Newspaper-Broadcast Cross Ownership Policy: A New Standard from Across the Border

Karen A. Hoffman

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol23/iss2/6
NOTES

Newspaper-Broadcast Cross Ownership Policy: A New Standard from Across the Border

I. INTRODUCTION

In 1975, the Federal Communications Commission (the Commission) adopted rules restricting newspaper and broadcast cross ownership within a single market area. The Commission rationalized the adoption of the newspaper-broadcast cross ownership rule (cross ownership rule) on policy grounds, determining that diversity of viewpoints and ownership is essential to serving the "public interest, convenience and necessity." Since 1975, however, the communications industry has developed new advances in technology, thus discrediting the Commission's diversity justification for maintaining a cross ownership rule. The Commission needs a new model to govern newspaper-broadcast cross ownership licensing in light of public interest concerns.

This note will address the usefulness of the current cross ownership

---


2 Section 309(a) of the Broadcasting Act of 1934, as amended, requires the Commission to find that the grant of a license serves the "public interest, convenience, and necessity." Broadcasting Act of 1934, 47 U.S.C. § 309(a)(1982).

3 Since 1970, there has been a substantial growth in both traditional broadcast services and alternative media delivery systems which have added significantly to viewpoint and ownership diversity in the marketplace. Specifically, such services as cable television, LPTV (low-powered television stations), SMATV (satellite master television systems), and MMDS (multi-point multichannel distribution systems) have lessened governmental concern for achieving the public interest goal of diversity through multiple ownership regulation. In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, 4 F.C.C. Rec. 1741, 1743 (1989) [hereinafter 1989 Second Report and Order].

4 47 U.S.C. § 309(a)(1982). Public interest concerns envelop two conflicting ideals: diversification of control of mass media and assurance of the best possible media service to the public. In determining the latter concern, the Commission examines such factors as full time participation in station operation by owners, past broadcast service, and anticipated broadcast performance for a
rule by first examining the history of the rule in light of current policy
trends advanced by the Commission. Second, it will consider the evolu-
tion of the cross ownership rule in Canada. Finally, a new cross owner-
ship rule, modeled after the Canadian rule, will be considered as a means
of allowing equitable and flexible treatment for future cross ownership
combinations in the United States.

II. BACKGROUND

A. The United States

On March 27, 1968, the Federal Communications Commission
adopted the Notice of Proposed Rulemaking,\(^5\) proposing rules to prohibit
common ownership of broadcast stations in different communication me-
dia within the same market area.\(^6\) Since the rules were prospective, they
did not require divestiture of existing common ownership combinations,
but applied only to applicants constructing new facilities or acquiring
existing facilities.\(^7\) On March 25, 1970, the Commission adopted the
Further Notice of Proposed Rulemaking,\(^8\) proposing divestiture of com-
mon ownership of broadcast stations and daily newspapers within a sin-
gle market.\(^9\) Five years later, in its 1975 Second Report and Order,\(^10\) the
Commission adopted prospective rules barring cross ownership of daily

---


\(^6\) The Commission's adoption of a 1968 proposal for rule making to prohibit common owner-
ship of newspaper/broadcast combinations does not represent a rapid policy change towards diversi-
fication of media. To the contrary, the Commission had been examining concentrations of
ownership in a given geographical area on an \textit{ad hoc} basis in both comparative and non-comparative
situations since the 1940s. See, e.g., WHDH, Inc., 16 F.C.C.2d 29, 259 (1966); McClatchy Broad-
casting Co. v. F.C.C., 239 F.2d 15, 17 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957); Sunbeam
Television Corp. v. F.C.C., 243 F.2d 26, 28 (D.C. Cir. 1957). Tampa Times Co. v. F.C.C., 230 F.2d
224, 227 (D.C. Cir. 1956). Allentown Broadcasting Corp. v. F.C.C., 222 F.2d 781, 786 (D.C. Cir.
hearing, it is essential to examine several factors, one being diversification of media ownership, in
determining what is in the public's interest. The fact that one applicant owns a newspaper in the
same market area as the proposed broadcast station places favorable weight on the applicant who
does not own a newspaper); Mansfield Journal Co. v. F.C.C., 180 F.2d 28 (D.C. Cir. 1950) (a broad-
cast license can be denied on the ground that the applicant is also the sole newspaper owner in town,
and the applicant's practice is found to be monopolistic in character).

\(^7\) One of the main purposes of the Commission's proposed common ownership rules was to
promote maximum diversification of programming sources and viewpoints. Notice of Proposed
Rulemaking, \textit{supra} note 5. \textit{See also infra} note 25.

\(^8\) 22 F.C.C.2d 339 (1970).

\(^9\) \textit{Id.} at 346. The Commission adopted the Further Notice of Proposed Rule Making on the
same date that \textit{In re Amendment of Sections 73.35, 73.240, and 73.636 of the Commission [sic]}
Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First
Report and Order, 22 F.C.C.2d 306 (Docket No. 18110) (1970), was adopted. The First Report and
Order prohibited the common ownership of VHF television and aural stations in the same market,
newspapers and radio or television stations in the same market area.\textsuperscript{11} The Order states that "if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer."\textsuperscript{12} In addition to determining the future effect of cross ownership policy, the Commission required divestiture in sixteen egregious\textsuperscript{13} cases where existing combinations monopolized an entire local media outlet.\textsuperscript{14} The Commission also allowed waiver of the divestiture requirement in certain situations.\textsuperscript{15} For existing broadcast systems not considered to be egregious but determined that UHF/aural station combinations would be treated on a case-by-case basis. \textit{Id.} at 307, 309.

\textsuperscript{10} 50 F.C.C. 2d 1046 (1975).

\textsuperscript{11} Under 47 U.S.C. Section 309(b), in accordance with 47 U.S.C. Section 154(f) and Section 303(c), the Commission is granted general rulemaking power not inconsistent with law or the Federal Communications Act of 1934, as amended, and is not required to hold a hearing before denying a license to operate a station in ways contrary to those that Congress has determined are in the public interest. \textit{United States v. Storer Broadcasting Co.}, 351 U.S. 192, 201 (1956).

\textsuperscript{12} 1975 Second Report and Order, 50 F.C.C.2d at 1047.

A pertinent part of the multiple ownership rule adopted by the Commission states:

\begin{itemize}
    \item [(c)] No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in:
    \begin{itemize}
        \item [(1)] The predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or
        \item [(2)] The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or
        \item [(3)] The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.
    \end{itemize}
\end{itemize}

\textbf{NOTE 6:} For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally. 47 C.F.R. § 73.3555 (1984).

\textsuperscript{13} Cross ownership combinations are considered "egregious" if one party owns, operates, or controls the only daily newspaper published in a community as well as the only television or radio station that places a city-grade signal over that entire community. \textit{In re 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}, 53 F.C.C.2d 589, 590 (1975). The Commission required divestiture of these sixteen egregious cases by January 1, 1980, five years after the 1975 Second Report and Order was adopted. \textit{Id.} at 590.

Although the Commission stressed the importance of achieving diversity in viewpoints, it also recognized the difficult task of requiring divestiture of common newspaper-broadcast ownership with respect to potential interruption to the industry and community, as well as hardship for individual owners. It was in light of these countervailing factors in which the Commission required divestiture in only the most "egregious" cases. 1975 Second Report and Order, 50 F.C.C.2d at 1078.

\textsuperscript{14} 1975 Second Report and Order, 50 F.C.C.2d at 1080. \textit{See also id.} at 1098, Appendices D & E.

\textsuperscript{15} Temporary or permanent waivers could be granted if the common owner was unable to sell the broadcasting station, or could sell it only at an artificially depressed price; separate operation of
gious monopolies, the Commission devised a grandfather clause.\textsuperscript{16} The Commission justified the creation and implementation of the cross ownership rule on two primary foundations of public policy: to promote diversity of viewpoints\textsuperscript{17} and economic competition.\textsuperscript{18}

In 1977, the Circuit Court for the District of Columbia reviewed the 1975 Second Report and Order, affirming the prospective aspect of the cross ownership rule,\textsuperscript{19} but reversing the grandfather clause.\textsuperscript{20} The Court's reversal made all existing newspaper-broadcast combinations subject to the five-year divestiture absent the grant of a waiver.\textsuperscript{21} The Commission appealed to the United States Supreme Court.

The Supreme Court reversed,\textsuperscript{22} reinstating the Commission policy\textsuperscript{23} as originally promulgated in the 1975 Second Report and Order.\textsuperscript{24} The Court first looked to the Commission's long-standing policy of achieving diversification in the control of mass media communications.\textsuperscript{25} The

\textsuperscript{16} The "grandfather" clause allowed existing media combinations, not considered "egregious," to remain unaffected by the cross ownership rule. However, if a newspaper or broadcast proprietor transferred or sold the interest protected by the "grandfather" clause, the media interest would not be protected by the clause in the new proprietor's possession. \textit{In re Applications of McClatchy}, 76 F.C.C.2d 324 (1980).

\textsuperscript{17} The promotion of diversification of media ownership is a long-standing Commission policy, deriving statutory authority from the Communications Act of 1934, as amended, 47 U.S.C. §§ 2(a), 4(i), 4(j), 301, 303, 309(a) (1982). Section 309(a) requires the Commission to find that the grant of a license serves the "public interest, convenience, and necessity." The term "public interest" envelopes several factors, including "the widest possible dissemination of information from diverse and antagonistic sources." 1975 Second Report and Order, 50 F.C.C.2d at 1048 (quotting \textit{Associated Press v. United States}, 326 U.S. 1, 20 (1945)).


\textsuperscript{20} The Circuit Court for the District of Columbia reasoned that the limited divestiture requirement was arbitrary and capricious within the meaning of Section 10(e) of the Administrative Procedure Act, since the Commission failed to rationally conclude that public interest injury could result from separating current newspaper broadcast combinations. \textit{Id}.

\textsuperscript{21} The Commission determined that a five year divestiture period for "egregious" cases would provide proper balancing between allowing the entities sufficient time to divest without creating hardship, and the need to promote diversity effectively and efficiently in the market. 1975 Second Report and Order, 50 F.C.C.2d at 1084 n.40.

For a discussion concerning requirements to qualify for a waiver, see \textit{supra} note 15.


\textsuperscript{23} This included maintaining the "grandfather" aspect of the cross ownership rule. \textit{Id} at 809.

\textsuperscript{24} See \textit{supra} note 12 and accompanying text.

\textsuperscript{25} Diversity, coupled with the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, compelled Congress to delegate broad authority to the Com-
Court then examined both First Amendment and antitrust principles, and determined that the Commission had the authority to promulgate the cross ownership rule in order to achieve the widest possible dissemination of information from divergent sources. The Court then concluded that the Commission had acted prudently "to enhance the diversity of information heard by the public" and "to further, rather than contravene the system of freedom of expression."

Since the Supreme Court's endorsement of the cross ownership rule in 1978, the Commission has decided many cases concerning various aspects of the rule. In particular, the Commission's treatment of the cross ownership rule in recent cases appears to illustrate a trend in Commission policy toward a more relaxed cross ownership standard.

FCC Policy — A Trend Toward Revocation

Although the Commission adopted a cross ownership rule which prohibits newspaper and broadcast proprietors from acquiring a newspaper-broadcast combination in a single geographical market, this rule is not rigid. Rather, the Commission crafted the cross ownership rule to provide permanent or temporary waivers in special circumstances. The Commission's use of these waivers allows either a stricter or a more relaxed approach to regulating cross ownership.


26 Id. at 799.
27 Id. at 801.
28 Id. at 802.
29 See, e.g., In re Gannett Co., 102 F.C.C.2d 1263 (1986) (since the newspaper/broadcast cross ownership rule is not designed to affect an owner of a national newspaper, a waiver of such rules in these situations is unnecessary). In re McClatchy Broadcasting Co., 76 F.C.C.2d 324 (1980) (although "grandfathered" media combinations generally lose their "grandfathered" status when licensees seek transfer of control or assign licenses to new parties, the Commission allowed transfer of control to remain "grandfathered" due to involuntary transfers); In re Newhouse Broadcasting Corp., 73 F.C.C.2d 186 (1979) (although applicant is "grandfathered" under the cross ownership rules, this does not eliminate challenges at renewal periods as to specific monopoly or antitrust abuses); Evening Star Broadcasting Co., 68 F.C.C.2d 129 (1978) (although transfer of control provides applicant preferred stock with a common interest in broadcast/newspaper combinations, such combinations are not in violation of the cross ownership rules, since applicant will not obtain a right to exercise control).

30 See infra note 34 and accompanying text.
32 See supra note 15.
33 For example, if the Commission proceeds with strict adherence to the cross ownership rules, fewer waiver requests may be justified, since the Commission can apply a narrow application of the four exceptions set out in the 1975 Second Report and Order, 50 F.C.C.2d at 1085. See also supra note 14. On the other hand, the Commission may justify a liberal waiver application by determining that all required divestitures of broadcast interests create hardship for media owners, as well as interruption of public community service. As such, the Commission can grant a waiver request by
Before the cross ownership rule reached the Supreme Court in 1978, the Commission liberally permitted cross ownership combinations. Upon endorsement by the Supreme Court, however, the Commission rigidly applied the rule over the next few years, granting waivers only conservatively.

Determining that the purposes of the cross ownership rule would be better served by continuation of the current ownership pattern. 1975 Second Report and Order, 50 F.C.C.2d at 1085.

34 See Syracuse Coalition For the Free Flow of Information In the Broadcast Media v. F.C.C., 593 F.2d 1170, 1172 (D.C. Cir. 1978); Chronicle Broadcasting Co., 40 F.C.C.2d 775, 796 (1973); Television Corp., 24 F.C.C.2d 625, 628 (1970); WHBL, Inc. 26 F.C.C.2d 678 (1970) (broadcast license granted despite fact that applicant is a newspaper owner, since market conditions do not illustrate undue concentration). But see Enterprise Broadcasting, Inc., 56 F.C.C.2d 352 (1975) (in mutually exclusive applicants, preference is given to applicants with no newspaper ownership interests).

In Crosby N. Boyd, 57 F.C.C.2d 475, 484 (1975), the Commission granted a three-year temporary waiver to Perpetual Corporation of Delaware (Perpetual), in order to allow Perpetual to assume de jure control of Washington Star Communications, Inc., which owns the Washington Star newspaper, as well as several broadcast entities. Perpetual produced sufficient evidence to the Commission to support the proposition that a high risk of failure existed for the Washington Star if the grant was not approved. Perpetual noted that the failure of the Washington Star would make the Washington Post (which also owns two major broadcast stations in the Washington market that are protected by the cross ownership "grandfather" clause) the only other daily paper of general circulation in the Washington, D.C. area. Id.

In granting the waiver, the Commission noted that not only would diversity be better served by allowing Perpetual time to enhance the possibility of survival of the Washington Star, but that would also allow Perpetual time to locate perspective buyers for the Washington area broadcasting stations. Moreover, the waiver would alleviate the possibility of a virtual print monopoly by the Washington Post which currently enjoyed a favorable position due to the "grandfather" clause. Id.

In Field Communications Corp., 65 F.C.C.2d 959 (1977), the Commission granted a permanent waiver to Field Communications Corporation (Field), despite a combination contrary to cross ownership policy. The Commission justified its position by examining the special circumstances of Field's position, namely, that encouragement of UHF television growth is the type of exigency to which the Commission referred in providing waivers. Moreover, the present cross ownership rule was not intended to bar the reassignment of broadcast licenses. Field was the entity responsible for initial construction and commencement of operation of a successful Chicago UHF station, assigning the controlling interest to Kaiser only to ensure economic viability of the station. In addition, the Commission determined that Field was not a "new entrant" in the market. Id. at 961. See also Bonneville Int'l Corp., 68 F.C.C.2d 933, 935 (1977).

35 In Petitions for Waiver of Sections 73.35, 73.240 and 73.636 of the Commission's Rules, 74 F.C.C.2d 497, 512 (1979), the Commission denied waiver requests to five parties originally required by the 1975 Second Report and Order to divest themselves of their newspaper or broadcast interests by January 1, 1980 (the "egregious" cases divestiture date). See supra note 13 and accompanying text.

Commissioner Robert E. Lee, in a dissenting statement, criticized the Commission's actions since they failed to take into account the changing conditions in media markets. "If future decisions are going to be as rigidly 'structured' as this one, we won't need Commissioners, just computers." Commissioner Lee noted that a few of the original "egregious" cases in this proceeding no longer existed, since new communication systems were "on the horizon." Moreover, the Commissioner noted that this rigid divestiture plan failed to take into account the public interest, by looking at the local service provided the community as well as the public's satisfaction with the present service. In
By 1985, the Commission began to relax its cross ownership standards, allowing temporary waivers of varying duration for newspaper proprietors who acquired broadcast holdings in the same market.36 In recent years, the Commission has granted stays to aggrieved parties when no special circumstances existed to warrant granting a temporary waiver.37

Responding to the Commission’s steady shift in policy, in November 1987, the Freedom of Expression Foundation (FEF) submitted a petition for rulemaking to the Commission, advocating the elimination of the cross ownership rule.38 FEF argued that continued enforcement of the cross ownership rule, in light of technological advances in media alternatives, no longer serves the public interest and raises serious questions of

36 The Commission has granted temporary waivers of reasonable duration to alleviate the threat of distress sales. See Metromedia Radio & Television, Inc., 102 F.C.C.2d 1334, 1353 (1985), aff’d Health & Medicine Policy Research Group v. FCC, 807 F.2d 1038, 1043 (D.C. Cir. 1986) (temporary waiver granted, since party unable to sell newspaper at anything but a depressed market price); Twentieth Holdings Corp., 1 F.C.C. Rec. 1200, 1201 (1986) (Commission allowed an eighteen month waiver, since purposes of diversity would not be served by compelling an immediate sale of a newspaper which may eliminate all potential buyers except those with immediate access to a large amount of capital).

Through waiver grants, the general public has realized that the Commission maintains a great deal of political control over the communications industry:

[The newspaper owner] could always ask the FCC to grant him a waiver, allowing him to keep the Post, on the grounds that otherwise it will fold . . . [h]e has done the Reagan administration many favors and is in a position to do many more—especially if he keeps the Post . . . Many people believe that if he wanted a waiver, the FCC would bend the rules for him.


37 “The Commission has recognized . . . that divestiture as a means of complying with the newspaper/broadcast cross ownership rules can be difficult and may require considerable agency latitude and flexibility to accomplish.” In re Owasso Broadcasting Co., 60 Rad. Reg.2d (P & F) 99, at 118 (Apr. 14, 1986); Anniston Broadcasting Co., 51 Rad. Reg.2d (P & F) 1300 (1982).

consistency with First Amendment principles.\textsuperscript{39}

In December 1987, concerned with the Commission’s recent trend toward relaxed cross ownership rules, Congress attached a provision to its appropriations bill\textsuperscript{40} in an effort to limit the Commission’s control over cross ownership.\textsuperscript{41} The provision specifically prohibited the Commission from applying funds to any activity which might modify the cross ownership rule.\textsuperscript{42} Congress’ efforts failed, however, when the D.C. Circuit Court in \textit{News Am. Publishing, Inc. v. Federal Communications Comm’n} \textsuperscript{43} (News America) found the last eighteen words of the provision to be unconstitutional.\textsuperscript{44}

News America is a corporation\textsuperscript{45} which owns substantial broadcast and newspaper interests in the United States.\textsuperscript{46} In 1986, News America secured permission from the Commission to acquire WXNE-TV in Boston\textsuperscript{47} despite its current ownership of the Boston Herald newspaper.\textsuperscript{48} The Commission granted News America a temporary eighteen month waiver in which to divest itself of either the newspaper or broadcast station.\textsuperscript{49} In January 1988, News America requested an extension of its waiver, scheduled to expire in less than six months.\textsuperscript{50} However, since Congress enacted the appropriations provision in 1987, prohibiting the

\textsuperscript{39} \textit{FEF Petition for Rulemaking, supra} note 38, at 12. Specifically, FEF argued that continued enforcement of the cross ownership rule impinges freedom of expression, since there is no longer a substantial governmental interest to justify such a heavy burden placed on First Amendment rights. \textit{Id.} at 13. FEF also argued that continued enforcement of the cross ownership rule, in light of the policy goal of diversity in viewpoints and ownership, is counterproductive to the public interest; elimination or substantial modification of the policy would best serve the public interest; and relaxation of the rules, in light of antitrust laws and minority ownership concerns, would not be disadvantageous. \textit{Id.} at 9-29.


\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} 844 F.2d 800 (D.C. Cir. 1988).

\textsuperscript{44} The last eighteen words of the provision read, “or to extend the time periods of current grants of temporary waivers to achieve compliance with such rules.” \textit{Making Further Continuing Appropriations for the Fiscal Year Ending September 30, 1988}, H.R. Rep. No. 498, 100th Cong., 1st Sess., at 34 (1987). For a more detailed reading of the provision, \textit{see} note 57 and accompanying text.

\textsuperscript{45} News America is owned and controlled by K. Rupert Murdoch, a recently naturalized U.S. citizen. News Am., 844 F.2d at 804.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} Twentieth Holdings Corp., 1 F.C.C. Rec. 1201 (1986), \textit{construed in News Am.}, 844 F.2d at 804.

\textsuperscript{48} In November of the previous year (1985), News America, which also owned the New York Post, acquired WNYX-TV in New York City, and was granted a two year temporary waiver of the cross ownership rule. This waiver extension ran out in March 1988. Metromedia Radio & Television, Inc., 102 F.C.C.2d 1334, 1353 (1985), \textit{construed in News Am.}, 844 F.2d at 804.

\textsuperscript{49} The waiver extension for the Boston station would expire on June 30, 1988. News Am., 844 F.2d at 804.

\textsuperscript{50} \textit{Id.} at 802.
Commission from granting waiver extensions.\textsuperscript{51} News America’s request was denied. News America appealed to the D.C. Circuit Court.

The Circuit Court vacated the Commission’s order denying News America Publishing Corporation’s request to the Commission to extend its waiver.\textsuperscript{52} The Court determined that the provision, which precludes future grants of waivers of the cross ownership rule, applied to the sole holder of a current temporary waiver. Since News America was the only broadcaster the provision would ever effect, the last eighteen words of the provision, as written, violated both the First Amendment’s protection of free speech and the Equal Protection clause’s requirement that the government afford similar treatment to similarly situated persons.\textsuperscript{53}

The Circuit Court’s decision first examined the Continuing Resolution (the Resolution) passed by Congress and signed by the President on December 22, 1987.\textsuperscript{54} The Resolution appropriated all funds for the federal government for the fiscal year 1988.\textsuperscript{55} In a section entitled, “Federal Communications Commission Salaries and Expenses,” the Resolution contains a provision restricting the FCC from applying funds to any activity which might terminate or modify the current cross ownership rule.\textsuperscript{56} The provision states:

\begin{quote}
[t]hat none of the funds appropriated by this Act or any other Act may be used to repeal, to retroactively apply changes in, or to begin or continue a re-examination of the rules of the Federal Communications Commission with respect to the common ownership of a daily newspaper and a television station. . . or to extend the time period of current grants of temporary waivers to achieve compliance with such rules . . .
\end{quote}

As of December 22, 1987, News America was the sole holder of a temporary waiver in the United States.\textsuperscript{58} In addition, various members of Congress made statements supporting the cross ownership provision, directed specifically at Rupert Murdoch.\textsuperscript{59} Together, this evidence led the Circuit Court to conclude that Congress intended the last eighteen

\textsuperscript{51} See infra, note 57 and accompanying text.
\textsuperscript{52} News Am., 844 F.2d at 815.
\textsuperscript{53} Id. at 805. Although the final eighteen words of the provision were declared unconstitutional by the Circuit Court, the remainder of the appropriations provision has been upheld and carried over each year since 1987.
\textsuperscript{55} News Am., 844 F.2d at 801-02.
\textsuperscript{56} The provision’s sponsor was Senator Hollings. Id. at 802.
\textsuperscript{58} News Am., 844 F.2d at 802.
\textsuperscript{59} The D.C. Circuit Court carefully examined post-enactment statements of Senators Hollings, Kennedy, and Wirth, concluding that “the Hollings Amendment was directed solely at Rupert Murdoch and his media holdings.” Id. at 807. See 134 Cong. Rec. S54-69 (daily ed. Jan. 26, 1988); 134 Cong. Rec. at S138-47 (daily ed. Jan. 27, 1988).
words of the Amendment to specifically prevent News America from obtaining an extension of its waiver. Since the narrowly drafted provision denied a sole newspaper/broadcast proprietor of its rights to apply for additional waivers, the First Amendment freedom of speech interests, and the Fifth Amendment equal protection interests, outweighed Congress' interests in protecting the objectives of the cross ownership rule.

In a lengthy dissent, Judge Robinson examined the Commission's changing policy behind the cross ownership rule. According to Robinson, Congress recognized that "[o]ver time the Commission's position on the [cross ownership] rule has shifted, and there have been indications that the Commission may favor revision or outright repeal of the rule." Even if the Commission did not repeal the rule, Congress recognized that the Commission could still achieve its policy change through indefinite grants of temporary waivers, or grants of permanent waivers. Robinson concluded that Congress' actions to protect the cross ownership rule through a resolution provision were justified on First Amendment grounds. Robinson specifically pointed out that the rule was "designed to further, rather than contravene, 'the system of freedom of expression' " by achieving the widest possible dissemination of information from sources as possible.

Indeed, the future trend of Commission policy as illustrated by News America and various other case law, petitions for rulemaking, and Congressional records indicates that the cross ownership rule fails to serve the "public interest" as first intended. In order to better assess the usefulness of the current rule, it is helpful to examine the results of another country's revocation of a cross ownership rule. Since the Canadian government devised and implemented a cross ownership rule for three years, with similar goals and aspirations as the United States, the Canadian cross ownership rule serves as a useful model for comparison.

B. Canada

**Revocation in the Public Interest**

As early as 1968, when the Canadian Radio-Television and Telecommunications Commission (CRTC) was first created as the regulatory body of Canadian Communications, the CRTC has been concerned with

---

60 News Am., 844 F.2d at 816 (Robinson, J., dissenting).
61 Id. at 816.
62 Id. at 817.
63 Id. at 818.
64 See supra notes 34, 35, 43-64 and accompanying text.
65 See FEP Petition for Rulemaking, supra note 38.
66 See supra notes 54-57 and accompanying text.
joint ownership of broadcasting and newspapers in the same market.\textsuperscript{68} Although the CRTC does not expressly state the source for its policy objectives in judicial decisions, the concern over diversity of ownership can be traced to Section 3(d) of the \textit{Broadcasting Act},\textsuperscript{69} which states that "the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide a reasonable, balanced opportunity for the expression of differing views on matters of public concern."\textsuperscript{70} One can presume that the CRTC's inquiry into diversity of ownership functioned as a means of achieving the statutory goal of diverse programming and viewpoints, since diverse ownership patterns allowed more Canadian voices to communicate information to the public on matters of public concern.\textsuperscript{71}

On July 29, 1982, the Governor-in-Council,\textsuperscript{72} on the recommendation of the Minister of Communications, issued a policy directive\textsuperscript{73} (the Directive) to the CRTC restricting the issue and renewal of broadcasting licenses to daily newspaper proprietors.\textsuperscript{74} The Governor-in-Council issued the Directive "for the general purpose of fostering independent,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{68} In Community Antenna Television, 70-169 CRTC 1 (Public Announcement 1970), the Commission stated its concern about the maintenance of a balance of ownership in the communications media. This concern was reinforced in Community Antenna Television Ltd., 73-152 CRTC 1 (Public Announcement 1973), when the CRTC granted a license renewal to F.P. Publications Limited, despite its ownership of Community Antenna Television Limited. The CRTC determined that although diversity of viewpoints is an important policy goal, such factors as financial stability outweigh the 70-169 policy goal as stated in Community Antenna Television, 70-169 CRTC, at 1. See also Bushnell Communications Ltd., 72-316 CRTC 1 (Avis Public 1972); CKOY Ltd., 73-452 CRTC 1 (Public Announcement 1973); Bay Ridges Cable T.V. Ltd., 74-87 CRTC 1 (Public Announcement 1974); CKOY Ltd., 75-490 CRTC 1 (1975); Baton Broadcasting Inc., 78-669 CRTC 456 (1978).
\item \textsuperscript{69} R.S.C. ch. B-9 (1985).
\item \textsuperscript{70} \textit{Id.} at § 3(d).
\item \textsuperscript{71} Baton Broadcasting Inc., 78-669 CRTC 456 (1978); Townsend, Regulation of Newspaper/Broadcasting, Media Cross Ownership in Canada, 33 U. NEW BRUNSWICK L. J. 261, 266 (1984), [hereinafter Townsend].
\item \textsuperscript{73} Direction to the CRTC on Issue and Renewal of Broadcasting Licenses to Daily Newspaper Proprietors, SOR/82-746, 116 Canadian Gazette, Part II, at 2713, Nov. 8, 1982 [hereinafter Directive].
\item \textsuperscript{74} A relevant part of the Directive reads:
3. The Canadian Radio-television and Telecommunications Commission is hereby directed that, on and after July 29, 1982, broadcasting licenses may not be issued and renewals of broadcasting licenses may not be granted to an applicant who is a member of the class described in section 4.
4. The class of applicants referred to in section 3 consists of (a) the proprietors of daily newspapers, and (b) the applicants who, in the opinion of the Commission, are effectively owned or controlled, or are in a position to be effectively owned or controlled directly or indirectly, by the proprietor of a daily newspaper where the major circulation area of the
\end{itemize}
\end{footnotesize}
competitive and diverse sources of news and viewpoints within Canada." The Directive also allowed a hardship exception for the renewal or issuance of licenses to newspaper proprietors in cases where denial would "adversely affect service to the public or create exceptional or unreasonable hardship to the applicant."

Although the Directive had been in force and applied to only six cases in two years, the CRTC began to express doubt as to whether the Directive helped to achieve the twin goals of diversity and competition through diversification of ownership in Canada. The financial difficulties faced by both new licensees entering the broadcast market and current broadcast license holders, who were required to sell extra media interests, prompted the CRTC to rethink its original policy goals: "The Commission's belief in financially strong entities has moved it to the point of being prepared to examine a relaxation of cross-ownership restrictions on a case-by-case basis, if that is what it would take to ensure strength and long-term viability." On May 31, 1985, by Order-in-Council, the 1982 Directive was revoked.

Nonetheless, revocation of the Directive did not end CRTC inquiry into cross ownership of a potential license issuance or transfer of control. Rather than overtly preventing newspaper proprietors from acquiring broadcast interests, the revocation allows the CRTC to examine, on a case-by-case basis, whether in a given region, "there continues to be available a diversity of information, opinion and broadcasting sources to daily newspaper substantially encompasses the major market area served or to be served by the broadcasting undertaking.

Id. at 2713-14.

Thus, similar to the United States, Canada maintains a communications system premised upon the theory that natural market competition between diversely held media outlets will produce a multiplicity of viewpoints and information. Townsend, supra note 71, at 262 & nn.3-4.

Directive, supra note 73, at 2714. In determining what causes hardship to the applicant, or adversely affects broadcasting in the public interest, the CRTC looks to such factors as economic background, market size, ease of entry to market, quality of service, availability of diverse information and broadcasting sources and years of public service. See CFPL Broadcasting Ltd., 83-676 CRTC 356 (1983) (CRTC grants license renewal despite Direction, since market area currently maintains independent, competitive and diverse sources of information, and since licensee has developed outstanding quality in local broadcasting service over the years, denial of license would not be within the public interest).


CRTC Says It's Willing to Ease Ownership Rules, Montreal Gazette, Apr. 4, 1985, at D1.

CRTC Chairman Andre Bureau, quoted in CRTC Says It's Willing to Ease Ownership Rules, Montreal Gazette, Apr. 4, 1985, at D1.

provide the communities served with differing points of view on matters of public concern." The CRTC's inquiry into cross ownership is essentially a balancing test which takes into consideration both applicant and public interests. "[T]he Commission must be fully satisfied that the potential benefits to the communities concerned, and to the Canadian broadcasting system as a whole, clearly outweigh any potential disadvantages and that approval is in the public interest." In sum, the CRTC believes that concentration of ownership in the broadcasting industry is not necessarily a concern, provided there continues to be divergent ownership and views to ensure that the objectives of the Broadcasting Act are met. Several recent cases illustrate this position.

In New Brunswick Broadcasting Co., (NBB) the CRTC approved issuance of a television broadcast license, even though the applicant is controlled by New Brunswick Publishing Company, Ltd., "which is ultimately owned and controlled by .. .the Irving family," which also directly or indirectly controlled four New Brunswick newspapers. In determining its position, the CRTC looked to the applicant's financial stability and proposal for providing a locally-oriented, over-the-air television service. In addition, the CRTC looked for existing diversity of services in the proposed market area, which currently maintained two television stations, two student FM radio stations, eight commercial radio stations, and cable service as of 1983. The CRTC also noted that new FM stations were expected within a few months. In light of these various factors, the CRTC concluded that a grant of license to NBB would be in the public interest, since diversity would neither be diminished nor threatened by the introduction of a new television station.

82 Id.
83 Id. In part, objectives of the Broadcasting Act include varied and comprehensive programming, which provides reasonable, balanced opportunities for the expression of differing views on matters of public concern. Broadcasting Act, supra note 69, at § 3(d).
84 See, e.g., Calgary Television Ltd., 89-769 CRTC (1989) (CRTC approves application for transfer of control, despite several other media holdings, since applicant's transactions would not create excessive or undue concentration of ownership); Moffat Communications Ltd., 89-772 CRTC 1 (1989). But see MH Acquisition Inc., 89-770 CRTC 1 (1989) (CRTC denies application for transfer of control to major Canadian broadcaster, since CRTC not satisfied that applicant's proposed benefits of additional media service taken as a whole, would yield measurable improvements either to the community or the Canadian broadcasting system); Niagara Television Ltd., 89-768 CRTC 1 (1989); 163831 Canada Inc., 89-767 CRTC 1 (1989).
85 87-59 CRTC 1.
86 Id. at 2.
87 Id. at 5.
88 Id.
89 However, the CRTC does not provide data in its decision on how many new stations are expected to begin operations.
90 New Brunswick Broadcasting Co. 87-59 CRTC at 19-20.
In *Selkirk Communications Ltd. / MH Acquisition Inc.*, (MHA)\(^91\) the CRTC approved a complex transfer of control between two major communication holding companies,\(^92\) despite a two-part cross ownership inquiry\(^93\) into two markets.\(^94\) The CRTC first looked to concentration of ownership. In the first market\(^95\) effected by transfer of control, the CRTC noted some fifteen other local radio stations, eight local television stations, and two newspapers outside of MHA's interests to provide diversity of voices and competition.\(^96\) In the second market\(^97\), the CRTC determined that area residents had access to twenty-four other local radio services, seven other local television services, and at least three other daily newspapers besides MHA's newly acquired interests.\(^98\) The CRTC concluded that "the diversity of broadcast and other voices present in the various communities concerned is sufficient to ensure that residents continue to have access to differing views on matters of public concern."\(^99\)

In the second part of the inquiry, the CRTC looked to past performance of MHA in carrying out its broadcast responsibilities, concluding

---

\(^91\) 89-766 CRTC 1 (1989).

\(^92\) Selkirk Communications Limited has indirect ownership of some twenty-three FM and AM radio stations; owns 100% of the licensee companies operating CFAC-TV Calgary, CFAC-TV-7 Lethbridge, and CHCH-TV Hamilton, and 50% of voting shares in the company owner of CHBC-TV Kelowna; is the indirect owner of a cable system serving approximately 135,000 subscribers in the Ottawa area; and holds various other interests in broadcasting companies throughout Canada. *Id.* at 4.

MHL holds various radio broadcasting licenses throughout Canada, including CIWW and CKBY-FM Ottawa, and CKEY Toronto; owns cable service in Toronto and seventeen other Ontario locations, serving 6% of all cable subscribers in Canada, owns several television broadcasting stations, ranking MHL the 12th Canadian television broadcasters in revenues, and owns the Toronto Sun. *Id.* at 2-3.

In addition to examining such matters as concentration of ownership, cross ownership, and local participation in ownership, in determining how the public interest would best be served, the CRTC "must be satisfied that the strength of the applicant's human and financial resources are sufficient to give it the capability to improve the undertaking in question and to make a contribution to the enhancement of the Canadian broadcasting system." Elements Assessed by the Commission in Considering Applications for the Transfer of Ownership of Control of Broadcasting Undertakings, 89-109 CRTC 1, at 2 (Public Notice Sept. 28, 1989).

\(^96\) Ottawa and Toronto/Hamilton areas. 89-766 CRTC 1 (1989).

\(^95\) The Ottawa market. MHL's interests in this market after the transfer of control would include the AM and FM radio stations, The Ottawa Sun daily newspaper, and Ottawa Cablevision Limited's community channel. *Id.* at 4.

\(^94\) Ottawa and Toronto/Hamilton areas. 89-766 CRTC 1 (1989).

\(^93\) The Ottawa market. MHL's interests in this market after the transfer of control would include the AM and FM radio stations, TV stations, The Ottawa Sun daily newspaper, and Ottawa Cablevision Limited's community channel. *Id.* at 4.

\(^98\) *Id.*

\(^97\) The Toronto/Hamilton market. MHL's interests would include radio stations CKEY, CFNY-FM; television station CHCH-TV; and the Toronto Sun. *Id.*

\(^99\) *Id.*

\(^98\) The Globe and Mail and Toronto Star in Toronto, and the Spectator in Hamilton. *Id.* at 5.


In addition, the CRTC took into account the performance of MHL in carrying out its broadcast responsibilities in the past for determining that transfer of control is in the public interest. New Brunswick Broadcasting Co. Ltd., CRTC 87-59.
that MHA had served the public interest.\footnote{In determining past performance, the CRTC looked to the financial stability of the applicant, as well as its proposed benefits in the public interest, such as various capital projects, system improvements, and plans for implementation of Canadian programming. CRTC Approves Transfer of Control of Selkirk Communications Limited to Maclean Hunter Limited, CRTC News Release, 3-4, Sept. 28, 1989.}

In order to provide Canada with diverse ownership and views, the CRTC has developed an effective alternative to an outright ban placed on newspaper proprietors from obtaining broadcast interests. This alternative public interest standard allows the CRTC to treat applicants equitably, rather than to exclude a broadcasting or newspaper entity solely on the basis of geography.

III. A CROSS OWNERSHIP COMPARISON — THE UNITED STATES AND CANADA

A. Policy Concerns

When regulating cross ownership, both the United States and Canada strive to achieve the same policy goals of diversity of viewpoints and competition. The present cross ownership rule employed by the United States, however, unlike that of Canada, is essentially a ban on broadcast and newspaper proprietors which prohibits acquisition of other media interests in the same market area. Regulation by prohibition in order to achieve a diverse and economically efficient market is an overbroad means of protecting the "public interest" in a technologically different market situation. As such, a new standard, like the CRTC's approach for cross ownership inquiries, should be adopted in the United States.

The Commission initially adopted the cross ownership rule when fewer media alternatives existed for consumers. At that time, a prohibition proved to be an effective tool for promoting diversity in the market. Thus, similar to the \textit{Broadcasting Act of 1934},\footnote{47 U.S.C. §§ 1-610 (1982).} designed for present-day radio conditions, the cross ownership rule provided guidance for current market conditions, failing to take into account technological advances of the future. The long-standing Commission concern of providing a multitude of voices in the marketplace, which justified media diversity in 1975, is no longer accurate, since "[t]oday's telecommunications market offers individuals a plethora of information outlets to which they have access on a daily basis."\footnote{\textit{In re} Complaint of Syracuse Peace Council against Station WTVH, Syracuse, New York, 63 Rad. Reg.2d (P & F) 541, at ¶72 (Aug. 4, 1987). The Commission also noted that there were, as of 1987, 11,443 broadcast stations nationwide, 1,657 daily newspapers, and 43 million household subscribers to cable television service. Additional services available to consumers today include newer video delivery technologies, Video Cassette Recorders (VCRs), Satellite Master Antenna Systems (SMATV), Multipoint Mul-}

\footnote{102} indeed, the Commission has recently recognized in
the 1985 Fairness Report (footnote 103) that alternative electronic media sources have either already contributed greatly to the diversity of information available to consumers, or have the potential of providing substitute information sources (footnote 104).

Moreover, in the 1989 First Report and Order (footnote 105) and 1989 Second Report and Order (footnote 106) the Commission relaxed the "duopoly" (footnote 107) and "one-to-a-market" (footnote 108) rules, respectively. The Commission's liberalization of these multiple ownership rules was based on the "substantial growth in the number of [traditional] media outlets in markets of all sizes since the rule was adopted and...the benefits of joint ownership." (footnote 109) In addition, the Commission recognized a substantial increase from 1970 to the present in the availability of alternative media delivery systems which has also added to viewpoint diversity and economic competition in the marketplace. In light of these changed marketplace conditions, the Commission has concluded that "our diversity concerns have become somewhat attenuated since the radio-TV cross ownership rule was adopted in 1970," and "relaxing the cross-ownership rule should not significantly affect diversity of viewpoints and should further programming and other public interest goals." (footnote 111) Since the concern for achieving the policy goals of diversity of viewpoints and economic competition no
longer seems to be a viable issue,\textsuperscript{113} it is necessary to examine whether the current prohibition on cross ownership interests is inconsistent with First Amendment principles.

\textbf{B. Constitutional Concerns: The First Amendment}

The First Amendment is based on the principle that "debate on public issues should be uninhibited, robust, and wide-open."\textsuperscript{114} In light of diversification, however, antitrust policy is recognized as a correlative source of authority, since "requiring competition in the marketplace of ideas is, in theory, the best way to assure a multiplicity of voices."\textsuperscript{115} The Supreme Court upheld this viewpoint in \textit{Red Lion Broadcasting Co. v. Federal Communications Commission,}\textsuperscript{116} by stating that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."\textsuperscript{117} The Court determined that the Commission may place restraints on licensees in favor of others who should also have an opportunity to express themselves, emphasizing that the public has a right "to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences. . .[which] may not constitutionally be abridged either by Congress or by the FCC."\textsuperscript{118}

The cross ownership rule, absent a sufficiently important government interest, violates the free flow of information in the marketplace of ideas by restricting speech output. Further, restricting speech in order to promote the voice of others is "wholly foreign to the First Amendment," which was designed to assure an uninhibited, robust exchange of ideas.\textsuperscript{119} However, the Commission justifies restricting the free flow of information on the grounds that broadcast media poses problems, such as scarcity, which are unique to the industry. As such, the Commission regulates the communications market and ultimate flow of information through license grants essential to furthering the "public interest, convenience, and necessity."\textsuperscript{120} In other words, the First Amendment value

\textsuperscript{115} 975 Second Report and Order, 50 F.C.C.2d 1046, 1049 (1975).
\textsuperscript{118} Red Lion Broadcasting Co. v. F.C.C., 395 U.S. at 390.
\textsuperscript{119} Buckley v. Valeo, 424 U.S. 1, 49 (1975).
\textsuperscript{120} 47 U.S.C. § 309(a)(1982). Nevertheless, one may argue that the broadcast industry no longer warrants special problems essential for distinguishing the communications industry from traditional free speech cases.
of allowing uninhibited, robust speech in the marketplace of ideas is not absolute in the communications industry, and must be regulated by the Commission in order to protect the rights of the general public.\textsuperscript{121}

The "public interest" may be defined as the right of a citizen to have access to all available viewpoints in the marketplace of ideas.\textsuperscript{122} Certainly this creates difficulties for the Commission to regulate the unknown but potential voice in the marketplace who would, in theory, speak if not restricted by lack of available communication channels. In light of this "public interest" concern, the Commission seems justified in enacting a cross ownership restriction. However, since the Commission must deny access to an additional voice in the marketplace in order to maintain an open invitation for the unknown but potential voice, it is possible that the "public interest" may be neglected when no additional voice applies for the broadcast license.

This view on "licensing in the public interest" is further attenuated when technological developments and market growth allow for additional channels of communication. These additional channels can satisfy not only the unknown speaker, but the current broadcast license holder who has the resources to present additional viewpoints in the marketplace of ideas. The Commission has recently recognized this last point in the 1989 Second Report and Order, by noting that "[p]articularly in light of the substantial growth in media outlets over recent years, the Commission has found in certain circumstances that the benefits of relaxing various ownership rules far outweigh any minimal impact on the number of separate voices in a market."\textsuperscript{123} Indeed, the Commission has recently determined that pursuing maximum ownership diversity through prohibition is not always in the public interest.\textsuperscript{124} Although the Commission originally enacted, and the Supreme Court upheld the cross ownership rules in order to protect a substantial governmental interest of assuring diversity in the marketplace,\textsuperscript{125} today's market conditions do not justify the government's rigid restriction on newspaper and broadcast proprietors access to free speech. Instead, a more liberal, flexible alternative to cross ownership is necessary.

Since the diversity rationale no longer justifies outright prohibition in today's market conditions, the current prohibition on cross ownership may actually impinge freedom of expression by limiting the opportunity

\textsuperscript{121} In Red Lion Broadcasting Co., 395 U.S. at 390, the Supreme Court determined that in light of First Amendment values of free speech, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." See also F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); F.C.C. v. Allentown Broadcasting Corp., 349 U.S. 358, 361-62 (1955).
\textsuperscript{122} Red Lion Broadcasting Co., 395 U.S. at 390.
\textsuperscript{124} \textit{Id.} at 1743.
\textsuperscript{125} 1975 Second Report and Order, 50 F.C.C.2d 1046, 1048 (1975).
of newspaper and broadcast proprietors to supply additional media for expression in large market areas. The addition of cross ownership voices in the marketplace of ideas can foster the goal of diversity. Moreover, according to the 1989 Second Report and Order, allowing cross ownership may actually enhance diversity and economic competition by allowing savings in the joint operation of newspapers and broadcast stations, thus leading to enhanced quality and viability of communication sources.\textsuperscript{126} Thus, the addition of cross ownership voices in the marketplace of ideas, in certain situations, can actually work to benefit the public interest.

Specifically, since current market conditions obliterate the necessity of protecting diversity by outright prohibition on cross ownership, continued use of the current cross ownership rule may actually function as a prior restraint on First Amendment rights.\textsuperscript{127} Since a waiver may be granted in certain circumstances, a newspaper or broadcast proprietor may petition the Commission to grant a license despite its cross ownership status. The waiver request procedure may be analogized to a prior restraint circumstance, in which a speaker first must obtain city approval before printing a newspaper.\textsuperscript{128}

Moreover, while the Commission is arguably justified in restricting broadcast licenses to promote diversity, the reverse situation, that of restricting broadcast proprietors from acquiring newspaper interests, constitutes a prior restraint on First Amendment rights. As early as the seventeenth century, Blackstone recognized how vital freedom of the press was in a democratic society: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications....”\textsuperscript{129} Recently, Blackstone’s view was reiterated in \textit{Nebraska Press Association v. Stuart},\textsuperscript{130} when the Supreme Court recognized that “prior restraints on speech and publication are the

\textsuperscript{126} 1989 Second Report and Order, 4 F.C.C. Rec. at 1725. Cross ownership may alleviate the problem of declining numbers of daily newspapers, since economies of scale will better alleviate the problem of overhead newspaper costs. \textit{See FEF Petition for Rulemaking}, supra note 38, at 16. (In 1910, there were 2,202 daily newspapers, as compared with 1987’s decline to 1,657).

\textsuperscript{127} The Doctrine of “Prior Restraint” recognizes that the liberty of the press includes the right to publish without any previous restraint or license laid upon any publication. \textit{J. Story, Commentaries on the Constitution of the United States}, §§ 993-95 (1987).

\textsuperscript{128} One may argue that the proposed CRTC approach, similar to the present cross ownership rule, also imposes a prior restraint on the broadcaster since a potential license holder still must obtain Commission approval before operating a newspaper broadcast combination in a given market area. The CRTC approach, however, would place less of a burden on newspaper/broadcast proprietors’ First Amendment rights than the current system, which altogether denies access to communication channels. In application to First Amendment principles, the CRTC approach would allow proprietors rights to be weighed against the government’s interest of promoting broadcasting in the public interest, concentrating on diversity of ownership and views.

\textsuperscript{129} 4 \textit{W. Blackstone, Commentaries}, 151-52 (1723-1780) (emphasis in original).

\textsuperscript{130} 427 U.S. 539 (1976).
most serious and the least tolerable infringement on First Amendment rights," since the resulting damage does not simply place a chilling effect on speech, but an outright "freeze" on communication of news and current events.

In a democratic society, it is essential for the public to have unrestricted access to information in order to scrutinize governmental affairs. In light of this concern, the protections of the First Amendment provide newspaper proprietors certain rights necessary to disseminate information to the general public. As the cross ownership rule now applies in the United States, however, a broadcast proprietor who does not divest its interests in a station is prohibited from starting or acquiring a daily newspaper. This prohibition denies the public its "right of access to information," which consequently places an unjustifiable burden on First Amendment principles. Thus, while the Commission may justify the cross ownership rule based on broadcast regulation, this rationale should not be extended to newspaper ownership.

In light of Nebraska

---

131 Id. at 559.
132 Id. This "freeze" on speech refers to the loss of immediacy of the impact of speech which occurs due to a prior restraint. A freeze is more damaging to societal notions of free speech than criminal sanctions designed to prohibit certain types of speech, since it altogether prohibits the speaker from speaking in the first place, rather than simply imposing criminal liability on the speaker "after the fact" of speaking. A. BICKEL, THE MORALITY OF CONSENT 61 (1975).

133 Nebraska Press, 427 U.S. at 560.
134 Id. Chief Justice Burger defined this special function in terms of a fiduciary duty of broadcasters. Burger's opinion seems to imply that the general public places reliance on the broadcast media to maintain a check on governmental affairs. This seems to create a special role for the press in society. However, one may argue that the press does not maintain a fiduciary duty, since there is no source for enforcing a social contract, and the press has no special rights beyond those possessed by the general public.

135 A democratic system of freedom of expression "includes the right to hear the views of others and to listen to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (1970).

136 In particular, the theory of self-governance "is essential to provide for participation in decision making by all members of society." Id. at 7.

137 While it is a well-recognized principle that freedom of speech requires no previous restraints be placed upon publication, this right is not absolute. Near v. Minnesota, 283 U.S. 697, 716 (1931). Prior restraints are justified in exceptional cases, for example to protect military secrets, decency in publication, and security of community life. Id. As such, one may argue that the Commission is justified in restricting communication ownership to promote diversity of viewpoints and ownership. This stance, however, not only neglects to take into consideration the flaws of the current cross ownership rule in light of the reverse situation of a broadcast proprietor acquiring a newspaper, but it also fails to provide what might be considered the "exceptional" case in order to justify a prior restraint. Indeed, promotion of diversity does not seem to raise an immediacy as to speech which threatens military defense or public security. It is also recognized that some forms of speech, such as decency, are wholly unprotected by the First Amendment (see, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words — words which by their very utterance inflict injury or tend to incite an immediate breach of the peace — are of such slight social value that any benefit
Press, the cross ownership rule acts as a prior restraint on First Amendment rights and should necessarily fail, since the rule places an outright freeze on certain individuals from speaking through the newspaper medium.

Finally, some newspaper and broadcast proprietors were fortunate enough to have set up various media holdings in a large market area prior to the 1973 Second Report and Order.\textsuperscript{138} Since regulation by prohibition no longer seems to be a viable issue due to technological advances and First Amendment concerns, the current cross ownership rule should not disadvantage the unfortunate broadcaster and newspaper proprietors which did not fall under the immunity provided by the grandfather clause. One may argue that the cross ownership grandfather clause does not violate the Equal Protection clause, since statutory discrimination requires “only that the classification challenged be rationally related to a legitimate state interest.”\textsuperscript{139} The Supreme Court upheld the Commission’s grandfather clause in Federal Communications Commission v. National Citizens Committee for Broadcasting,\textsuperscript{140} determining that while diversity of viewpoints is an important policy goal, this interest is outweighed by maintaining an uninterrupted industry and preventing hardship to media combination owners.\textsuperscript{141}

Nevertheless, the Equal Protection clause requires that statutes affecting First Amendment interests be narrowly tailored, content-neutral and in furtherance of a substantial governmental interest.\textsuperscript{142} While the grandfather clause is on its face content-neutral, protecting all existing combination owners at the time the cross ownership rule was adopted, its effect is discriminatorily content-specific, since the clause prohibits certain broadcast proprietors from speaking, for fear of dominating the marketplace of ideas.\textsuperscript{143} In other words, if no cross ownership rule is in

\textsuperscript{138} Supra note 1.

\textsuperscript{139} City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

\textsuperscript{140} 436 U.S. 775 (1978).

\textsuperscript{141} Id. at 804. The Commission specifically looked to the importance of maintaining a stable and continuous communications industry as well as preventing hardship to the owner who had invested resources in the media combination. \textit{Id}.

\textsuperscript{142} Police Dep’t of Chicago v. Mosley 408 U.S. 92, 101-02 (1971).

\textsuperscript{143} In the 1975 Second Report and Order, the Commission noted that “ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission’s concern with the public interest.” 50 F.C.C.2d 1046, 1050 (1975).

This fear of market dominance may have been the reason for Congress’ increased interest in preventing appeal of the cross ownership rule, as seen in News Am. Publishing, Inc. v. F.C.C., 844 F.2d 800 (D.C. Cir. 1988). \textit{See also supra} note 57 and accompanying text. Indeed, News America suggests a tension between Congress and the former Wiley Commission, which looked favorably to
effect, the broadcast or newspaper proprietor will use an additional me-
dium to deliver the same messages currently expressed over the existing
station or newspaper. As such, the cross ownership rule presumes
that an individual has nothing new to say on a different media outlet, and
should therefore be limited to one channel per market area.

This presumption seems baseless, since a broadcaster may have ad-
ditional viewpoints to express. Yet without access to more than one out-
let, it is possible that these viewpoints will never reach the marketplace of
ideas. Additional outlets would allow messages to reach the public
which otherwise might not have done so through the proprietor’s first
outlet. Thus, while the cross ownership rule is on its face a content-
neutral regulation which applies to all broadcast and newspaper propri-
tors, its effects are content-specific, directed towards preventing certain
individuals from speaking freely in the marketplace of ideas.

Indeed, regulation by prohibition is a rigid standard which fails to
take into account changing industry standards. While diversity no
longer seems to provide a substantial government interest to promote a
multitude of ideas through the use of the cross ownership regulation by
prohibition, the Commission still maintains an interest in promoting
broadcasting in the public interest. As such, the Commission needs to
adopt a dynamic, flexible standard which takes into account industry
technology and changing market conditions.

IV. THE PROPOSAL

The Commission should adopt a cross ownership standard similar
to the approach implemented by the CRTC. This would allow the Com-
mision to examine whether benefits to the community and communica-
deregulation of the broadcast industry. One may question Congress’ motives in retaining the cross
ownership rule, which is invariably a political tool for preventing undue power in the traditional
media. In other words, an increase in radio, television, and newspaper proprietors results in an
increase in local and national news coverage, press informants and reporters, and economic power in
the marketplace. Thus, by maintaining a certain number of media holdings in a given market, Con-
gress can effectively promote certain policies favorable to its position without opposition by more
press and public interest groups.

144 This problem is most visible in the voting trust cases, in which the broadcaster argues that a
potential newspaper broadcast combination would be operated with separate facilities, staff, and
issued stock, as a proposed mechanism of insulating oneself from multiple ownership schemes. The
Commission has not taken a final stance in these situations, instead leaving this query for future
rulemaking. See Bonneville Int’l Corp., 68 F.C.C.2d at 934; Carl v. Venters, Jr., 47 F.C.C.2d 463
(1974).

145 A clear example of this proposition is News Am. Publishing, Inc. v. F.C.C., 844 F.2d 800
(D.C. Cir. 1988), in which a sole broadcaster was denied its rights to apply to the Commission for a
waiver grant. News Am. suggests the political effects of a content-based prohibition on a broad-
caster’s right to speak in the marketplace of ideas. The cross ownership rule allows Congress and the
Commission to monitor not only who is going to speak, but about what one is going to speak, since
these legislative bodies maintain control over the entire communications regulatory process.
tions industry as a whole outweigh any disadvantages in serving the public interest. The CRTC standard provides a more flexible approach for determining whether the public interest is fulfilled. As such, rather than place an outright prohibition on newspaper and broadcast proprietors, the CRTC approach would allow the Commission to determine on a case-by-case basis whether a particular region currently maintains enough diversity in viewpoints and ownership to support a newspaper-broadcast combination, or whether it should be protected against monopolization. Moreover, the Commission can adopt several factors for determining whether the potential benefits to the community and communications system as a whole, outweigh any potential disadvantages not considered to be in the public interest. These factors can be designed to provide consistent results. This compromise not only would allow the Commission to determine whether a cross ownership would serve the public interest, but would accomplish this task without burdening the First Amendment rights of newspaper and broadcast proprietors, since the CRTC approach simply allows additional voices into

---

146 The 1989 Second Report and Order, 4 F.C.C. Rec. 1741 (1989), provides strong guidance for adopting factors pertaining to newspaper/broadcast cross ownership, since the criteria developed by the Commission is currently applied for waiver requests in “one-to-a-market” radio/television combinations. These factors include:

1) Preference to the top 25 markets, in which there are at least 30 separately owned, operated, and controlled broadcast licensees, or “voices”, 2) Preference to “failed” or bankrupt media proprietors, 3) Preference to minority interests, 4) Rigorous case-by-case basis for proprietors not falling under one of the three preferences. This is essentially a public interest inquiry, similar to the CRTC approach, since it looks to such factors as: benefits of the combination, types of facilities involved, number of facilities already owned by the applicant, financial make-up of the applicant, and the nature of the proposed combination in light of diversity and economic ownership concerns.

*This factor is not included in the present “one-to-a-market” inquiry, but has been added here as an additional concern for promoting minority interests in the communications industry.

147 Several public interest benefits can flow from allowing common ownership. In the 1989 First Report and Order, the Commission recognized that common ownership can allow economies of scale in production, such as staffing, advertising, and capital expenditures, which consequently benefits consumer welfare due to cost savings. 1989 First Report and Order, 4 F.C.C. Rec. 1727 & n.44. In addition, common ownership can lead to more media combinations within a geographical area without adversely affecting traditional diversity or competition concerns because of the large growth in media outlets in the marketplace. Id. at 1729.

On the other hand, by adopting an ad hoc basis, the Commission will incur costs, which may place too heavy a burden on the Commission, given its presently weak economic condition. An ad hoc approach will require extra staff, finances, and time necessary to conduct hearings. While these costs would impose a substantial burden on the Commission, the benefits of maintaining an uninhibited system of expression is more essential to protecting the public interest.

148 Rather than obtaining inconsistent results from conducting an ad hoc waiver request inquiry, the CRTC approach would allow consistent results, since the several factors provide a framework for the Commission in determining whether a particular media combination would benefit the public interest. See supra note 145.
market area.\textsuperscript{149}

First, the CRTC case-by-case approach would permit the Commission to determine whether a particular newspaper-broadcast combination is in the public interest. Since the Commission can individually evaluate a particular market, it can effectively assess whether a current market condition is amenable to a newspaper-broadcast combination. In this way, the Commission maintains ultimate control in determining whether a newspaper-broadcast combination will continue and promotes diversity in viewpoints and ownership, as well as to protect against monopoly by adopting factors focusing on antitrust concerns.\textsuperscript{150} In addition, the case-by-case standard promotes growth in a market, especially with regard to daily newspapers,\textsuperscript{151} since economies of scale allow a profitable entity the funds necessary to undergo a difficult financial risk.\textsuperscript{152} At the same time, the case-by-case standard is flexible enough to prohibit licenses in "egregious" situations.\textsuperscript{153} Thus, unlike the Commission's current prohibitive regulations, the CRTC standard does not place a presumption against cross ownership, but allows cross ownership to exist in the proper circumstances.\textsuperscript{154} Congress and the Commission must then determine the rigidity of the public interest standard to be applied through the various

\textsuperscript{149} It is essential to note, however, that in crafting a "public interest" inquiry standard, certain market conditions do not provide enough diversity in viewpoint and ownership to allow cross ownership. These are the "egregious" situations, which, similar to the current rule enforced by the Commission, do not justify allowing media combinations. Canada handles these situations simply by refusing to grant a license. See supra, note 84.

\textsuperscript{150} Indeed, reliance on antitrust law provides an effective remedy against potential monopolies, and can be incorporated in the "public interest" inquiry. See, e.g., Comments of the American Newspaper Publishers Association, supra note 38, at 15.

In support of a new case-by-case approach for cross ownership despite monopolization concerns, see Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285 (D.C. Cir.), \textit{aff'd}, 110 S. Ct. 398 (1989) (Newspaper Preservation Act creates an exemption to antitrust laws by permitting a joint operating arrangement (JOA) between two newspapers if the Attorney General determines one newspaper is a "failing" newspaper, and should be preserved in order to promote the free press. Attorney General determined that two Detroit newspapers fell within the realms of the Newspaper Preservation Act despite that neither newspaper was actually "failing," but only in probable danger of failing).

One may analogize the use of the Newspaper Preservation Act to the CRTC cross ownership approach, since both rules address monopolization concerns, and realistically deal with the problem of the "failing" newspaper. The steady decline in daily newspapers led to passage of the Newspaper Preservation Act. One may speculate that a contributing factor to the decline in dailies is the current cross ownership rule. See WHDH, Inc., 16 F.C.C.2d 1, 12 (1969) (Herald-Travelor newspaper publisher denied renewal of Boston license due to cross ownership policy). The Herald-Travelor, a long established Boston newspaper, was denied renewal of WHDH in 1969 and went out of business soon thereafter. Adoption of the CRTC approach would help alleviate the plight of the "failing" daily.

\textsuperscript{151} See supra note 150.

\textsuperscript{152} Field Communications Corp., 65 F.C.C.2d 959, 959 (1977).

\textsuperscript{153} See supra note 21.

\textsuperscript{154} One may argue that the CRTC standard fails to take into account that a case-by-case
factors adopted to assist the Commission in its case-by-case analysis. These factors, unlike the existing prohibition against cross ownership, are flexible and dynamic with existing market conditions as a whole.

Second, the CRTC standard corrects any existing burdens on newspaper and broadcast proprietors' First Amendment rights, thereby providing equitable treatment. Unlike the current cross ownership regulation by prohibition, the CRTC standard does not place an automatic vocal and geographic restriction on newspaper and broadcast proprietors. Thus, if certain market conditions provide favorable circumstances for a newspaper-broadcast combination, the newspaper or broadcast proprietor will not be restricted from proposing additional service in the market.

Moreover, while diversity is an important criterion for determining whether a particular broadcaster will best serve the public interest, a broadcaster's past performance, at least in a renewal proceeding, is considered the most important criterion. Under the current cross ownership rule, however, past performance is never examined, since the rule does not allow the opportunity for a license in the first place. Since the Commission places great emphasis on past performance, one may question whether the public interest is best served by a cross ownership rule which looks solely to future predictions.

The CRTC approach, however, emphasizes past performance as the most important criterion for determining the public interest. The CRTC approach, unlike the present cross ownership rule, would better address both the Commission's concern for diversity and past performance, by restricting media combinations to appropriate market areas and examining past performance upon license renewal. Upon license renewal the Commission could then determine whether the existing cross ownership pattern still provides the community with quality service and substantial diversity of viewpoints in the marketplace.

In addition, by adopting the CRTC standard, the grandfathered media combinations would no longer be the exception to the rule. Given current market conditions, it is illogical to maintain a current system which favors newspaper-broadcast combinations in operation before 1970. Indeed, if the Commission, and consequently the Supreme Court, method creates a lengthy process, as well as invites considerable amounts of litigation. Yet the current cross ownership rule generates proceedings for both temporary and permanent waivers.

In addition, one may argue that minority interests may be neglected by the CRTC approach. However, the Commission can use the CRTC standard to the advantage of protecting minority interests, by refusing media combinations in markets which do not currently provide enough minority interests. In addition, the CRTC approach provides minority newspaper or broadcast proprietors the opportunity to create media combinations through economies of scale. See supra note 146.

155 For a proposal of various factors the Commission can adopt, see note 146.

has determined that these stations provide service in the public interest, then one may assume that the adoption of the CRTC standard would also allow future newspaper-broadcast combinations in the public interest, provided the correct market circumstances exist.

V. CONCLUSION

The current cross ownership rule fails to provide a flexible and equitable basis for determining whether newspaper-broadcast combinations provide communication “in the public interest, convenience, and necessity.” Specifically, since government justifications for maintaining the current rule, in light of technological advances, are no longer warranted on First Amendment grounds, the current rule should not continue to infringe on the rights of broadcast and newspaper proprietors. The CRTC standard provides a better approach for determining whether a particular newspaper-broadcast combination will satisfy the public interest, since it is flexible enough to apply in changing market conditions. As such, diversity of viewpoints and ownership are not compromised but enhanced, by providing communities extra viewpoints otherwise foreclosed by the present cross ownership rule. The CRTC approach not only ensures the protection of broadcast and newspaper proprietors’ First Amendment right to free speech, but also corrects inequitable conditions currently existing with grandfathered newspaper-broadcast combinations.

Karen A. Hoffman*