested in foreign cable markets. The most obvious explanation for this is that aside from GTE, none of the independent telcos have the same depth of financial resources with which to diversify their operations, either domestically or abroad, as do the BOCs. In 1991, the top eight U.S. telephone companies (measured in number of access lines) were the seven BOCs and GTE, with operating revenues ranging from $7.4 to $12.8 billion. In contrast, the revenues of the next two telephone companies were $1.2 and $2.5 billion, while the revenues of the remaining top 20 companies ranged from $120 to $941 million. U.S. Telephone Association, Phone Facts '92, at 20-21 (1992). (These figures exclude non-telephone operations, such as revenues from cellular radio service, to the extent that a company offered such service through a separate subsidiary.)

481/ See, e.g., Markey Commits to Moving Comprehensive MFJ Bill in Wake of Greene Decision, Comm. Daily, July 29, 1991, at 3 (NCTA President predicts cable will not feel major impact from removal of MFJ restriction, so long as Cable Act restriction remains in place); Greene Decision May Open Floodgate of Hill Debate, But Not of Cable Buys, Comm. Daily, July 30, 1991, at 1 (similar) (Greene Decision).

This hypothesis is supported by the fact that while the independent telcos have been free to invest in cable properties outside of their local service areas, relatively few of them have done so. Aside from the question of whether the independent telcos have the financial resources to make such investments, see supra note 480, they may believe that it would not be economical to provide cable service outside of their region; cross-entry would only be profitable if they can provide telephony and cable service on an integrated basis and thereby achieve efficiencies.

482/ Ferguson Sets Priorities for NYNEX Information Services, Comm. Daily, Oct. 24, 1991, at 3.

integrated telephony and cable television, thus may still seem attractive relative to out-of-region entry in the United States.[483]

Lifting the 1984 Cable Act crossownership restriction, however, could well cause the BOCs to curtail their aggressive acquisition of foreign cable properties, and, potentially, could even lead to the sale of existing interests. If the restriction of the 1984 Cable Act were repealed, the BOCs, and other telcos, presumably would want to focus their financial resources on developing cable service within their own regions where the greatest potential efficiencies could be realized. At the same time, the BOCs would continue to be motivated to invest in foreign cable systems if those investments are more profitable than (or at least as profitable as) domestic cable opportunities.

A final question is whether lifting domestic restrictions on telco entry into cable would stimulate the flow of video programming across international borders. We believe that removal of the restriction would lead to greater overall investment in programming in the U.S. marketplace for several reasons. First, telco provision of video programming in competition with incumbent cable operators should lead to increased demand for such programming: as competition leads to lower prices and service improvements, consumer demand for cable service should increase, thereby stimulating demand for video programming. Second, to the extent telcos are permitted to participate in the provision of video programming, they likely would have greater incentives to invest in broadband networks than is the case under the current rules.[484] The capabilities of such networks to provide new video services that benefit the public, such as improved video on demand, "narrowcasting," targeted advertising, and "video processing," could all result in greater demand for video programming and greater investment in program suppliers.

Telco entry into cable as program packagers or providers of video dialtone service could also encourage new entry by third party suppliers of programming and new investment in existing program suppliers. Such new investment, in turn, could come from both U.S.-based

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483/ In a number of countries, such as the United Kingdom, the BOCs are receiving original franchises to construct cable systems; in contrast, in the United States, where cable already passes over 90% of homes, the BOCs would either have to purchase an existing system from an incumbent operator (possibly at a price they are unwilling to pay, particularly in light of uncertainties over the impact of the 1992 Cable Act) or build a second, competing system.

484/ NTIA Infrastructure Report, supra note 100, at 235.

and foreign-based firms. Moreover, to the extent that U.S. telcos are permitted to own programming, they might seek to develop their own programming services to provide on their distribution facilities.[485/] Such increased domestic investment in programming should lead, in turn, to greater export of such programming, as all program producers -- whether they be traditional cable networks or telcos -- have economic incentives to distribute their product as widely as possible.[486/]

In sum, we conclude that the BOCs have invested in foreign cable properties for a variety of reasons. While these firms in part have been motivated by a desire to explore avenues presently forbidden in the United States, such investments also represent a deliberate corporate strategy to seek diversified opportunities for growth. As a consequence, it is difficult to predict whether the level of foreign cable investment by BOCs would decline if the current domestic restrictions were lifted.

It is likely that lifting domestic restrictions will lead to greater demand for, and greater investment in, video programming in the United States. To the extent that telco entry into cable leads to more rapid investment (by telcos and cable systems alike) in building advanced infrastructure that can provide subscribers with improved video services, this should also stimulate increased demand for, and investment in, the U.S. programming industry. This should enhance the overall competitiveness of the U.S. program production industry as well as create expanded opportunities for foreign suppliers in the United States. The result could well be a net increase in the flow of video programming across international borders, both into and out of the United States. In light of these factors, NTIA thus recommends that the cable/telco crossownership restriction should be removed for both domestic and international policy reasons.

485/ See NTIA Infrastructure Report, supra note 100, at 237-40. But see Greene Decision, supra note 481, at 1 (US West not interested in providing video programming domestically; prefers to construct and manage cable systems in partnership with cable systems).

486/ It also is conceivable that removal of the crossownership prohibition could result in an increase in U.S. imports of foreign programming, particularly to the extent that U.S. telcos seek to provide specialized niche cable service catering to particular ethnic groups. For instance, program producers in nations like Brazil, Venezuela, and Argentina could become suppliers to Hispanic cable channels in the United States.

C. The Broadcast-Cable Crossownership Prohibition

1. History of the Prohibition

In 1970, at the same time the FCC adopted the network-cable crossownership restriction, it also adopted a rule prohibiting the common ownership of a television broadcast station and cable system within the same market.[487/] In doing so, the FCC sought to maximize diversity of control over media in the local marketplace. In particular, the FCC was primarily motivated by a concern that broadcast stations would have an incentive to restrict the carriage of other broadcast stations or cable originated programming on co-owned cable systems in order to protect the audience for its own broadcast programming.[488/] Congress codified that rule in the Cable Act of 1984.[489/]

In the 1981 Cable Report, the FCC's OPP reexamined the premises of the broadcast-cable crossownership rule. It concluded that there would be sufficient competition, both economic and in the marketplace of ideas, in most local markets even in the absence of the crossownership rule, pointing to increases in the number of channels available on cable systems, the development of numerous video substitutes to cable, and consumer demand for the new programming services that were being provided over cable.[490/] It also rejected arguments that jointly-owned broadcast station/cable system combinations would be able to exercise undue market power in the advertising marketplace in light of the wide range of advertising outlets available in most markets.[491/]

487/ 47 C.F.R. § 76.501(a)(2). In particular, the rule bars a cable system from carrying the signal of any television broadcast station if the cable system directly or indirectly owns, operates, controls, or has an interest in a broadcast station whose Grade B contour overlaps in whole or in part with the service area of the cable system.

488/ Cable Crossownership, 23 FCC 2d at 820.

489/ 47 U.S.C. § 533(a).

490/ 1981 Cable Report, supra note 396, at 53-54.

491/ Id. at 74.

OPP accordingly recommended that the rule be abolished.[492] For those markets with a limited number of alternative outlets, it suggested that reliance on the antitrust laws and local franchising authorities would be sufficient to deal with potential problems.[493] In the alternative, it recommended a ban on crossownership limited to those markets where only one broadcast station covered the cable system's service area.[494] It also suggested that crossownership could be allowed even in those circumstances, if cable or broadcast service demonstrably could not exist absent such a combination.[495]

In the 1988 Video Study, NTIA recommended that Congress amend the 1984 Cable Act so as to permit the FCC to grant permanent waivers of the broadcast-cable crossownership prohibition on a case-by-case basis when the applicant could demonstrate that crossownership would not significantly lessen economic competition or diversity in that market.[496] NTIA argued that it could not be concluded that anticompetitive harms would result if this prohibition were lifted. For instance, a commonly owned broadcast station-cable system would have economic incentives to continue to carry other popular broadcast stations and cable networks.[497] Moreover, NTIA concluded that the potential benefits stemming from elimination of the prohibition -- increased efficiencies associated with consolidated production and administrative operations, preservation of television service in certain markets, and the resulting increased competitiveness of economically ailing broadcast stations -- could outweigh traditional concerns about maintaining program diversity in the local marketplace.[498]

In 1991, OPP's Broadcast Television Report concluded that "allowing combinations between broadcasters and other media, as long as they did not decrease the competitiveness

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492/ Id. at 79.

493/ Id. at 80.

494/ Id. at 80-81.

495/ Id. at 81.

496/ Video Study, supra note 350, at 63.

497/ Id. at 74.

498/ Id. at 74-76.

of local broadcast markets, could allow efficient use of programming and other resources."[499] It therefore recommended that Congress repeal the broadcast-cable crossownership ban in the Cable Act and that the FCC eliminate its own prohibition, subject to certain, unspecified conditions.

The FCC subsequently solicited comment in its Television NOI on whether its rules and policies remain justified in light of the trends described in OPP's report. Of particular relevance here, the FCC asked whether its ownership rules prevent realization of economies of scale and limit program investment that might otherwise promote the vitality of local stations. It also requested comment on the impact that changes in its crossownership rules would have on traditional diversity concerns and the extent to which changes in such rules would enable broadcasters to increase investments in programming, thereby increasing diversity.[500]

In 1992, the FCC concluded in the Network-Cable Crossownership proceeding that an absolute prohibition on broadcast-cable crossownership was no longer valid in light of the changes that had occurred in the video marketplace, and that local broadcasters should have the same opportunity as the networks to enter the cable industry.[501] It therefore recommended that Congress repeal the statutory prohibition to allow local broadcasters to own cable systems in their service areas.[502]

499/ Broadcast Television Report, 6 FCC Rcd at 4103.

500/ Television NOI, 6 FCC Rcd at 4962. Several parties addressed the broadcast-cable crossownership rule in their comments. One broadcaster urged the FCC to repeal the restriction, noting that it would enable co-owned media to pool their resources to provide news and local affairs programming, and could result in an increase of local programming on cable. Comments of Group One Broadcasting Limited Partnership at 9-10 (filed Nov. 21, 1991) in Television NOI. In contrast, several other parties -- including NAB and MPAA -- opposed elimination of the prohibition, arguing that cable systems affiliated with a local broadcast station would be able to discriminate against non-affiliated broadcast stations. See NAB Television NOI Comments, supra note 412, at 43-44; MPAA Television NOI Comments, supra note 412, at 21-23; Comments of Fisher Broadcasting Inc. at 6-7 (filed Nov. 21, 1991) in Television NOI.

501/ Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6167 (citing Comments of Chris-Craft/United Group at 10).

502/ Id.

2. Effect of the Broadcast-Cable Crossownership Prohibition on the Domestic Marketplace

Local broadcast stations and cable systems essentially are competing distribution media in the local marketplace. Broadcasters transmit a single channel of video programming over the air. Those stations affiliated with (or owned by) a television network primarily distribute a network schedule, complemented with locally produced programming (e.g., local news) and non-network programming purchased from syndicators. Independent stations rely more heavily on syndicators for their programming, thus acting as both program packagers and transmitters. Independent broadcasters also produce some of their own programming, although typically not as much as network affiliates.[503/] Local broadcast stations derive their revenues from the sale of advertising time within their schedule; in addition, network affiliates receive "compensation" from their networks for the carriage of network programming.[504/]

In contrast, cable systems provide subscribers with a multichannel package of video programming via a wire. As noted above, cable operators retransmit broadcast signals and act as distributors of cable-exclusive networks; they also originate a limited amount of their own programming. Cable operators derive the bulk of their revenues from cable subscription fees and, to a lesser extent, advertising.

The effect of the broadcast-cable crossownership rule, then, is a blanket prohibition on the merger of competing distribution outlets in the local marketplace.[505/] NTIA previously

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503/ According to OPP, 19% of the programming expenses of network affiliates is devoted to news, compared to 4% for independent stations. Broadcast Television Report, 6 FCC Rcd at 4031.

504/ See generally Lafayette, CBS Revises Plan to Cut Comp Fees, Electronic Media, Oct. 12, 1992, at 1; McClellan, NBC, Affils Agree on New Compensation, Broadcasting, Oct. 5, 1992, at 5; ABC Cuts TV Affiliate Compensation, Broadcasting, Aug. 19, 1991, at 41 (Affiliate Compensation).

505/ It should be noted, however, that the broadcast-cable crossownership rule is not an absolute bar to diversification by either broadcasters or cable firms into allied media fields. There are no restrictions on common ownership of broadcast stations and cable companies outside of the same market, and a number of major broadcast groups have found it advantageous to invest in non-local cable systems over the years. Therefore, to the extent that there are benefits to be derived from common ownership of broadcast stations and cable companies, some of those benefits can be

concluded that an absolute prohibition is unwarranted,[506] while the FCC has recommended that Congress repeal the ban altogether.[507] If Congress is unwilling to repeal the current ban, it should at least give the FCC the authority to grant a waiver of the crossownership rule when the benefits of waiver appear likely to outweigh any costs associated with lessened competition and diversity. In particular, a waiver may be warranted if the proponent of a proposed broadcast-cable combination can demonstrate that, if granted, either a sufficient number of independent media voices would remain in the market after the combination so as to maintain diversity,[508] or merger would enable an economically failing broadcast station to remain on the air.

3. Effect of Lifting the Broadcast-Cable Crossownership Prohibition on Globalization

While NTIA believes that lifting the broadcast-cable crossownership prohibition would produce domestic benefits, the effect on such action on the global competitiveness of U.S.-based firms is less clear. In particular, it seems unlikely that repeal of the broadcast-cable crossownership ban would have a substantial impact on the international marketplace for U.S. video programming or the incentives of U.S. broadcasters to engage in FDI. On the other hand, repeal of this rule may have some impact on the incentives of foreign-based firms to enter U.S. markets.

The effect of the broadcast-cable crossownership restriction on the export of programming is mixed. On the one hand, removal of this restriction could allow U.S. firms to realize greater efficiencies from combined operations, thereby strengthening their financial position; such firms, in turn, might increase their demand for programming, which could be

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attained under current law.

506/ Video Study, supra note 350, at 63, 74.

507/ Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6167.

508/ For instance, the FCC might consider adopting a waiver standard similar to that applied under the one-to-a-market rule, in which it would look favorably at waiver applicants operating in one of the top 25 television markets so long as there would be at least 30 separately owned, operated, and controlled broadcast licensees after the proposed merger. See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, First Report and Order, 4 FCC Rcd 1723 (1989).

met by both U.S. and foreign-based firms. On the other hand, repeal of the ban would not likely have a significant impact on the flow of U.S. programming abroad. This is so because local broadcasters do not produce a major amount of their own programming; instead, they are largely dependent on outside sources (either networks or syndicators) for the bulk of their programming. While repeal of this prohibition might result in some increase in local origination programming due to the efficiencies associated with consolidated operation, that programming is most likely to be locally oriented news and public affairs programming, which would not be suitable for export.

The effect of the broadcast-cable crossownership prohibition on FDI, either by foreign-based firms or by U.S. broadcasters, is equally mixed. As discussed in Chapter 6,[509/] the primary impediment to FDI in broadcast properties are the foreign ownership restrictions of many nations, including the United States. If those foreign ownership restrictions were liberalized, and the crossownership restriction were eliminated, there might be more FDI in the United States. In particular, to the extent that firms anticipate greater efficiencies from consolidated operation of a broadcast station and a cable company, there could be increased investment in such properties, both from U.S. and foreign-based firms.[510/] With respect to FDI by U.S. firms abroad, to the extent that U.S. firms are able to derive additional efficiencies from combined operation of a broadcast station and a cable system, their overall financial position would be strengthened, which could affect their ability to expand and diversify, both in the United States and abroad. Other than through such efficiencies, there is little reason to believe that a U.S. broadcast station/cable system combination would find it more profitable to invest in broadcast properties abroad -- or, for that matter, other types of mass media properties -- than would either of those two entities acting individually. Because the effect of modification of this rule on the globalization of mass media firms is uncertain, we base our recommendation for repeal primarily on the anticipated domestic, as opposed to international, benefits.

509/ See discussion supra at p. 73.

510/ Moreover, even if the U.S. foreign ownership rules are not liberalized, removal of the crossownership rule could result in greater FDI in the United States because foreign-based firms would have incentives to invest in such combinations up to the limits currently permitted.

D. The Broadcast-Newspaper Crossownership Prohibition

1. History of the Prohibition

The FCC adopted the broadcast-newspaper crossownership rule in 1975 after conducting a lengthy rulemaking.[511] After detailed analysis of the issues and the arguments made by numerous participants in the proceeding, the FCC decided to bar prospectively the same entity from owning both a radio station and a newspaper, or a television station and a newspaper, in the same market.[512] The FCC also ordered divestiture to take place within five years in a limited number of "egregious" cases in which, in its view, the existing broadcast-newspaper combination had "an effective monopoly" in the local "marketplace of ideas as well as economically."[513] Aside from those egregious cases, the FCC grandfathered all existing crossownership situations, while providing that such favored treatment would end if and when the grandfathered owner transferred the license to another party.

511/ The FCC originally proposed a broadcast-newspaper crossownership prohibition in 1970. See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 FCC 2d 339 (1970). The FCC adopted the crossownership ban in 1975. Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046 (1975) (Broadcast-Newspaper Crossownership Second Report and Order), recon., 53 FCC 2d 589 (1975), aff'd in part and rev'd in part sub nom. National Citizens Committee For Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), aff'd in part and rev'd in part, 436 U.S. 775 (1978).

512/ 47 C.F.R. § 73.3555(c). In particular, the FCC will not grant a radio or television broadcast license to any party when the signal of that station (defined as the predicted or measured 2 mV/m contour of an AM station, the predicted 1 Mv/m contour of an FM station, or the Grade A contour of a television station) encompasses the community in which a newspaper is published, if that newspaper is directly or indirectly owned, operated, or controlled by the station.

513/ Broadcast-Newspaper Crossownership Second Report and Order, 50 FCC 2d at 1080-81. In particular, it ordered divestiture in those instances in which (1) the same entity owned the sole broadcast outlet (either radio or television) and the sole daily newspaper in the local market, or (2) the same entity owned the sole television station and the sole daily newspaper in the local market (even if there also was an independently owned radio station).

In adopting these rules, the FCC's goal was to increase diversity of media ownership in the local marketplace, and therefore promote a diversity of voices and greater economic competition in the media.[514] In the FCC's view, this diversification policy addressed both First Amendment and antitrust concerns about excessive concentration of power in a single entity.[515]

Several parties challenged the FCC's actions in court on both statutory and constitutional grounds. In 1978, the Supreme Court upheld the FCC's action in its entirety.[516] The Court concluded that the FCC had acted within its statutory authority, and that the distinctions drawn between new and existing broadcast-newspaper combinations, and between grandfathered combinations and those subject to divestiture, were not arbitrary and capricious. The Court also rejected constitutional challenges raised by the newspaper industry, which had argued that the rules abridged its First Amendment right to speak.

The crossownership ban is not absolute, as the FCC has provided for both temporary and permanent waivers.[517] In adopting the rule, the FCC articulated several grounds that would justify grant of a waiver (or extension of an existing waiver): the owner is unable to sell the station, the owner can only sell at a distress price, or the "separate ownership and operation of the newspaper and station cannot be supported in the locality."[518] In addition, the FCC recognized that waiver could be appropriate in other circumstances in which the purposes of the rule would be best served by continued joint ownership.[519]

If a broadcast licensee acquires a company that publishes a daily newspaper, the FCC's practice is to grant automatically a temporary waiver of the rule for one year or until the

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514/ Id. at 1048, 1074-76.

515/ Id. at 1048.

516/ National Citizens Committee For Broadcasting v. FCC, 436 U.S. 775 (1978).

517/ In practice, the FCC has granted a permanent waiver only once, in unusual circumstances. Field Communications Corp., 65 FCC 2d 959 (1977).

518/ Broadcast-Newspaper Crossownership Second Report and Order, 50 FCC 2d at 1085.

519/ Id.

license renewal date, whichever is longer, to allow time for divestiture.[520] Temporary waivers of varying durations also are available if a newspaper publisher acquires a broadcast station.[521] The FCC also has granted temporary waivers to purchasers of grandfathered broadcast-newspaper combinations.

Congress has provided direction to the FCC in recent years to maintain the broadcast-newspaper crossownership rule and not to effectively overturn the rule through the waiver process.[522] Most recently, Congress included language in the FCC's 1993 appropriations bill prohibiting its use of funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and policies" of the FCC regarding newspaper/broadcasting cross-ownership.[523] Congress has enacted similar language in the FCC's appropriations bill each year since fiscal year 1988.[524]

520/ See id. at 1076 n.25.

521/ See, e.g., Metromedia Radio & Television, Inc., 102 FCC 2d 1334, 1353 (1985) (Metromedia), aff'd sub nom. Health & Medicine Policy Research Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986).

522/ In particular, Congress has expressed concerns that the FCC not grant waiver applications merely based on allegations that such action is necessary to protect the applicant from financial hardship. See, e.g., Media Mergers and Takeovers: the FCC and the Public Interest, Hearings Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. (1985), reprinted in part in 134 Cong. Rec. S65 (daily ed. Jan. 26, 1988). See also News America Publishing, Inc. v. FCC, 844 F.2d 800, 818-19 (D.C. Cir. 1988) (News America Publishing).

523/ Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. 102-395, 106 Stat. 1846 (1992).

524/ It appears that the original impetus for such congressional action was when the FCC requested public comment in November 1987 on a petition filed by the Freedom of Expression Foundation asking the FCC to commence a rulemaking to eliminate the broadcast-newspaper crossownership rule. A month later, Congress enacted the first of these statutory prohibitions. Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329 (1987). See also infra note 530.

2. Effect of the Broadcast-Newspaper Crossownership Prohibition on the Domestic Marketplace

In one sense, newspapers and broadcast stations are competitors in the local media marketplace, in that both are in the business of attracting audiences and selling those audiences to advertisers. In many respects, however, they are imperfect substitutes. The product market in which each operates is somewhat different: local newspapers primarily provide news and other forms of information, while radio and television broadcast stations provide significant amounts of entertainment programming, as well as news, to attract an audience for advertisers. Moreover, while both primarily sell to local advertisers,[525/] the geographic markets in which each sells advertising generally differ somewhat, depending on the location of neighboring broadcast stations and newspapers. Thus, the economic effect of the crossownership ban is to limit the merger of firms that are not direct competitors.

Moreover, while NTIA recognizes the longstanding commitment of the FCC to maintain a diversity of voices in the local marketplace, in many communities the number of voices, at least on the broadcast side, is fairly substantial, so that a newspaper-broadcaster affiliation would not seem to raise a serious threat to diversity. Moreover, it appears that co-ownership of broadcast and newspaper outlets in the same market may produce beneficial domestic effects in many instances. At the time the crossownership prohibition was adopted, a number of parties argued that jointly-owned broadcast station/newspaper combinations in the same market could provide better service to the public due to realization of efficiencies and economies in joint operation, greater financial stability, and an improved ability to disseminate news and informational programming.[526/] The FCC staff produced a study concluding that, on average, collocated newspaper-owned television stations broadcast significantly more minutes in several categories of local programming.[527/] Others argued

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525/ See Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd 2755, 2766 & n.50 (1992) (Radio Report and Order) (in 1990, 75% of total radio advertising expenditures were in the local spot market, 20% were in the national spot market, and 5% were in network advertising).

526/ See Broadcast-Newspaper Crossownership Second Report and Order, 50 FCC 2d at 1064.

527/ See id. at 1094, app. C. In particular, collocated stations programmed 6% more local news, 9% more local non-entertainment, and 12% more total local programming (including entertainment) than did other television stations. The study found those differences to be statistically significant when controlling for a

that newspaper-owned broadcast stations had benefitted, and would continue to benefit, from the journalistic resources and professional standards of their newspaper affiliates.[528]

In light of these factors, we question whether the current blanket prohibition on broadcast-newspaper crossownership is necessary to promote the competition and diversity goals that the FCC articulated over seventeen years ago in adopting this rule. The explosive growth of U.S. media outlets -- both broadcast and non-broadcast -- has been well documented.[529] In those markets where an abundance of media outlets exists, the need for an outright prohibition on crossownership seems speculative at best. In those instances, the benefits of co-ownership -- to both broadcast stations and newspapers -- might well outweigh the incremental benefits associated with having an "additional voice" in the community. While NTIA recognizes congressional interest in retention of the broadcast-newspaper crossownership ban, we suggest that Congress consider whether to permit the FCC to take into account, when reviewing waiver requests, the number and diversity of media voices in the local community.

3. Effect of Lifting the Broadcast-Newspaper Crossownership Prohibition on Globalization

The effect of modifying the broadcast-newspaper crossownership policy on the globalization of the mass media appears to be mixed. On the one hand, modification of the broadcast-newspaper crossownership rule to permit the FCC to take into account the degree of diversity in the local marketplace is unlikely to have a significant impact on the international marketplace for video programming or the incentives of U.S. broadcasters to engage in FDI. On the other hand, the rule may impede firms from assembling diversified media holdings in the United States.

Like the broadcast-cable crossownership restriction, the broadcast-newspaper crossownership rule affects local broadcast stations. As noted above, local broadcasters, as a

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number of different variables, such as network affiliation, UHF or VHF, group ownership, revenue size, total minutes broadcast during the week, and number of commercial stations in the market.

528/ See id. at 1064.

529/ See, e.g., Radio Report and Order, 7 FCC Rcd at 2757-58, 2765.

general rule, do not produce substantial amounts of their own programming. Moreover, while relaxation of the broadcast-newspaper prohibition could result in some increase in local programming, that programming is most likely to be locally oriented news, which would not be suitable for export. Changes to this crossownership rule therefore do not appear likely to have a significant effect on the supply of U.S. programming in the global marketplace. Similarly, removal of this rule is unlikely to affect U.S. import of foreign television programming; little such import occurs today, and removal of the rule would not appear likely to change the incentives or the ability of foreign-based firms to enter the U.S. market in such fashion.

Nor would relaxation of the broadcast-newspaper crossownership prohibition be likely to affect the investment patterns of U.S. broadcasters abroad. As previously noted, U.S. firms by and large are precluded from acquiring foreign broadcast outlets by the foreign ownership restrictions of other nations, just as foreign-based media firms are precluded from acquiring U.S. broadcast outlets. Even in the absence of such restrictions, however, it is unlikely that the economies inherent in joint operation of a newspaper and broadcast station in the same market would, standing alone, make it more likely for such a U.S. combination to invest in broadcast properties abroad.

On the other hand, the broadcast-newspaper crossownership rule may operate to impede the ability of firms to assemble diversified media holdings in the United States.[530/] To the

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530/ In one notable example, the rule directly affected the plans of a global media firm to acquire U.S. properties. As discussed infra in Appendix C at C-9, News Corp., an Australian company controlled by Rupert Murdoch, has extensive media holdings in Australia, Europe and North America. In 1985, News America Television Inc. (News America), a company controlled by Murdoch and, through several intermediate holding companies, News Corp., acquired the former Metromedia (now Fox) television stations. (Murdoch became a naturalized citizen in order to acquire U.S. broadcast licenses.) At that time, News America also published daily newspapers in two of the cities where the Metromedia stations were located: Chicago and New York. In 1986, News America acquired another television station, in Boston, where it also published a daily newspaper. In each case, the FCC granted News America a temporary waiver of the crossownership rule, expressly relying on the degree of diversity in each of the local markets. See Metromedia, 102 FCC 2d at 1353 (New York and Chicago); Twentieth Century Holdings Corp., 1 FCC Rcd 1201 (1986) (Boston). See generally News America Publishing, 844 F.2d at 804. News Corp. subsequently divested itself of one media holding in each market.

extent that this crossownership policy affects the competitiveness of such firms, it has some international consequences, as would its modification. Nonetheless, the case for providing the FCC with a broader waiver authority in this area primarily rests on potential domestic benefits.

The fact that the FCC granted such waivers to News America was a significant impetus behind Congress' original enactment of appropriations legislation barring the FCC from taking any action with respect to its broadcast-newspaper crossownership ban. In addition to the general ban on reconsideration of the crossownership policy, the appropriations legislation for fiscal year 1988 also contained a proviso barring the FCC from extending any current temporary waivers for television-newspaper combinations; the only ones in existence at the time were those granted to News America's holdings in Boston and New York. The Court of Appeals for the D.C. Circuit found the latter provision to be unconstitutional under the First Amendment. See News America Publishing, 844 F.2d at 815.

Chapter 9
THE NATIONAL MULTIPLE OWNERSHIP RULE

I. INTRODUCTION

In addition to rules that limit the crossownership of domestic media outlets, the Federal Communications Commission (FCC) has imposed restrictions on the number of broadcast stations that a firm may hold, both nationwide and in the same market. Of particular interest to us in this inquiry is the national multiple ownership rule. Until recently, that rule (also known as the "Twelve Station Rule") generally prohibited a single entity from owning more than twelve AM, twelve FM, or twelve television stations nationwide, or television stations with a combined national audience in excess of twenty-five percent.[531] In August 1992, the FCC liberalized its national multiple ownership rule for the radio services, allowing ownership of up to eighteen AM and eighteen FM radio stations nationwide.[532]

Historically, the FCC has justified its national multiple ownership rule, and modifications to it, based solely on its domestic effects.[533] In particular, the stated purpose of the national multiple ownership rule, since its inception, has been to encourage diversity of broadcasting ownership in order to foster the expression of varied viewpoints and programming, and to safeguard against undue concentration of economic power in the domestic marketplace.

531/ 47 C.F.R. § 73.3555(d) (1991). Under the FCC's attribution rules, any entity with a direct ownership interest in at least 5% of the outstanding voting stock of a corporate broadcast licensee generally is considered to have an attributable ownership interest. Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997 (1984). There are a number of exceptions to this rule, however, such as the FCC's "single majority stockholder" rule. 47 C.F.R. § 73.3555 Note 2(b).

532/ Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387 (1992) (Radio Reconsideration Order).

533/ See Revision of Radio Rules and Policies, Report and Order, 7 FCC 2755 (1992) (Radio Report and Order).

In this inquiry, we examine the rule from a different perspective. In the Notice, NTIA invited comment on the continued validity of the national multiple ownership rule in light of recent globalization trends.[534/] In particular, we inquired whether this rule promotes a healthy structure for the growth of our domestic media, and whether the rule unnecessarily restrains the growth of U.S. firms that otherwise might become more globally competitive. We also asked parties to assess the putative benefits of this rule -- the promotion of diversity and competition in the domestic marketplace -- and to weigh them against any global competitiveness considerations.

II. Summary of Comments

Two parties addressed the national multiple ownership rules in their comments. CBS argues that the multiple ownership rule "arbitrarily prevent[s] the networks (and others) from achieving efficiencies of scale and scope in an area of their expertise," and that there is no evidence of a marketplace dysfunction that would justify the rule.[535/] It argues more generally that restrictions on media structure are likely to impose costs that reduce the competitiveness of U.S. firms, noting that such rules arbitrarily prohibit acquisitions regardless of the level of competition in the relevant market, and are inflexible in response to changes in the marketplace.[536/] It concludes that such rules "unnecessarily impair the ability of U.S. broadcast networks and other domestic media companies to compete in the increasingly important global marketplace."[537/]

534/ Notice, 55 Fed. Reg. at 5797, para. 39. At the time of the Notice, FCC rules also prohibited ownership of two (or more) stations in the same service in the same market (known as the "duopoly" rule), 47 C.F.R. § 73.3555(a) (1991), and ownership of both a radio and a television station in the same market (known as the "one-to-a-market" rule), 47 C.F.R. § 73.3555(b) (1991). In the Notice, we focused on the national multiple ownership rule, but invited parties to comment on whether the local multiple ownership rules are implicated by the globalization of mass media firms. Notice, 55 Fed. Reg. at 5796, para. 36 n.31. No party responded to our invitation in its comments. Subsequent to the Notice, the FCC liberalized the duopoly rule. See infra note 560.

535/ Comments of CBS at 22.

536/ Id. at 23.

537/ Id. at 24.

News Corp. argues generally that the multiple ownership rules are not affected by globalization trends, as the rules affect only the operations of firms in the United States, and not operations abroad.[538] Although News Corp. does not specifically address any particular multiple ownership rule, it states that the antitrust laws are adequate to meet concerns about competition in the domestic media marketplace.[539]

III. IMPACT OF THE NATIONAL MULTIPLE OWNERSHIP RULE ON GLOBALIZATION

We now examine the effect of the national multiple ownership rule on the globalization of mass media firms. We first review the history of the rule, followed by an overview of the current state of group ownership today. Then, we discuss how the rule limits vertical integration and horizontal merger of U.S. broadcast stations and consider whether such limitations are necessary in today's marketplace. Finally, we ask whether the potential benefits that might be achieved through elimination of the rule would change the incentives of foreign-based firms to enter the U.S. market or would affect a U.S.-based firm's ability to compete more effectively in the global marketplace.

We conclude that the domestic mass media market is sufficiently diverse that the concerns about diversity and undue economic concentration that provided the original basis for the rule have lessened substantially. For that reason, while NTIA supports the FCC's recent decision to relax the rule for the AM and FM radio services, we believe the numerical limits could have been raised even further.[540] Indeed, in NTIA's view, domestic considerations would support substantial relaxation or even complete repeal of the national multiple ownership rule for both the radio and television services.[541] We conclude further

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538/ Comments of News Corp. at 22. News Corp. suggests that the multiple ownership rules apply equally to both domestic and foreign firms operating in the United States. We note, however, that the multiple ownership rules, as a practical matter, have little effect on those firms that are restricted from owning broadcast stations in the United States by the foreign ownership prohibition. 47 U.S.C. § 310(b) (1988).

539/ Comments of News Corp. at 23.

540/ See Opposition to Petitions for Reconsideration of the National Telecommunications and Information Administration at 5 (filed July 2, 1992) in Revision of Radio Rules and Policies, MM Docket No. 91-140.

541/ See id.; Comments of the National Telecommunications and Information Administration at 4-15 (filed Aug. 24, 1992) in Review of the Commission's

that elimination or relaxation of the national multiple ownership rule may increase the incentives of foreign-based firms to engage in foreign direct investment (FDI) in the United States and also may have some impact on the international competitiveness of U.S.-based firms. However, because the magnitude of this effect is uncertain, the primary impetus for repeal comes from domestic considerations.

A. Historical Development of the National Rule

1. Genesis of the Seven Station Rule

The FCC first adopted a national ownership rule for FM stations in 1940 in the course of adopting rules for the new FM service, limiting ownership to no more than six FM stations.[542] That same year, the FCC also adopted an ownership limit for the experimental television service, setting the limit at three television stations; it retained that limit when it adopted rules for the commercial television service in 1941,[543] but subsequently raised the limit to five in 1944.[544] The FCC created a de facto limit of seven in the AM service in 1946 when it denied CBS' application to purchase an eighth AM station, reasoning that the company had already reached the permissible number of stations.[545]

Regulations Governing Television Broadcasting, MM Docket No. 91-221 (NTIA Television NPRM Comments).

542/ Rules Governing Standard and High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940). The rule provided that no person "shall, directly or indirectly, own, operate, or control" more than six stations, and specified that "control" was "not limited to majority stock ownership, but includes actual working control in whatever manner exercised." Id. at 2384 n.6.

543/ Broadcast Services Other than Standard Broadcast, 6 Fed. Reg. 2282, 2284-85 (1941).

544/ Rules Governing Broadcast Services Other than Standard Broadcast, 9 Fed. Reg. 5442 (1944).

545/ Sherwood B. Brunton, 11 FCC 407, 413 (1946).

The FCC formally adopted a multiple ownership limit for all three broadcast services in a rulemaking in 1953.[546] At that time, the FCC decided to establish the limit at seven for FM stations, seven for AM stations and five for television stations.[547] Within a year, the FCC raised the limit for television stations to seven, no more than five of which could be VHF.[548] The underlying policy reason for adopting the "Seven Station Rule," as it came to be called, was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[549]

546/ The Amendment of Sections 3.55, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 18 FCC 288, 295 (1953) (1953 Multiple Ownership Report and Order).

547/ The FCC explained that the reason for different limits for television and radio was that there was a substantial disparity in the number of existing television and AM stations. Id. at 295 n.14.

The FCC considered alternatives to a numerical limit, such as limits based on a station's size, class, geographical location or population served, but rejected these proposals as "either unsatisfactory or unworkable." Id. at 292.

548/ It took this action, in part, to encourage the development of UHF stations. Amendment of Sections 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 FCC 2797 (1954).

549/ 1953 Multiple Ownership Report and Order, 18 FCC at 291-92.

2. The Twelve Station Rule

In 1984, the FCC raised the national multiple ownership limit to twelve stations for the three broadcast services.[550/] The FCC concluded that while a strong case could be made for complete repeal of the Seven Station Rule,[551/] it would adopt a transitional limit of

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550/ Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 100 FCC 2d 17 (1984) (1984 Multiple Ownership Report and Order).

In its comments in the 1984 proceeding, NTIA supported elimination of the Seven Station Rule, while urging the FCC to develop more sophisticated standards for its local multiple ownership rules (the duopoly rule and one-to-a-market rule). Reply Comments of the National Telecommunications and Information Administration at 3-4, 10-11 (filed Feb. 22, 1984) in Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Gen. Docket No. 83-1009.

551/ First, the FCC concluded that elimination of the rule would not jeopardize viewpoint diversity. In particular, the FCC reasoned that the market for ideas is local, as the public obtains information from whatever media are available in the local community -- radio, television, cable, newspapers and magazines. 1984 Multiple Ownership Report and Order, 100 FCC 2d at 19, 37, 54. Moreover, it concluded that to the extent that the market for ideas is national, the rule was unnecessary because: (1) the public obtains information from an abundance of media sources (both broadcast and non-broadcast) nationwide, and the number of such media sources had grown significantly since adoption of the rule; (2) group owners do not impose monolithic views on local media outlets; and (3) group owners tend to provide superior programming. Id. at 37-38, 54.

Second, the FCC concluded that repeal of the rule would not result in excessive economic concentration in the relevant markets for television or radio advertising, relying heavily on the comments of the Department of Justice (DOJ) in the proceeding. Id. at 40-42, 54.

Third, the FCC concluded that elimination of the rule could allow group owned stations to realize significant efficiencies stemming "from the ability to spread the services of management, bookkeeping, secretarial, sales, and programming personnel over a number of stations, and the potential for group advertising sales and program purchases." Id. at 45. The FCC also relied on evidence in the record that group ownership can foster superior newsgathering, editorializing and public affairs programming, and the development of programming through ad hoc networks. Id. at 19, 38, 54.

twelve stations per service for a period of six years "out of an abundance of caution."[552] On reconsideration the following year,[553] the FCC decided not to adopt an automatic sunset for the national multiple ownership rule and refined the rule in several important respects.[554] The FCC imposed an additional requirement that no entity may own television stations with an aggregate national audience greater than twenty-five percent,[555] as measured by Arbitron's Area of Dominant Influence (ADI) market rankings.[556] The FCC also modified the rule to encourage minority ownership by allowing group owners to own up to fourteen stations, and television stations with an aggregate national audience of thirty percent, so long as at least two of the stations are minority-controlled.[557]

552/ Id. at 55.

553/ Amendment of Section 73.3555 of the Commission's Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order, 100 FCC 2d 74, 91 (1985) (1985 Multiple Ownership Reconsideration).

554/ Id. at 96. The FCC adopted these various modifications partially in response to congressional concerns. Two months after the FCC adopted the 1984 Multiple Ownership Report and Order, Congress, in effect, imposed a moratorium on its implementation with respect to television stations. See Second Supplemental Appropriations Act, 1984, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984). The FCC stayed the effect of the Order until 60 days after reconsideration or April 1, 1985, whichever occurred later, in conformance with the congressional mandate. 49 Fed. Reg. 32,581 (1984). As a consequence, the Seven Station Rule for television remained in effect until April 2, 1985.

555/ The FCC also decided to discount the audience attribution for UHF stations by 50% to reflect the inherent physical limitations of the UHF medium. 1985 Multiple Ownership Reconsideration, 100 FCC 2d at 93.

556/ An ADI market is a geographic area consisting of all counties in which the home market stations receive a preponderance of viewing. Each station in the country is associated with one, and only one, ADI. For purposes of calculating compliance with the 25% cap, the television households in each station's ADI are added together, and that sum is then divided by the total number of television households in the United States. See 47 C.F.R. § 73.3555(d)(3).

557/ 1985 Multiple Ownership Reconsideration, 100 FCC 2d at 94.

3. The FCC's "Attic to Basement" Review

In 1991, the FCC commenced a so-called "attic to basement" review of its rules governing radio and television stations in two separate proceedings.[558/] Among other things, the FCC considered whether to modify its ownership rules.

In March 1992, the FCC decided to raise the national multiple ownership limit for radio from twelve to thirty stations per service.[559/] In August 1992, the FCC reconsidered that decision, and decided to allow ownership of up to eighteen stations in the AM and FM service, with that limit to be increased after two years to twenty stations.[560/] In its March 1992 action, the FCC was motivated in large part by a concern that much of the radio industry is facing, and will continue to face, serious financial difficulty, as its economic base has been eroded by increased competition for audiences and advertising from both radio and non-radio sources.[561/]

The FCC concluded that these trends are unlikely to be reversed, and that the industry, particularly small radio stations, would benefit from being able to consolidate administrative, sales, programming, promotion, production, and other functions. The efficiencies realized would, in turn, enable such stations to improve the diversity of programming provided to the

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558/ See Revision of Radio Rules and Policies, Notice of Proposed Rulemaking, 6 FCC Rcd 3275 (1991) (Radio NPRM); Review of the Policy Implications of the Changing Video Marketplace, Notice of Inquiry, 6 FCC Rcd 4961 (1991) (Television NOI).

559/ Radio Report and Order, 7 FCC Rcd at 2765. The FCC also decided to prohibit commonly owned stations in the same service serving substantially the same area from simulcasting more than 25% of their broadcast schedule, and it decided that any station that programmed more than 15% of the schedule of another station in its market would have to "count" that station for purposes of complying with both the national and local multiple ownership rules. Id. at 2761.

560/ Radio Reconsideration Order, 7 FCC Rcd at 6390. In addition, the FCC significantly revised its local ownership rules for radio broadcasting to permit a single firm to own three stations, no more than two of them in the same service, if the combination constitutes less than 50% of the stations in the market. In larger markets, a single firm may own up to two AM and two FM stations, provided the proposed combination does not lead to excessive concentration in the market. Id. at 6388.

561/ Radio Report and Order, 7 FCC Rcd at 2760.

public, including news and public affairs programming.[562] The FCC concluded that the likelihood of a single firm exerting dominance over the radio industry on a national level was small, noting that the number of radio stations and other mass media outlets had continued to grow dramatically since it last had relaxed the rule.[563] It also reiterated its conclusion from the 1984 proceeding that competition and diversity are primarily of local, not national, concern.[564]

As noted above, in August 1992, the FCC decided on reconsideration to allow initially ownership of up to eighteen, rather than thirty, stations in each radio service.[565] The FCC determined that although the competitive realities of the radio industry, as detailed in the Radio Report and Order of March 1992, fully justified significant expansion of the national limits, a more modest approach would permit the FCC to monitor marketplace developments and make further adjustments, if necessary.[566]

The FCC also is currently considering whether to revise its national multiple ownership rule for the television service.[567] Specifically, the FCC has requested comment on whether to increase the numerical cap from twelve to twenty or twenty-four television

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562/ Id. at 2760-61, 2766-67. While the FCC did not consider explicitly the impact that further consolidation in the industry might have on the competitive position of smaller groups and stand-alone stations, it clearly made a policy judgment that measures that would enable firms to take advantage of greater efficiencies were preferable to the current situation. At the same time, the FCC directed the Mass Media Bureau to prepare an annual report on the impact of the revised rules on competition, diversity, and minority ownership. Id. at 2789-90.

563/ In particular, it noted that the number of radio stations, particularly FM, had continued to grow dramatically (with over 11,000 stations available nationwide), radio increasingly faced competition from audio services delivered by cable, and non-radio services that compete with radio for both audience and advertising -- namely, broadcast television and cable -- had also grown significantly. Id. at 2765.

564/ Id. at 2766.

565/ Radio Reconsideration Order, 7 FCC Rcd at 6390. Two years after adoption of the rule, the limit is to increase to 20 stations per service. Id. at 6403.

566/ Id. at 6390.

567/ Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking, 7 FCC Rcd 4111 (1992) (Television NPRM). This proceeding is pending as of the time of this report's publication.

stations, while increasing the audience reach cap to thirty-five percent of the national audience; increase the numerical cap to eighteen stations with an audience reach limit of thirty percent; or increase the numerical limit alone, while retaining the twenty-five percent audience reach cap.[568]

A number of commenters in the Television NPRM proceeding (including NTIA, NAB, CBS, NBC, CapCities/ABC and INTV) urged the FCC to eliminate or relax the Twelve Station Rule for the television service, arguing that the rule could no longer be justified in today's marketplace and unnecessarily prevented the public from realizing the full benefits associated with group ownership.[569] For instance, CBS stated that its owned-and-operated stations realize significant savings from joint finance, sales, legal and other operations, and through joint acquisitions of goods and services, benefit from the expertise and experience acquired by CBS management and personnel over the years, and provide superior news coverage due to the pooling of resources among individual stations.[570] CBS also stated that its owned-and-operated stations have served as an important nucleus of its network operations, providing assurance that network programming will achieve at least minimal clearance and a base of personnel and economic resources upon which the network can draw.[571]

In contrast, a number of parties, including the Office of Communication of the United Church of Christ, the U.S. Catholic Conference, and the Telecommunications Research and Action Center, opposed repeal or relaxation of the rule. In general, these opponents of

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568/ Id. at 4114. The FCC also seeks comment on whether to retain an incentive for minority ownership, and, if so, how that incentive should be structured.

569/ See NTIA Television NPRM Comments, supra note 541, at 4-15; Comments of National Association of Broadcasters at 1-9 (filed Aug. 24, 1992) in Television NPRM (NAB Television NPRM Comments); Comments of CBS Inc. at 5-22 (filed Aug. 24, 1992) in Television NPRM (CBS Television NPRM Comments); Comments of National Broadcasting Company, Inc. at 7-24 (filed Aug. 24, 1992) in Television NPRM (NBC Television NPRM Comments); Comments of Capital Cities/ABC, Inc. at 3-16 (filed Aug. 24, 1992) in Television NPRM (CapCities/ABC Television NPRM Comments); Comments of the Association of Independent Television Stations, Inc. at 12-15 (filed Aug. 24, 1992) in Television NPRM (INTV Television NPRM Comments).

570/ CBS Television NPRM Comments, supra note 569, at 16-18.

571/ Id. at 18-19.

repeal argued that any relaxation of the rule would reduce programming diversity and thereby harm the public interest.[572]

B. Group Ownership Today

1. Radio

There are in excess of 11,000 radio stations today, of which nearly 10,000 are commercial stations.[573] Group ownership has increased in an absolute sense since the FCC relaxed its Seven Station Rule in 1984: the number of group owners has risen from 423 in 1985 to 542 in 1992, while the number of stations held by group owners has risen from 2,318 in 1985 to 3,414 in 1992.[574]

572/ See, e.g., Comments of the Office of Communication of the United Church of Christ at 10-11 (filed Aug. 24, 1992) in Television NPRM (group owners are less likely to meet their public interest obligations because they tend to air more nationally syndicated news and public affairs programming, and less locally produced programming).

573/ As of November 30, 1992, there were 4,961 AM stations, 4,766 FM stations, and 1,585 FM educational stations. Broadcast Station Totals as of November 30, 1992, Mimeo No. 30979 (FCC News Release, Dec. 15, 1992) (Broadcast Station Totals).

574/ Radio NPRM, 6 FCC Rcd at 3276 n.10; Broadcasting and Cable Market Place 1992 at J-81 to J-101 (1992) (NTIA calculations for group ownership in 1992 treat any three or more commonly owned radio stations as a group) (Broadcasting Market Place). At the same time, group ownership of radio stations remains far below the theoretical limits of the former Twelve Station Rule. Radio Report and Order, 7 FCC Rcd at 2768-69.

The top twenty-five radio group owners, as ranked by Broadcasting based on average total number of listeners, are set forth in the table below:

RADIO GROUP OWNERS(a)	FM STATIONS	AM STATIONS	RANK
CBS	13	8	1
Group W	7	9	2
CapCities/ABC	9	10	3
Infinity(b)	14	8	4
Cox(b)	8	5	5
Viacom(b)	10	3	6
Bonneville	8	6	7
Malrite	6	4	8
Gannett	8	7	9
Emmis	5	0	10
Greater Media(b)	7	7	11
Evergreen Media Corp.	8	4	12
Summit	5	3	13
Great American	10	7	14
Susquehanna	9	6	15
Shamrock	9	5	16
Jacor	7	5	17
Beasley Broadcast Group	11	4	18
Clear Channel Communications(b)	13	11	19
Nationwide	11	2	20
Noble(b)	10	8	21
EZ Communications(b)	8	2	22
Booth American	13	7	23
Park Communications(b)	11	11	24
Jefferson Pilot(b)	6	6	25

Source: Radio's Top 25 Groups, Broadcasting, Nov. 16, 1992, at 55.

(a) Ranked by Broadcasting using "Metro cume, 12-plus, Mon.-Sun., 6am-midnight," as reported in Arbitron's summer '92 survey, with limited exceptions.

(b) Includes pending acquisition.

Table 9.1: 1992 -- Top 25 Radio Group Owners

When the FCC liberalized the radio multiple ownership rule in 1992, a number of group owners expressed an interest in acquiring more radio stations, and a few have added stations

to their holdings.[575] As shown in Table 9.1, as of November 1992, three of the top twenty-five groups exceeded the former twelve station limit for either FM or AM stations: CBS, Infinity, and Booth American.[576]

According to many radio group owners, their individual stations have considerable independence to program according to the needs of their particular local markets.[577] The stations may produce such programming in-house,[578] or they may obtain it from their group owner, from national or regional radio networks,[579] or from syndicated program

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575/ See Gallagher, Infinity, Jefferson-Pilot First to Take Advantage of New Radio Rules, Broadcasting, Aug. 24, 1992, at 4; Viles, Surge, Not Frenzy, Seen in Radio Trading, Broadcasting, Mar. 16, 1992, at 5.

576/ Infinity and Booth American acquired stations after the August 1992 rule change. CBS acquired its thirteenth FM station in 1992, prior to the rule's liberalization. See CBS Annual Report, supra note 425, at 58. The FCC granted CBS a temporary waiver of the multiple ownership rule to allow CBS time to sell one of its other FM stations. See At Deadline: Buying and Selling, Broadcasting, Dec. 23, 1991, at 6. When the FCC liberalized its rule in 1992, it no longer was necessary for CBS to sell one of its FMs. In addition, Clear Channel Communications has a pending acquisition of a thirteenth station. See Radio's Top 25 Groups, Broadcasting, Nov. 16, 1992, at 55, 56.

577/ For instance, Infinity allows each of its stations to "make completely independent decisions with respect to . . . the types of programs that they wish to produce or acquire." Comments of Infinity Broadcasting Corporation at 17 (filed Aug. 5, 1991) in Radio NPRM. Infinity's stations program in a wide variety of formats, tailored to the needs of the local market. See also Reply Comments of CBS Inc. at 4 (filed Sept. 5, 1991) in Revision of Radio Rules and Policies.

578/ According to Gannett, most of its stations' programming originates locally, even if the station is a network affiliate. Gannett Co., Inc., Annual Report 1991, at 59 (1992) (Gannett Annual Report).

579/ National or regional network radio reaches 72% of all persons aged 12 or older. Westwood, Sheridan Post Gains in Radar 43, Broadcasting, Aug. 19, 1991, at 24. In 1992, there were well over 100 national and regional radio networks. See Broadcasting Market Place, supra note 574, at F-37 to F-50, F-52 to F-56. The CBS Radio Network provides news, sports and music programming to 1,300 affiliated stations nationwide, while the ABC Radio Networks provide programming, including ABC News and commentator Paul Harvey, to approximately 3,200 affiliates nationwide. CBS Annual Report, supra note 425, at 25; CapCities/ABC Annual Report, supra note 425, at 10. In 1992, ABC Radio Network announced the formation of a new 24-hour wire service, called ABC

services.[580] In addition, stations may obtain programming from other stations in their market under "time brokerage arrangements," also known as "local marketing agreements."[581]

As a result of this independence, the radio stations under group ownership often program in a variety of formats.[582] For those stations that broadcast in a music-oriented format -- predominantly FM stations -- the programming often is produced in-house by the local station, consisting of a series of musical recordings, selected and presented by a disc jockey, interspersed with news, weather, traffic, sports, and talk segments. To a lesser, but growing, extent, music-oriented stations also may air syndicated programming, such as

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News Wire, to be available only to its affiliates. ABC Radio Launches Wire with Reuters, Gannett, Broadcasting, June 22, 1992, at 28 (ABC Radio Launches Wire). Gannett, a major radio group owner, has licensed the right to market and distribute "USA TODAY Radio" to the ABC Radio Networks. Gannett Annual Report, supra note 578, at 53. Many stations affiliate with more than one program network, and few rely on networks for their entire supply. See Telecom 2000, supra note 88, at 515, 519.

580/ See, e.g., Radio Syndicators: 1991 Menu, Broadcasting, June 24, 1991, at 34 (Radio Syndicators) (lists 59 entities, including national networks and syndicators, that provide radio stations with programming).

581/ Traditionally, the term "time brokerage" has referred to the practice in which stations sell blocks of time to third parties seeking to provide specialized, niche programming for a limited portion of the station's broadcast schedule, often just a few hours per week. In recent years, the FCC staff, acting on delegated authority, has approved arrangements under which stations have entered into long-term agreements to broadcast programming provided by a third party, often another station in the market, over their entire broadcast schedule. In the Radio Report and Order, the FCC decided not to limit such local marketing arrangements, but concluded that when a station supplies more than 15% of the programming of another station in the same market, it is deemed to have an attributable interest in the latter station for purposes of the multiple ownership rule. It also imposed a requirement that stations in the same service serving substantially the same area not simulcast more than 25% of their broadcast schedule. 7 FCC Rcd at 2788-89.

582/ For example, Scripps Howard operates a country format combo in Portland, contemporary format FMs in Baltimore and Memphis, and a news/talk AM in Memphis. The E.W. Scripps Company, 1991 Annual Report 4 (1992). See also Cox Enterprises, Inc., Annual Report 1991, at 22 (1992) (Cox philosophy is to program each radio station separately).

"Casey's Top 40 with Casey Kasem."[583] For those stations that broadcast in a talk format -- predominantly AM stations -- the programming often consists of locally produced talk shows, supplemented with nationally syndicated shows. The programming of all-news stations typically is a mixture of news produced in-house,[584] news programming provided by the group, and network news material.[585]

2. Television

There are over 1,500 television stations today, of which nearly 1,150 are commercial stations.[586] The number of commercial station groups has remained stable in the last decade: there were 174 station groups in 1983 and the same number of groups in 1992.[587] The number of stations held by groups has risen in absolute terms, but has declined slightly on a percentage basis since repeal of the Seven Station Rule. In 1982, 571 out of 790 commercial television stations (72%) were under group ownership; in 1992, 773 out of 1,146 commercial stations (67%) were under group ownership.[588]

583/ See Viles, Syndicators Head for the Niches, Broadcasting, May 18, 1992, at 28 (Syndicators Niches); Radio Syndicators, supra note 580, at 34; Radio Syndication Proliferation, Broadcasting, July 25, 1988, at 56 (number of independent program suppliers growing, many of which provide music programming).

584/ Local stations may edit AP or UPI material to produce their own news.

585/ ABC Radio Launches Wire, supra note 579, at 28.

586/ As of November 30, 1992, there were 588 UHF commercial stations, 558 VHF commercial stations, 239 UHF educational stations, and 124 VHF educational stations. Broadcast Station Totals, supra note 573.

587/ Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Notice of Proposed Rulemaking, 95 FCC 2d 360, 378-79 & Table 5 (1983 Multiple Ownership NPRM); Broadcasting Market Place, supra note 574, at J-81 to J-101 (NTIA calculations for group ownership in 1992 treat any two or more commonly owned television stations as a group).

588/ 1983 Multiple Ownership NPRM, 95 FCC 2d at 378-79 & Table 4; Broadcasting Market Place, supra note 574, at J-81 to J-101 (NTIA calculations for group ownership in 1992 treat any two or more commonly owned television stations as a group). See also Group Ownership on the Rise, Broadcasting, Feb. 11, 1991, at 69, 71 (in 1990, more than 100 groups collectively owned 535 of the 699 stations (or 76.5%) in the top 100 markets; in 1988, 497 out of 647 stations (77%) in the

The top twenty-five television group owners, as ranked by Broadcasting based on audience reach, are set forth in the table below:

TELEVISION GROUP OWNERS	VHF STATIONS	UHF STATIONS	% OF AUDIENCE PENETRATION	RANK (a)
CapCities/ABC	7	1	23.83	1
CBS	7	0	22.12	2
NBC	6	0	20.38	3
Tribune Broadcasting	4	3	19.60	4
HSN Communications	0	12	18.67	5
Fox	4	3	18.64	6
Chris-Craft Industries	5	2	10.78	7
Univision Station Group	0	9	10.59	8
Gannett Broadcasting	8	2	10.31	9
Group W	5	0	9.89	10
Telemundo Group	0	6	9.35	11
Gillett Holdings	7	2	9.31	12
Scripps Howard	7	3	8.68	13
Cox Enterprises	6	1	8.54	14
Pinelands(b)	1	0	7.35	15
Hearst Broadcasting	6	0	6.81	16
A.H. Belo	5	0	5.78	17
Disney	1	0	5.32	18
Great American	6	0	5.24	19
Providence Journal	7	2	4.93	20
Paramount	0	6	4.89	21
Post-Newsweek	4	0	4.79	22
Lin Broadcasting	4	3	4.69	23
Gaylord	2	2	4.63	24
Multimedia	5	0	4.25	25

Source: Networks Still Tops in TV Group Ownership, Broadcasting, March 30, 1992, at 47.

(a) Ranked by Broadcasting, by ADI rank/percentage penetration, using Arbitron's 1991-92 estimated market and ADI household figures. Rounded to the nearest 1/100.

(b) Does not reflect pending purchase of Pinelands by BHC Communications, a subsidiary of Chris-Craft (see WWOR Sale to BHC Clears FCC, Broadcasting, Aug. 24, 1992, at 32.)

Table 9.2 -- 1992, Top 25 Television Group Owners

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top 100 markets were group owned).

As of March 1992, CapCities/ABC was the only firm among the top twenty-five groups effectively precluded from acquiring an additional station in a major market by the Twelve Station Rule's twenty-five percent audience reach cap, although it theoretically could acquire another station in a smaller market. CBS, NBC, and Fox all potentially could acquire one or more television stations, even one in a relatively large television market, and still remain under the twenty-five percent cap. Among the top twenty-five groups, HSN Communications (the Home Shopping Network) was the only group to reach the numerical limit of twelve stations.

The television networks[589] supply their "owned-and-operated" stations with a substantial amount of programming, some of which the networks produce,[590] and some of which they obtain from outside sources.[591] In contrast, non-network group owners are

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589/ For purposes of discussion in this chapter, we use the term "network" to refer to CapCities/ABC, CBS, NBC, and Fox. As discussed infra in Chapter 10 at p. 202, for purposes of the financial interest and syndication rules, a network is defined as any entity providing more than 15 hours per week of prime-time programming on a regular basis to interconnected affiliates that reach, in the aggregate, at least 75% percent of the television households nationwide. 47 C.F.R. § 73.658(j)(4) (1991). Under that definition, Fox is currently not a network.

For a further description of CapCities/ABC, see infra Appendix C at C-4. For a further description of CBS, see infra Appendix C at C-5. For a further description of NBC, see infra Appendix C at C-8. For a further description of Fox, see infra Appendix C at C-9. In addition to the four principal television networks, there are a number of quasi-networks, such as the Telemundo Group, Inc., a Spanish-language network that serves over 80% of the U.S. Hispanic market through both owned-and-operated stations and affiliates. Telemundo Group, Inc., Annual Report December 31, 1990, at 23 (1991) (Telemundo Annual Report).

590/ In addition, owned-and-operated network stations occasionally may air original entertainment programming produced by other stations in the group. See Lafayette, NBC Stations Put Local Spin on Saturdays, Electronic Media, Aug. 3, 1992, at 22 (NBC owned-and-operated station in Denver producing children's programming, which it planned to share with other stations in the group); CBS Television NPRM Comments, supra note 569, at 16-17.

591/ Often it is the network station group, and not the network entertainment division, that acquires programming to be aired on owned-and-operated stations. For instance, both the NBC and CapCities/ABC station groups have collectively purchased blocks of programming from major syndicators. See Freeman, NBC Does More Than Talk with Multimedia, Broadcasting, Jan. 27, 1992, at 22. See also McClellan, More Talk for Fox Stations, Broadcasting, Nov. 30, 1992, at 8

much less likely to provide their owned stations with a significant amount of programming. Many group stations are network affiliates, and groups often own stations that are affiliated with different networks.[592] Individual stations therefore acquire the bulk of their programming from their respective networks, rather than the group owner. Stations supplement that network programming with non-network programming (some of which may be obtained through the group and some of which may be purchased by the individual station from outside syndicators), and in-house produced programming, such as local news.[593]

Station groups that choose not to affiliate with the networks pursue a variety of strategies to provide programming to their stations. In some instances, the groups produce their own programming;[594] in other instances, they air syndicated programming.[595]

(Fox-owned stations acquiring syndicated talk show).

592/ See Gallagher, Networks Still Tops in TV Group Ownership, Broadcasting, Mar. 30, 1992, at 47-49.

593/ Great American Communications Company, owner of six network affiliates, has considered whether its stations could profitably create local programming for dayparts traditionally served with syndicated programming. Great American Communications Company, 1991 Annual Report 3 (1992).

On occasion, individual stations in a group produce programming that is syndicated to other stations. For instance, Belo Corporation's Sacramento station produces a nationally syndicated teen show Scratch. A.H. Belo Corporation, Third Quarter Report (1992).

594/ For instance, Tribune Co. provides its six independent stations with a significant amount of programming produced by its syndication arm, Tribune Entertainment. Tribune stations also are increasingly originating their own shows. In 1991, Tribune's New York station launched a program targeted to Hispanic young adults, which now is available in 32 markets. See Tribune Company, 1991 Annual Report 9, 11 (1992) (Tribune Annual Report); Freeman, Tribune Targets Minority Audience, Broadcasting, Mar. 9, 1992, at 26.

Chris-Craft Industries, owner of five independent and two network affiliated stations, has increased its "financial commitment to develop original, alternative programming." Chris-Craft Industries, Inc., 1991 Annual Report 6 (1992).

595/ See F. Setzer & J. Levy, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4086 (FCC Office of Plans and Policy Working Paper No. 26, 1991) (Broadcast Television Report).

C. Domestic Effects of the National Multiple Ownership Rule

Prior to considering the impact of the national multiple ownership rule on the globalization of mass media firms, we analyze the domestic policy justification for the rules. We examine whether the original rationales underlying adoption of national ownership caps -- that such limits are necessary to prevent undue economic concentration and promote diversity of programming -- apply in today's video marketplace. We also discuss how the national multiple ownership rule limits both domestic vertical integration and horizontal merger among broadcast stations in the United States. Such analysis is a critical predicate to understanding the effects of the rule on firms operating in an international marketplace.

On a national basis, the television and radio broadcast industries comprise many firms. In 1991, according to the National Association of Broadcasters (NAB), the Herfindahl-Hirschman Index (HHI)[596/] based on audience share for the television broadcast industry was 187, a figure far below DOJ's threshold for even a moderately concentrated industry of 1000.[597/] In 1992, there were 174 group owners of broadcast television stations in the

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In 1991, a group of independent stations, including station groups Chris-Craft, Gaylord, Renaissance, Cannell, Taft, and ABRY, formed a consortium, the Prime Time Network, to acquire a two-hour block of first-run syndicated programming from Warner Bros. Domestic Television Distribution. See Freeman, 'Babylon' Uses Computer to Battle Budget, Broadcasting, Sept. 21, 1992, at 29; McClellan, 'Kung Fu,' 'Time Trax' Set for 1993, Broadcasting, Feb. 17, 1992, at 26 (Kung Fu).

Station groups also often buy theatrical movie packages from studios and syndicators for distribution over their owned stations. See Coe, At the Movies at NATPE, Broadcasting, Jan. 27, 1992, at 6. In recent years, a number of station groups (including Chris-Craft Industries and Tribune) have joined with cable networks or superstations to bid on such programming. See Cable's Appetite for First-Run Movies Abating, Broadcasting, Sept. 23, 1991, at 56.

596/ DOJ uses the Herfindahl-Hirschman Index (HHI) to evaluate potential mergers within a relevant market under the antitrust laws. The HHI is calculated by summing the squares of the market shares of the firms within a particular market. According to DOJ, markets with an HHI below 1,000 are "unconcentrated," markets with an HHI between 1,000 and 1,800 are "moderately concentrated," and markets with an HHI over 1,800 are "highly concentrated." In its Radio Report and Order, the FCC noted that the HHI for the radio industry, calculated on a national basis, was only 49 in 1990. Id. at 2757 n.6, 2765-66.

597/ NAB Television NOI Comments, supra note 412, at 26.

United States.[598] Of these, only one (Home Shopping Network) is at the current numerical ownership limit, although several are near the twenty-five percent national audience reach cap. In 1990, the HHI for the nationwide commercial radio industry was forty-nine,[599] and there were 536 group owners of radio stations in the United States.[600] These national industry characteristics indicate that, even assuming it is economically sensible to analyze television and radio broadcasting as separate markets, and to exclude competing media sources from the analysis, those markets are far from being concentrated in any way that threatens competition.

As to the diversity effects of the national multiple ownership rules, the FCC's analysis performed in 1984, when it modified the predecessor to the current national ownership limits, is persuasive.[601] As the FCC noted, Americans obtain information from whatever media are available in their local communities -- radio, broadcast television, cable television, newspapers and magazines.[602] Although program production markets are national, and indeed increasingly international, broadcast television and radio stations serve viewers in their localities. Ownership of more than twelve television stations or eighteen AM or FM radio stations scattered across the country does little to affect program diversity in those individual local markets.

Some might argue that national ownership limits promote viewpoint diversity by preventing a single owner from speaking with the same voice in numerous local markets. NTIA believes, however, that due to the significant increase in the number of information sources in the United States since the rule was changed in 1984 from a seven station limit, it is extremely unlikely that any group owner could "homogenize" nationally the information that Americans receive. In 1984, there were 1,138 full power television stations (841

598/ See discussion supra at p. 181.

599/ Radio Report and Order, 7 FCC Rcd at 2757 n.6.

600/ See Radio NPRM, 6 FCC Rcd at 3276 n.10.

601/ 1984 Multiple Ownership Report and Order, 100 FCC 2d at 37, 54.

602/ Id. at 27 ("[V]iewers in San Francisco, St. Louis and Philadelphia each judge viewpoint diversity by the extent of sources of ideas available to them, not by whether those same or other ideas are available in other broadcast markets.").

commercial and 297 educational),[603] 327 low power television stations,[604] and 8,864 radio stations (4,747 AM and 4,717 FM);[605] today, there are 1,509 full power television stations (1,146 commercial and 363 educational), 1,311 low power television stations, and 11,312 radio stations (4,961 AM and 6,351 FM).[606] In 1985, cable television systems passed seventy-six percent of the nation's homes and forty-three percent of households subscribed;[607] today, cable passes over ninety percent of U.S. households, and sixty percent of all households subscribe.[608] In 1985, there were sixty-seven cable networks nationwide;[609] now, there are more than eighty national basic cable networks,[610] and, if regional ones are included, over one hundred networks.[611] In 1985, twenty-one percent of all households had a videocassette recorder (VCR); in 1991, seventy-seven percent did.[612]

As a practical matter, group-owned stations have generally spoken with local voices, not as mouthpieces for a monolithic national voice. It appears to be industry practice that group-owned stations exercise local autonomy over local news and public affairs

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603/ 56 Television & Cable Factbook at C-299 (Cable & Services Vol., 1988 ed).

604/ Broadcasting Yearbook 1986, at C-81 to C-85.

605/ 1984 Multiple Ownership Report and Order, 100 FCC 2d at 27-28.

606/ Broadcast Station Totals, supra note 573.

607/ Broadcast Television Report, 6 FCC Rcd at 4044 & Table 15.

608/ Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Report and Order, 7 FCC Rcd 6156, 6162 (1992) (Network-Cable Crossownership Report and Order).

609/ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 4966 (1990).

610/ Radio Report and Order, 7 FCC Rcd at 2757-58.

611/ See Television NPRM, 7 FCC Rcd at 4112.

612/ Broadcast Television Report, 6 FCC Rcd at 4066 & Table 20; Network-Cable Crossownership Report and Order, 7 FCC Rcd at 6164.

efficiencies by reducing transaction costs,[621] and is important to the operation of a viable broadcast network.[622] The national multiple ownership rule thus unnecessarily restrains potential new network entrants, the four principal broadcast networks, and other group owners from realizing efficiencies that permit them to compete effectively against vertically integrated cable operators and networks, which are free from similar restrictions. Because group ownership can increase efficiency in the broadcasting marketplace and add to diversity in program production, U.S. policy should permit groups to develop as needed to realize these benefits. A more flexible multiple ownership policy could result in new entry into the programming market, or the development of new networks or network-like organizations, if groups were permitted to expand to the levels needed to support such activities.

Greater vertical integration between networks and affiliate broadcasters also may benefit broadcast stations and, through them, viewers of those stations. As group owners, networks are more directly concerned with the operational strength of their owned-and-operated stations than their affiliates because the overall profitability of the owned-and-operated stations directly affects the networks.[623] For instance, CBS states that it provides CBS News materials, personnel, and technical facilities to its owned-and-operated stations that are

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further enhance the distribution of its programming. Id.

621/ See Network Inquiry, supra note 395, at 399.

622/ See, e.g., Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Notice of Proposed Rulemaking, 95 FCC 2d 360, 368 (1983) (1983 Multiple Ownership NPRM) (citing Amendment of Section 3.363 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 FCC 2797, 2801-02 (1954)).

623/ See Reply Comments of Capital Cities/ABC, Inc. at 4 n.4 (filed Apr. 7, 1992) in Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 586 (1991) (CapCities/ABC's eight owned stations "consistently produce by far the lion's share" of the company's operating profit each year); Media Ownership: Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. 487 (1989) (statement of NBC CEO Robert C. Wright) (profits of network owned-and-operated stations help support the company).

not available to non-owned CBS affiliates.[624] To the extent that the present multiple ownership rule prevents even greater efficiencies from being realized, it should be removed.

In NTIA's view, not only is the national multiple ownership rule unnecessary, it is counterproductive as well. Given the fierce competition for programming and viewers among broadcasters and other media, extensive FCC regulation of this industry's structure can impair broadcasters' economic competitiveness. By handicapping the providers of free, over-the-air television, such regulation ill serves the viewing public. Moreover, to the extent that the current rules limit the efficiencies that broadcasters can realize in delivering information to American homes, the rules disserve the FCC's viewpoint diversity goals.

Some might argue that the fact that only a few groups have reached, or are even close to reaching, the limits imposed by the current national multiple ownership rule demonstrates that firms are unlikely to achieve greater efficiencies through repeal or further liberalization of the rule. However, there is no precise means to determine the "optimal" degree of vertical integration or horizontal concentration in the broadcast industry. It is possible that firms may not realize significant additional efficiencies by owning twelve stations as opposed to, say, nine stations. It may be as likely that firms would realize significantly greater efficiencies if they could own thirty stations, for instance, instead of twelve.[625] More importantly, regardless of the extent to which liberalization of the rule would result in groups growing beyond their current size, there is little reason to retain a rule that is no longer necessary.[626] For these reasons, while we support the FCC's decision in August 1992 to

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624/ CBS Television NPRM Comments, supra note 569, at 17-18.

625/ As discussed supra note 595, in 1991, a number of stations, including several station groups formed a consortium to acquire programming from Warner Bros. Domestic Television Distribution. See Kung Fu, supra note 595, at 26. The fact that these stations have formed a consortium suggests that additional efficiencies may be obtained above the current limit. It may be the case that a number of those groups that currently fall shy of the 12 station limit for television would be interested in merging with another group, if the rule were relaxed or eliminated.

626/ As we have shown supra at pp. 185-188, removal of the rule would not jeopardize competition or viewpoint diversity. Moreover, if the market, not the rule, is constraining the size of broadcast station groups, the rule serves no function. Repealing the rule would only affect the industry's structure to the extent that owning more than 12 stations would increase the efficiency of certain group owners' operations. The rule is inhibiting those pro-efficiency ownership arrangements from taking place.

liberalize its radio ownership rules, we believe that those numerical limits could have been raised even further. Indeed, based on domestic considerations alone, we believe the national multiple ownership rule could be eliminated altogether or substantially relaxed[627] for both the radio and television services with little risk to economic competition or viewpoint diversity and potential significant benefits for the efficiency and competitiveness of those industries.[628]

While we are not addressing the local multiple ownership rules in this report, we do note that different considerations apply to them, which have led NTIA to support retention of modified forms of those rules for both radio and television. See NTIA Television NPRM Comments, supra note 541, at 15-23.

627/ Given congressional interest in the FCC's decision in 1992 to liberalize the radio multiple ownership rule, and in light of the strongly diverging opinions on this subject, we recognize that the FCC may conclude that immediate elimination of the national multiple ownership rule for the television service is too dramatic a change. If that is the case, we recommend that the FCC take a phased approach in lessening its regulation of the television industry, initially increasing the station limit to 24 stations and the audience reach cap to 40% percent, and then reviewing marketplace conditions every two years thereafter to modify further or eliminate the rule.

628/ NTIA believes that the effect of Commission regulations on small businesses, particularly those owned by new entrants and minority firms, is an important consideration, and that increased minority ownership of broadcast and other communications is a major policy objective. NTIA has sought to facilitate greater minority participation in the broadcast industry through its executive management training program for new minority station owners, ComTrain, and it has devoted substantial energy and resources to measuring U.S. progress in this area. Cf. Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Dep't of Commerce, Compilation by State of Minority-Owned Commercial Broadcast Stations (Nov. 1992) (a statistical analysis based on a compilation of licenses in the United States in 1992) (1992 Statistics).

However, the efficacy of the national multiple ownership rule in meeting the objective of increased minority ownership is speculative. It appears that minority ownership of broadcast television stations, while still very small, actually grew slightly from 1983, immediately before the limit on national ownership was changed from seven to twelve stations, through 1992. Compare National Association of Broadcasters, Minority Broadcasting Facts, Sept. 1986, at 8 (1.8% of all U.S. broadcast television stations in 1983 were owned by minorities) with 1992 Statistics, supra (2.8% of all commercial U.S. broadcast television stations in 1992 were owned by minorities).

D. Global Effects of the National Multiple Ownership Rule

As discussed in Chapter 2, media firms can compete internationally by FDI or in exporting. In the remainder of this chapter, we consider the extent to which the national multiple ownership rule affects the international competitiveness of media firms, both U.S. and foreign-based.

We first examine the impact that elimination of the national multiple ownership rule would have on FDI by foreign-based media firms in the United States. As discussed in Chapter 6,[629] major impediments to FDI in broadcast stations, both in the United States and in other countries, are foreign ownership laws that limit the amount of foreign investment permitted in broadcast licensees. For this reason, elimination of the national multiple ownership rule by itself would have only a limited effect: foreign-based firms might have additional incentives to engage in FDI in broadcast stations in the United States, but such FDI would still have to fall under the thresholds set forth in Section 310(b) of the Communications Act.[630] On the other hand, if the U.S. foreign ownership rules were

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> Moreover, we believe the rule must be evaluated in light of its overall effect on the television industry. As we have shown, the rule prevents broadcasters from realizing efficiencies that could benefit all viewers. In the long run, neither small business and minority broadcasters nor their viewers benefit from regulatory policies that impair the efficiency and competitiveness of over-the-air television stations.
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> NTIA believes that the Commission should pursue less burdensome and more effective ways of attempting to pursue the goal of greater small business, and minority, broadcast ownership. In this regard, we agree with the Commission that the single greatest impediment to greater minority participation in the communications industry is lack of access to capital. See Radio Report and Order, 7 FCC Rcd at 2770. We are encouraged that the Commission has sought comment on actions it might take to foster the availability of capital in the broadcast industry. Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Notice of Proposed Rulemaking and Notice of Inquiry, 7 FCC Rcd 2654, 2659 (1992). We suggest that the Commission closely monitor the effect of its television rules on diversity and competition in the television broadcast industry.

629/ See discussion supra at p. 73.

630/ As discussed supra in Chapter 6 at p. 77, an alien or foreign corporation may hold up to a 20% interest in a corporation that holds a U.S. broadcast license. Moreover, as discussed supra at p. 77, the FCC does not allow foreign

liberalized and the national multiple ownership rule were eliminated, foreign-based firms might seek to acquire U.S. broadcast properties outright because they, like U.S.-based firms, would anticipate benefitting from the greater efficiencies that would be possible after repeal.

Elimination of the national multiple ownership rule could also increase the incentives of all firms, whether U.S.- or foreign-based, to invest in diversified U.S. media businesses that own U.S. broadcast stations as well as other interests. Indeed, a domestic or foreign-based investor might be particularly interested in acquiring a U.S. media firm that owned both broadcast stations and a program production company because those broadcast stations represent a likely outlet for the programming produced by the firm. To the extent that such diversified U.S. firms could realize additional efficiencies from group ownership, they would be more attractive for investment purposes to both U.S. and foreign-based firms. Such increased investment in U.S. media firms, in turn, would be beneficial, both by increasing the flow of capital into the industry and by spurring U.S.-based firms to operate more efficiently in a more competitive domestic marketplace.

We also consider the effect that elimination of the national multiple ownership rule would have on the incentives of U.S. media firms to engage in FDI. Repeal of the rule would not have a significant impact on FDI by U.S. firms in foreign broadcast stations because such investment is largely precluded by the foreign ownership laws of many nations. On the other hand, U.S. firms generally are permitted to invest in foreign ventures to produce and distribute programming.[631/] It appears that the only U.S. broadcast station group owners that have engaged in such foreign activities are those that also operate radio or television programming networks.[632/] Elimination of the national multiple ownership rule could improve the financial position of these networks by allowing them to acquire more affiliates, and thereby eliminate the vertical externalities present in the network-affiliate

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corporations to own more than a 25% interest in holding companies that own broadcast licensees.

631/ As discussed supra in note 61, however, some nations limit foreign participation in program production.

632/ As discussed infra in Appendix C at C-5, CapCities/ABC has invested in a number of European program production firms. In the radio area, the CBS Radio Networks have explored European business opportunities and entered into a venture with a London radio station to produce an "oldies" show with American and British co-hosts. See CBS's Nancy Widmann: A Healthy Business, But the Toughest Year in Memory, Broadcasting, Sept. 9, 1991, at 30-31.

relationship. Such acquisitions would provide the networks with an assurance that their programming would clear a greater number of stations in the United States, which would increase their advertising revenues. In addition, the radio and television networks may realize some additional efficiencies stemming from the economies of scale associated with owning a greater number of stations. To the extent that a network group owner is in a financially stronger position in the United States, it presumably is more likely to have available capital, which it could invest in foreign programming ventures abroad.[633/] Elimination of the national multiple ownership rule therefore may have some impact on the ability of U.S. network group owners to invest in foreign programming ventures, although the magnitude of this impact is uncertain.

The final question is what impact, if any, elimination of the national multiple ownership rule would have on the flow of programming across international borders. It is unlikely that elimination of the national multiple ownership rule would have much impact on the incentives of foreign-based firms to import programming into the United States. As discussed in Chapter 2, little such activity occurs today,[634/] which largely can be explained by the worldwide strength of the U.S. program production community and the preference of Americans for U.S.-produced programming. Because elimination of the national multiple ownership rule is unlikely to change either of these conditions, one would expect little change in the flow of programming into the United States.

It is not clear whether elimination of the national multiple ownership rule would enable U.S. broadcast station group owners to export more programming. As discussed in Chapter 4,[635/] firms that produce programming have economic incentives to distribute it as widely as possibly in order to reduce the per viewer cost of that product. Programming that is successfully, i.e., widely, distributed in the United States presumably has mass appeal and will be more suitable for export, to the extent that the tastes of foreign audiences are similar to those of U.S. audiences.

633/ Of course, it is not clear to what extent a network in those circumstances would choose to engage in FDI in foreign programming ventures; it would do so only if those ventures appear to be more profitable than those available in the United States, all other things being equal.

634/ See discussion supra at note 160 and accompanying text.

635/ See discussion supra at p. 61.

The market for the export of U.S. radio programming is very different from the market for the export of U.S. television programming. Radio programming is a very fragmented market, with numerous program suppliers serving small niche markets.[636] The firms that tend to export radio programming are those that distribute programming most widely in the United States -- radio syndicators.[637] Unlike television, in which a number of group owners have become actively involved in program production and syndication, radio group owners have generally not entered the syndication market and thus do not produce much programming for wide distribution in the United States.[638] Moreover, a significant amount of the programming produced by group owners for mass distribution in the United States is news and sports, much of which would generally not be suitable for export. Given these facts, it does not appear that elimination of the national multiple ownership rule would have much impact on the ability of radio group owners to export U.S. programming.[639]

The export market is significantly different for the U.S. television industry. Most broadcast television programming is produced for a national market and distributed primarily through one of two avenues: carriage by network affiliates or syndication. The broadcast networks and many of the firms that syndicate programming domestically also distribute that programming abroad. Thus, in addition to the four principal network group owners, a number of other group owners produce programming (mainly through affiliated companies)

636/ While stations are relying more on syndicated material, the trend toward format fragmentation is making it increasingly difficult for radio networks and syndicators to produce generic programming for broad national distribution. Instead, syndicators are customizing their product to distinct markets. See Syndicators Niches, supra note 583, at 28. See also Radio Report and Order, 7 FCC Rcd at 2758 (radio programming has become increasingly diverse and targeted, with 35 major formats and more than 20 minor formats).

637/ See generally Radio is Growing Overseas, Broadcasting, Oct. 8, 1990, at 57 (discusses efforts of radio program syndicators to market U.S. programming abroad).

638/ But see Infinity Eyes Syndication Business, Broadcasting, Nov. 30, 1992, at 36 (group owner Infinity Broadcasting considering whether to expand into radio syndication business).

639/ Radio syndicators are not subject to the national multiple ownership rule (unless they also own broadcast stations).

that is distributed abroad, including Group W,[640] Telemundo,[641] Tribune,[642] Hearst,[643] and Paramount Stations Group.[644] Such international activities appear to be a logical extension of their domestic efforts to produce and syndicate programming widely in the United States. To the extent that elimination of the national multiple ownership rule would enable firms to realize greater efficiencies from vertical integration of program production and distribution, those firms would be better able to produce programming with greater mass appeal, which, as we have discussed, may be more suitable for export.

In sum, repeal of the national multiple ownership rule for both radio and television broadcast stations may have some impact on the globalization of mass media firms. On the one hand, elimination of the rule by itself would not result in significant FDI in U.S. media

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640/ Group W Television operates five television stations. Group W Productions produces and syndicates radio and television programming, both domestically and abroad. One notable example is "Teenage Mutant Ninja Turtles," which Westinghouse Broadcasting International (WBI) has marketed to more than 50 countries. Westinghouse Electric Corporation, Annual Report 1990, at 6 (1991). Since 1990, WBI has been involved in a co-production venture with Mitsubishi International Corp. to produce a television series in the United States that is distributed exclusively over Japanese television. In 1992, WBI entered into a more extensive production/distribution agreement with Mitsubishi. Syndication Update: WBI/Mitsubishi Deal, Broadcasting, Feb. 10, 1992, at 36.

641/ Telemundo, a Spanish-language network with six owned stations, has an international syndication division, which develops overseas markets for its U.S.-produced Spanish-language programming. Telemundo Annual Report, supra note 589, at 4.

642/ Tribune Broadcasting owns seven stations. Its affiliate, Tribune Entertainment, produces a number of shows, alone or in partnership with other entities, which are syndicated in both domestic and international markets. For instance, "Geraldo" is distributed in Russia and the Ukraine, while "Joan Rivers" is distributed in Israel. Tribune Annual Report, supra note 594, at 20.

643/ Hearst Broadcasting, a division of Hearst Corp., owns six stations. The affiliated syndication arm, Hearst Entertainment, has estimated that 75% of that company's post-network revenues come from abroad. Prognosis for International TV, Broadcasting, Sept. 23, 1991, at 52.

644/ Paramount Stations Group owns six stations. Paramount syndicates its programming in more than 119 foreign markets. Internationally, Paramount's television sales have nearly doubled over the last five years. Paramount Annual Report, supra note 618, at 10.

firms that own broadcast stations by foreign-based firms because such FDI would still be subject to the thresholds established in the U.S. foreign ownership law. On the other hand, repeal of the rule could strengthen the overall financial position of U.S. broadcast station group owners, which could strengthen their ability to invest in foreign media ventures. It also is possible that elimination of this rule would allow more efficient integration of program production and distribution in the United States, which could lead to a greater flow of programming across international borders. Thus, while the major impetus for change comes from the domestic benefits associated with repeal, repeal could also promote the globalization of mass media firms.

Chapter 10

FINANCIAL INTEREST AND SYNDICATION RULES

I. INTRODUCTION

We have discussed how "globalization" can take place through export and foreign direct investment (FDI). The Federal Communications Commission's (FCC) rules governing the participation of U.S. broadcast television networks in financing and syndicating television programming affect both the export of programming from the United States and the conditions under which U.S.-based firms invest in foreign productions. For example, the FCC rules originally adopted in 1970, and several consent decrees entered into by the Department of Justice (DOJ) and ABC, NBC and CBS, the three major broadcast television networks, limited the networks' ability to export programming through international syndication and to enter into co-production ventures with foreign entities. On the other hand, program producers viewed these rules as enhancing their ability to compete in supplying programming internationally.[645]

The financial interest and syndication rules adopted by the FCC in 1991 remove some regulatory impediments to the networks' ability to engage in export of programming and FDI. On November 5, 1992, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) vacated the FCC's 1991 rules.[646] On December 7, 1992, the Seventh Circuit stayed the effect of its November 5 decisions for 120 days, giving the FCC an opportunity to conduct further proceedings, which it initiated on December 31, 1992,[647] to formulate new

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645/ Comments of MPAA at 6; Comments of the Coalition to Preserve the Financial Interest and Syndication Rule at 38-40 (filed as Reply Comments to NTIA's Notice on July 10, 1990) (previously filed on June 14, 1990 in Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162).

646/ Schurz Communications, Inc. v. Federal Communications Commission, No. 91-2350, slip op. at 22 (7th Cir. Nov. 5, 1992), clarified, slip op. at 4 (7th Cir. Dec. 7, 1992).

647/ Evaluation of the Syndication and Financial Interest Rules, Second Further Notice of Proposed Rulemaking, MM Docket No. 90-162, FCC 92-573 (rel. Dec. 31, 1992).

or modified rules or a new justification for the 1991 rules.[648] With those proceedings in mind, NTIA believes it is important to reexamine certain aspects of the 1991 rules. Because the global competitiveness of the U.S. programming industry is enhanced when all U.S. firms can participate in global markets, some aspects of the 1991 rules could increase the participation of U.S. firms in the international programming marketplace. As we discuss below, however, other aspects of those rules could continue to limit U.S. international competitiveness in this area.

II. THE EVOLUTION OF THE 1991 RULES

As stated in the Notice,[649] the FCC first adopted financial interest and syndication rules in 1970[650] to promote creative diversity in television program production and to curb the perceived anticompetitive control by ABC, CBS, and NBC of the financing, development, and syndication of television programming. Because, at that time, the three networks controlled most outlets for television programming (through affiliation with, or ownership of, broadcast television stations), the FCC was concerned that the networks had excessive bargaining power over non-network program producers that would enable the networks to extract undeserved financial and syndication concessions from producers as a condition of network exhibition. Generally, the 1970 rules prohibited the networks from obtaining a financial interest in programs not produced solely by them.[651] The rules also prohibited the networks from syndicating any programs in the U.S. or foreign syndication of

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648/ Schurz Communications, Inc. v. Federal Communications Commission, No. 91-2350, slip op. at 4 (7th Cir. Dec. 7, 1992).

649/ Notice, 55 Fed. Reg. at 5797, para. 41.

650/ See 47 C.F.R. § 73.658(j)(1)-(3) (1971) (the "1970 rules").

651/ In 1981, the FCC clarified that the 1970 rules applied only to financial interests in the broadcast of television programs and did not preclude networks from holding non-broadcast interests, such as the rights for distribution through cable and videocassettes. Request by CBS, Inc. for a Declaratory Ruling on Section 73.658(j)(1)(ii) of the Commission's Rules, Memorandum Opinion and Order, 87 FCC 2d 30 (1981).

programs, except that they could engage in foreign syndication of programs solely produced by the network or foreign-produced.[652]

As noted above, network program production activities have been further limited pursuant to several consent decrees[653] (Network Consent Decrees) that settled antitrust actions brought by the Department of Justice against the three networks. These decrees, portions of which have expired, restrict ABC, CBS, and NBC from the activities that the FCC independently proscribed in its 1970 rules. They prohibit the networks from acquiring a financial interest in any program wholly or partly produced by an independent supplier.[654] They also prohibit the networks from syndicating programs domestically or internationally, except that the networks may syndicate overseas programming solely produced by them or an affiliated interest, or programming produced in a foreign country that is not aired on the network.[655]

652/ Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, 26 FCC 2d 28, 31 n.3 (1970) (syndication restrictions do not apply to the acquisition of foreign-produced programs for foreign distribution).

653/ United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal.), aff'd mem. No. 77-3381 (9th Cir. Apr. 12, 1978), cert. denied, 444 U.S. 830 (1979) (NBC Consent Decree); United States v. CBS, Inc., No. 74-3599-RJK (C.D. Cal. July 3, 1980), reprinted in 45 Fed. Reg. 34,463 (1980) (CBS Consent Decree); United States v. ABC, Inc., No. 74-3600-RJK (C.D. Cal. Nov. 14, 1980), reprinted in 45 Fed. Reg. 58,441 (1980) (ABC Consent Decree).

654/ NBC Consent Decree, 449 F. Supp. at 1131; CBS Consent Decree, 45 Fed. Reg. at 34,465; ABC Consent Decree, 45 Fed. Reg. at 58,442.

655/ NBC Consent Decree, 449 F. Supp. at 1131; CBS Consent Decree, 45 Fed. Reg. at 34,465; ABC Consent Decree, 45 Fed. Reg. at 58,443. Unlike other portions of the Network Consent Decrees, these provisions have no expiration date. In 1990, a provision expired in each of the Network Consent Decrees that limited the number of hours of programs that the networks can produce "in-house." Id. Other provisions of the Network Consent Decrees not found in the 1970 rules are scheduled to expire in 1995, including restrictions on the use of network production facilities by programmers, and a four-year "option limit" on the networks' ability to buy a producer's option to exhibit a prime-time series. NBC Consent Decree, 449 F. Supp. at 1132; CBS Consent Decree, 45 Fed. Reg. at 34,465; ABC Consent Decree, 45 Fed. Reg. at 58,443.

In 1990, in response to a petition for rulemaking and request for waiver filed by Fox Broadcasting Co., the FCC initiated a rulemaking proceeding to determine whether to alter the 1970 rules.[656/] Following extensive proceedings,[657/] in 1991 the FCC significantly modified the rules, eliminating some restrictions, relaxing others, and adding new limitations.[658/] The 1991 rules only apply to network prime-time entertainment programs and network participation in first-run syndication.[659/] The 1991 rules define a "network" to be any entity providing more than fifteen hours per week of prime-time programming on a regular basis to interconnected affiliates that reach, in aggregate, at least 75% of television households nationwide.[660/] Thus, Fox Broadcasting Co., which supplies twelve to fourteen hours a week of prime-time programming to its owned and affiliated stations, is currently exempt from the rules.

The 1991 rules permit networks to acquire financial interests, domestic syndication rights, and foreign syndication rights in outside-produced programming, aired on their own or another network, so long as a network acquires such rights pursuant to a phased negotiation -- that is, a negotiation separate from, and no less than thirty days after,

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656/ Evaluation of the Syndication and Financial Interest Rules, Notice of Proposed Rulemaking, 5 FCC Rcd 1815 (1990) (Finsyn NPRM).

657/ These proceedings included an en banc hearing by the FCC on December 14, 1990, and an additional comment period following a Further Notice of Proposed Rulemaking, 5 FCC Rcd 6463 (1990) (Finsyn Further NPRM). NTIA filed reply comments in response to the Notice of Proposed Rulemaking, and comments in response to the Further Notice of Proposed Rulemaking. See Reply Comments of National Telecommunications and Information Administration (filed Aug. 1, 1990) in Finsyn NPRM (NTIA Finsyn Reply Comments); Comments of National Telecommunications and Information Administration (filed Nov. 21, 1990) in Finsyn Further NPRM (NTIA Finsyn Further NPRM Comments).

658/ Evaluation of the Syndication and Financial Interest Rules, Report and Order, 6 FCC Rcd 3094 (1991) (1991 Order). The FCC affirmed the current rules upon reconsideration. Evaluation of the Syndication and Financial Interest Rules, recon. denied, Memorandum Opinion and Order, 7 FCC Rcd 345 (1991) (Reconsideration Order).

659/ They do not apply to non-prime-time programming or non-entertainment, e.g., news and sports, programming in prime time. 1991 Order, 6 FCC Rcd at 3103.

660/ Id. at 3147-51. A "prime-time program" is one that airs on a network during the hours of 7 p.m. to 11 p.m. Eastern Time and Pacific Time, or 6 p.m. to 10 p.m. Central Time and Mountain Time. Id. at 3103.

execution of an initial network license fee agreement -- and the airing or licensing of the programming was not conditioned on the acquisition of such rights.[661/]

In-house productions may comprise no more than forty percent of a network's prime-time entertainment schedule.[662/] In-house productions are defined to include co-production ventures between the network and another producer.[663/] Thus programming co-produced by a network and a "foreign production entity" is considered an in-house production.[664/]

The 1991 rules permit networks to syndicate internationally all types of programming, both independent and "in-house" productions.[665/] Networks may also syndicate domestically "in-house" productions, including co-productions with foreign entities aired on their own network.[666/]

661/ Id. at 3106-07, 3114, 3126, 3129-30. In addition, a network must certify that it has complied with these requirements. Id. at 3142.

The current rules also prohibit "cross-extraction" -- that is, networks cannot condition program access to their own networks on the granting of rights with respect to programs aired elsewhere. Id. at 3140 n.140.

662/ Id. at 3121-23.

International and domestic syndication of in-house productions aired by the networks are subject to specific safeguards that apply if a co-production occurs between a network and "outside domestic production entities." Id. at 3117, 3118-19. The FCC states that an "outside domestic production entity" is one registered to do business and located within the United States that is not owned or controlled by the network with which it seeks to co-produce. Id. at 3117 n.72. Domestic co-production arrangements must be initiated by an outside entity, and not the network, and are subject to a 30-day cooling off period, during which the outside producer has the option of nullifying the co-production agreement. Id. at 3119.

663/ Id. at 3116-17.

664/ Id. at 3117. A "foreign production entity" is defined as a production entity registered to do business and located outside the United States. Id. at 3117 n.71.

665/ Id. at 1340. Indeed, the networks may also retain financial interests and domestic syndication rights in their "in-house" productions.

666/ The current rules require each network to use an independent syndicator, in which the network holds no interest, to syndicate domestically all programs produced in-house for other networks, all programs produced by outside producers, and all

CBS, CapCities/ABC, Fox Broadcasting Co., Schurz Communication, and the Arizona Consumers Council petitioned various federal courts to review the current rules. On August 13, 1991, these appeals were consolidated in the Seventh Circuit.[667] On November 5, 1992, the Seventh Circuit vacated the FCC's 1991 rules, finding that the FCC order was arbitrary and capricious.[668] As noted above, the court has stayed the effect of its order until April 6, 1993, permitting the FCC to conduct proceedings, which it initiated on December 31, 1992, to determine whether to formulate new or modified rules or provide a new justification for the 1991 rules.[669]

Regardless of the outcome of the Seventh Circuit case, the networks are still effectively barred from financial interest and syndication activities due to the continuing effect of the Network Consent Decrees. Those decrees prohibit each network from obtaining a financial interest in programming that it does not solely produce. They also prohibit the networks from engaging in domestic or foreign syndication, except that the networks may syndicate in other countries programming that they or an affiliated interest solely produces, or programming that is produced overseas and not aired on the network.

On May 8, 1992, the Department of Justice filed a memorandum with the U.S. District Court for the Southern District of California tentatively agreeing to modify the Network Consent Decrees, so that the networks can engage in the currently proscribed activities described above.[670] DOJ conditioned its final agreement on a review of public comments, which it invited interested parties to file. On November 18, 1992, DOJ formally agreed to modification of the consent decrees, reporting to the court that nothing in the public comments it received undermined its initial analysis.

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first-run programming. Id. at 3119 n.79, 3137.

667/ Petitions for Review of an Order of the Federal Communications Commission No. 90-162, Order (7th Cir. Aug. 13, 1991).

668/ See supra note 646.

669/ See supra text accompanying note 648.

670/ Department of Justice's Stipulation Re: Publication and Proposed Modification of Consent Judgment (Civ. Nos. 74-3599-RJK et al.) (C.D. Cal. May 8, 1992).

III. Summary of Comments

In the Notice,[671] NTIA invited comment on the global implications of the FCC's 1970 financial interest and syndication rules. In particular, we asked whether the globalization trend heightened or lessened the need for such rules. We also sought comment on the effect of the rules on the ability of commercial broadcast networks and independent program producers to compete with global media firms.

CapCities/ABC, CBS, NBC, the Economic Policy Institute, which participated on behalf of the networks, and News Corp., parent of Fox Broadcasting Co., filed comments with us opposing the 1970 rules. Several of these parties argued that the 1970 rules were no longer necessary in the television marketplace of 1990 because, for a variety of technological and competitive reasons, the networks no longer were able to exercise market dominance in the program production and distribution markets.[672] Moreover, these parties argued generally that, despite the U.S. positive net balance of trade in program production, the rules hampered U.S. competitiveness in global markets for television programming. Several of these parties contended that because the 1970 rules limited the networks' ability to syndicate programs abroad and to enter into co-production ventures with foreign entities, they diminished the ability of U.S. firms to obtain an increasing share of the growing international programming marketplace.[673]

On the other hand, MPAA, INTV, Time Warner, the Coalition to Preserve the Financial Interest and Syndication Rules, and the Program Producers and Distributors Committee argued that the 1970 rules effectively served the public interest by promoting economic competition and diversity in domestic program production and distribution markets. This increased competition and diversity in the domestic marketplace, they argued, enhances the ability of U.S. firms to penetrate and compete successfully in the international

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671/ Notice, 55 Fed. Reg. at 5798-99, para. 48.

672/ Comments of CapCities/ABC at 32-35; Comments of NBC at 6-9; Comments of News Corp. at 24-25.

673/ Comments of CapCities/ABC at 28-31; Comments of CBS at 15-19; Comments of NBC at 9-12, 17-25; Comments of Economic Policy Institute at 6-8, 16-20, 26, 43.

marketplace.[674] These commenters attributed the relative health of the U.S. program production industry and the diversity of U.S. programming options to the successful operation of the 1970 rules. Several of these parties contended that, although the 1970 rules restricted the ability of the networks to obtain a financial interest in or syndicate programming, the networks are free to enter into a wide range of other media businesses, both domestic and international.[675]

IV. NTIA's Position

In the 1991 proceeding, NTIA proposed that the FCC significantly relax the rules, while adopting certain narrowly tailored safeguards. NTIA's reasons for taking this position were principally based on an appraisal of conditions in the video programming marketplace. In NTIA's view, the market for video programming had changed substantially since the 1970 rules were adopted. In particular, NTIA noted the increase in the number of potential video program purchasers and distribution outlets, which altered the relative positions of the broadcast television networks and the program producers in the video marketplace.[676] Based on this analysis, NTIA concluded that the 1970 rules were unnecessarily restrictive and that if the only two alternatives before the FCC were retention or elimination of the 1970 rules, elimination would be appropriate. However, because the FCC was not restricted to these two polar extremes, NTIA recommended a more moderate course in designing and implementing a new regulatory regime.

NTIA found that the record, including both data on the industry and the economic analyses submitted by the various parties, was inconclusive as to whether the networks still retained any market power, at least in certain segments of the marketplace.[677] NTIA also expressed concern that if the complete elimination of the rules proved unwise, reimposing

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674/ Comments of MPAA at 5-6; Comments of Time Warner at 33; Comments of Coalition to Preserve the Financial Interest and Syndication Rules at 39-40; Comments of the Program Producers and Distributors Committee at 2-3; Reply Comments of INTV at 5-7.

675/ Comments of Time Warner at 34-35; Comments of Coalition to Preserve the Financial Interest and Syndication Rules at 50-51; Comments of MPAA at 10-17.

676/ NTIA Finsyn Reply Comments, supra note 657, at 8-10.

677/ Id. at 17-24.

regulation would be significantly more difficult and disruptive than initially adopting a more moderate approach and moving to complete elimination of the rules in the future as circumstances warranted.[678] NTIA thus proposed several safeguards that were designed to permit significantly greater participation by networks in program production and distribution with limitations only on those specific areas in which concerns about possible exploitation of residual network power seemed most relevant.

Specifically, NTIA emphasized the importance of removing all restrictions that prevent U.S. companies from fully competing in the international arena and recommended that the restriction on foreign syndication be dropped in toto.[679] NTIA also recommended that the FCC modify the rule against domestic syndication to permit the networks to hold a continuing profit interest in programming, subject to specific prohibitions against warehousing of programming and a requirement that the actual syndication be performed through an independent entity.[680] Moreover, NTIA proposed that the rule against network acquisition of financial interests and syndication rights in independently produced programming be eliminated, subject to (i) a requirement that network negotiations to acquire such interests be conducted subsequently to negotiations for network exhibition rights, and (ii) a general prohibition against network discrimination in favor of programming in which the network holds such interests. NTIA also recommended that the FCC not impose caps on network in-house production.[681] Finally, NTIA called for further review by the FCC of the effects of these rule changes, three to five years after they take effect.[682]

In light of the Seventh Circuit's recent actions, the FCC will soon reevaluate the need for financial interest and syndication rules. Although NTIA intends to reexamine the relevant issues again, in light of the court's concerns and the developments in the marketplace since the FCC last addressed the issue, in this Report we undertake a narrower

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678/ Id. at 26 n.61.

679/ Id. at 34-36.

680/ Id. at ii; NTIA Finsyn Further NPRM Comments, supra note 657, at 4, 7-8.

681/ NTIA Finsyn Reply Comments, supra note 657, at 41-42.

682/ NTIA also recommended that Fox Broadcasting be granted a waiver from the rules' application. Id. at 43-45.

analysis. In particular, we examine the effects of the present rules on the international activities of program producers and networks.

V. Effects of the 1991 Rules on U.S. Global Competitiveness

As we discussed in Chapter 2, the increasing international demand for television programming has prompted a dramatic increase in the export of U.S television programming and has led to new partnerships between U.S. producers and foreign producers and distributors.[683] Two aspects of the FCC's 1991 financial interest and syndication rules provided the networks with much greater ability to participate in these growing international markets for the production and distribution of programming than had been the case under the 1970 rules. First, the networks can now acquire interests in the foreign syndication of independently produced programming, subject to safeguards, and can actually engage in foreign syndication of any programming with virtually no limitations.[684] Second, the networks can exhibit or syndicate domestically programming that they co-produce with other entities, including foreign entities, subject to certain limitations.[685] We then discuss generally the effect on U.S. competitiveness of the domestic aspects of the current rules.

A. Foreign Syndication

The FCC's 1970 rules prevented a network from syndicating programming abroad, unless such programming was produced solely by the network itself or by foreign entities. However, as the FCC stated in 1991, "the concerns regarding anti-competitive behavior in distributing syndicated programming in domestic markets are not relevant to foreign markets."[686] Moreover, as the FCC noted in adopting the 1991 rules, this restriction had precluded network participation in international markets even as the worldwide demand for U.S. programming was rapidly increasing and the networks' competitors were entering the international programming market.[687] Indeed, according to one commenter, from 1981 to

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683/ See discussion supra pp. 11, 18-20.

684/ See supra text accompanying notes 661 and 665.

685/ See supra text accompanying notes 663-666.

686/ Reconsideration Order, 7 FCC Rcd at 374.

687/ See 1991 Order, 6 FCC Rcd at 3140-41.

1988, foreign syndication revenues tripled, reaching $1.2 billion, and some have estimated that they will reach $4 billion in 1995.[688]

Although most parts of the world have witnessed a growing demand for programming, demand in Western Europe has undergone the largest change. The growth of this market is largely attributable to the privatization of existing channels and the addition of new terrestrial and satellite broadcasters.[689] The number of broadcast channels has risen from 38 in 1980 to an estimated 125 today.[690] In addition, the number of satellite channels is expected to increase from 67 in 1988[691] to 140 in the 1990s.[692] As a result, the number of hours of programming delivered to television homes in Europe is estimated to grow, between 1985 and 1998, from 150,000 to 535,000 hours per year.[693] With the collapse of communism in Eastern Europe and the former Soviet Union, there is growing demand for television entertainment and news in these countries, as well as in the Far East, Latin America and other parts of the world. As a result, worldwide demand for programming will almost certainly increase over the rest of this decade.[694]

688/ Comments of CapCities/ABC at 20 (citing Syndication 1995, Channels Magazine, at 18, 66, 67). Frost & Sullivan, an international market research firm, predicts that U.S. companies will capture $3 billion of the international programming market in 1995, up from $1.9 billion in 1990. Miller, Euro TV Boom Seems a Steady Thing, Variety, Apr. 15, 1991, at M2 (Euro TV Boom).

689/ For a discussion of the effects of technological and regulatory change on the worldwide demand for film and television programming, see supra Chapter 3.

690/ Shapiro, supra note 132, at B29.

691/ Lensen, supra note 131, at 8.

692/ Comments of CapCities/ABC at 20 (citing Syndication 1995, Channels Magazine, at 18, 66).

693/ Kerver, European Programming: A Boom. But for Whom?, Satellite Communications, Apr. 1990, at 14A (citing Communications & Information Technology Research Ltd.). See also Lensen, supra note 131, at 8 (estimates that the number of hours of programming broadcast in Europe will reach 600,000 by 1995).

694/ Some predict that U.S. exports to regions of the world other than Europe will increase faster than exports to Europe, rising from $446 million in 1990 to $824 million in 1995. See Euro TV Boom, supra note 688.

The FCC's 1991 rules permit the networks to respond more effectively to the growing worldwide demand for programming by syndicating programming in foreign markets. We agree with the FCC that, regardless of what one thinks of the networks' participation in domestic syndication markets, there is no reason not to permit them to be fully active participants in foreign markets.[695/] In order to be globally competitive, particularly in this growing market, the United States should field as many players as possible with the interest, expertise, finances, and other resources to be active competitively. The 1991 rules permit the networks to develop and deploy programming and packaging skills that could increase the returns to U.S. firms.[696/] The FCC should carefully consider the potential effects of the 1991 rules on foreign syndication by networks as the international market for programming evolves.[697/]

B. Co-Production Ventures with Foreign Entities

In today's global marketplace for programming, co-production ventures with foreign entities are beginning to emerge as one of the most effective means of competing in the international arena. Co-production arrangements with foreign firms can allow U.S. companies to gain entry to otherwise restricted markets. The European Community (EC) has made a concerted effort to develop its program production industry, and, under its Broadcast Directive, has imposed a program quota that requires European broadcasters "whenever practicable . . . [to] reserve for European works . . . a majority proportion of their transmission . . . ."[698/] Under these rules, co-produced programming may count as a "European work," so long as it is "supervised and actually controlled" by an EC producer,

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695/ For a description of the networks' activities, see infra Appendix C at pp. C-4, C-5, C-8.

696/ For instance, the networks have indicated that they plan to market programs of independent producers with their own sports and news offerings, providing foreign broadcasters with a package of programs previously unobtainable. Comments of Economic Policy Institute at 16-17.

697/ While the networks are free to syndicate programming in foreign markets, they have asserted that application of the separate negotiation requirement to acquisition of foreign syndication rights handicaps their ability to acquire these rights. See, e.g., Comments of National Broadcasting Co, Inc. at 40 (filed Nov. 21, 1990) in Finsyn Further NPRM; Comments of CBS Inc. at 27 n.70 (filed Nov. 21, 1990) in Finsyn Further NPRM.

698/ Broadcast Directive, supra note 61, at 26, art. 4, para. 1.

or "the contribution of [EC producers] to the total co-production costs is preponderant."[699/] There is consequently a strong incentive for U.S. firms, including U.S. networks, to enter into co-production ventures with EC producers.

These ventures can also bring foreign capital and the promise of additional foreign distribution outlets to U.S. producers. At a time when program production costs are increasing,[700/] and the networks' advertising revenues are flat,[701/] the ability to enter into co-production ventures can make program production by these substantial U.S. firms more economically feasible. Foreign co-productions also enable U.S. producers to obtain more knowledge and expertise in producing programming for non-U.S. audiences. Such ventures also potentially advance diversity goals to the extent that networks use them to provide programming from new sources to U.S. viewers.

The 1970 rules restricted U.S. television networks from engaging in co-productions with foreign producers.[702/] Under the 1991 financial interest and syndication rules, the networks can now participate in these co-production ventures.

Under the 1991 rules, the networks are more attractive co-production partners for foreign production companies than previously because they are permitted to offer potential co-producers, among other things, distribution through their U.S. broadcast affiliates. However, as we have noted, the current rules limit the networks from producing more than forty percent of their prime-time schedule "in-house", which include co-productions between

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699/ Id. at 27, art. 6, paras. 1-4. A European producer is a producer established in an EC state. Id. For a discussion of the EC's quota policy in the Broadcast Directive, see supra note 61.

700/ See The Rise and Rise of Program Prices, Broadcasting, Sept. 23, 1991, at 44.

701/ All the News That Fits the Budget, Broadcasting, Sept. 23, 1991, at 15.

702/ The 1970 rules permitted the networks to enter into co-production ventures with foreign entities, but effectively prohibited the networks from syndicating such co-produced programming domestically or internationally. The networks could acquire foreign programs for foreign distribution only if they did not exhibit or syndicate the programs domestically. The networks could offer their foreign partners either foreign syndication or network exhibition opportunities, but not both, and in either event, could not syndicate domestically co-produced programming. 47 C.F.R. § 73.658(j)(1990). See also Comments of NBC at 19-20; Comments of CBS at 18; Comments of CapCities/ABC at 30.

the network and a foreign producer.[703] The networks may retain financial interests and foreign and domestic syndication rights in such programs.[704]

C. Effects of Restrictions on Domestic Syndication on U.S. Global Competitiveness

The 1991 rules governing foreign syndication and co-production by the networks have direct implications for U.S. global competitiveness in programming markets. The impact on global competition of other aspects of the 1991 rules, which govern network activities in the domestic television production market, is less clear. As noted above, for instance, the 1991 rules include safeguards that limit a network's ability to obtain domestic syndication rights, or a financial interest, in outside productions that air on its prime-time entertainment schedule.[705] Moreover, although networks can actively syndicate the "in-house" programming they air, they are required to distribute domestically, through an independent syndicator, all outside-produced programming and programming produced in-house that airs on another network or is distributed as first-run programming.[706] The 1991 rules also prohibit networks from favoring affiliates when syndicating their in-house programming and from warehousing programs produced in-house prior to syndication.[707] These rules, which were adopted to mitigate potential abuses by the networks in the domestic marketplace, would at first glance seem to have little effect on the global programming marketplace.

As we discussed in Chapter 1, however, the domestic market structure of the mass media industry does affect the global competitiveness of this industry. To the extent that vigorous domestic competition in an industry enhances the competitive advantage of that

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703/ 1991 Order, 6 FCC Rcd at 3117, 3121-22.

704/ Id. at 3119.

705/ See supra note 661 and accompanying text (describing phased negotiation and certification requirements).

706/ Id. at 3137.

707/ Id. at 3136. The anti-warehousing safeguard requires networks to release a program into the syndication market after four years or within six months following the end of a network run, whichever is sooner. Id.

industry in the global marketplace, regulations that restrict U.S. domestic competition harm U.S. international competitiveness.[708]

As noted above, in the FCC proceeding that led to adoption of the 1991 rules, NTIA proposed modifications to the financial interest and syndication rules that, we argued, would have promoted diversity and competition in the programming industry. Although the FCC's 1991 rules incorporate some measures suggested by NTIA, they include other restrictions, such as the forty percent limitation on the amount of prime-time programming that networks can produce "in-house," expressly opposed by NTIA.[709] Not only are the 1991 rules more than adequate to address concerns about network power in the acquisition and distribution of video programming, they could unduly restrict future development of the networks' role as program producers.

As a result of the continuing effect of the Network Consent Decrees and the short time in which the 1991 rules were in effect before the Seventh Circuit's actions, the practical effects of the 1991 rules have not fully unfolded. In its further deliberations in this area, we believe that the FCC should consider in detail the international effects of possible financial interest and syndication rules. The major changes now occurring in distribution methods, technology, and the market structure of the television industry could well justify further modifications to the 1991 rules.

708/ In fact, the networks argued that the 1970 finsyn rules, including the domestic syndication restrictions, increased costs, discouraged risk-taking, and reduced competition in U.S. markets. As a result, they claimed, U.S. television programming was less attractive and less competitive in foreign markets than it would have been in the absence of these regulations. Comments of NBC at 13; L. Summers, The Economic Consequences of the Financial Interest and Syndication Rules Governing the Television Networks 22 (prepared for submission with Joint Comments of Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Co., Inc.) (filed Nov. 21, 1990) in Finsyn Further NPRM.

709/ NTIA Finsyn Reply Comments, supra note 657, at 41-43.

Chapter 11

LOCALISM

I. INTRODUCTION

Some analysts argue that as mass media markets become globalized and multinational firms seek to supply programming for international audiences, news and entertainment will become increasingly homogenous, and the somewhat more specialized demands of local communities will no longer be met.[710/] Others contend that sophisticated mass media technologies such as satellite, fiber optics, and digital compression, will permit "narrowcasting" to specialized or localized audiences, thus meeting the needs of local communities. This chapter investigates how the increasingly international nature of mass media firms and the information they provide affect the traditional commitment of U.S. domestic media firms to meet the needs of local audiences.

As we stated in the Notice,[711/] one of the bedrock principles of mass media policy in this country has been "localism," under which the Federal Communications Commission (FCC) has sought to ensure, through the licensing process, that as many communities as possible receive local broadcast service, and that broadcasters respond to the needs of their communities of license. Because the federal policy of localism has principally been a part of broadcasting regulation, we focus on the effect of media globalization on the quality and quantity of local programming presented by U.S. broadcasters. In light of this analysis, we examine whether the localism policies now applied to broadcasters should be continued or modified.

II. SUMMARY OF COMMENTS

The commenters that address the localism issue -- INTV, News Corp., NAB, CBS, and PBS -- state generally that the FCC's localism policies continue to be important in an era of increasing international dissemination of information.

710/ See, e.g., Bagdikian, Conquering Hearts and Minds: Lords of the Global Village, The Nation, June 12, 1989, at 805.

711/ Notice, 55 Fed. Reg. at 5800, para. 60.

INTV argues that in a global market in which international program distributors, such as direct broadcast satellite (DBS), and national distributors, such as cable and the networks, play a major role, the need for a locally-based free distribution system increases.[712] According to INTV, the FCC's allocation policies for broadcast television licenses under Section 307(b) of the Communications Act are necessary to ensure that all Americans have "the opportunity to select from a diverse array of free off-air broadcast signals."[713]

News Corp. states that although government regulation may promote localism, marketplace forces "have led and will continue to lead domestic media to focus on local audiences."[714] As a result, it contends, media globalization will have little impact on the quantity or quality of local television programming.[715]

NAB agrees that marketplace forces ensure a commitment to localism, arguing that most broadcasters provide programming that meets the needs of their communities because it "is just good business." NAB, on the other hand, also asserts that the internationalization of mass media markets may actually have a positive impact on television and radio broadcasters' ability to provide local programming. As opportunities for worldwide distribution of programming increase, the cost of such programming to individual program distributors (such as broadcasters, cable operators, DBS distributors, and multichannel multipoint distribution service (MMDS) providers) should decrease, thereby allowing broadcasters, and others, to buy more, higher quality local programming.[716]

According to CBS, the continued vitality of a locally-based television and radio broadcasting system is essential to the international competitiveness of the broadcast networks

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712/ See Comments of INTV at 29.

713/ Id. at 26. See also id. at 29-30; Reply Comments of INTV at 14-15. Other commenters that addressed this issue agree with the point that in an era of globalization, the preservation of Section 307(b) localism policies will remain important. See, e.g., Comments of CBS Inc. at 36-37; Comments of NAB at 5-7; Comments of News Corp. at 28-29.

714/ Comments of News Corp. at 28. See also Comments of NAB at 5-6.

715/ Comments of News Corp. at 29.

716/ Comments of NAB at 3-4, 6-7.

and syndication companies that, it claims, are the U.S. companies in the strongest position to compete internationally.[717]

PBS argues that to the extent that globalization of the mass media leads to more homogenization of programming, preserving media that serve local needs will become even more important. PBS argues that public television, because it is rooted in local communities and dedicated to public service, is uniquely qualified to further the goals of localism and diversity.[718]

III. Impact of Globalization on U.S. Localism Policies

A. Localism Policies: Background

U.S. "localism" policies reflect two separate but interrelated goals: to promote the provision of local broadcast service to as many communities as practical and to ensure that broadcasters provide programming that meets the needs of their local communities. The first goal stems from Section 307(b) of the Act, which requires the FCC to "provide a fair, efficient, and equitable distribution of radio service."[719] The statutory basis for the second goal lies in the Act's requirements that licensees serve the public "convenience, interest, or necessity."[720]

717/ Comments of CBS at 36-37.

718/ Comments of PBS at 36, 43-45.

719/ 47 U.S.C. § 307(b) (1988).

720/ See 47 U.S.C. §§ 303, 307(a), (d), 309(a), 310, 312 (1988).

1. Section 307(b) of the Communications Act

Under the broad mandate of Section 307(b),[721] the FCC has developed a policy that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs."[722] The FCC determines the communities that receive broadcast service through the licensing processes for the various broadcast radio and television services.

Since 1952, the FCC has fulfilled its Section 307(b) mandate with respect to broadcast television and FM radio by establishing, and incorporating in its rules, a Table of Assignments for each service.[723] Communities throughout the nation have been assigned channels with specific frequencies to serve them. The FCC reasoned that a Table of Assignments can more closely approximate the theoretical maximum number of stations on the frequencies allotted to a service than would assignments of applications based on a first-come, first-served basis, thus keeping to a minimum areas receiving inadequate or no service.[724]

Generally, an applicant for a broadcast television or FM license may only apply for a frequency that has been assigned to a specific community in the Table of Assignments. If an applicant seeks to serve a community not in the Table, it must petition the FCC for a

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721/ Section 307(b) states: "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b).

722/ Television Assignments, Sixth Report and Order, 41 FCC 148, 172 (1952) (Sixth Report).

723/ In contrast, the FCC distributes AM radio frequencies on a demand basis, with an applicant requesting a license in the desired community. A hearing can result if petitions to deny are filed raising substantial and material questions of fact or if there are mutually exclusive applications. The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy, 93 FCC 2d 436 (1983) (Suburban Community).

724/ Sixth Report, 41 FCC at 152.

rulemaking to add the community.[725] If two applicants for the same frequency seek to serve different, but nearby communities, the FCC "first determines which community has the greater need for additional services . . . ."[726] After the FCC conducts the Section 307(b) rulemaking, it establishes the qualifications of the remaining applicants through the licensing process and, if there are competing applicants, decides which applicant should prevail.[727]

The FCC has adopted the following set of priorities for allocating TV and FM broadcast service:

Priority No. 1: To provide at least one broadcast service to all parts of the United States.

Priority No. 2: To provide each community with a licensee in at least one broadcast service.

Priority No. 3: To provide a choice of at least two broadcast services to all parts of the United States.

Priority No. 4: To provide each community with licensees in at least two broadcast services.[728]

2. Broadcasters' Obligation to Meet the Needs of the Local Community

Radio and television broadcasters also have an obligation to provide programming that meets the needs of their communities.[729] The basis for this policy stems from the "public

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725/ Suburban Community, 93 FCC 2d at 438.

726/ Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 361 (1955).

727/ Suburban Community, 93 FCC 2d at 452.

728/ Sixth Report, 41 FCC at 167.

729/ The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 FCC 2d 1076, 1091 (1984), recon. denied, 104 FCC 2d 358 (1986) (Commercial TV).

interest" standard of the Communications Act.[730] One of the FCC's central concerns under the public interest standard is that broadcasters "should present information on public issues so that the public may be informed and that this information should come from diverse sources."[731]

Until the early 1980s, the FCC imposed relatively extensive programming guidelines upon licensees to ensure that they met the needs of their communities.[732] Among other things, these guidelines called for television broadcasters to air not less than five percent local programming, five percent informational programming (news and public affairs), or ten percent total non-entertainment programming.[733] Guidelines for radio broadcasters were slightly less stringent.[734]

The FCC eliminated many of these guidelines in rulemakings in 1981 and 1984, reasoning that marketplace incentives ensure that broadcasters will provide programming that responds to community needs.[735] With only a few formal requirements, broadcasters now

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730/ See 47 U.S.C. §§ 307(a), (d), 309(a), 310, 312. Licensees are required to operate the station in the public interest. 47 U.S.C. § 309(h).

731/ Deregulation of Radio, Report and Order, 84 FCC 2d 968, 980 (1981) (Radio Deregulation Report).

732/ See National Telecommunications and Information Administration, U.S. Dep't of Commerce, NTIA Special Pub. No. 91-23, U.S. Spectrum Management Policy: Agenda for the Future app. E (1991).

733/ Commercial TV, 98 FCC 2d at 1078.

734/ These guidelines established that AM stations should offer 8% non-entertainment programming, and FM stations, 6% non-entertainment programming. Radio Deregulation Report, 84 FCC 2d at 975. If a broadcaster failed to meet these guidelines, its renewal application would not be routinely processed, and it could be designated for hearing. Commercial TV, 98 FCC 2d at 1078.

735/ See Commercial TV, 98 FCC 2d at 1076; Radio Deregulation Report, 84 FCC 2d at 968.

In 1984, the FCC also eliminated all "ascertainment" requirements, under which licensees were required to demonstrate how they discovered or "ascertained" the problems, needs, and issues facing their communities. Commercial TV, 98 FCC 2d at 1097-98, 1100-01.

may use their discretion to determine how best to provide programming that responds to the needs of their communities. For example, for radio broadcasters, "[t]he method to be utilized in meeting [a licensee's programming] obligation is largely entrusted to the good faith discretion of each licensee."[736] Similarly, a television licensee "in the exercise of its good faith judgment, will be able to address issues by whatever program mix it believes is appropriate in order to be responsive to the needs of its community. Moreover, licensees will also have the freedom to decide what amounts of such programming will be offered."[737]

The FCC also requires radio and television broadcasters to maintain in their public inspection files quarterly issues/programs lists.[738] This programming content log must list programs that have provided the station's most significant treatment of community issues during the preceding three-month period.[739]

Under the current rules, applicants for new and renewal television licenses "may determine the issues in their community that warrant consideration by whatever means they consider appropriate. The FCC will not request standardized documentation and submission of these efforts." Id. at 1098. Applicants for renewal radio licenses are similarly obligated to determine the issues facing their communities by "reasonable means." Radio Deregulation Report, 84 FCC 2d at 971.

736/ Deregulation of Radio, Second Report and Order, 96 FCC 2d 930, 931 (1984).

737/ Commercial TV, 98 FCC 2d at 1092. The FCC continues to require applicants for broadcast licenses to provide a "narrative statement of their proposed programming," 47 C.F.R. § 0.283(a)(7)(i)(A) (1991), which "must be sufficient to evince an understanding on the part of each applicant of its obligation to provide programming responsive to the needs of the community." Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments, 3 FCC Rcd 5467, 5469 (1988).

738/ 47 C.F.R. §§ 73.3526(a)(8), (a)(9) (1991).

739/ Id. Each list includes "a brief narrative describing what issues were given significant treatment and the programming that provided this treatment." The licensee is to include in its list the time, date, duration, and title of each of the listed programs, id., and must retain each list for two years. The two-year period may be extended if the list involves communications incident to a disaster or an FCC investigation. Id. § 73.1840 (1991).

For both television and radio broadcasting, adherence to the FCC's programming policy is an issue during license renewal. A licensee, during its prior license term, must address community issues with responsive programming and comply with all other legal requirements.[740/] The FCC currently is reviewing the standards used in comparative hearings for license renewal to compare incumbent licensees and competing applicants, and, in particular, the standards used for determining whether an incumbent licensee is entitled to a "renewal expectancy" credit.[741/] Under the current standard, an incumbent licensee may be granted a renewal expectancy for past meritorious programming service.[742/] The FCC determines renewal expectancy credit based on a sliding scale, and weighs the strength of the licensee's past programming record against other factors such as diversification and integration.[743/]

740/ Commercial TV, 98 FCC 2d at 1093.

741/ Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363, 6363 (1989) (Renewal Rule Making). The FCC has taken no action on this rulemaking since issuing the Third Further Notice in 1989.

742/ Cowles Broadcasting, Inc., 86 FCC 2d 993, 1006 (1981), aff'd sub nom. Central Florida Enterprises, Inc. v. Federal Communications Commission, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

743/ Renewal Rule Making, 4 FCC Rcd at 6363-64.

The diversification criterion involves an examination of the extent to which applicants for a broadcast license have other media interests on either a local or national level, and the provision of a comparative preference to the applicant that will diversify media ownership to a greater extent. Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 FCC Rcd 5179, 5188 (1988).

Integration refers to the extent to which an applicant's owners are integrated into or participate in the full time management of the station in question. Id. at 5189.

B. Provision of Local Programming to U.S. Viewers

Even as the international mass media business changes, U.S. communities generally continue to demand their own particular blends of news and entertainment. The FCC's Office of Plans and Policy noted in its report Broadcast Television in a Multichannel Marketplace that as much as a third of network affiliate revenue is derived from local news,[744] while a 1991 FCC study found that demand for local news and information programming in two cities had remained constant or had risen from 1981 to 1991.[745] Moreover, cable operators in urban markets are beginning to produce local news programs. In New York, Time Warner recently launched New York News 1, a 24-hour cable news channel.[746] News 12, a twenty-four hour local cable news channel, has been serving the Long Island market since 1987.[747] In Washington, D.C., Allnewsco Inc. started a twenty-four hour local cable news channel in October, 1991. In May, 1991, Time Warner Inc. announced plans to start a twenty-four hour local news channel in New York City.[748] Other cable operators in Chicago, Boston, and California have begun or announced plans to

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744/ F. Setzer & J. Levy, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4087 (FCC Office of Plans and Policy Working Paper No. 26, 1991) (citing Farhi, The Great Big Broadcast of 1991, Wash. Post, Mar. 11, 1991, at F1) (Broadcast Television Report).

745/ The FCC study measured the number of hours per week of news and public affairs programming broadcast by commercial television stations in St. Louis and Washington, D.C. In St. Louis, the total number of such hours rose by 33% from 1961 to 1971, by 81% from 1971 to 1981, and stayed relatively constant from 1981 to 1991. In Washington, D.C., the number of such hours rose by 19% between 1981 and 1991. See The "Public Interest" Standard Under the 1934 Communication Act 7-8 & attachment (June 20, 1991) (statement of Alfred C. Sikes, Chairman, FCC, before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation).

746/ Moshavi, Cable Ventures Compete with Stations for Tight Dollars, Broadcasting, Aug. 24, 1992, at 33.

747/ Pearl, Local News Stymies Many Cable Firms, Wall St. J., June 18, 1991, at B1; Goldman, Broadcasters, Cable Enter 'Era of Blur', Wall St. J., Sept. 28, 1989, at B1.

748/ Walley, Time Warner Plans N.Y.C. News Channel, Electronic Media, May 20, 1991, at 1.

begin regional news channels in the near future.[749] A UHF licensee in Houston plans to launch the first all news and information broadcast television station in the United States in the spring of 1993.[750]

Moreover, as discussed above, the number and variety of media sources in today's marketplace have grown dramatically, such that there are now numerous diverse ways of meeting demand for information. Americans can receive information from cable television, satellite broadcast, videocassette recorders, and computer databases, as well as the more traditional broadcast and print media.[751]

In spite of the diversity of media sources, television and radio broadcasters remain the most "local" sources of electronic information, in part because of the FCC's localism policies. Some major market television stations have expanded their local newscasts. These stations feel that their local newscasts attract more advertising revenue than alternative sources of programming and are hesitant to share advertising dollars with syndicators.[752] Independent television broadcasters, which often face major competitive challenges from both cable services and network affiliates, increasingly recognize the competitive importance of local programming. During a one-year period ending in May, 1992, almost a dozen Fox affiliates started news operations.[753] The trade press has recently emphasized that independents "stay on top by carving out their own niche in local programming -- news, sports and community affairs."[754] "What we have that's unique is our localism,"

749/ McClellan, All-News Station Planned for Houston, Broadcasting, Nov. 30, 1992, at 28. Some industry analysts predict that in the next ten years, 24-hour cable news shows will be in all of the top-50 television markets. Bell, Up and Coming of Cable All-News, Broadcasting, June 22, 1992, at 31.

750/ McClellan, supra note 749, at 28.

751/ See supra Chapter 3 at pp. 29-37 and Chapter 9 at pp. 186-187.

752/ Making the Most of More Local News, Broadcasting, Aug. 19, 1991, at 35.

753/ Foisie, Independents Build a New News Image, Nov. 16, 1992, at 45.

754/ Tyrer, Key to Top Independents? They Stress Localism, Electronic Media, May 6, 1991, at 31.

according to Peter Temple, vice president and general manger of Boston independent WLVI-TV.[755]

Although, in general, the marketplace for local programming is healthy, some broadcasters have found it increasingly difficult to produce local news and information profitably. Because advertisers compensate broadcasters based on the number of viewers a program is anticipated to attract, some radio and television broadcasters in smaller markets are finding it more difficult to produce local news shows that attract a sufficient amount of advertising dollars. As a result, stations may replace local news programming with syndicated entertainment.

For example, several network affiliates in four smaller markets replaced their 11 p.m. local newscasts with syndicated programming in 1991.[756] In each market the dropped newscast was the third-ranked newscast. Many smaller-market radio stations are eliminating news altogether or relying solely on satellite-delivered national news networks for top-of-the-hour updates.[757]

In larger markets, the number of potential viewers or listeners may be large enough to support most local news programs. Due to competitive pressures, however, even stations in

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755/ Broadcast television network affiliates that are the number one stations in their local communities have strong local newscasts and community affairs programs. See Walley, Affiliation Takes Back Seat to News, Localism, Electronic Media, May 6, 1991, at 32, 35.

756/ Goldman, More Stations are Signing Off on 11 PM News, Wall St. J., May 22, 1991, at B1.

The Broadcast Television Report stated that television stations in large markets devote a higher percentage of total expenses to news (16.6% in the top ten markets) than stations in smaller markets (e.g., 9% in markets below 175). 6 FCC Rcd at 4029, Table 13. This finding is consistent with the view that smaller market stations are unable to attract sufficient amounts of advertising dollars to justify increased expenditures for local news programs.

757/ Flip Side of More Choice May Be Less Local News, Broadcasting, Sept. 23, 1991, at 35.

these markets often seek to reduce costs by reducing their news and public affairs staffs.[758] Rather than producing local news to fill their newscasts, local radio and television news operations also rely on tapes or satellite feeds of national or international news, provided by regional, national, and international news organizations.[759] Despite these occurrences, local programming remains a mainstay of the broadcast marketplace.

C. The Role of "Localism" as a Regulatory Policy in an Era of Globalization

1. Section 307(b)

As seen in the previous section, radio and television broadcasting continue to be the most pervasive electronic sources of local news and information. Despite some incipient trends toward increasing local programming on their services, major competing service providers, such as cable, often deliver only national or, increasingly, international programming.[760] Thus, the availability of broadcasting services in a community would seem to promote the availability of local news and information in that community.

The Section 307(b) policies have been quite successful in promoting the widespread availability of broadcast service nationwide.[761] The FCC's priorities for the resolution of 307(b) choice-of-community issues and the allotment of hundreds of additional broadcast stations in recent years have fostered the provision of radio service in small markets,

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758/ See All the News That Fits the Budget, Broadcasting, Sept. 23, 1991, at 15; Investigative Teams on Wane at Local Stations, Broadcasting, Sept. 23, 1991, at 26.

759/ Growing Network, Affiliate Symbiosis, Broadcasting, Sept. 23, 1991, at 28.

760/ Some cable operators are required by their franchise authorities to make channel space available for public, education or governmental use. 47 U.S.C § 611 (1988).

761/ For example, over 96% of U.S. homes have television. See National Cable Television Association, Cable Television Developments 1-A (Oct. 1992) (approximately 92.74 million U.S. television households); Industrial Analysis Division, Common Carrier Bureau, FCC, Trends in Telephone Service 2, at Table 1 (rel. Sept. 16, 1992) (approximately 96.6 million households in the United States). Approximately 99% of U.S. households had radio as of 1991. See NAB, Broadcasting Profile 8 (1991).

although individual station owners have expressed concern that the substantial increase in the number of stations may be harming their profitability.[762]

These policies need not be altered. The need for them continues in today's global marketplace. There are a few remaining areas that do not receive television or radio service, and there are many communities with limited or no local broadcast service. For instance, since 1987, the FCC has decided several reported licensing hearings on the basis of a Section 307(b) community preference.[763]

Section 307(b) community preference policies also apply when a licensee proposes to change from one community to another, by effectively discouraging licensees of smaller communities from moving to larger communities.[764] Because most areas and communities

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762/ Most recently, the FCC allotted approximately 700 new FM stations, with a primary goal of achieving additional dispersion of FM service. See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, First Report and Order, 100 FCC 2d 1332 (1985); Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, Report and Order, 94 FCC 2d 152 (1983). Virtually all of these allotments were made to small communities. Many of the 395 AM stations authorized between 1973 and 1985 were awarded to applicants seeking to provide first local service to smaller cities, or service to unserved areas.

763/ See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Fisher, Mattoon, Neoga, Teutopolis, and Tuscola, Illinois), 7 FCC Rcd 5223 (1992) (first local service); Washoe Shoshone Broadcasting, 5 FCC Rcd 5561 (1990) (coverage area preference); 62 Broadcasting Inc., 4 FCC Rcd 1768 (Rev. Bd. 1989), reh. denied, 5 FCC Rcd 830 (1990) (first broadcast service); Valley Broadcasters, Inc. KAPS, 5 FCC Rcd 2785 (1990) (coverage preference); Land O'Lakes Broadcasting WTRJ (AM), 3 FCC Rcd 6135 (1988); Sunshine Broadcasting, Inc., 2 FCC Rcd 7559 (1987) (first local service); Warmac Communications, Inc., 2 FCC Rcd 5318 (1987) (first local service).

764/ Under certain conditions the FCC permits a licensee to petition to change its community of license without losing its existing allotment and without being subject to competing applicants. Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, Report and Order, 4 FCC Rcd 4870 (1989). The FCC has cautioned, however, that this procedure may not be used if "the effect would be to deprive a community of an existing service representing its only local transmission service." Id. at 4874. It added, "we will be particularly hesitant to deprive an area of an existing first or second reception service." Id.

in the country are already served by local broadcasters, this aspect of the policy may be the most important today.

2. The Programming Policy

The issue we now address is the impact of globalization on the requirement that broadcasters provide programming responsive to the needs of their local communities. We believe that this programming policy strikes the proper balance between concern for the supply of responsive programming and recognition that demand for such programming may change.

The programming policy can be seen as an extension of the Section 307(b) policies -- as a "safety net" to ensure that broadcasters, once licensed by the FCC to serve the localized needs of particular communities, actually do so, even if a thriving market for local news and information does not exist in a particular community. Although such market failure may be increasingly rare in today's multimedia environment, the FCC's programming policy provides an additional, nonintrusive assurance that broadcasters will continue to provide local programming demanded by their local communities. As such, the policy neither threatens the competitiveness of U.S. broadcasters or program producers, nor is itself threatened by globalization.[765]

765/ We do not believe that the programming policy should be extended to other forms of electronic mass media. Multichannel technologies such as cable allow distribution services to narrowcast, enabling them to better meet the local and other specialized needs of their audiences. In this competitive environment, delivery systems that cannot meet these needs will not prosper. Moreover, to the extent that other types of delivery systems carry local broadcast stations, the FCC's existing rules for broadcasting ensure that local concerns will be met. Imposition of restrictive localism policies on such systems could unnecessarily hamper their development, and ultimately their ability to serve the public.

Appendix A
LIST OF COMMENTERS

INITIAL COMMENTS

Adventist Broadcasting Service, Inc.
Association of Independent Television Stations, Inc.
Capital Cities/ABC, Inc.
CBS Inc.
The Christian Science Publishing Society
Coalition to Preserve the Financial Interest and Syndication Rules
Committee for America's Copyright Community
Corporation for Public Broadcasting
George Jacobs & Associates, Inc.
High Adventure Ministries
Indiana University School of Journalism
KUSW Worldwide Radio
Motion Picture Association of America, Inc.
National Association of Broadcasters
National Association of Shortwave Broadcasters
National Association of Television Program Executives International
National Broadcasting Company, Inc.
National Public Radio
The News Corporation Limited
Public Broadcasting System
Program Producers and Distributors Committee
Recording Industry Association of America
Sony, USA
Stromquist, Peter S.
Time Warner Inc.
United States Information Agency

REPLY COMMENTS

Association of Independent Television Stations, Inc.
Coalition to Preserve the Financial Interest and Syndication Rules
Corporation for Public Broadcasting
Economic Policy Institute
Motion Picture Association of America, Inc.
National Cable Television Association, Inc.
The News Corporation Limited
World Christian Broadcasting Corporation

OTHER ACTIVITIES

Conference

On December 13, 1990, NTIA, in conjunction with the Stanton/Heiskell Center for Public Policy in Telecommunications and Information Systems, The Graduate School and University Center of the City University of New York, conducted a conference in New York on the globalization of mass media. The conference assembled participants from the entertainment industry, government, the business community, and academia. Subjects explored at the conference included structural changes that have taken place in the industry, the changing or evolving role of media, technological influences on the global flow of information, and policy issues that face the United States.

Appendix B

ALPHABETICAL LIST OF COMMENTERS ACRONYMS AND ABBREVIATIONS

Commenter	Abbreviation
Association of Independent Television Stations, Inc.	INTV
Capital Cities/ABC, Inc.	CapCities/ABC
CBS Inc.	CBS
The Christian Science Publishing Society	Christian Science
Committee for America's Copyright Community	CACC
Corporation for Public Broadcasting	CPB
KUSW Worldwide Radio	KUSW
Motion Picture Association of America, Inc.	MPAA
National Association of Broadcasters	NAB
National Association of Shortwave Broadcasters	NASB
National Association of Television Program Executives International	NATPE
National Broadcasting Company, Inc.	NBC
National Cable Television Association, Inc.	NCTA
National Public Radio	NPR
The News Corporation Limited	News Corp.
Public Broadcasting System	PBS
Program Producers and Distributors Committee	PPDC
Recording Industry Association of America	RIAA
Sony, USA	Sony
Stromquist, Peter S.	Stromquist
Time Warner Inc.	Time Warner
United States Information Agency	USIA
World Christian Broadcasting Corporation	WCBC

Appendix C

CORPORATE PROFILES

In this Appendix, we describe in greater detail a number of media companies discussed in the body of this report.

BERTELSMANN AG

Bertelsmann AG (Bertelsmann), a firm with headquarters in Germany, is among the largest international media firms. With annual sales of about $9 billion in 1991, Bertelsmann's activities span the mass media sector.[766] Its subsidiaries are located throughout Europe, the United States, Canada, New Zealand, Japan, Colombia, Australia, Mexico, and Brazil.[767]

Under the BMG label, Bertelsmann is one of the world's largest producers and distributors of recorded music. In 1986, Bertelsmann purchased RCA Records from General Electric.[768] In 1990, Bertelsmann took over distribution for MCA's music unit in markets outside North America, Japan, and the United Kingdom.[769]

More recently, Bertelsmann has entered the television production and broadcasting fields, with interests in RTL Plus, a company with satellite TV stations in Luxembourg and Germany, and Premiere, a joint venture with Canal Plus (France) for a pay-TV service in Germany.[770] Bertelsmann also has interests in three radio stations and a number of

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766/ See Henry, A New Player on Times Square, Newsday, Mar. 4, 1992, at 33; Bertelsmann: When Being A Giant Isn't Enough, Bus. Wk., Nov. 12, 1990, at 72-75.

767/ See 1 Moody's Investors Service, Moody's International Manual 1830-31 (1992) (Moody's).

768/ Id. at 1830.

769/ See Turner, MCA's Music Unit, Bertelsmann Sign Distribution Pact, Wall St. J., Nov. 13, 1990, at B7.

770/ For a description of Canal Plus, see infra at C-3.

program production companies in Germany.[771] In 1992, Bertelsmann purchased a stake in Elf 99, a former East German youth channel.[772]

Bertelsmann has book and record clubs in a number of European countries, Latin America, North America, New Zealand, and Australia. Bertelsmann is a leading book publisher, as owner of the Bantam Doubleday Dell Publishing Group in the United States, publishes a number of magazines and professional periodicals worldwide, and operates several commercial printing concerns in the United States, Spain, Austria, Brazil, and elsewhere.[773]

BRITISH BROADCASTING COMPANY

The British Broadcasting Company (BBC) has a charter to provide a broadcasting service both within the United Kingdom and abroad. Today, the BBC's broadcasting activities are divided between Home Services and the BBC World Service. The Home Services Group is financed primarily from annual license fees levied on all television households in the United Kingdom. The BBC operates two national television channels and five national radio channels.[774]

Outside the United Kingdom, the BBC's World Service offers a wide array of radio and television programs in thirty-six languages across the globe.[775] Radio broadcasts by the BBC World Service reach an audience of 120 million worldwide.[776] In 1991, the BBC launched World Service Television, a 24-hour international satellite television news channel

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771/ Moody's, supra note 767, at 1830-31.

772/ See Truehand Privatizations Energizing German Media M&A Market, Euromedia Acquisitions, Jan. 30, 1992, at 5.

773/ Moody's, supra note 767, at 1830.

774/ Foreign and Commonwealth Office, Broadcasting in Britain: Recent Developments 1, 4, 5, 12 (May 1991) (Recent Developments).

775/ Id. at 12.

776/ Bravin, Global View, Chicago Trib., Apr. 23, 1992, at C15 (Global View); Recent Developments, supra note 774, at 12.

similar to CNN International.[777] The service, which began in Asia and now reaches nations in Europe and the Middle East, has the potential to reach 2.7 billion people in thirty-eight countries.[778]

CANAL PLUS

Canal Plus, with headquarters in France, is a relative newcomer to the international media arena, beginning with a pay TV network in France in 1984. In 1991, Canal Plus had over 3.3 million household subscribers in France producing revenues of approximately $1.2 billion.[779] Canal Plus has invested in similar pay TV channels in Spain,[780] Germany,[781] Belgium,[782] Scandinavia, and Africa.[783] Canal Plus also has interests in three leading French cable operators and the European Television Networks.[784]

To fill its channels' heavy demands for programming, Canal Plus paid $130 million in 1990 for the right to air about 160 American films.[785] In 1990, Canal Plus began its own

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777/ Recent Developments, supra note 774, at 12.

778/ BBC Launches Asian News Channel, Broadcasting, Oct. 21, 1991, at 58; Global View, supra note 776.

779/ See Canal Plus Thriving in International Market, Electronic Media, May 25, 1992, at 18 (Canal Plus Thriving).

780/ Canal Plus owns a 25% share in Canal Plus Espana. See id. at 18.

781/ Canal Plus owns a 37.5% interest in Premiere, a German pay television channel that is available through home satellite dishes and cable. The remaining interests in Premiere are held by Bertelsmann (37.5%) and Leo Kirch (25%), the biggest owner of broadcast rights for films in Germany. Id. For a description of Bertelsmann, see supra at C-1.

782/ Canal Plus TVCF is 43% owned by Canal Plus. Canal Plus Thriving, supra note 779, at 18.

783/ Canal Plus launched Canal Horizons in Senegal in 1991 and Tunisia in late 1992. See Young, Canal Plus Continues Launch Into Africa, Variety, Oct. 19, 1992, at 65.

784/ See Canal Plus Will Count the Cost of Expansion, Fin. Times, Feb. 27, 1992, available in LEXIS, Nexis Library, CURRNT File.

785/ See Riding, French TV Seeks a Slice of the Hollywood Pie, N.Y. Times, Mar. 19, 1991, at C11.

film and television production company, Le Studio, which finances films made in both the United States and Europe. In 1991, Le Studio entered into a four-way undertaking with Time Warner (U.S.), Regency Enterprises (Netherlands), and Scriba & Deyhle (Germany) to jointly finance, produce, and distribute twenty films for the North American and European markets.[786] The partners have undertaken seven projects to date, including the film JFK.[787]

In addition to film and television production and distribution, Canal Plus manufactures the decoders and satellite dishes necessary to receive its pay-TV services. In late 1992, Canal Plus and News Corporation (Australia) established a partnership to develop new television delivery services throughout Europe utilizing advanced digital transmission techniques via satellite.[788]

CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. (CapCities/ABC) operates the ABC Television Network and the ABC Radio Networks, and owns eight television stations and nineteen radio stations in the United States.[789] Through its Video Enterprises arm, it also owns eighty percent of ESPN, a cable sports network, and a one-third interest in two other cable networks, Arts & Entertainment and Lifetime.[790] In 1991, CapCities/ABC's broadcasting operations realized $4.33 billion in net revenues.[791]

As of 1991, CapCities/ABC published nine daily newspapers in seven U.S. states, seventy-four weekly community newspapers in eight states, and fifty-one shopping guides and

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786/ Id. For a description of Time Warner, see infra at C-14.

787/ Williams, Canal Plus Springs A Leak, Variety, Oct. 5, 1992, at 1, 101. For a description of News Corp., see infra at C-9.

788/ See Snoddy, Murdoch in Joint Venture to Develop TV Service, Fin. Times, Oct. 9, 1992, at 23 (Murdoch in Joint Venture). For a description of News Corp., see infra at C-9.

789/ See Radio's Top 25 Groups, Broadcasting, Nov. 16, 1992, at 55; CapCities/ABC Annual Report, supra note 425, at 6, 10.

790/ CapCities/ABC Annual Report, supra note 425, at 11-12.

791/ Id. at 24.

real estate magazines in twelve states.[792] CapCities/ABC also publishes a wide variety of specialized publications. In 1991, the publishing arm added $1.05 billion in net revenues.[793]

Internationally, CapCities/ABC has been involved in cable programming, program distribution, and program packaging through a number of foreign equity investments and co-production arrangements. CapCities/ABC has a fifty percent stake in Tele-Munchen GmbH (Germany), a television and theatrical production/distribution company; through Tele-Munchen GmbH, CapCities/ABC holds a significant minority interest in Tele-5, an independent German television network, and a minority interest in a German radio station. CapCities/ABC also holds a twenty-five percent stake in both Tesauro S.A. (Spain) and Hamster Productions (France).[794]

Hotels and cable systems in many countries throughout the world carry ESPN. In 1991, ESPN acquired a fifty percent interest in the European Television Networks, which owns the European Sports Network, a cable and direct-to-home programming service, based in London with affiliates in France, Germany, and The Netherlands, that reaches twenty-seven million homes; the remaining fifty percent of the European Television Networks was acquired by Canal Plus and Generale des Eaux, major French media companies.[795] CapCities/ABC also owns eighty percent of Worldwide Television News, a worldwide newsgathering and marketing organization headquartered in London.[796]

CBS INC.

The U.S. broadcast operations of CBS Inc. (CBS) consist of the CBS Television Network, seven CBS-owned television stations, the CBS Radio Networks, and twenty-one

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792/ Id. at K-9.

793/ Id. at 24.

794/ Id. at 12, K-4.

795/ Id. For a description of Canal Plus, see supra at C-3.

796/ CapCities/ABC Annual Report, supra note 425, at 8; see also T. Waite, As Networks Stay Home, Two Agencies Roam the World, N.Y. Times, Mar. 8, 1992, at C5.

CBS-owned radio stations.[797/] In 1990, CBS launched the CBS Hispanic Radio Network, which broadcasts American sports events to Spanish-speaking audiences in the United States and Latin America.[798/] The network has thirty domestic stations covering eighty percent of the U.S. Hispanic population.[799/] In 1991, CBS acquired Midwest Cable & Satellite, a supplier of regional sports programming to cable systems in the Midwest, as part of its acquisition of the assets of Midwest Communications, Inc.[800/] Net sales for CBS in 1991 were $3.04 billion.[801/]

CBS Entertainment Productions, its in-house programming arm, produces television programming for CBS and other outlets.[802/] CBS has a home video joint venture with Fox, CBS/Fox Home Video, which produces, acquires, and markets home videos.[803/]

CBS Enterprises sells and licenses domestically and internationally CBS-owned programming, and distributes programming produced by third parties, such as the ECA, an association of seven European broadcasters.[804/] In 1990, CBS Enterprises entered into joint venture agreements with Granada Television to co-finance made-for-television films in the United Kingdom, with Tokyo Broadcasting Systems to share newsgathering resources and to license CBS News programs in Japan, and with the British Broadcasting Service to obtain comedy programming.[805/] In 1991, CBS Enterprises licensed programs to more than 240 broadcasters in seventy-seven countries.[806/]

797/ CBS Annual Report, supra note 425, at 7.

798/ CBS, CBS/90 Annual Report 20 (1991) (1990 CBS Annual Report).

799/ P. Rogers, Old Pros Heart of CBS Team, Atlanta J. & Const., Jan. 26, 1992, at E9.

800/ CBS Annual Report, supra note 425, at 58.

801/ Id. at 7.

802/ Id. at 10-14.

803/ Id. at 25.

804/ Id. at 25.

805/ 1990 CBS Annual Report, supra note 798, at 9-10.

806/ CBS Annual Report, supra note 425, at 25.

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD.

Matsushita Electrical Industrial Co., Ltd. (Matsushita), headquartered in Japan, received wide publicity as a global media firm in 1990 with the purchase of MCA Inc. for $6.13 billion, plus stock.[807] With operations in more than 160 countries, Matsushita is known mostly for consumer electronics (JVC/Victor, Panasonic, Pioneer, Quasar, and Technics), computers, industrial equipment, and home appliances. For the fiscal year ending March 31, 1992, Matsushita had sales of $56 billion.[808] Twenty-three percent of Matsushita's 1992 sales were derived from video equipment, eight percent from audio equipment, and eight percent from entertainment.[809]

Matsushita's purchase of MCA linked the firm's consumer electronics lines to MCA's film and music production capability. At the time of the acquisition, MCA had extensive operations in:

- Filmed entertainment: Universal Pictures, Universal Television, MCA Home Video, Merchandising Division;
- Music entertainment: MCA Records, MCA Distributing, Geffen Records, MCA Music Publishing, GRP Records, the Universal Amphitheater, MCA Concerts;
- Book publishing: G.P. Putnam's Sons, The Berkley Publishing Group, The Putnam & Grosset Group;
- Cable: a fifty percent share of the USA Network;
- Theme parks: Universal Studios Hollywood, Universal Studios Florida; and

807/ See Fabrikant, $6.13 Billion MCA Sale to Japanese, N.Y. Times, Nov. 27, 1990, at D1.

808/ Matsushita Electric Industrial Co., Ltd., Matsushita Electric Annual Report 1992, at 1 (1992). Matsushita's net income was $999 million.

809/ Id. at 11. MCA Inc. is the primary revenue source for the entertainment division. See id. at 18.

- Movie Theaters: a forty-nine percent share in Cineplex Odeon Corporation.[810]

NATIONAL BROADCASTING CORPORATION

National Broadcasting Corporation (NBC) is a broadcast television network, owned by General Electric Company (GE). NBC owns six television stations in the United States, and operates NBC Productions, a programming arm.[811] NBC operates Consumer News and Business Channel (CNBC), a cable financial news network, available both in the United States and internationally.[812] In 1991, GE's broadcasting segment contributed $3.12 billion to its overall revenues of $60.2 billion.[813]

NBC International distributes video and television programming abroad.[814] In 1990, it announced a joint venture with Britain's Yorkshire Television to produce television programs for international distribution.[815] In 1990, NBC entered into an agreement with Mitsui and TV Tokyo to distribute NBC entertainment, sports, and U.S. cable programming in Japan, and to co-produce television shows for the Japanese and possibly other Asian markets.[816] Also in 1990, NBC News entered into an agreement with Nippon Television

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810/ MCA and Matsushita Sign Merger Agreement: MCA Shareholders to Receive $66 Per Share in Cash Plus Shares of WWOR-TV 5 & Attachment (Press release, Nov. 26, 1990) (on file at NTIA).

811/ GE Annual Report, supra note 425, at 15.

812/ Id.

813/ Id. at 35. GE also has an information services division that provides electronic messaging, and information networking, processing, and software applications to businesses worldwide. Id. at 17.

814/ See Briefly Noted, Electronic Media, Sept. 28, 1992, at 31; GE's NBC Unit in International Distribution, Reuters Ltd., Aug. 4, 1992, available in LEXIS, Nexis Library, CURRNT File.

815/ Comments of MPAA at 14.

816/ NBC Signs Two Deals With Japanese Firms, Broadcasting, Dec. 24, 1990, at 14.

to share newsgathering and satellite resources and to provide Nippon with exclusive Japanese rights to programming produced by the NBC News Channel.[817]

THE NEWS CORPORATION LIMITED

The News Corporation Limited (News Corp.) is a publicly-owned company, founded by Rupert Murdoch and headquartered in Sydney, Australia. It is active in the Pacific Basin, the United Kingdom and North America, in nearly all sectors of the media business. For the fiscal year ending June 30, 1992, revenues of News Corp. were $7.8 billion.[818]

News Corp. owns Twentieth Century Fox Film, a major studio that it acquired in 1985, and Twentieth Television.[819] Twentieth Television produces and distributes television programming in the United States and internationally.[820] Twentieth Television recently established a new division, Fox Basic Cable, to develop cable programming channels.[821]

In 1985, Murdoch and News Corp., acting through several intermediate holding companies, acquired six Metromedia television stations.[822] From this, News Corp.

817/ Id. Nippon Television was Japan's first TV broadcaster, and is now the largest private network with over 30 affiliates. NBC and Nippon had been sharing news reports on an informal basis for four decades.

818/ News Corp. Annual Report, supra note 425, at 3. Over 63% of News Corp.'s revenues are derived from the U.S. market. Id.

819/ In 1989, News Corp. attempted unsuccessfully to purchase MGM/UA Communications Co., the Hollywood studio and film library. Even Rupert Murdoch Has His Limits, Bus. Wk., Oct. 2, 1989, at 34.

820/ News Corp. Annual Report, supra note 425, at 10.

821/ Fox T. Create Basic Cable Service, Broadcasting, Mar. 16, 1992, at 56; News Corp. Annual Report, supra note 425, at 10.

822/ See News America Publishing, Inc. v. FCC, 844 F.2d 800, 815 (D.C. Cir. 1988); Metromedia Radio & Television, Inc., 102 FCC 2d 1334 (1985), aff'd sub nom. Health & Medicine Policy Research Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986). News Corp., acting through intermediate holding companies, subsequently acquired a seventh television station in 1990. See The News Corporation Ltd., Annual Report 1990, at 32 (1990).

launched a fourth broadcast network in the United States, Fox Broadcasting Company, which now reaches approximately ninety-three percent of the U.S. television households through seven owned-and-operated stations, 138 affiliates, and some local Fox Net cable systems.[823/]

News Corp. took steps in 1990 to position itself in the U.K. direct broadcast satellite market by merging its Sky Television operations with those of its competitor, British Satellite Broadcasting. The resulting company, British Sky Broadcasting (BSkyB), offers six channels serving over 2.8 million U.K. households, approximately thirteen percent of U.K. television households.[824/] In late 1992, News Corp. expanded its interest in satellite broadcasting by forming a partnership with Canal Plus (France) to develop satellite delivered video services throughout Europe.[825/]

News Corp. owns interests in over one hundred newspaper titles in Australia, including the national daily, The Australian.[826/] It owns interests in seven newspapers in Hong Kong, Fiji and Papua New Guinea.[827/] In the U.K., News Corp. owns the country's largest daily, The Sun, as well as the daily and Sunday Times.[828/] In the United States, News Corp. publishes newspapers in Boston and San Antonio.[829/] In 1990, News Corp. purchased fifty percent of two Hungarian papers, a daily, Mai Nap, and a weekly,

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823/ Tyrer, Independent Split, Electronic Media, Jan. 6, 1992, at 1, 103.

824/ BskyB Claims Trading Profit, Fin. Times, Mar. 10, 1992, at 23.

825/ See Murdoch in Joint Venture, supra note 788, at 23. For a description of Canal Plus, see supra at C-3.

826/ Many of these are suburban and regional papers. News Corp. Annual Report, supra note 425, at 30.

827/ Id.

828/ Id.

829/ Id.

Reform.[830] News Corp. also publishes a number of magazines in the Pacific Basin, United Kingdom, and United States, and owns HarperCollins Publishers.[831]

NIPPON HOSO KYOKAI

Nippon Hoso Kyokai (NHK) became Japan's national public broadcaster in 1950.[832] Like the BBC, NHK is funded by a "receiving fee," or license fee on all owners of television sets. Viewers who wish to receive NHK's satellite service pay an additional fee.[833]

Domestically, NHK operates two medium wave AM radio channels, one FM radio channel, two terrestrial television channels, and two direct broadcast satellite television channels.[834] Radio programming is divided into general interest programming on Radio 1 and educational and cultural programming on Radio 2. The FM channel is reserved for sound broadcasting of classical music, Japanese folk and traditional music, poetry, and plays.[835] NHK spends 69.9% of its Y486.92 billion budget on domestic broadcasting.[836] NHK purchases a limited amount of programming from abroad for distribution in Japan, amounting to approximately four percent of its schedule during the period April 1990 to March 1991.[837]

Internationally, NHK operates a shortwave overseas service called Radio Japan, which provides approximately fifty-two hours of programming a day in twenty-two languages.

830/ Bohlen, Murdoch Buying Two Tabloids in Hungary, N.Y. Times, Jan. 21, 1990, at 13.

831/ News Corp. Annual Report, supra note 425, at 30.

832/ Public Relations Bureau, NHK, NHK Factsheet (Jan. 1992), at No. 1 (NHK Factsheet).

833/ Id. at No. 12.

834/ Id. at No. 10.

835/ Id. at No. 8.

836/ Id. at No. 2.

837/ Id. at No. 14.

Programming consists of Japanese and foreign news, entertainment programs, and features about Japan. In 1991, NHK started an international television service called TV-Japan, which delivers by satellite NHK news reports and other programming to North America and Europe.[838]

NHK has concluded cooperation agreements with thirty-seven broadcasting organizations in thirty countries. Cooperation is generally undertaken in the areas of newsgathering, co-production, satellite transmissions and technical assistance.[839] In fiscal year 1991, NHK took part in twenty-three co-productions with broadcasters and production companies from Europe, North America, Asia, and Australia.[840]

SONY CORPORATION

Sony Corporation (Sony), headquartered in Japan with operations throughout the world, traditionally has been a manufacturer of electronics equipment and components. Among Sony's consumer electronic products are Walkman personal audio systems, compact disc players, audio cassette players, digital audio tape players, mini discs,[841] television sets, videocassette recorders, video cameras, and audio and videotape. Sony is one of the leading firms in Japanese advanced television (ATV) research and development. Sony also produces much of the professional equipment used to create motion pictures, television programming, and audio software.[842] Sony manufactures other electronic products, such as semiconductors, computers, and telecommunications equipment.[843]

838/ Id. at No. 9.

839/ Id. at No. 13.

840/ Id. at No. 14.

841/ A mini disc is a portable CD player (for recording and playback), which uses an ultra small disc, 2.5 inches in diameter. In addition to portability, its reported strong suit is that it will not skip when jarred as other CD players can. See Sony, Annual Report 1992, at 13 (1992) (Sony Annual Report); Will the Mini Disc Be a Megahit for Sony?, Bus. Wk., May 27, 1991, at 38.

842/ Examples include professional quality camera systems, video editing equipment, tape decks, music recording, mixing, and mastering systems.

843/ Sony Annual Report, supra note 841, at 5-21.

Sony's net sales for the fiscal year ending March 31, 1992, were $28.7 billion.[844/] According to Sony officials, the company has a twenty percent market share across the globe in music, motion pictures, and consumer electronics.[845/]

In recent years, Sony also has become active in all aspects of entertainment "software": film, video, and recorded music. Sony entered the software side of the global media business by acquiring CBS Records in 1988.[846/] Sony is now one of the world's top producers of recorded music. Sony Music Entertainment Inc. (SMEI), formerly CBS Records, had sales approaching $3.3 billion in the fiscal year ending March 31, 1992.[847/] In January 1991, SMEI and a subsidiary of Time Warner Inc. formed The Columbia House Company, a fifty-fifty partnership that is a direct marketer of music and video products in the United States and Canada.[848/]

Sony acquired Columbia Pictures Entertainment, Inc. in 1989, which was renamed Sony Pictures Entertainment (SPE) in August 1991.[849/] SPE owns the Columbia Pictures and TriStar Pictures film studios, which created such films as Terminator 2: Judgment Day, Hook, and Bugsy.[850/] SPE is a leading supplier of programming for the four major U.S. television networks; during the 1992-93 television season, it scheduled the production and distribution of twelve network prime time series, as well as made-for-television movies, mini-series, and specials.[851/] Through its purchase of Columbia, Sony acquired a fifty percent interest in the RCA/Columbia Home Video joint venture; Sony subsequently acquired the remaining fifty percent in 1991, and renamed the entity Columbia TriStar Home

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844/ Id. at 2.

845/ Fleming, Sony Synergy Is on Mickey's Mantle, Variety, Aug. 24, 1992, at 1, 80.

846/ Sony Annual Report, supra note 841, at 31.

847/ Id. at 22.

848/ Id. at 22-23.

849/ Id. at 26, 31.

850/ Id. at 27-28.

851/ Id. at 29.

Video.[852] Sony also owns Loews Theater Management Corp., which owns nearly 900 screens in over 180 locations.[853]

TIME WARNER INC.

On March 3, 1989, Time Inc. and Warner Communications Inc. merged to become one of the world's largest media and entertainment companies. Time Warner Inc. (Time Warner), a publicly-held company headquartered in the United States, had revenues of $12 billion in 1991,[854] with subsidiaries in Australia, Asia, Europe, and Latin America. The company's businesses include magazine and book publishing, music recording and publishing, film and video, television programming, cable television, and theme parks.[855]

Warner Bros. is the Time Warner unit that produces, finances, and distributes films domestically and abroad. Some recent Warner titles include Robin Hood: Prince of Thieves, JFK, Batman Returns, and Malcolm X.[856] Warner Bros. controls one hundred percent of its own worldwide distribution.[857] In 1991, it derived almost forty percent of its revenues from overseas.[858] Warner Home Video operates in more than forty countries, distributing the MGM/UA/Pathe, EMI, and Cannon libraries, as well as Warner Bros. and Home Box Office (HBO) product.[859]

Time Warner owns both Warner Bros. Television and Lorimar Television, which together were the leading suppliers of entertainment programming to the U.S. broadcast

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852/ Id. at 45.

853/ Id. at 29.

854/ Time Warner, 1991 Annual Report Time Warner 1 (1992) (Time Warner Annual Report).

855/ Id. at 15-32; Mermigas, Profit Playgrounds: Media Titans Move Into Theme Parks, Electronic Media, Aug. 24, 1992, at 1.

856/ Time Warner Annual Report, supra note 854, at 24.

857/ Id. at 23.

858/ Id. at 25.

859/ Id.

networks during the 1991-92 season, supplying fifteen hours of prime time programming.[860] Warner Bros. International Television is the world's largest distributor of programming, licensing movies and television programming in more than 110 countries.[861]

Time Warner Cable owns eighty-two percent of the American Television and Communications Corp. and wholly owns Warner Cable Systems. Time Warner Cable is the second largest owner and operator of cable systems in the United States, serving approximately 6.7 million cable subscribers.[862] Time Warner owns the pay-TV channel HBO, which had 17.3 million subscribers, and Cinemax, which had 6.3 million subscribers, in 1991.[863] In 1991, HBO launched Comedy Central, a basic cable joint venture.[864] Time Warner also has minority interests in other major cable programmers: a twenty-two percent interest in Turner Broadcasting System, a fifteen percent interest in Black Entertainment Television, a forty-four percent interest in E! Entertainment, and a thirty-three percent interest in Courtroom Television Network.[865]

In music entertainment, the Warner Music Group includes Warner Bros. Records Inc., Atlantic Recording Group, and Elektra Entertainment.[866] Warner Music International operates in fifty-eight countries, earning more than half its revenues in 1991 outside of the United States.[867]

860/ Id.

861/ Id.

862/ Id. at 31.

863/ Id. at 29.

864/ Id. at 29.

865/ Id. at 29.

866/ Id. at 21.

867/ Id. at 20.

In the United States, Time Warner publishes Time, Fortune, Sports Illustrated, People, Money, Life, and Entertainment Weekly magazines.[868] Time Warner also publishes an extensive range of books, from textbooks and trade publications to general interest books through Time Life Inc. (formerly Time Life Books), Book-of-the-Month Club, Warner Books, and Little, Brown and Company.[869]

Since the Time Warner merger in 1989, Time Warner has embarked on many international ventures. One of its larger undertakings, announced in October 1991, is the creation of a new company, Time Warner Entertainment (TWE), with C. Itoh & Co. Ltd. and Toshiba Corporation, both Japanese companies. Time Warner will own 87.5% of TWE; its partners will equally divide the remaining 12.5%, investing $1 billion total in the venture.[870] This new venture will include Time Warner's Warner Bros. Studios, HBO, and Time Warner Cable, but will exclude Time Warner's music, publishing, and journalism businesses.[871] In addition, a sub-venture, called Time Warner Entertainment Japan, will distribute Time Warner's home video, theatrical film, television programming and merchandising products in Japan. This venture will be owned fifty percent by Time Warner, and twenty-five percent each by Toshiba and C. Itoh.[872]

Also in Japan, Time Warner has joined with Nichii Co. to build thirty multiplex cinemas, the first of their kind in that country.[873] In Europe, Time Warner has entered into agreements to construct multiplex theaters in Germany and Austria, with plans for additional theaters in Italy, France, Spain, and Australia.[874]

868/ Id. at 16.

869/ Id. at 17.

870/ Id. at 5-6.

871/ Id.

872/ Id. at 6.

873/ Ono, Time Warner, Nichii to Build Japan Theaters, Wall St. J., May 10, 1991, at A5.

874/ Time Warner Annual Report, supra note 854, at 25.

In 1991, Time Warner announced a financing, co-production and distribution arrangement with three partners: Canal Plus (France), Regency International (Netherlands), and Scriba & Deyhle (Germany).[875] The group planned to cooperate on twenty movies for European and North American markets, and has undertaken seven projects to date, including the film JFK.[876] Time Warner also is part of a consortium of U.S. companies that in 1991 purchased a fifty-one percent stake in Sky Entertainment, a multichannel pay subscription television service in New Zealand. The consortium, consisting of Time Warner, Bell Atlantic, Ameritech, and Tele-Communications Inc., plans to provide movies, sports, and news to 25,000 homes over three UHF television channels.[877]

In July 1991, Time Warner purchased twenty percent of Swedish Cable and Dish, the second largest cable operator in Sweden.[878] HBO International has entered into a number of international co-ventures, including HBO Hungary and HBO Olé, a Spanish language version of HBO provided to Latin American and the Caribbean basin.[879]

TURNER BROADCASTING SYSTEM, INC.

Turner Broadcasting System, Inc. (TBS) provides news and entertainment programming to viewers in U.S. and international markets. Its entertainment division consists of TBS SuperStation, Turner Network Television, and TNT Latin America, a 24-hour per day trilingual network serving cable systems in twenty-two countries in Latin America and the Caribbean.[880] TBS' news division operates Cable News Network (CNN), a 24-hour per day cable news network, Headline News, a cable channel that provides news updates, and CNN International, a 24-hour per day international news service that is distributed by satellite to cable systems, broadcasters, hotels, and home satellite dishes

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875/ Id. at 24. For a description of Canal Plus, see supra at C-3.

876/ Williams, supra note 787, at 101.

877/ Time Warner Annual Report, supra note 854, at 32; Phone, Cable Companies Hook Up in New Zealand, Wall St. J., May 3, 1991, at B4.

878/ Time Warner Annual Report, supra note 854, at 32.

879/ Id. at 10, 29.

880/ Turner Broadcasting System, Inc., 1991 Annual Report to Shareholders inside cover, 6, 26, 35 (1992) (TBS Annual Report).

around the world.[881] In 1992, CNN International was available to more than 22 million homes worldwide.[882] In addition, TBS syndicates and licenses programming in both the United States and international markets through Turner Program Services, Inc. and Turner International Sales.[883] TBS had revenues of $1.48 billion in 1991, of which $140.3 million were derived internationally.[884]

CNN's international profile rose dramatically with its coverage of the 1991 Gulf War. When conventional and satellite telephone links were disrupted by allied bombing, other television channels around the world carried CNN's coverage of the hostilities. Among those taking CNN's feeds were affiliates of the U.S. broadcast networks and the BBC in the United Kingdom.

881/ Id. at inside cover, 35.

882/ Amdur, Shrinking Budgets Make for Smaller World, Broadcasting, Apr. 20, 1992, at 37, 39.

883/ TBS Annual Report, supra note 880, at inside cover.

884/ Id. at 6, 32.

Appendix D
COUNTRY PROFILES

I. AUSTRALIA (Commonwealth of)

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	7.25 million (a)
	Number of TV Households	5.4 million (a)
Cable TV Penetration	Number of Homes Passed	N/A
	Number of Cable Subscribers	N/A
VCR Penetration		81% (c)
TV Stations		47 commercial 3 remote commercial (d)
	Government-Run Networks	2—Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) (e)
	Privately-Run Networks	3 National Networks—Seven, Nine, Ten (e)
Radio Stations		149 Commercial, 90 Public Access (d)
Other Relevant Mass Media Information	Broadcast Languages	English
	TV Technical Standards	PAL, System B

(a) Board for International Broadcasting, World Guide To Television & Programming, at A-89 (1992) (World Guide 1992).

(b) Organization for Economic Cooperation and Development, Australia: Telecommunications and Information Services Policies 109 (Working Paper No. DSTI/ICCP/TISP(90)6/REV2, Oct. 1991).

(c) Media Markets Around the World, Electronic Media, Apr. 20, 1992, at 34.

(d) Australian Broadcasting Tribunal, Broadcasting in Australia 123 (Sept. 1991).

(e) Australian TV at a Glance, Variety, Oct. 12, 1992, at 172.

B. Media Environment

The Australian Broadcasting Tribunal (ABT) is responsible for most broadcast regulation in Australia. The ABT licenses and regulates commercial broadcasters, and establishes advertising and programming standards. The ABT does not, however, regulate the two state-run networks, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS).

Australian broadcasting regulatory policy focuses heavily on the promotion of indigenous cultural diversity, the limitation of ownership concentration and media influence, and the restriction of foreign influences, both financial and cultural.

1. Broadcast Television

ABC, patterned after the United Kingdom's BBC, is an independent but government-funded television network. SBS is an independent statutory authority that distributes cultural programming to most major cities and several regional centers in southeastern Australia.[885/] The ABT currently licenses forty-seven commercial television stations. According to ABT, the Australian commercial television industry suffered heavy losses between 1988 and 1990, the first time it had suffered losses since 1957-58.[886/] In fiscal year 1989-90, the industry lost A $80.9 million (US $60.8 million).[887/]

885/ Organization for Economic Cooperation and Development, Australia: Telecommunications and Information Services Policies 109 (Working Paper No. DSTI/ICCP/TISP(90)6/REV2, Oct. 1991) (OECD Australia Report).

886/ Australian Broadcasting Tribunal, Broadcasting in Australia 76 (July 1990) (Broadcasting in Australia 1990).

On June 26, 1992, US $1 = Australian (A) $1.33.

887/ In fiscal year July 1989-June 1990, commercial broadcasting revenues were A $1,756.3 million (US$1320.5 million), but operating expenditures increased to A$1,837.2 million (US$1381.4 million). Australian Broadcasting Tribunal, Broadcasting in Australia 79 (Sept. 1991) (Broadcasting in Australia 1991).

Recently, two of the three metropolitan commercial television networks, "Ten" and "Seven," passed into receivership, while the third, "Nine," changed ownership from Bond Corporation Holdings back to its original owners, Consolidated Press Holdings.[888/]

2. Cable Television

There are several cable television networks in Australia, but a government moratorium on some of their operations has restricted their growth. They have been prohibited from providing residential service, except to resort areas and where reception of off-air broadcasting is poor.[889/]

3. Radio

Portions of the Australian commercial radio industry have experienced financial difficulties economically. FM stations have continued to hold their own as AM stations have suffered losses. Sixty-eight out of 149 licensees reported a loss in fiscal year 1989-1990.[890/] In the same fiscal year, the seven FM stations within the state capital cities gained profits of A $9.9 million (US $7.4 million), while the thirty AM stations in state capital cities suffered a loss of A $16.2 million (US $12.2 millions).[891/]

4. Satellite Broadcasting

The ABC is currently providing direct broadcast satellite (DBS) service nationwide. Within southeastern Australia, the SBS is providing DBS service. Three Remote Commercial Television Services (RCTV) providers and distributors of SKY-TV, a satellite television service, supply DBS service in other parts of Australia.[892/]

888/ Id. at 7.

889/ OECD Australia Report, supra note 885, at 109.

890/ Broadcasting in Australia 1991, supra note 887, at 123.

891/ Id. at 79.

892/ OECD Australia Report, supra note 885, at 109.

The ABT explains in Broadcasting in Australia 1991, supra note 887, at 123, that most Australian television and radio services providers, especially the public radio

C. Media Regulation

The ABT issues licenses for all broadcasting operations for five year terms. The ABT conducts a public inquiry each time a license is granted or renewed to ensure the financial and technical capabilities of media companies and the character of their executives.[893/] If the public raises significant issues at the inquiry, the ABT may hold a hearing to determine the renewal of a license.[894/]

1. Foreign Ownership

The 1988 Broadcasting Act prohibits foreign entities from controlling a broadcast license. Foreign ownership in television and radio stations is limited to a maximum of twenty percent. A single company or individual may not own more than a fifteen percent interest in a broadcast property.[895/] As a result of the passage of the 1988 Broadcasting Act, ownership of the three major commercial networks changed hands. In 1988, Rupert Murdoch was forced to sell the television network, "TEN," after he became a U.S. citizen.[896/]

In 1991 the Australian government closed a legal loophole in the Broadcasting Act that previously made it possible for foreign interests, through holding companies, to gain up to a fifty percent interest in a television network. Now, through amendments to the Broadcasting Act, interests in holding companies are counted toward the twenty percent maximum. In

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services, serve only a small geographical area. The remote television commercial services -- IMP, WAW, and QQQ -- cover the extensive "remote" areas of the Northern Territory, South Australia, Western Australia, Queensland, and parts of New South Wales and Victoria. The radio service 6FMS provides remote commercial service to Western Australia. These regional markets are undergoing "aggregation," a governmental plan to increase the number of commercial services in these regions.

893/ See, e.g., The Honorable Ralph Willis, Minister of Transport and Communications of Australia, Broadcasting Amendment Bill 1989, at 10-11 (Bill read before Parliament) (1989) (on file with the Australian Embassy).

894/ Broadcasting in Australia 1991, supra note 887, at 143.

895/ Broadcasting in Australia 1990, supra note 886, at 94.

896/ Media Markets Around the World, Electronic Media, Apr. 1988, at 18, 42.

addition, a minimum of eighty percent of the board of directors of a licensee must be Australian.[897/]

2. Multiple Ownership

A single owner can control television services that reach up to a maximum of sixty percent of the national population. Thus, one owner can own licenses in up to four of the five major metropolitan areas.[898/]

A broadcast company can own a maximum of sixteen radio stations (up from eight), either AM or FM. No more than one half of a licensee's stations may be located in any one state, and a broadcaster may own only one license per service area.[899/] Under the Department for Transport and Communications' (DTC) "Equalization of the Regional Commercial Television Indicative Plan," the government, in the licensing process, attempts to allocate service equitably to all sections of the country.[900/]

3. Crossownership

Currently there are no direct crossownership restrictions applicable to ownership of telecommunications and broadcasting companies.[901/] The wholly government-owned telecommunications carrier, AOTC (formerly Telecom Australia/OTC) provides transmission for the national ABC television service, but does not directly provide television service or programming to customers. OPTUS will continue to carry some ABC and RCTV services delivered by satellite.

The 1988 Broadcasting Act limits cross-ownership of television and newspaper businesses. A major television network that reaches sixty percent of the national audience

897/ Broadcasting in Australia 1991, supra note 887, at 9-11, 105.

898/ Id. at 105.

899/ Id.

900/ Broadcasting in Australia 1990, supra note 886, at 2-3. For an explanation of the government's "aggregation" plan, see supra note 892.

901/ OECD Australia Report, supra note 885, at 110-11.

may not own more than a fifteen percent interest in a major newspaper in any of the cities in which it owns television stations. A radio and television station owner cannot own another media outlet within the same market, although some owners have been grandfathered.[902]

4. Programming Restrictions

a. Television

In 1989 the ABT issued regulations effective January 1990 that call for broadcasters to air progressively more Australian-content programming. The regulations required broadcasters to air programming, from 6:00 A.M. to midnight, that was thirty-five percent Australian in 1990, forty percent Australian in 1991, forty-five percent Australian in 1992, and fifty percent Australian in 1993.

The regulations also establish minimal content standards for programming, including an overall transmission quota, and a "first-run" programming quota for drama, children's drama, and "diversity" (e.g., science, news, arts) programs.[903] Upon institution of this new policy, then-ABT Chairman Deirdre O'Connor stated her rationale for content standards:

> The new Australian content standard puts a safety net under existing levels of these types of programs. It is intended to provide a guarantee to the Australian viewer that the level of Australian programming will not decline. Furthermore, we believe that the new standards will have essentially a revenue neutral effect on the commercial television environment.[904]

902/ Broadcasting in Australia 1990, supra note 886, at 94.

903/ Broadcasting in Australia 1991, supra note 887, at 22.

904/ Broadcasting in Australia 1990, supra note 886, at 2.

b. Radio

Since 1976, a program quota has required commercial and public radio stations to air from 6:00 A.M. to midnight programming that is at least twenty percent Australian. The Australian government asserts that the rationale for the quota is cultural, not economic.[905/]

c. Advertising

All television advertisements must be produced in Australia or New Zealand. ABT standards generally limit the foreign content of television or radio advertisements to twenty percent. If Australians film a place or event for the purpose of depicting the place or event shown (e.g., foreign travel destinations), the quota does not apply. Broadcast licensees usually rely upon the Federation of Australian Commercial Television Stations' Commercial Acceptance Division for guidance.[906/]

The ABT continues to review these standards, and has proposed that instead of an eighty percent local content level for each advertisement, that eighty percent of all broadcasted advertisement time be Australian.[907/]

As a result of Australia's advertising policy, the Bush Administration's U.S. Trade Representative, Carla Hills, announced in April 1991 that Australia would be on a "priority watch list" of foreign governments that may be unfair in their support of intellectual property rights protection. In April 1992, Ambassador Hills noted that, among other countries, Australia will stay on this watch list. The U.S. government will work "to improve the situation, before further action becomes warranted under our trade laws."[908/]

905/ Broadcasting in Australia 1991, supra note 887, at 61.

906/ Broadcasting in Australia 1990, supra note 886, at 16.

907/ Broadcasting in Australia 1991, supra note 887, at 21.

908/ U. S. Trade Representative, Washington, D.C., USTR Announces Special 301, Title VII Reviews (Press Release, Apr. 29, 1992).

D. Policy Initiatives

1. Pay TV

A four-year moratorium on the introduction of pay TV via terrestrial and broadcasting transmission ended in September 1990. At the end of 1992, the Australian government passed legislation to authorize three pay-TV licenses carrying a total of ten channels.[909] Under the plan, two channels were allocated to ABC, four to a new operator, and four to currently existing media outlets.[910] The legislation limits foreign ownership of a pay-TV channel to thirty-five percent.[911]

2. AM to FM Conversion

The Department of Transport and Communications in 1988 announced its National Plan for the Development of Metropolitan Radio Services. In order to meet the demands of AM radio licensees that find FM stations more economically attractive, the Plan allows two AM commercial radio licensees in each state capital to convert to FM by means of a tender process. Six stations converted in 1989,[912] while seven more in Adelaide, Melbourne, Brisbane, and Perth converted in 1990.[913]

3. New Transmission Methods

The satellite carrier OPTUS (formerly AUSSAT) is in the midst of a privatization effort. BellSouth Corporation leads the consortium that purchased AUSSAT. AUSSAT changed its name to OPTUS, and became the second nationwide telecommunications carrier. OPTUS

909/ Foster, Canberra Paves the Way for Pay Television, Christian Science Monitor, Dec. 17, 1992, at 12 (Pay Television).

910/ News in Brief, Facts on File World News Digest, Dec. 21, 1992, § C2, at 961.

911/ Pay Television, supra note 909, at 12.

912/ Broadcasting in Australia 1990, supra note 886, at 6.

913/ Broadcasting in Australia 1991, supra note 887, at 8.

will provide a full range of domestic and international services, including pay TV, and is free to provide satellite transmission service to territories previously restricted.[914]

914/ OECD Australia Report, supra note 885, at 109-10.

II. CANADA

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	15.6 million (a)
	Number of TV Households	9.75 million (b)
Cable TV Penetration	Number of Homes Passed	9.12 million (b)
	Number of Cable Subscribers	7.53 million (b)
VCR Penetration		66% (c)
TV Stations		129 (c)
	Government-Run Networks	2 -- Canadian Broacasting Corporation (CBC) (1 French Network, 1 English Network) (d)
	Privately-Run Networks	5 -- CITY-TV (Toronto), CTV Television Network Ltd. (Anglo Canada), Global Television Network (Anglo Canada), Quatre Saisons (French Canada), TVA Television Network (French Canada) (d)
Radio Stations		900 AM; 29 FM (e)
Other Relevant Mass Media Information	Broadcast Languages	English and French
	TV Technical Standards	NTSC

(a) Board for International Broadcasting, World Guide to Television & Programming, at A-123 (1992).

(b) National Cable Television Association, Facts at a Glance: International Cable 1 (Oct 1992).

(c) Media Markets Around the World, Electronic Media, Apr. 20, 1992, at 36.

(d) Television Business International, World Guide '90, at 302 (1990).

(e) Central Intelligence Agency, The World Factbook 63 (1992).

B. Media Environment

The Broadcasting Act of 1968 established the Canadian Broadcasting Corporation (CBC), a national, publicly-owned broadcasting service, and created the Canadian Radio-Television and Telecommunications Commission (CRTC) as the regulatory agency overseeing the radio, television, and cable television industries. In 1976, CRTC's jurisdiction was expanded to include telecommunications. While the CRTC regulates broadcasting in Canada, the Department of Communications (DOC) determines the overall strategy for broadcasting policy and can refer back or set aside CRTC decisions.

In 1985, as part of a move to strengthen and preserve Canadian cultural industries, broadcasting policy was moved from the technology sector to the cultural affairs sector of the DOC. Regulations favor Canadian ownership, operation, and production of media industries whenever possible. Due to its large French-speaking population, Canadian radio and television include both French-speaking and English-speaking channels.

1. Broadcast Television

CBC, the government-run network, offers a majority of Canadian programming, as required by law. It is financed mainly by public funds and about thirty percent by advertising revenue. In response to budget cuts, CBC recently reduced the amount of local programming and increased regional production for both its French and English networks.

The CRTC has traditionally protected Canadian broadcasters and programmers from competition from U.S. broadcasters, cable distributors, and programmers. Private broadcasters are licensed by the CRTC in Canada with obligations to limit the amount of foreign programming they show. The "simultaneous substitution" regulation requires a cable operator to black out a U.S. signal if a Canadian and an American broadcaster are showing the same program at the same time.

2. Cable Television

Cable television was not clearly defined or regulated until the CRTC published its Cable Television Regulations in 1975. At that time, forty-two percent of Canadian television households subscribed to cable, compared to only fourteen percent in the United States.

Canadian cable's popularity resulted from a CRTC decision in the early 1970s to allow the importation of American programming by microwave to Canada.[915/]

In 1979, the CRTC imposed additional regulations on the cable industry, including the "simultaneous substitution" regulation discussed above. In 1986, the CRTC ushered in an era of more streamlined regulation, in particular, by partially deregulating cable rate setting. In 1991, the Broadcasting Act required cable operators to give priority to the carriage of Canadian programs, especially those of local Canadian stations.[916/]

3. Radio

CBC radio is a non-commercial network supported by government funding and money from ads on the CBC's television network. The CBC operates two AM and two FM radio networks, one in French and one in English for each frequency. The CBC provides national and local radio programming, but funding cuts have resulted in a decision to focus on local programs for radio and national programs for television.[917/] In addition to CBC radio, there are approximately 900 AM and 29 FM commercial radio stations in Canada.[918/]

4. Satellite

Canada became the first country to offer satellite broadcasting services in 1972 with the launching of Telesat, Canada's Anik A satellite. The CBC began broadcasting over Anik A in 1973, and was the only satellite broadcaster in Canada until 1981. Beginning in the late 1970s, many individuals in remote areas installed backyard satellite dishes and received U.S. programming illegally via satellite. Even cable companies began to receive and distribute American satellite programming without CRTC authorization.

915/ Until 1990, cable operators did not have to pay for the retransmission of these programs. See discussion infra at p. D-15.

916/ Hank Intven & Robert Menard, Convergence, Competition and Cooperation: Policy and Regulation Affecting Local Telephone and Cable Networks app. C, at 227-30 (Report of the Co-Chairs of the Local Networks Convergence Committee, 1992).

917/ Gerard Villeux: Setting the CBC's Course, Broadcasting, Apr. 29, 1991, at 54-55 (Setting CBC's Course).

918/ Central Intelligence Agency, The World Factbook 63 (1992).

In 1981, the CRTC licensed CANCOM as a private satellite network, to provide television and radio services to remote and underserved areas. CANCOM scrambles its signals and supplies decoders to subscribers. Initially, CANCOM received a license for eight radio frequencies. In 1983, CANCOM was authorized to carry four Canadian television stations, plus the three major American networks (CBS, NBC, and ABC), and PBS.

Among the programs Anik D currently transmits are English and French proceedings of the House of Commons for CBC, four Canadian and four American television broadcast stations via CANCOM, and Canadian specialty services such as The Sports Network (TSN).[919]

C. Media Regulation

1. Foreign Ownership Restrictions

Foreign investment is limited to twenty percent ownership of any broadcasting or cable company.[920] New broadcast licenses cannot be issued to persons who are not Canadian citizens or to Canadian corporations that do not have a Canadian chairman and directors. In addition, at least eighty percent of a broadcast licensee's stock must be held by Canadian citizens. Licenses held prior to 1968 can be renewed if the CRTC finds it is not contrary to the public interest and the Federal Cabinet approves the CRTC's decision.[921]

2. Crossownership

Crossownership restrictions generally prohibit telephone companies from owning an interest in broadcast and cable television companies. Telcos seeking a waiver of these rules generally must invest in cable television in an unserved, rural area. In order to obtain a

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919/ Caplan & Savageau, Report of the Task Force on Broadcasting Policy 590-91 (1986) (commissioned by the Canadian Minister of Communications) (Broadcasting Policy).

920/ Organization for Economic Cooperation & Development, Canada: Investment by Established Foreign-Controlled Enterprises 11 (Working Paper No. DAFFE/IME/IIP (91)8/REV1, 1991).

921/ Nay, Restrictions on Foreign Ownership of Assets in Various Countries 12 (prepared for the Library of Congress, Dec. 1989).

waiver, telcos must prove that they are the only appropriate ones to serve that particular market. However, Bell Canada is completely prohibited from entering the cable television market.[922/]

3. Programming Restrictions

Canadian law states that sixty percent of all programming and fifty percent of prime time programming must be of Canadian origin.[923/]

4. Localism

The CBC provides local programming over its Northern Service, some of it in the native Indian languages.[924/] However, local television programming has suffered recently due to CBC funding cuts. While satellite television provides coverage for people living in remote areas, it broadcasts mainly national programs.[925/]

D. Policy Initiatives

1. Privatization

Canada has private radio and television broadcasting services. Currently, there are no plans to privatize the CBC. In March 1992, the government sold its fifty-three percent share in Telesat Canada, the country's domestic satellite communications system, to Alouette Telecommunications Inc. for $155 million. Alouette Telecommunications is a consortium made up of Spar Aerospace Ltd., Quebec-Telephone, and Stentor (formerly Telecom Canada,

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922/ Organization for Economic Cooperation & Development, Canada: Cross-Ownership & Cross-Sectoral Service Provision 126 (Working Paper No. DTII/ICCP/TISP (90)6/REV2, 1990); see also Bell Canada Act & the Broadcasting Act of February 1991, § 7 (1991).

923/ Motion Picture Association of America, A Country-by-Country Listing of Government Owned Broadcast Authorities and TV Broadcast Quotas, Feb. 1, 1989, at 2.

924/ 1 Europa World Yearbook '91, at 661 (1991) (Europa '91).

925/ Id.; Broadcasting Policy, supra note 919, at 55; Setting CBC's Course, supra note 917, at 55.

which already owned forty-one percent of the satellite company). A major function of Telesat Canada is to provide services to the broadcasting sector.[926]

2. Cable Retransmission

Until 1990, Canadian cable and satellite companies retransmitted American programs without payment to program producers. Canadian broadcasters complained that they had paid for exclusive rights to American programs, and that these rights were infringed upon by Canadian cable operators. American program producers objected to the lack of compensation for the retransmission of their programs.[927]

The Canadian Copyright Law, which took effect on January 1, 1990, requires the payment of royalties for the retransmission by cable systems of U.S. network and superstation signals. A royalty rate structure was adopted by the Canadian Copyright Board in October 1990, and the rates were upheld on appeal in December 1990.

926/ Now-private Monopoly Telesat Takes Aim at Critics, Fin. Post Ltd., May 1, 1992, at 16.

927/ Broadcasting Policy, supra note 919, at 545-46, 578.

III. FRANCE

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	24 million (a)
	Number of TV Households	20.25 million (b)
Cable TV Penetration	Number of Homes Passed	3.744 million (b)
	Number of Cable Subscribers	762,278 (b)
VCR Penetration		33% (a)
TV Stations		846 (c)
	Government-Run Networks	3 -- France 2, France 3, La Sept (satellite) (d)
	Privately-Run Networks	2 -- TF1, M6 (d)
	Pay TV Networks	1 -- Canal Plus (subscription and advertising) (d)
Radio Stations		41 AM; 800 FM (mostly repeaters) (c)
Other Relevant Mass Media Information	Broadcast Languages	French, English, German
	TV Technical Standards	SECAM (V)

(a) Board for International Broadcasting, World Guide to Television & Programming, at A-40 (1992).

(b) National Cable Television Association, Facts at a Glance: International Cable 1 (Oct. 1992).

(c) Central Intelligence Agency, The World Factbook 1992, at 116 (1992).

(d) International Television and Video Almanac 609-10, 734 (J. Klain ed., 1990).

B. Media Environment

Broadcasting policy falls under the responsibility of the Ministry of Culture and Communications. Agence Cable, which is part of the Ministry of Culture and Communications, oversees cable television policy. The Conseil Superieur de l'Audiovisuel (CSA) currently administers broadcasting and cable regulation.

Until the 1980s, radio and television broadcasters were state monopolies administered by a number of regulatory agencies with varying degrees of dependence on government ministerial authorities. In 1982, the government allowed private ownership in radio broadcasting. A new mass media law created a new regulatory authority for the mass media, the Haute Autorite, which administered cable and broadcasting regulation, organized licensing procedures, and reorganized state-owned television companies.

In 1986, the coalition government of President Francois Mitterand and Prime Minister Jacques Chirac permitted private ownership in television. A mass media law dissolved the Haute Autorite and created the Commission Nationale de la Communications et des Libertes (CNCL), which set cable and broadcasting regulation, organized licensing procedures, privatized the national television channel, TF1, and reorganized state-owned television companies.

In 1989, the Socialist government of Mitterand/Rocard replaced the CNCL with CSA. Like the regulatory bodies before it, the CSA administers French broadcasting and cable regulation. CSA allocates licenses for privatized television channels, distributes cable networks and frequencies, and monitors program standards.

1. Broadcast Television

France has two private and three state-run broadcast television networks. The two major public networks are France 2 (formerly Antenne 2) and France 3 (formerly FR-3). They share the same management structure. France 2 is funded approximately two-thirds by advertising and the remainder by government subsidies and license fees. France 3 receives approximately eighty percent of its revenues from government funding and the remainder

from license fees and advertising. It provides regional programming, but attracts only about ten percent of French viewers.[928]

Channel 7 (La Sept) is a state-funded "cultural" channel that began broadcasting in 1989. It is distributed by satellite to cable stations in both France and Germany at a joint cost to each country of about $60 million. It specializes in European films, festivals and other events.[929]

Private, commercially funded networks include Channel 1 (TF1) and Channel 6 (M6). TF1, the major French national broadcast channel, was privatized in 1987, with fifty percent of its shares sold to a consortium of companies headed by the construction firm Groupe Bouygues. It has approximately forty percent of the audience share. Channel 6, which is aimed at a young audience, is twenty-five percent owned by the Luxembourg television company, twenty-five percent owned by CLT, and twenty-five percent owned by the French water company, Lyonnaise des Eaux.

Channel 5 (La Cinq) was France's third commercial network until it declared bankruptcy in 1992.[930] Its major shareholder was Hachette, the publishing division of Matra-Hachette, an electronics, defense and communications conglomerate. Arte, a public cultural channel jointly owned by the French and German governments, has replaced Channel 5 during the evening hours. Most of its programs come from Channel 7, the publicly owned satellite channel. Channel 5's daytime hours will be filled in the near future, probably with educational programming.

Canal-Plus (sometimes "Canal +") is a pay-TV channel whose largest shareholders are the Havas advertising and communications group and Compagnie Generale des Eaux. The Caisse des Depots, a part of the French Treasury Ministry, owns six percent. Its programs

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928/ See International Television and Video Almanac 610 (J. Klain ed., 1990).

929/ Television Business International, World Guide '90, at 36 (1990) (TBI World Guide).

930/ Rawsthorn, Hachette Cuts Its Losses Over La Cinq, Fin. Times, Apr. 1, 1992, at 21.

are scrambled for most of the day and are transmitted over the air, by cable and satellite.[931] Canal-Plus is a profitable and increasingly popular channel that has unscrambling devices in about four million French households. It shows movies, often before other channels have access to them.[932]

2. Cable Television

France Telecom began developing cable television as a monopoly service provider in 1982 with the idea of creating a technically advanced interactive fiber optic network. Because progress was slow, the government scaled down the technology in 1986 and allowed cities to allocate cable franchises to private companies. The government also permitted competition in laying the cable network, previously the sole responsibility of France Telecom. Recent investors in cable include Generale des Eaux, Lyonnaise des Eaux, Caisse des Depots (part of the French Ministry of Treasury), Telediffusion de France (TDF), and Bouygues Construction.[933] US West owns nine percent of Lyonnaise Communications and BellSouth owns seventeen percent of Communication-Developpement.[934] Even so, cable remains a relatively undeveloped industry in France.

3. Radio

The state monopoly on radio broadcasting ended in 1982, and in 1986 the government sold its controlling share in the Europe No. 1 radio network. In 1984, advertising was allowed on private radio stations, and by 1989 there were 1,740 private radio stations in France.[935] Most of these were FM stations, either small, locally oriented, non-

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931/ See Organization for Economic Cooperation and Development, France: Broadcast TV Operators 142-43 (Working Paper No. DSTI/ICCP/TISP (90)6/REV2, 1990) (OECD France Report); see Europa '91, supra note 924, at 1068.

932/ Interviews with Serge Schoen, Telecom Attache, French Embassy, in Washington, D.C. (June 26, 1992); Jean-Francois le Prince, Telecom Attache, French Embassy, in Washington, D.C. (Dec. 18, 1992).

933/ OECD France Report, supra note 931, at 144.

934/ National Cable Television Association, Facts at a Glance: International Cable 18, 22 (Oct. 1992).

935/ Europa World Yearbook '91, supra note 924, at 1068.

commercial stations, independent commercial stations, or FM affiliates of national commercial stations, such as NRJ, Europe 1 and 2, RTL, Radio Monte Carlo, and Skyrock.[936] The local, non-profit stations are finding it increasingly difficult to maintain their financial viability and their number has been decreasing.

The majority of national networks consist of AM stations that broadcast news, cultural programs, games, and public service programs. They include about six commercial and two public broadcasting stations. National networks that follow a single format, such as news or music, have become increasingly popular since private radio was legalized.[937]

Public radio in France is about eighty percent subsidized by the government, and twenty percent advertiser supported. These stations can offer a general or a single-theme format, and are broadcast on both FM and AM. Examples of public radio stations include France Musique for classical and jazz music, France Culture for cultural programs, and France Info for news.[938]

4. Satellite

The French satellite system Telecom I is used for television and radio program distribution. While the second satellite in the series, Telecom 1B, was a technical failure, Telecom 1C was a successful broadcast distributor. Telecom II replaced Telecom 1C in 1992. Its customers include France 2, TF1, and Canal Plus.

TDF, the program distributor for high power direct broadcast satellites, has also suffered from technical problems. In addition, the government promoted the D2-MAC standard for satellite television pending the development of high definition television. Currently, there is little programming using the D2-MAC standard, and there are few receivers equipped to

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936/ Good Reception for Investors in French Radio, Eur. Media, Bus. & Fin., Nov. 19, 1990, at 11.

937/ Id. at 10.

938/ Id. at 11; Interview with Serge Schoen, Telecom Attache, French Embassy, in Washington, D.C. (June 26, 1992).

receive that format.[939] Other satellites broadcasting French programming include Eutelsat and Astra.

C. Media Regulation

1. Foreign Ownership Restrictions

France generally limits foreign ownership in broadcasting to twenty percent; however, foreign investment can be increased if a reciprocal agreement is reached with the foreign country involved.[940] Individuals or corporate entities from EC countries are exempt from this restriction, including non-EC companies that have subsidiaries located in France and are considered French under French law.[941] There are no foreign ownership restrictions applicable to cable companies.

2. Crossownership

Crossownership of services is generally allowed in France. For example, France Telecom, the monopoly public telecommunications service operator, lays cable and provides satellite television facilities and has a fifty-one percent share in Telediffusion de France, France's broadcast distributor.[942]

3. Programming Restrictions

Sixty percent of programming must be of EC origin of which forty percent must be French. This is a change from the previous level of fifty percent French programming. The

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939/ OECD France Report, supra note 931, at 144.

940/ Martin Georges & Alain Vallee, Perspectives pour les Telecommunications 92-93 (1992) (citing Loi n# 90-1170 of the 29th of December, 1990, l'article L. 33-1, II).

941/ Id.

942/ France OECD Report, supra note 931, at 142.

quota does not apply to certain types of programs, including news, sports, or talk shows. The quotas went into effect April 1, 1992.[943/]

4. Advertising

Television advertising is limited to fifteen percent of daily transmission time and no more than twenty percent in one hour. Regulations enacted in 1987 require that radio stations must provide a minimum of eighty-four hours of programming per week and that twenty percent of this programming has to be produced by the owners of the station.

D. Policy Initiatives

Privatization has been a major French policy initiative. Beginning in 1982, France permitted competition in radio broadcasting. This resulted in a proliferation of private radio programs. In 1986, the government allowed private companies to participate in the construction of the French cable network. Previously, cable had been part of France Telecom's monopoly. Foreign firms are permitted to operate cable networks and a maximum of fifty percent of cable channels can be allocated to foreign transmissions. If broadcast in the French language, cable programs are required to conform to French broadcast regulations.[944/] In 1987, the government privatized the national network, TF1, and introduced two new commercial television channels.

943/ 1991: Much More Foreign Co-Production Money, Screen Fin., May 20, 1992, available in LEXIS, Nexis Library, SRNFIN File; See also High Quotas, Low Prospects for France, Euro. Media Bus. & Fin., Sept. 2, 1991, at 1.

944/ Europa World Yearbook '91, supra note 924, at 1068.

IV. Federal Republic of Germany[945]

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	37.8 million (Eastern and Western Germany) (a)
	Number of TV Households	30.0 million (a)
Cable TV Penetration	Number of Homes Passed	17.7 million (b)
	Number of Cable Subscribers	9.9 million (b)
VCR Penetration		52% (a)
TV Stations	Government-Run Networks	2 national -- German Public Law Broadcasting Corporation (ARD: Arbeitsgemeinschaft der oeffentlich-rechtlichen Rundfunkan-stalten deutschlands) or First Program[946] (Channel 1), and ZDF (Zweites Deutsches Fernsehen) or Second Program (Channel 2) (c) 11 regional (collectively called Third Program) (c)
	Privately-Run Networks	6 national -- SAT 1, RTL-Plus, Tele-5, Pro-7, Premiere (Pay TV), Kabelkanal; 10 local (c)
Radio Stations		2 federally owned and operated stations: Deutschlandfunk (DLF) and Deutsche Welle (DW); approximately 30 regional stations; and approximately 120 private stations (c)
Other Relevant Mass Media Information	Broadcast Languages	German
	TV Technical Standards	PAL

(a) Board for International Broadcasting, World Guide To Television & Programming, at A-47 (1992).

945/ NTIA wishes to thank Mr. Peter Ziemons of the U.S. Embassy in Bonn for his substantial contributions to and review of earlier drafts of this profile.

946/ "Program" is the term used in the Federal Republic of Germany to describe a station or channel.

(b) National Cable Television Association, Facts at a Glance: International Cable 1 (Oct. 1992).

(c) On March 31, 1992, 31.25 million television sets were registered, about 96% of which were color. Ziemons, U.S. Embassy in Bonn, Media Policy in the Federal Republic of Germany: An Overview of Some of the Legal, Policy, Technical and Trade Aspects of Private and Public Broadcasting 2, 9-18 (Economic Section Working Paper, May 1992).

B. Media Environment

The media environment in the Federal Republic of Germany is a matter of "Land" (state) control. In 1991, the governors of the "Laender" (states)[947/] signed an agreement designed to ensure political neutrality in program content, a variety of program sources, and allowance of private ownership of mass media programming and distribution facilities. However, federal laws provide recommendations for the terms of the agreements between ARD and ZDF, the two federally-owned broadcasting corporations, and the states in which they operate, including provisions for subscription fees, revenue sharing, and distribution of ARD programming. Other areas over which the federal government has jurisdiction include spectrum use and the coordination and enforcement of EC Directives.[948/]

1. Television

Germany has two nation-wide public law broadcasting television networks,[949/] both owned by the German Public Law Broadcasting Corporation: ARD (Arbeitsgemeinschaft der oeffentlich-rechtlichen Rundfunkanstalten Deutschlands) or First Program, and ZDF (Zweites Deutsches Fernsehen) or Second Program. They both carry news, theatrical and musical productions, films, sports, and general entertainment programming. The overall budget for the ARD in 1990 was about 7.8 billion deutschemarks (DM), while ZDF's was DM 1.9

947/ Until unification of the two Germanies on October 3, 1990, the Federal Republic of Germany consisted of ten states and West Berlin. Since October 3, 1990, five new states and Berlin have been added to the Federal Republic of Germany, for a total of 16.

948/ Ziemons, U.S. Embassy in Bonn, Media Policy in the Federal Republic of Germany: An Overview of Some of the Legal, Policy, Technical and Trade Aspects of Private and Public Broadcasting 6-9, 13, 26 (Economic Section Working Paper, May 1992) (Ziemons); U.S. Information Agency, Country Data Sheet: Germany 5 (Feb. 1992).

949/ A public law corporation is established by the state legislature.

billion.[950] Under the umbrella of ARD, there are five Third Program channels owned and operated by groupings of the public law broadcasting corporations in the individual states. Currently, funding for public broadcasting is mainly obtained from fees that households and business users pay to register their radio and television sets. A smaller amount is raised through the sale of commercial advertising.[951]

A federal court decided in 1981 that private broadcasting was permissible under Article 5 of the German constitution.[952] Since 1984, four nation-wide television broadcasting corporations and a number of local broadcasters have begun operation. After initially limiting them to cable or satellite transmission, the German telecommunications administration has undertaken to arrange for terrestrial transmission. Since 1984, two major German commercial corporations (SAT 1 and RTL-Plus) and two minor ones (Tele-5 and Pro-7) have gone into operation at a national level, accompanied by a large number of local television and radio corporations.[953] Private broadcasters raise all of their revenue from advertising income and other forms of sponsorship, not from subscription fees.[954]

Film distribution companies owned by Leo Kirch control approximately forty percent of SAT 1 and are heavily invested in German radio companies. RTL-Plus is owned by Radio-TV Luxembourg, Bertelsmann, the Westdeutsche Allgemaine Zeitung, the Frankfurter Zeitung, and the Burda Publishing House. Silvio Berlusconi, the Italian media entrepreneur, is heavily invested in Tele-5.[955]

950/ Ziemons, supra note 948, at 12.

951/ Id.

952/ Id. at 6; Telegram from the U.S. Embassy in Bonn to NTIA, Private Broadcasting in Germany, No. 17036, Sec.1 at 2 (May 20, 1988) (on file with NTIA) (Telegram No. 17036).

953/ Ziemons, supra note 948, at 13.

954/ Id. at 7.

955/ Id. at 16-17; Telegram No. 17036, supra note 952, Sec. 2, at 2.

2. Cable Television

Dr. Christian Schwarz-Schilling, former Minister of Posts and Telecommunications (CDU), after taking office in October 1982, advocated the rapid deployment of cable systems throughout Germany. At present, cable passes approximately 17.7 million households. Cable subscribers currently number approximately 9.9 million.[956/] The cost of cable installation paid by the subscriber varies according to the type of residence served.[957/]

According to the U.S. Embassy in Bonn, Deutsche Bundespost Telekom (DBP TELEKOM), the monopoly cable network service provider, aims to make cable accessible to most of the population of Germany. In some more remote areas, however, DBP TELEKOM does not install cable because it is unable to recover investment costs. Despite the recent reunification of Germany, it will be some time before the availability of cable in the eastern section of the country approaches the level available in the portion of the country that formerly was West Germany.

There are various specialized cable channels. A major pay channel (Premiere) is owned by Canal Plus, Bertelsmann and Kirch.[958/] Another channel, n-tv, started operation on November 30, 1992. It is a news channel owned by a consortium including Turner Broadcasting (27.5%), Time Warner (19.6%), and various UK, French and German firms. Another channel, Fox, offers both entertainment and news programming. It is owned by Bertelsmann, West Deutsche Median Beteiligung Gesellschaft, and RTL (controlled by Luxembourg Television).[959/]

956/ Id. at 19; See also National Cable Television Association, Facts at a Glance: International Cable 1 (Oct. 1992).

957/ Ziemons, supra note 948, at 19.

958/ Fox, U.S. Information Agency, Regional Television in Selected Countries of Western Europe 8 (Working Paper, Apr. 1991).

959/ Telephone Interview with Peter Ziemons, U.S. Embassy, Bonn, Federal Republic of Germany (Dec. 18, 1992).

3. Radio

The two government-owned radio broadcast corporations are DLF (Deutschlandfunk) and DW (Deutsche Welle). DLF broadcasts in German and in fourteen other languages within the Federal Republic of Germany and to neighboring countries. DW broadcasts in over thirty languages over medium- and short-wave radio throughout the world. In addition to these two radio-only state corporations, there are eleven regional radio-television corporations which are joined together in the Conference of German Public Law Broadcasting Corporations (ARD). Each of the ARD member corporations broadcasts two to four radio programs in its region.[960/] There are approximately seventy-nine AM radio transmitters and 941 FM transmitters in operation.[961/]

4. Satellite Broadcasting

Both national public television broadcasting operations, ARD and ZDF, operate certain satellite programming networks received only by means of satellite dish or cable. ARD offers 1Plus, and ZDF offers 3Sat. 1Plus consists of programming from the eleven regional corporations operated by cooperating states, and 3Sat programming is packaged in cooperation with the Austrian and Swiss broadcasting authorities. Programming from 1Plus and 3Sat is transmitted via TV-Sat2, and cover all of Germany, Austria, and Switzerland.[962/] The deployment of satellite dish receivers appears to be growing, particularly in the five new states in former East Germany.[963/]

C. Media Regulation

1. Foreign Ownership

Under official German policy, there is no discrimination against foreign providers in the licensing process for terrestrial and satellite television licenses and radio licenses and franchises. Both domestic and foreign applicants are subject to the same licensing

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960/ Ziemons, supra note 948, at 9.

961/ Id. at 20.

962/ Id. at 12.

963/ Id. at 24.

requirements. There are no restrictions on the foreign ownership of cable programming systems.

2. Multiple Ownership

Multiple ownership restrictions, if they exist, occur at the state level, although the Bundeskartelamt (Federal Cartel Oversight Office) might intervene if a firm acquires excessive market power.

3. Crossownership

Crossownership of radio and television stations and newspapers is permitted, although in some states the regulating authority may prohibit crossownership of television and radio broadcast stations if the stations' areas overlap substantially and it appears such overlap may threaten program diversity and variety of opinion. The U.S. Embassy reports that owners of newspapers are heavily involved in the electronic media, especially the state-wide radio stations and local private radio stations in Bavaria and Baden-Wuerttemberg.[964/]

4. Programming Restrictions

The EC Broadcast Directive currently recommends that fifty percent of all television programming aired by broadcasters be of EC origin. Although the German federal government supports this recommendation, the matter is unresolved because broadcast law is a state function in Germany, and individual states, such as Bavaria, object to the EC recommendation.[965/]

5. Localism Policy

The German constitution stipulates that media policy is governed by the individual states. Therefore, most operational as well as content regulations are "local" issues. Broadcast television channels must obtain permission from the relevant state authority to be carried via

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964/ Id. at 13.

965/ Id. at 26; U.S. Information Agency, The Broadcast Media Environments of Europe and the USSR 13 (Working Paper, Dec. 1990) (Europe/USSR Media Environments).

local cable systems.[966] The state authority makes its decision in part based on the number of local signals carried on a cable system.

All states have "public access" time requirements for private television broadcasters, under which time and channel space must be set aside for members of the public. The majority of radio stations cover only the area of one city or locality. Only six private radio broadcasters covered the entire country at the start of 1990.

D. Policy Initiatives

From 1949 until recently, a social and political consensus developed with respect to how radio and television services should be administered in West Germany. This consensus basically called for political neutrality and consideration of the diversity of society. Recently, a variety of controversies have developed in the newly formed Federal Republic of Germany regarding the economic, political, and social aspects of these media. These issues include the kinds of constraints that should be placed on the use of radio and television in the political arena; the desirability of significantly increasing the number, and variety, of programs available to the public; whether content should be properly controlled by the public domain; and how much the public domain should yield to commercial or private interests.[967]

1. Broadcasting

Effective January 1, 1992, virtually all households wishing to operate a radio must pay a registration fee of DM 8.25 per month. Households with a television pay DM 23.80 including the right to operate a radio. Business-use vehicles with a radio must also pay DM 8.25 per month.[968] There is some debate as to whether households should continue to pay the same fees if ratings for public television continue to decline.[969]

966/ Europe/USSR Media Environments, supra note 965, at 13.

967/ Ziemons, supra note 948, at 7, 8.

968/ Id. at 12.

969/ The fee schedule for former East Germany is lower than cited above, but will be equalized by 1995. Id.

2. New License Grants

Some states have enacted relatively liberal licensing requirements to encourage private broadcasting, while others have enacted more stringent licensing and operational requirements. The German federal court decided in 1986 that when frequencies are found for new assignment to broadcasters, or when frequencies are reassigned, public and private broadcasters must compete with one another for the use of such frequencies. Recently, the Ministry of Posts and Telecommunications was reviewing some 1,800 frequency applications from private entities wishing to engage in broadcasting.[970/]

3. Other Initiatives

In 1987, the states agreed that, in the future, there will be no additional nation-wide public law broadcasting. They also decided that public law broadcasters will not be permitted to increase the amount of advertising they air.[971/] The states are individually developing policies that would allow private citizens, using state supplied equipment, to produce their own programs for airing over state facilities.

970/ Ziemons, supra note 948, at 20.

971/ Id. at 6-7.

V. ITALY[972/]

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	23.5 million (a)
	Number of TV Households	20.3 million (a)
Cable TV Penetration		Virtually non-existent
	Number of Homes Passed	N/A
	Number of Cable Subscribers	N/A
VCR Penetration		24% (a)
TV Stations	Government-Run Networks	Radiotelevisione Italiana (RAI): 3 channels (RAI-1, RAI-2, RAI-3) (b)
	Privately-Run Networks	8 -- Canale 5, Italia 1, Rete 4, TeleMonteCarlo, Videomusic, Rete A, Tele Capri, Tele Elefante (b)
Radio Stations		3,855 (c)
Other Relevant Mass Media Information	Broadcast Languages	Italian, Some English
	TV Technical Standards	PAL, Systems B & G

(a) Board for International Broadcasting, World Guide To Television & Programming, at A-56 (1992).

(b) Report from Economic Section, U.S. Embassy, Rome, Italy, 1 (Oct. 6, 1992) (on file with NTIA); Clark, In Italy, Pressures on to Rewrite Regulations, Variety, Oct. 12, 1992, at 58.

(c) Media Markets Around the World, Electronic Media, Apr. 20, 1992, at 32.

972/ NTIA wishes to thank the Economic Section of the U.S. Embassy in Rome for their substantial contributions to and review of earlier drafts of this profile.

B. Media Environment

The Italian Government in August 1990 passed a law regulating the broadcast industry for the first time. The Broadcasting Law or "Mammi Law" (named for the former Minister of Posts and Telecommunications) establishes media crossownership rules and other broadcast ownership restrictions applicable to radio, limits the amount of commercial time allowed in feature films shown on television, and prohibits television commercials during children's cartoons. The Broadcasting Law restructured the broadcasting industry by creating, for regulatory purposes, national, regional, and local networks.[973]

1. Broadcast Television

Standard television broadcasting is dominated by the state-controlled television network Radiotelevisione Italiana (RAI), with three channels, RAI-1, RAI-2, and RAI-3, and by Fininvest, which owns Canale 5, Italia 1, and Rete 4. In August 1992, the Italian government granted broadcast licenses for national television service to the three Fininvest networks and TeleMonteCarlo, Videomusic, and Rete A. Tele Capri and Tele Elefante are awaiting national private broadcast licenses.[974]

2. Cable Television

Cable television penetration essentially does not exist in Italy. It appears unlikely that cable will significantly increase its penetration in the near future, unless it comes through the installation of new telecommunications cabling with video capacity. The Italian government is focusing on satellite, rather than cable, distribution.[975]

3. Radio

RAI owns three radio and three television networks that cover the entire country. The RAI radio broadcasting stations (Radio Uno, Radio Due, and Radio Tre) have the highest

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973/ Report from Economic Section, U.S. Embassy, Rome, Italy 1 (Oct. 6, 1992) (on file with NTIA) (U.S. Embassy Report).

974/ Clark, In Italy, Pressure's on to Rewrite Regulations, Variety, Oct. 12, 1992, at 58.

975/ U.S. Embassy Report, supra note 973, at 1.

share of listeners during news broadcasting hours, while the private radio stations have a major share during late night and early afternoon.[976]

There are about 4,000 private broadcasting stations in Italy. The private sector is regulated through the "Mammi Law." The main private radio stations are: Radio Italia, Radio DJ, Rete 105, 102.5 - Hot Radio, Radio Montecarlo, Radio Kiss, Italia Network, Dimensione Suona Network, Lattemiele L'Italiana.[977]

4. Pay TV

The first pay TV operations began in Italy in June 1991. Pay TV is distributed by satellite and requires a decoder. Two thousand vendors sell decoders, and subscribers pay a hook-up fee and an annual subscription fee. There are currently two pay TV channels in Italy: Tele+1 which broadcasts entertainment shows and movies; and Tele+2, which carries sports. A third pay TV channel, Tele+3, is planned.[978]

C. Media Regulation

1. Foreign Ownership

Broadcast licenses are only granted to Italian or EC citizens or to companies incorporated in Italy or the EC. Italian law generally forbids non-EC persons or companies from obtaining a controlling interest in a license. Italy recently adopted a reciprocity policy with regard to foreign ownership of broadcast properties. If the host country of a foreign applicant seeking a broadcast license permits Italian citizens or companies to hold a controlling interest in a broadcast property in its country, the Italian government will grant an equivalent interest to the applicant. Article 17 of the Mammi Law requires transparency of stock companies seeking ownership interests in broadcast licenses in order to prevent indirect foreign control.[979]

976/ Id. at 2.

977/ Id.

978/ Id. at 2; Telephone Interview with Greg Stoloff, U.S. Foreign Commercial Service, U.S. Embassy, Rome, Italy (June 16, 1992).

979/ U.S. Embassy Report, supra note 973, at 3.

2. Multiple Ownership

Concurrent ownership of national and local broadcast licenses for either radio or television is forbidden. There are limits on the number of local radio or television stations one person or company may own within the same region.[980/]

3. Crossownership

There are no restrictions covering radio and television crossownership. Print media and television crossownership are governed by a complex set of rules:

a) An individual or group controlling over sixteen percent of newspaper circulation may not own a national television network;

b) An individual or group controlling between eight and sixteen percent of national daily newspaper circulation may only own one national network;

c) An individual or group controlling less than eight percent of newspaper circulation may own up to three national networks.

In any case, no individual or group may control more than three networks or more than twenty percent of the mass media market, as defined by revenues from sales, subscriptions and advertising in newspapers, journals, books, magazines, television, radio, and the sale or use of audiovisual products.[981/]

4. Programming Restrictions

Program quotas are consistent with the EC Broadcast Directive. The Mammi Law requires the phasing-in, over three years, of a quota for feature films broadcast over television that eventually requires that over fifty percent of feature films must be of EC-origin (of which at least fifty percent must be of Italian origin). The Mammi Law banned

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980/ Id.

981/ Id.

the airing of adult-only films; movies for viewers older than fourteen must start no earlier than 10:30 P.M.[982/]

5. Advertising

RAI is permitted to obtain approximately $850 million a year in advertising revenue. The Mammi Law reduced the amount of advertising permitted on commercial stations.[983/]

6. Localism Policy

The Mammi law also requires broadcasters to air a minimum number of hours of news and local programming.[984/]

982/ Id. at 4.

983/ Id.

984/ Id.

VI. JAPAN

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	60 - 60.85 million (a)
	Number of TV Households	40 million (b)
Cable TV Penetration		15% - 20% penetration (c)
	Number of Homes Passed	N/A (d)
	Number of Cable Subscribers	6.2 million (d)
VCR Penetration		66% - 66.8% (e)
Direct Broadcast Satellite	Number of DBS Stations	3 -- 2 Nippon Hoso Kyokai (NHK); 1 private (f)
	Number of DBS Households	2.5 million (g)
TV Stations	Government-Run Networks	1 (NHK) (f)
	Privately-Run Networks	5 -- Asahi National Broadcasting, Fuji Television Network, Tokyo Broadcasting System (TBS), Nippon Television Network Corporation, Television Tokyo Channel 12 Ltd. (h)
Radio Stations		199 AM (NHK), 140 AM educational (NHK), and 224 AM (private), 510 FM (NHK), 173 FM (private), 2 FM (University of the Air) (f)
Other Relevant Mass Media Information	Broadcast Languages	Japanese, English
	TV Technical Standards	NTSC, System M

(a) Board for International Broadcasting, World Guide To Television & Programming, at A-99 (1992) (60 million sets) (World Guide 1992); Figures supplied courtesy of the Embassy of Japan, Washington, D.C. (Dec. 1991) (66.85 million sets in 1990) (Embassy of Japan).

(b) World Guide 1992, supra note (a), at A-99; National Cable Television Association, Facts at a Glance: International Cable 1 (Oct. 1992) (Facts at a Glance).

(c) Facts at a Glance, supra note (b), at 1 (15% penetration); World Guide 1992, supra note (a), at A-99 (18% penetration); Remarks of the Government of Japan, Fourth United States-Japan High-Level Telecommunications

Policy Discussions, Oct. 28-29, 1991, Tokyo, Japan (20% penetration) (from personal notes of Diane Steinour, NTIA) (1991 data) (on file with NTIA) (U.S.-Japan Discussions).

(d) World Guide 1992, supra note (a), at A-99.

(e) Embassy of Japan, supra note (a) (66.8%); World Guide 1992, supra note (a), at A-99 (66%).

(f) Ministry of Posts & Telecommunications of Japan, Major Policies of the Japanese Broadcasting Administration -- Appendices, at 7 (Jan. 1992).

(g) U.S.-Japan Discussions, supra note (c) (1991 data).

(h) Organization for Economic Cooperation and Development, Japan: Telecommunications and Information Services Policies 175 (Working Paper No. DSTI/ICCP/TISP(90)6/REV2, Oct. 1991).

B. Media Environment

The Ministry of Posts and Telecommunications (MPT) regulates broadcasting in Japan, under the Radio Act (1950), the Broadcast Act (1950), the Cable Television Broadcast Act (1972), the Law Regulating Cable Sound Broadcasting (1976), the University of the Air Act (1981), and the Satellite Communications and Broadcasting Organization Act (1983), among others.[985/]

Japanese media are not limited to traditional broadcast television. Satellite broadcasting is a fast-growing medium, and VCR penetration levels are high. Cable television (CATV) penetration rates, while significantly lower than in the United States, are growing as more facilities are deployed, using both one-way and interactive systems.

1. Television

There are five private networks and one state-run system in Japan. The state-run Nippon Hoso Kyokai (NHK) television broadcasting system operates two terrestrial networks, stipulated by law to be national in scope. One of NHK's two networks is educational. NHK broadcasts both domestically and internationally, in twenty-two languages.[986/]

NHK's revenues are based on television receiver license fees. Subscribers to NHK must pay a monthly reception fee that is set by the Japanese Diet. The Diet also approves NHK's budget and financing plan. The Broadcast Act establishes a series of programming standards

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985/ Ministry of Posts and Telecommunications of Japan, Outline of Broadcasting in Japan 22 (1991) (Broadcasting in Japan).

986/ Id. at 5-6.

to which NHK and all other broadcasters must adhere. The Act also requires broadcasters to develop their own program standards and to create a Broadcast Program Consultative Committee to enforce those standards.[987/]

The five private networks are limited to serving regions or prefectures. In practice, however, the private networks cooperate with each other to achieve near-national coverage.

Japan also has a well-developed educational broadcasting system, called the University of the Air. Established in 1981, the University of the Air began broadcasting university-level programming in 1985, using UHF-TV and FM programs broadcast from Tokyo and Gunma.[988/]

2. HDTV

The first-generation enhanced definition television (EDTV) service, known in Japan as CLEARVISION, uses traditional terrestrial broadcasting methods. Since 1989, more than one hundred companies have offered CLEARVISION. A second-generation service with higher video and sound quality and a wider aspect ratio is currently under review by Japan's Telecommunications Technology Council.[989/]

NHK has been broadcasting HDTV programming on four channels since June 1989, using its own HI-VISION system of 1125 scanning lines, with a 16:9 aspect ratio and digital sound. One of the commercial satellite networks, Japan Satellite Broadcasting, Inc. (JSB), conducted a nine-day demonstration of the HI-VISION system in February 1991.[990/] NHK is attempting to make the HI-VISION system become the industry standard in Asia, as well as in Europe and the United States.[991/]

987/ Id. at 6-7, 9-10.

988/ Id. at 8-9.

989/ Remarks of the Government of Japan, Fourth United States-Japan High-Level Telecommunications Policy Discussions, Oct. 28-29, 1991, Tokyo, Japan (from personal notes of Diane Steinour, NTIA) (U.S.-Japan Discussions).

990/ Hi-Vision Becoming a Reality on NHK: New Breeze, ITU of Japan Ass'n J., 9-11 (Summer 1991).

991/ U.S.-Japan Discussions, supra note 989.

3. Videocassettes

The videocassette market is strong in Japan, with almost sixty-six percent of households owning VCRs, VTRs, or laser disc systems. In 1990, videocassette sales totalled $252.8 million, and videocassette rental revenues totalled $93.3 million.[992/] The VCR phenomenon in Japan is not as strong as in the United States.[993/]

4. Cable Television

The Japanese CATV market differs from its American counterpart. CATV in Japan serves mainly hotels, luxury apartment buildings, and areas with poor reception. In 1990, there were approximately 50,400 CATV facilities in Japan.[994/] While most CATV facilities engage solely in retransmission, CATV systems that provide only cable network programming have grown, from 152 in 1986 to 369 in 1990.[995/] In addition, large-scale, two-way interactive urban systems with multichannel capability are on the rise, with over 400,000 subscribers in December 1991.[996/]

There are over thirty Japanese cable programming distribution companies, supplying news, teletext news, weather, sports, films, music, children's programming, horse racing, and other programming. Some cable programming, such as "Space Cable Network," is supplied by communications satellite. With the launching of JCSat 1 and SCC Super Bird A communications satellites, satellite-delivered cable services will grow in the future.[997/]

992/ 1990 International Television & Video Almanac 736 (J. Klain ed., 1990) (TV & Video Almanac).

993/ Id. at 736.

994/ Ministry of Posts and Telecommunications of Japan, Communications in Japan, White Paper 1992, at 41 (1992) (White Paper 1992).

995/ Ministry of Posts and Telecommunications of Japan, Current Situation and Future Perspective on CATV 2 (Oct. 1991) (CATV Situation).

996/ White Paper 1992, supra note 994, at 7.

997/ CATV Situation, supra note 995.

5. Radio

Commercial AM operations began in 1951, and FM operations began in 1970.[998] In March 1990, there were forty-seven companies engaged in radio broadcasting, and thirty-six companies engaged in both radio and television broadcasting.[999]

NHK has operations in the AM and FM frequencies: two AM networks (No. 1 and No. 2) and one FM network. NHK also engages in overseas shortwave broadcasting in twenty-two languages, up to a cumulative of fifty-two hours per day.[1000]

AM operations suffer from low signal strength and interference from overseas transmissions. To counteract these effects, AM broadcasters are increasing the number of relay stations and boosting signal strength.[1001]

6. Satellite Broadcasting

NHK began using DBS in 1984 via the BS-2 series of satellites. NHK's DBS service was the first of its kind in the world. In October 1991, NHK began DBS transmissions via its newest generation BS-3a satellite. Privately operated satellite broadcasting began in 1989. Currently there are two commercial satellite broadcasters, JSB, which began charging subscription fees in April 1991, and Satellite Digital Audio Broadcasting (SDAB). As of March 1991, there were 3.94 million NHK DBS subscribers,[1002] and 490,000 with the

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998/ Ministry of Posts and Telecommunications of Japan, Major Policies of the Japanese Broadcasting -- Appendices 15 (Jan. 1992).

999/ Id. at 3.

1000/ NHK Factsheet, supra note 832, at No. 9. For a further discussion of the operations of NHK, see discussion supra Appendix C at p. C-11.

1001/ Broadcasting in Japan, supra note 985, at 14.

1002/ Ministry of Posts and Telecommunications of Japan, Communications in Japan, White Paper 1991, at 10 (1992).

privately-operated SDAB.[1003] Government sources forecast DBS will penetrate forty percent of the population by 2000.[1004]

C. Media Regulation

1. Broadcast/Cable

Under the Radio Act, broadcast applicants must meet four standards when applying for a license:

a. broadcast stations must conform to technical standards and their frequencies must conform to the Broadcast Frequency Plan;

b. applicants must have a sound financial basis and applicants must comply with basic business establishment standards;

c. licenses must be renewed every five years; and

d. commercial broadcasters cannot engage in nationwide broadcasting, but should be regionally based.[1005]

Japan's regulatory structure subdivides cable into CATV and Cable Sound broadcasting (sound distributed by cable). In Japan, CATV providers, or licensees, are regulated as transmission "facilities," with responsibility for their own programming.[1006] CATV providers with more than 500 "drop line" or subscriber terminals[1007] are regulated under

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1003/ U.S.-Japan Discussions, supra note 989.

1004/ Id.

1005/ Broadcasting in Japan, supra note 985, at 4, 8.

1006/ See N. Koike, Cable Television and Telephone Companies: Towards Residential Broadband Communications Services in the United States and Japan 33-34 (Harvard University Program on Information Resources Policy, 1990) (CATV and Broadband).

1007/ The Japanese term "drop line terminal" is similar to the U.S. term "cable subscriber household."

In 1988, 98% of all cable systems in Japan had less than 500 subscribers. Id. at 30.

the CATV Broadcast Act.[1008] Providers with 51-500 terminals, and Cable Sound facilities providers are regulated under the Cable Telecommunications Act.[1009] CATV providers with under fifty-one terminals are not regulated and need only notify MPT of their existence.[1010]

2. Foreign Ownership

Under Japan's Radio Law (Article 5(4)(i)), foreign citizens, foreign governments, or foreign juridical persons/organizations may not hold broadcast licenses. Under Article 5(4)(ii) and (iii), foreigners may hold up to a one-fifth indirect ownership interest in a broadcast station.[1011]

3. Multiple Ownership

The Broadcast Act licensing procedures do not allow commercial broadcasters to own or control more than one television or radio station.[1012]

4. Crossownership

In Japan, crossownership of the print and broadcast media is allowed. The major private networks are wholly- or partly-owned by major Japanese newspapers. For example, TV Asahi is managed by the Asahi group, NTV is managed by Yomiuri, and TV Tokyo by Nihon Keizai Shinbun.[1013] However, the Broadcast Act licensing procedures do not allow

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1008/ Broadcasting in Japan, supra note 985, at 12.

1009/ Id.

1010/ Cable Sound operations are also regulated under the Law Regulating Cable Sound Broadcasting. Id. at 12.

1011/ According to the Japanese and American Embassies, there is a similar one-fifth foreign ownership limitation applicable to CATV facilities.

1012/ Broadcasting in Japan, supra note 985, at 8.

1013/ Television Business International, World Guide '90, at 215 (1990).

commercial broadcasters to own or control a television station, a radio station, and a newspaper simultaneously.[1014]

The Nippon Telegraph & Telephone (NTT) Law forbids NTT, the dominant domestic telecommunications carrier, from providing CATV or video-based entertainment services in Japan. One observer believes this prohibition may curtail NTT's ability to provide optical fiber to the home, because NTT cannot provide cable services to help recover its investment costs in the more advanced services (e.g., videophone).[1015]

5. Programming Restrictions

Under the Broadcast Act, broadcasters must follow certain stipulated programming standards. Broadcasters must provide programming that does not disrupt public order or morals. Programming must also be politically impartial and the amounts of cultural, educational, news, and entertainment programming must be balanced. News programs may not distort facts, and must present as many viewpoints as possible when presenting an issue. Advertisements must be clearly identified as such, and cannot be shown during broadcasts to schools.[1016]

Any program changes or additions must be announced publicly by the broadcaster and referred to the Broadcast Program Consultative Committee, established by NHK and commercial broadcasters. Under the Broadcast Act, broadcasters must publicly disclose the findings of the Committee and provide programming responsive to their recommendations.[1017]

1014/ Broadcasting in Japan, supra note 985, at 8.

1015/ CATV and Broadband, supra note 1006, at 112.

1016/ Broadcasting in Japan, supra note 985, at 9-10.

1017/ Id. at 10-11.

D. Policy Initiatives

1. Long-Term Policy Review by MPT

MPT has instructed several study groups to develop policy recommendations for the mass media in Japan. In September 1992, one group completed a review of broadcast policy, technology, and management in an increasingly multichannel and multimedia environment.[1018] The report of a second group, "Long-term Vision for Satellite Broadcasting Technology," is scheduled for release in 1993. It will study such issues as band compression systems for satellite TV, broadband HDTV, three-dimensional TV systems, and Integrated Services Digital Broadcasting (ISDN).[1019] A third group reported its findings on satellite TV broadcasting transmission standards in June, 1991.[1020]

2. Broadcasting Policy Goals

In January 1992, MPT's Director General of Broadcasting described six policy goals in Japan's administration of broadcasting:

a) Contribute to the "revitalization of regional social activities through broadcasting," by improving reception in outlying areas;

b) Increase overseas broadcasting to develop closer economic, political, and cultural ties worldwide, especially to Europe;

c) Increase the "diffusion of satellite broadcasting," via both broadcasting and communications satellites, through a variety of promotional actions by MPT;

d) Promote the diffusion of Japan's high definition television technology HI-VISION in the broadcasting, film, telecommunications, and print media;

1018/ "Panel on Future of Broadcasting" Submits Its Report, MPT News Extra, Sept. 1992, at 20-23.

1019/ Ministry of Posts and Telecommunications of Japan, Study Group on Long-Term Vision for Satellite Broadcasting Technology Began Work, MPT News, June 3, 1991, at 2.

1020/ Ministry of Posts and Telecommunications of Japan, Technical Standards for Satellite TV Broadcasting Revised, MPT News, July 1, 1991, at 1.

e) Expand and improve the quality of Japan's broadcast programming by exploring ways to improve high-quality program distribution methods; and

f) Reorganize divisions within MPT's Broadcasting Bureau so that an administrative system covers all planning and implementation operations, "from policy planning to licensing, supervision and promotion." [1021]

3. HDTV

MPT has three goals for HDTV development: to promote understanding of the technology through demonstrations, to implement HDTV transmission via broadcast satellites, and to implement the HI-VISION program to help twenty-four regional cities become more economically attractive. MPT has said that it is closely following the U.S. trials of digital advanced television systems. However, Japanese broadcasters do not see the need to switch to digital systems in the near future.[1022]

4. Satellite Broadcasting

A blue-ribbon study group concluded a study in December 1991 for MPT regarding "Continuous and Stable Implementation of Broadcasting-by-Satellite Broadcasting." The group's major finding was that, due to the launch of the Broadcasting-by-Satellite (BS) satellite in August 1991, the number of subscriber households should be increasing steadily. The study group expects further development of BS-Broadcasting.

Due to the technical constraints of BS-Broadcasting technology and its long and costly repairs, broadcast down-time, and lengthy procurement process, the study group concluded that Japan needs an operational backup satellite. The group also calls for the training of operators and the improvement of technology to prevent technological breakdowns.[1023]

1021/ Address by Tomoyuki Onozawa, Director General, Broadcasting Bureau, Ministry of Posts and Telecommunications of Japan, New Year's Statement (1992) (provided courtesy of Embassy of Japan, Washington, D.C.).

1022/ U.S.-Japan Discussions, supra note 989.

1023/ Ministry of Posts and Telecommunications of Japan, Report on Continuous and Stable Implementation of BS-Broadcasting 2, 5 (Press Release, Dec. 10, 1991).

5. Standards Policy

MPT places a high priority on the development of standards, particularly audio/visual standards. MPT continues to uphold the United Nation's International Telecommunication Union (ITU) standardization process. The government of Japan will engage in more integrated efforts to merge the standardization processes for visual, sound and computing activities. In late October 1991, the MPT asked its advisory body, the Telecommunications Technology Council (TTC), to start a one-year review process of digital video technology, and to submit its findings to the ITU and the International Standards Organization.[1024]

1024/ U.S.-Japan Discussions, supra note 989.

VII. MEXICO

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets	15 million (a)
	Number of TV Households	11.2 million (a)
Cable TV Penetration	Number of Homes Passed	5% (a)
	Number of Cable Subscribers	600,000 (b)
VCR Penetration		38% (c)
TV Stations		283 (d)
	Government-Run Networks	Imevision (5 channels) (e)
	Privately-Run Networks	Televisa (4 channels) (e)
Radio Stations		686 AM, 237 FM (d)
Other Relevant Mass Media Information	Broadcast Languages	Spanish
	TV Technical Standards	NTSC

(a) Bureau for International Broadcasting, World Guide to Television & Programming, at A-137 (1992).

(b) Letter from Anne D. Jillson, Economic Section, U.S. Embassy in Mexico City to NTIA 1 (Sept. 5, 1991) (on file with NTIA).

(c) Media Markets Around the World, Electronic Media, Apr. 20, 1992, at 36.

(d) Camara Nacional de la Industria de Radio y Television Brochure (1991).

(e) Television Business International, World Guide '90, at 310-11 (1990).

B. Media Environment

Until the 1970s, broadcasting was an unregulated, private sector service. The Mexican government allocated the first radio and television licenses to a Mexican entrepreneur, Emilio Azcarraga. Azcarraga went on to create the Spanish International Network (SIN) to sell Spanish-language programs to U.S. stations.[1025/]

During the 1970s, the Mexican government began regulating the broadcast industry, which the Secretariat for Telecommunications and Transport currently regulates. Private broadcasters reacted to government regulatory efforts by consolidating their interests to form the monopoly broadcaster and program provider, Televisa. Televisa is controlled by the Azcarraga family.[1026/]

1. Broadcast Television

Mexico has two television networks, Imevision and Televisa, both of which are supported by advertising revenue. Imevision, Mexico's state-owned broadcasting network, was established in 1972. It has two national channels and three local channels (Mexico City, Monterrey and Chihuahua). It covers seventy percent of Mexico, broadcasts principally in Spanish, and carries fifty percent domestic and fifty percent imported programming (primarily from the United States, France, and Italy).[1027/]

Televisa is Mexico's privately owned and operated television network. It has four national channels, and covers 100 percent of Mexico. Its principal language is Spanish, and it has seventy percent domestic and thirty percent imported programming (primarily from the

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1025/ Solis, U.S. Information Agency, Latin American Television Series: Mexico 2 (Working Paper, Mar. 1990) (Latin American Television).

1026/ Fox, U. S. Information Agency, Latin American Broadcasting: The Balance of the Past, The Challenge to Come 12, 19 (Working Paper, June 1991).

1027/ See World Guide '90, supra note 1013, at 310-11; Letter from Anne D. Jillson, Economic Section, U.S. Embassy in Mexico City to NTIA 1 (Sept. 5, 1991) (Embassy Letter).

United States).[1028] Televisa and its subsidiary, Univisa, provide much of the Spanish-language programming to Mexico, the United States, and other parts of the world.

Following a 1987 FCC decision, Televisa sold its U.S. stations and its U.S. Spanish-language network, Univision, to Hallmark Cards, Inc.[1029] In 1992, the FCC granted Hallmark's application to sell Univision to a group of investors that includes A. Jerrold Perenchio, Venevision International Ltd., and a U.S. subsidiary of Grupa Televisa S.A. de C.V. (Televisa).[1030]

Televisa's other subsidiaries include Galavision, a distributor of Spanish-language programming to affiliated cable systems and television broadcast stations throughout the United States; Protele, an international distributor of television programming; DATEL, a telemarketing company; Videovisa, a producer and marketer of videocassettes; Fonovisa, a producer and marketer of Spanish-language records; and ECO, a Spanish-language news service.[1031]

Mexico's Public Education Office owns Channel 11, an educational and cultural channel. Established in 1959, it covers forty percent of Mexico, its principal language is Spanish, and it has seventy percent domestic and thirty percent imported programming (primarily from the United States, Spain, and England).[1032]

1028/ World Guide '90, supra note 1013, at 310-11.

1029/ See Applications of Spanish International Communications Corp., Memorandum Opinion and Order, 2 FCC Rcd 3962 (1987), aff'd, 3 FCC Rcd 4319 (1988). U.S. foreign ownership restrictions limit Azcarraga's ownership interest in a U.S. broadcasting station to 20%. See supra Chapter 6, at 77. See also Latin American Television, supra note 1025, at 3-4.

1030/ Applications of Univision Holdings, Inc., et al., Memorandum Opinion and Order, 7 FCC Rcd 6672, 6673 (1992); see also Stevenson, Hallmark to Sell Its Univision TV Group, N.Y. Times, Apr. 9, 1992, at D1, D4. The sale was recently finalized in December 1992. See, e.g., Perenchio Completes Univision Buy, Daily Variety, Dec. 18, 1992, at 6.

1031/ Latin American Television, supra note 1025, at 4, 10.

1032/ Bureau for International Broadcasting, World Guide to Television & Programming, at A-137 to A-138 (1992).

2. Cable Television

Cable regulation in Mexico is based on a federal law passed in 1979 that allows commercial cable stations to operate under a fifteen year license administered by the Secretariat for Communications and Transport.[1033] In September 1991, ninety systems holding cable television franchises were operating in Mexico, twenty additional systems were being constructed, and eighty-one were in the process of obtaining government approval.[1034] The eight largest cable systems in Mexico account for sixty-six percent of all earnings and forty-four percent of all subscribers in the cable industry. Local businesses typically own the smaller cable television systems.[1035]

Cablevision, owned by Televisa, is the largest cable company in Mexico. Its system, located in Mexico City, has sixteen channels. Cablevision produces programming for three of its channels, receives five channels via satellite from the United States, and receives eight over-the-air channels from Mexico City. In addition, Cablevision provides programming and services for other Mexican cable systems.[1036]

Univision and Galavision provide most of the programming for Mexican cable systems. In September 1988, Galavision developed a twenty-four hour news service that provides coverage to the United States, Latin America, and Europe, and reaches about 400 million Spanish speakers worldwide. The U.S. stations that receive the Galavision news service mix the news with entertainment programming, much of which is supplied by Televisa.[1037]

1033/ Latin America Television, supra note 1025, at 7.

1034/ Embassy Letter, supra note 1027, at 1.

1035/ Latin American Television, supra note 1025, at 8-9.

1036/ Id. at 9-10.

1037/ Id. at 11.

3. Radio

The majority of Mexican radio stations are privately owned commercial stations.[1038] There are several government-owned radio stations. The Secretariat of Education owns one, and the Instituto Mexicano de Radio owns two (one AM and one FM).[1039]

C. Media Regulation

1. Foreign Ownership Regulation

Based on the Mexican Foreign Investment Law, ownership of radio and television companies is currently reserved exclusively to Mexicans or Mexican companies. A recently passed law that has not yet gone into effect would allow up to a forty-nine percent foreign ownership interest of cable facilities.

2. Multiple and Crossownership

There are no restrictions on multiple or crossownership of media firms in Mexico. For example, Televisa owns a number of television and radio stations, as well as newspapers. In addition, although there is an antitrust provision in the Mexican constitution, Mexico has no operative antitrust legislation.

3. Programming Restrictions

The government requires all private radio and television stations to reserve 12.5% of their air time for cultural and public service programs provided by the federal government.[1040] While there are no restrictions on foreign program content in Mexico, English-language over-the-air broadcast channels are prohibited.

1038/ Camara Nacional de la Industria de Radio y Television, Industry Association Brochure (1991) (CIRT Brochure).

1039/ Embassy Letter, supra note 1027, at 1.

1040/ See CIRT Brochure, supra note 1038.

Foreign channels, other than English channels, carried on cable TV systems must be approved by the government, and three channels on each system must be reserved for federal government use. English-language channels are permitted on cable systems.[1041]

4. Advertising

Both Imevision and Televisa are supported by advertising revenue; however, they are not allowed to show foreign commercials. Until 1991, Mexican cable systems were prohibited from airing commercials at all. This prohibition was frequently violated, because cable systems carried over-the-air channels from Mexico City, and did not delete the commercials received from these channels.[1042]

D. Policy Initiatives: Broadcasting

The Mexican government is considering privatizing the government-run network, Imevision, which needs an infusion of capital to refurbish old equipment. The government is planning to sell at least one national channel and possibly two local channels. One local channel in Mexico City would remain in government hands as a cultural channel. It would be administered by Imevision with the assistance of a board of advisors.[1043]

1041/ Latin American Television, supra note 1025, at 7.

1042/ Id. at 7-8; see also Embassy Letter, supra note 1027, at 1.

1043/ Embassy Letter, supra note 1027.

VIII. UNITED KINGDOM (of Great Britain & Northern Ireland)

A. Media Availability

Condition Measured	Unit of Measure	Measurement
Television Penetration	Number of TV Sets Number of TV Households	35 million (a) 21.6 million (b)
Cable TV Penetration	Number of Homes Passed Number of Cable Subscribers	2.197 million (b) 488,677 (b)
VCR Penetration		70.4% (c)
TV Stations	Government-Run Networks Privately-Run Networks	4 National Terrestrial Channels (d) 1 -- BBC1 and BBC2 (d) 2 -- Channel 3 (formerly ITV), Channel 4 (d)
Radio Stations		225 AM; 525 FM (mostly repeaters) (e)
Other Relevant Mass Media Information	Broadcast Languages TV Technical Standards	English, Welsh PAL

(a) Board for International Broadcasting, World Guide to Television & Programming, at A-78 (1992).

(b) National Cable Television Association, Facts at a Glance: International Cable 1 (Oct. 1992).

(c) Hard Data: Great Britain, Eur. Media Bus. & Fin., Jan. 20, 1992, at 12.

(d) ITV, BBC, Bskyb: Blighty TV Heats Up, Variety, Oct. 12, 1992, at 56; Television Business International, World Guide '90, at 89 (1990).

(e) Central Intelligence Agency, The World Factbook 1992, 357 (1992).

B. Media Environment

Regulations governing broadcasting in the United Kingdom include the Broadcasting Act of 1981, the Broadcasting Act of 1987, the 1984 Cable and Broadcast Act, and the Broadcasting Act of 1990.

The 1981 Broadcasting Act created the Independent Broadcast Authority (IBA) to regulate newly established commercial television in the United Kingdom. In 1984, the Cable and Broadcast Act created the Cable Authority to oversee the newly developing cable television sector.

The 1990 Broadcasting Act replaced the IBA and the Cable Authority with the Independent Television Commission (ITC), whose regulatory oversight includes broadcast and cable television, as well as satellite broadcasting. A new Radio Authority oversees radio broadcasting. The 1990 Broadcasting Act also created the Broadcasting Standards Council, which is responsible for monitoring program content, in part to ensure that broadcasters comply with the obscenity rules of the Obscene Publications Act.

After the 1992 election, the Government created a new ministry called the Department of National Heritage to regulate public broadcasting. The ITC still oversees commercial broadcasters.

1. Broadcast Television

Television households pay an annual license fee to receive public radio and television programs produced by the British Broadcasting Commission (BBC). Established in 1926, the BBC is the state television and radio broadcaster for the United Kingdom, governed by a twelve-member board of governors appointed by the Queen.[1044/] There is no advertising on the BBC, but the 1990 Broadcasting Act permits the BBC to use commercial sponsorship to help fund programming.

Independent Television (ITV) is a commercial, independent network, which originally consisted of fifteen companies whose programs were authorized by the Independent

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1044/ Foreign Commonwealth Office, Broadcasting in Britain: Recent Developments 4, 5, 12 (May 1991) (Broadcasting in Britain).

Broadcasting Authority (now the ITC). The original ITV contracts expired at the end of 1992. In January 1993, Channel 3 replaced ITV. Channel 3 consists of fifteen regional licensees of the ITC, which are bound by ITC requirements regarding program quality and diversity.[1045]

Channel 4 broadcasts throughout Britain except in Wales. It offers alternative, non-mainstream programming. Currently, it is funded by ITV programmers, who sell advertising time on Channel 4. Under the 1990 Broadcasting Act, Channel 4 may sell its own air time in 1993 as a public corporation. A government-funded Welsh channel, SC4, is required by law to broadcast a significant proportion of its programs in the Welsh language.[1046] A new fifth channel, which is expected to cover about seventy percent of U.K. households, has been authorized to begin operations by the beginning of 1994. It will be funded by a combination of advertising, subscription, and sponsorship revenues.[1047]

2. Cable Television

Cable television was deregulated in 1983. By January 1, 1991, 135 broadband cable franchises[1048] had been awarded in the United Kingdom, covering about 14.5 million households, or two-thirds of all television households.[1049] However, as of that date, only twenty-seven cable franchises actually offered service, four were being built, and 102 were inactive.[1050]

1045/ For details regarding the relationship of ITV and its franchisees with the ITC, see Department of Trade and Industry, Broadcasting in the 90's: Competition, Choice and Quality 20-26 (Nov. 1988) (White Paper).

1046/ Broadcasting in Britain, supra note 1044, at 7.

1047/ Id.

1048/ Cable systems are of two types in the United Kingdom: tree and branch coaxial cable, which is primarily used for retransmission of broadcast programs, and fiber optic broadband cable systems. Broadband systems can carry up to 30 channels and are capable of offering interactive services. In the United Kingdom, broadband systems are allowed to compete in the provision of local telephone service.

1049/ Broadcasting in Britain, supra note 1044, at 8.

1050/ U.K. Cable Hopes Confront Financial Reality, Broadcasting, Feb. 4, 1991, at 36.

The ITC took over cable regulation from the Cable Authority in January 1991. The ITC awards licenses to cable channels based on consumer protection standards and the qualifications of operating management.[1051]

The 1990 Broadcasting Act has allowed North American telephone and cable companies to invest in U.K. cable systems. U.S. companies with interests in U.K. cable franchises include, among others, TCI, Pacific Telesis, Southwestern Bell, U.S. Cable Corporation, US West, NYNEX, Jones Intercable, and Comcast.[1052]

3. Radio

The state-owned BBC operates four national, four regional, and thirty local radio services. Independent local radio service began in 1973. At the end of 1989, fifty-two local commercial radio franchises had been awarded, and forty-nine were operational. Most of these local stations have become profitable. In addition, twenty-three community radio stations have been awarded. By the end of 1989, five were broadcasting. These stations direct local programming to particular audiences, such as ethnic groups.[1053]

In 1990, a new Radio Authority began regulating independent radio stations in the United Kingdom. The 1990 Broadcasting Act authorized the Radio Authority to license three new national commercial radio stations and up to several hundred new local radio stations.[1054] Beginning in May 1991, the Radio Authority began auctioning the national radio licenses to the highest bidder.[1055]

1051/ Broadcasting in Britain, supra note 1044, at 8.

1052/ National Cable Television Association, Facts at a Glance: International Cable 26 (Oct. 1992).

1053/ C. Veljanovski, The Media in Britain Today: The Facts, The Figures 55-56 (1990) (Media in Britain Today).

1054/ Mullin, Rhyne, Emmons and Topel, P.C., A Guide to Developments in United Kingdom Commercial Radio 7-8 (1991) (Developments in U.K.). See also Broadcasting in Britain, supra note 1044, at 8-9.

1055/ See Sloppy Rules and Sloppy Songs, The Economist, May 25, 1991, at 65; TV-AM and Virgin Win Radio Bid, The Times, Apr. 3, 1992, available in LEXIS, Nexis Library, CURRNT File.

4. Satellite

The merger of British Satellite Broadcasting and Sky Broadcasting in 1990 to form British Sky Broadcasting (Bskyb) consolidated the DBS industry in the United Kingdom. The trade press estimates that satellite programming reaches 1.5 million homes, either directly by satellite dish or via cable television.[1056]

C. Media Regulation

1. Foreign Ownership Restrictions

No organization from outside the European Community can acquire a controlling interest in a domestic broadcasting license. Control is defined as an interest of more than thirty to fifty percent, depending on the circumstances.[1057]

The United Kingdom liberalized its foreign ownership restrictions with respect to cable in 1990. The Broadcasting Act of 1990 lifted all foreign ownership restrictions in cable television, allowing U.S. companies to invest in U.K. cable systems.

2. Crossownership

a. Print Media

Under the 1990 Broadcasting Act, national newspaper proprietors cannot own more than twenty percent of the new Channel 3 (formerly ITV), the new Channel 5, or any radio franchise.

b. Broadcasting

The Broadcasting Act of 1990 contains detailed ownership rules. Commercial television companies and independent radio companies must seek ITC and Radio Authority approval in

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1056/ Tube License Renewals Cloud Everybody's Biz, Variety, Jan. 21, 1991, at 66.

1057/ See Developments in U.K, supra note 1054, at 51-52.

order to invest in other radio or television companies and are subject to a variety of ownership restrictions.[1058/]

Public telecommunications (telephone) operators may not hold a controlling interest in any Channel 3, Channel 5, national radio or domestic satellite license.[1059/] Public telephone operators are also barred from providing entertainment services until the year 2000 (subject to possible review in 1997).[1060/]

In addition, an independent producer cannot be an employee of a broadcaster and cannot, as a member of a producing group, own more than 15% of a broadcaster or vice versa.[1061/]

3. Broadcast Multiple Ownership

A single person may own two ITV franchises, but no single group or company can own franchises in two large regions, or two neighboring regions.[1062/]

4. Programming Restrictions

Broadcasters in the United Kingdom traditionally abided by informal industry guidelines to carry no more than fourteen percent foreign programming. The government recently enacted a more stringent quota, making it compatible with that set by the EC Broadcast Directive. The new quota requires that at least a majority of programming hours, with certain exceptions, must be of European origin. Exceptions include news, sports, game shows, advertising, and teletext services.

1058/ For a detailed summary of ownership restrictions, see Broadcasting in Britain, supra note 1044, at 9-10. See also Media in Britain Today, supra note 1053, at 78-80.

1059/ Broadcasting in Britain, supra note 1044, at 9.

1060/ Department and Trade and Industry, Competition and Choice: Telecommunications Policy for the 1990s: White Paper 25-29 (Mar. 1991).

1061/ Home Office, Further Provisions on Independent Productions Announced 3 (Mar. 14, 1991) (Home Office News Release).

1062/ Broadcasting in Britain, supra note 1044, at 9-10.

In addition, all television broadcasters (new Channel 3 licensees, Channel 4 and BBC) must devote at least twenty-five percent of their programming time to independent productions, which refer generally to films or programs made by independent producers.[1063]

5. Localism

The ITC intends to foster local programming by promoting competition in local and regional television and radio markets. It also requires SC4, the Welsh television station, to broadcast a "significant proportion"[1064] of its programming in Welsh.

D. Policy Initiatives

The White Paper, Broadcasting in the 90's: Competition, Choice, and Quality, released by the Department of Trade and Industry in November 1988, proposed to reform broadcast policy in the United Kingdom according to the principles of choice and competition rather than monopoly and regulation. These proposals led to the adoption of the Broadcasting Act of 1990.

1. Privatization

March 1991 ITC regulations, mandated by the Broadcasting Act of 1990, called for the sale of all sixteen ITV franchises to the highest bidders that met stipulations regarding program quality and diversity. The new ITV franchises were awarded in mid-October 1991, and will be valid for ten years.

Sunrise TV, in which Disney owns a fifteen percent interest, won the morning television franchise. Although there were several U.S. bidders for various ITV franchises, including Time Warner's HBO, NBC, and United Artists Cable, Sunrise was the only franchise winner that included an American investor.

1063/ Home Office News Release, supra note 1061, at 2.

1064/ In practice, the proportion of Welsh-language programming is 23 hours per week. Broadcasting in Britain, supra note 1044, at 7.

In awarding franchise licenses, the ITC disqualified some high bidders, claiming that the amount bid would compromise the ability of the company to produce high quality programming over the life of the franchise. Four franchise holders lost their licenses to new bidders.[1065]

1065/ NBC, HBO and United Artists are Losers in British TV License Bidding, Comm. Daily, Oct. 18, 1991, at 8.

Appendix E

A GAME THEORETIC ANALYSIS OF TRADE INTERVENTION

Recent work by economic theorists suggests that "strategic trade policy" by public authorities can affect international markets.[1066/] According to traditional trade theory, governments should not subsidize domestically located firms.[1067/] This is based on the notion that, absent such factors as economies of scale or product differentiation, competition among a large number of rivals will eliminate supra-competitive returns that exist within a market. This implies that all industries within each country earn equivalent risk-adjusted rates of return. Consequently, it would be fruitless, according to traditional trade theory, for governments to pursue activist trade policy in the hope of assisting "domestic" firms, since these economic rents do not exist.

Some experts, however, believe that such economic rents may exist.[1068/] This thinking begins with the observation that, contrary to the assumptions of traditional trade theory, "market imperfections" exist in the world economy.[1069/] The competitive process, therefore, cannot be relied upon to allocate resources to their highest returns, thereby preventing firms from earning supra-competitive returns. Rather, firms may be able to earn supra-competitive returns. The objective of a country's strategic trade policy is to obtain these supra-competitive returns.

The simplest method of describing how a government may be able to secure supra-competitive returns is through an example couched in terms of game theory.[1070/] Consider

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1066/ For purposes of this appendix, "strategic trade policy" is any policy that tilts international competition in favor of domestic industry.

1067/ See Grennes, supra note 43, at 236-37.

1068/ See Brander & Spence, Export Subsidies and International Market Share Rivalry, 18 J. of Int'l Econ. 83-100 (1985).

1069/ Economists define a "market imperfection" as any market condition that causes resources to be allocated in a manner that fails to maximize economic welfare. Economies of scale and product differentiation lead to a market imperfection if they allow firms to establish supracompetitive prices.

1070/ Game theory is a tool by which one can analyze the strategic interaction between "players" (e.g., individuals, firms, governments). A "game" is defined whenever two or more players find themselves in a situation in which each must choose from a

the situation in which two firms, one based in Country X, the other in Country Y, are each considering whether to enter into the race to develop a New Television Transmission System ("NTV"). Because of technical incompatibility between the two systems, combined with the market's need for compatibility, suppose there is only room for one participant in this hypothetical, highly lucrative market. Each firm must, therefore, decide whether to enter the market, realizing that only a single firm can survive. The possible outcomes or payoffs of any pair of strategies are shown in Figure E-1.[1071]

Country Y-Based Firm

Country X-Based Firm	G	N
G	-50 -50	0 125
N	125 0	0 0

Cell Entries in Millions of Dollars

Figure E-1

The columns of this matrix represent the decision adopted by the Y-based firm, while the rows indicate the decision adopted by X-based firm. The numerical values contained in each

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set of alternatives, and in which each player's welfare depends upon the strategies adopted by the other. Game theory attempts to identify each player's "best" strategies given its objectives. Because it is general in scope, game theory can provide insights into many situations in which players have different goals or preferences. Game theory has been particularly useful in providing insights into the competitive behavior of firms. See, e.g., R. Myerson, Game Theory: Analysis of Conflict (1991); R. Luce & H. Raiffa, Games and Decisions (1957); J. von Neumann & O. Morgenstern, Theory of Games and Economic Behavior (2d ed. 1947).

The game theory example presented here is similar to one presented in Krugman, Is Free Trade Passe?, 1 Econ. Perspectives 131-44 (1987).

1071/ If each potential participant faced three choices, then the payoffs would be represented by a 3 x 3 matrix.

cell of this matrix represent the payoff each firm will receive as a result of each pair of strategies. The lower left number represents the X-based firm's profit, the upper right number represents the Y-based firm's profits.

According to this matrix, if both firms "go" (G), and enter the market, they will each lose $50 million. If the X-based firm enters the market and the Y-based firm does not, then the former earns $125 million. Conversely, if the Y-based firm enters the market and the X-based firm does not ("no go," or NG), then the former earns $125 million. Finally, if neither firm enters, neither firm realizes losses or profits. The players in this NTV development game are interested in achieving the highest profits possible.

The analysis begins with a first move by one player. Suppose, for instance, that the X-based firm, because of some recent technical innovation, is able to commit itself publically to undertake the project before the Y-based firm's decision. The act of being the first to publically commit to entering the NTV market is important in this particular game because it provides the firm a "first mover" advantage. As noted earlier, one of the assumptions of the analysis is that, because of certain market features (e.g., product incompatibility combined with the market's demand for compatibility), only one firm can exist in the NTV transmission market. The inability of two firms to exist in any market indicates that there is an important advantage to being the first to enter. Due to this advantage, and in the absence of government intervention, the outcome will be GN, in the upper right cell: the X-based firm will earn large profits, while foreclosing entry by the Y-based firm.

The Government of Country Y can, however, eliminate the first mover advantage enjoyed by the X-based firm, thereby altering the game's outcome and its distribution of profits. The Government of Y may accomplish this by subsidizing the Y-based firm.[1072] Suppose the Government of Y can pay a subsidy of $55 million to the Y-based firm if it undertakes this project, regardless of the decision made by the X-based firm. The change in the payoff matrix is shown in Figure E-2 below. The result is to reverse the game's outcome. This subsidy eliminates the first mover advantage the X-based firm enjoyed. This occurs because the Y-based firm will enter (because it can earn a positive profit upon entering, regardless of the decision taken by the X-based firm) and, in so doing, ensure that

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1072/ A subsidy is not the only way of improving one country's economic welfare at the expense of another. Under certain circumstances, import restrictions can produce similar results. See Brander & Spence, supra note 1068, at 83-100.

the X-based firm loses money.[1073/] Realizing that it will persistently lose money, the X-based firm will exit the NTV market, thereby changing the game's outcome from GN to NG. The interesting result is that a subsidy of $55 million raises the Y-based firm's profits from 0 to $180 million. Of this, $125 million represents a transfer of excess returns from Country X to Country Y.

Country X-Based Firm \ Country Y-Based Firm	G	N
G	X: -50, Y: 5	X: 125, Y: 0
N	X: 0, Y: 180	X: 0, Y: 0

Cell Entries in Millions of Dollars

Figure E-2

Under some circumstances, therefore, public authorities can, in theory, tilt the terms of oligopolistic competition and the profits derived therefrom, from foreign-based to domestic-based firms.[1074/]

1073/ The proposed subsidy must exceed the losses that the firm will incur if the other firm entered the market. Under this condition, the Y-based firm's decision to enter the market is insensitive to the decision made by the X-based firm.

1074/ For a discussion of the practical problems in implementing strategic trade policy, see Krugman, supra note 1070, at 138-42. In addition to the purely distributive effects, strategic behavior on the part of governments may even reduce total economic welfare (e.g., sum of the welfares of Countries X and Y) if such behavior deters the entry or forces the exit of a more efficient entrant.

Appendix F

A GAME THEORETIC ANALYSIS OF MERGERS BETWEEN HARDWARE AND SOFTWARE FIRMS

The explanation in the text for mergers between software and hardware firms is incomplete as a theory because there is an alternative method by which externalities can be internalized. It is conceivable that two separate firms can find, without merging, a set of prices for hardware and software that maximizes the combined profits of both firms. The firms' choice of the method of capturing the externality depends on both the likelihood of success and the cost of each method. In this appendix we use "game theory" to analyze this choice.

There are a number of reasons why two (or any n-collection of firms) "non-integrated" firms will likely find merger the preferred alternative. For instance, maximization of joint profits will require the two firms to behave "cooperatively." However, the maximization of joint profits is not a completely cooperative "game" in that, like most games, conflicting interests among parties (e.g., firms) may make it exceedingly difficult for them to behave (i.e., price) cooperatively.[1075/] This proposition is illustrated in Figure F-1.

The columns of this matrix represent the decision adopted by a "Hardware" firm, while the rows indicate the decision adopted by a "Software" firm.[1076/] The numerical values contained in each cell of this matrix represent the payoff each firm will receive as a result of each pair of strategies. The lower left number represents the Software firm's profit, the upper right number represents the Hardware firm's profit.

1075/ Some examples in which players have mixed motives are an automobile salesperson negotiating with a customer (both want to consummate the sale but differ on the price), two competing department stores, and an employee and employer negotiating over compensation.

1076/ For simplicity, we assume that the "Hardware" and "Software" firms each have three choices with regard to what price to set. The analysis generalizes trivially to n > 3 choices. In addition, the above payoff matrix describes a "symmetric game" -- a game in which the payoff matrix looks exactly the same from both players' point of view. Moreover, the game is a "non-constant-sum" game in that one player's gain is not necessarily the other player's loss.

Hardware Firm

Software Firm	$200	$250	$275
$40	50 50	60 20	45 10
$60	20 60	30 30	40 20
$80	10 45	20 40	25 25

Cell Entry Payoffs in Millions of Dollars

Figure F-1

One of the rules of this particular game is that the elements of each cell are known to both firms and that "side payments" are not available.[1077] For instance, if Hardware establishes a price of $200 for its videocassette recorders (VCRs) while Software sets a price of $40 for its videocassettes, each will earn $50 million.[1078] In this example, we assume that the total profit of $100 million represents the profits available if both firms price their products cooperatively (i.e., in a manner that would internalize available externalities). The $100 million also represents the maximum profits available to Hardware and Software if they were to merge.[1079]

1077/ "Side payments" are payments made by one party to another party in order to affect the latter's actions. Side payments generally increase the number of possible outcomes from a game.

1078/ It can be easily shown that the results of this game are not sensitive to the order in which the respective prices are set.

1079/ Merger costs notwithstanding, the difference between the payoffs for cooperative and non-cooperative behavior depends upon the magnitude of the product complementarity, the cross and own price elasticities of demand for the two products, and the marginal cost of producing each product.

If Hardware acts cooperatively and sets a price of $200 for its VCR while Software acts non-cooperatively by setting a price of $60, Hardware's payoff gets reduced to $20 million while Software's payoff increases to $60 million. The payoffs would reverse if Hardware decided to establish a non-cooperative price of $250 for its VCR and Software decided to set a cooperative price of $40 for its videocassettes. The payoffs from the remaining combination of choices available to Hardware and Software regarding prices can be interpreted in a similar manner.

Would Hardware and Software be able to establish and maintain the profit maximizing price-pair? The conditions and "rules" of this particular game suggest that this may be very difficult. For instance, while joint profits are maximized when videocassettes and VCRs are priced at $40 and $200, respectively, both Hardware and Software have the possibility of unilaterally improving their profits by following a non-cooperative pricing strategy.[1080/] Therefore, it is unlikely that cooperative pricing will be the outcome of this game.[1081/]

Given the structure of the payoff matrices, a more likely outcome of this game is that Hardware and Software will each earn $25 million. In this example, Hardware's price of $250 for VCRs "dominates" a price of $200 in that the payoff with the former is no less profitable than the payoff with the latter.[1082/] That is, no matter which pricing strategy Software adopts (i.e., $40, $60, $80), Hardware would do better adopting a price of $250 than $200. Consequently, self-interest causes Hardware not to charge a price of $200 for its VCRs.

1080/ For instance, according to the payoff matrix, Hardware can potentially earn $60 million by setting a price of $250 for its VCRs provided that Software priced its videocassettes at $40. Similarly, Software can potentially earn $60 million by charging $60 for its videocassettes, provided that Hardware is charging $200 for its VCRs. These conditions imply that the cooperative solution to this game is not a "Nash Equilibrium." A "Nash Equilibrium" exists if no player has an incentive to change its current strategy given the strategies adopted by the other players. See R. Myerson, supra note 1070, at 91-98.

1081/ The likelihood of cooperative pricing increases if binding contracts or side payments are permitted.

1082/ In this example, the payoff from charging $250 is always greater, regardless of the pricing strategy adopted by Software, than the payoff from charging $200.

Similarly, according to this example, self-interest dictates that Software should not charge $40 for its videocassettes since it can always do better by setting a price of $60, regardless of the pricing strategy adopted by Hardware. Consequently, once both $200 and $40 have been ruled out as respective selling prices, Hardware and Software are aware that they can, by the same reasoning, rule out $60 and $250, respectively, because they are dominated by $80 and $275, respectively. Therefore, by following logical reasoning, the two firms will find themselves both earning $25 million despite the fact that each could earn double that amount by pricing cooperatively.[1083/]

The ability of both firms to arrive at the cooperative outcome depends on their ability to resolve conflicts. That is, on the one hand, each firm could reason that it does "best" by setting the highest price for its product while, on the other hand, the example is constructed so that each would do "better" if each adopts the lowest price strategy. While it is in both firms' interest to resolve this conflict, it may not get resolved quickly, if at all, because of difficulties in inducing one's partner to adopt the lowest priced strategy. For instance, how does one invite one's partner to cooperate in a specific situation? One way is to unilaterally adopt an apparently inferior strategy and hope that the other player "catches on" (i.e., draws the proper inference).[1084/] However, if one's partner benefits from not catching on, as in our example, it may be reluctant to follow along very quickly, if at all.[1085/]

1083/ In technical terms, the above game was "solved" through the iterative elimination of "strongly dominated strategies." A strategy is considered "strongly dominated" if it can never be a player's best response, given the set of strategies available to the other player. See R. Myerson, supra note 1070, at 57-58. Therefore, iterative elimination of strongly dominated strategies leads to a unique prediction regarding what the players should do in a game.

1084/ In some instances, the "message" requesting cooperation may be misunderstood. See Flood, Some Experimental Games RM-789-1 (Rand Corp. Memorandum 1952), noted in Morton D. Davis, Game Theory: A Nontechnical Introduction 94 (1970). However, it is assumed here that both Hardware and Software have the opportunity to describe clearly the meaning of their price changes.

1085/ The foregoing discussion assumes that the respective parties know each other's payoffs. However, the probability that Hardware and Software can reach the profit-maximizing solution is complicated considerably if they only have knowledge of their own payoffs. In general, uncertainty regarding the payoffs of a game may eliminate any equilibria in pure strategies. See D. Fudenberg & J. Triole, Game Theory 555 (1991).

In summary, complementarities between products may cause the market demand for one firm's product to be affected by the decisions made by another firm. The affected firms may attempt to internalize this "demand externality" through either merger or cooperative pricing. In selecting which method to employ, firms will choose the one that yields the largest incremental net benefit (i.e., additional profits - additional cost). The preceding analysis suggests that a merger (or acquisition) may be more efficient than cooperative pricing behavior in capturing the available externality. This stems from the fact that, first, a "merged" firm comprised of Hardware and Software would provide the governance structure necessary to induce its affiliated entities to price cooperatively, and, second, there may be strong incentives for unaffiliated firms to act non-cooperatively in the "non-merger" setting. The greater the amount of time firms spend behaving non-cooperatively, the more efficient a merger would be compared to a "non-merger," in internalizing the externality. Assuming that the cost of a merger is less than or equal to the cost of remaining unaffiliated, firms should prefer mergers to "non-integration" as a means of capturing the externalities.

Appendix G

A GAME THEORETIC ANALYSIS OF FDI

Research suggests that some firms engage in FDI because their rivals do.[1086/] Game theory is a useful tool for examining this proposition. Consider the situation in which two single country firms, one based in Country X (X-based), the other in Country Y (Y-based), are each deciding whether to enter the domestic market of the other via FDI. Suppose that each knows the payoffs associated with the actions of both it and its rivals. Furthermore, suppose that the X-based firm starts the game by choosing whether to engage in FDI.[1087/] The Y-based firm can respond by either engaging or not engaging in FDI. Suppose that if the X-based firm engages in FDI and the Y-based firm reciprocates, each firm splits $40 million per year. On the other hand, suppose that if the Y-based firm refrains from engaging in FDI, the X-based firm earns $70 million while the Y-based firm earns $10 million per year.

The X-based firm also has the option of not engaging in FDI. In that case, if the Y-based firm pursues FDI, it will earn $70 million, while the X-based firm will earn $10 million. On the other hand, if the Y and the X-based firms refrain from engaging in FDI, they will split $60 million evenly. These four scenarios are shown schematically in Figure G-1 through the use of a "game tree," which depicts each player's choices and the payoffs accruing to each player given a specific sequence of player choices.[1088/]

1086/ See Graham, Transatlantic Investment by Multinational Firms: A Rivalistic Phenomenon?, 1 J. Post Keynesian Econ. 82-99 (1978); Graham, Exchange of Threat Between Multinational Firms as an Infinitely Repeated Noncooperative Game, 4 Int'l Trade J. 259-77 (1990).

1087/ It can easily be shown that the outcome of the game would be the same if the Country Y-based firm "moved" first.

1088/ The values at the end of each branch of the tree are the payoffs to the Country X and Country Y-based firms, respectively, in millions of dollars.

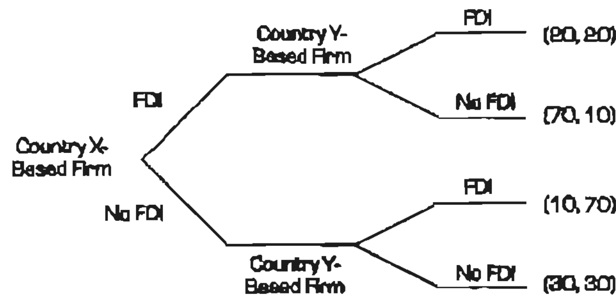

Figure G-1

In our simple example, if the X-based firm were to engage in FDI, the Y-based firm should reciprocate because the yearly profits from FDI ($20 million) exceed the profits from no-FDI ($10 million). Similarly, if the X-based firm were to refrain from engaging in FDI, it should expect that the Y-based firm would pursue FDI because the latter's yearly profits from doing so ($70 million) exceed the yearly profits from not doing so ($30 million).

The X-based firm can determine its optimal strategy by looking forward and reasoning backward. Specifically, the X-based firm can predict that if it does not pursue FDI, the Y-based firm will, resulting in a yearly profit of $10 million for itself and a yearly profit of $70 million for the Y-based firm. Similarly, the X-based firm can predict that if it engages in FDI, the Y-based firm will also engage in FDI, resulting in yearly profits of $20 million for each firm. Since the profits to the X-based firm are higher under FDI than under no FDI, it should engage in FDI.

An interesting feature of the outcome of this game is that each firm could fare better if they could both be induced not to enter each other's domestic market -- that is, by not engaging in FDI, each firm earns $30 million per year, while by engaging in FDI each firm earns $20 million per year.[1089/] To some extent, therefore, the outcome of this game is undesirable to both firms. This predicament can be avoided if each firm had the ability to exercise influence over its rival's foreign investment decisions. This ability would exist if,

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1089/ This predicament is called the "prisoners' dilemma." Its remarkable feature is that by attempting to maximize their respective payoffs, both firms end up with a smaller payoff ($20 million, $20 million) than if both followed the strategy of minimizing their payoff ($30 million, $30 million).

for instance, the complying firm had the capability to "punish" the cheating firm by, for example, changing its FDI strategy.

To see this, suppose each firm starts out by not entering each other's market. Each firm will be tempted, however, to renege on this cooperative arrangement since to do so would allow it to earn additional profits of $40 million per year ($70 million - $30 million). However, once the cooperating firm recognizes the defection, it will itself engage in FDI since it would earn, compared to the case where it is the only cooperating firm, an additional $10 million per year ($20 million - $10 million). Therefore, while the initial defector obtains a short-term gain of $40 million per year, it receives $10 million less profit per year, relative to the cooperative outcome, in each year following FDI entry by its foreign rival. If the number of years in which the defecting firm "loses" money is large, then the cost of defection (a punishment) may be enough to keep the two competitors from reneging on their agreement.

This analysis could be used to explain some possible causes and results of the globalization process. First, entry into a country by foreign-based firms via FDI may be motivated, in part, by the entry of firms from that country in foreign markets. Following such entry, foreign-based firms may feel that they are better off by also engaging in FDI than being "cooperating" firms. However, depending on the actual payoffs, by taking into account the effect of current FDI decisions upon future profits, each firm may find it in its interest to refrain from engaging in FDI. Consequently, globalization could evolve from a game of robust competition into a game of oligopolistic coordination among multinational firms. On the other hand, if the firm's expected profits from entering a country exceed the reduction in profits resulting from its new rival's counter-entry into its domestic market, the firm is likely to engage in FDI, thereby increasing competition in the entered market.

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