The Rise and Fall of the FCC's Financial Interest and Syndication Rules

Christopher J. Pepe

Follow this and additional works at: http://digitalcommons.law.villanova.edu/mslj

Part of the Communications Law Commons, and the Entertainment, Arts, and Sports Law Commons

Recommended Citation
THE RISE AND FALL OF THE FCC’S FINANCIAL INTEREST AND SYNDICATION RULES

I. INTRODUCTION

Historically, three major broadcast television networks (networks)\(^1\) dominated the television industry. The networks maintained their dominance into the 1970s by developing an extensive communications system of network owned and operated television stations and independently owned stations affiliated with the networks.\(^2\) The networks’ market dominance enabled them to com-

---

1. In 1992, the Code of Federal Regulations defined a network as: any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime time programming per week . . . to interconnected affiliates that reach, in aggregate, at least of seventy-five (75) percent of television households nationwide; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.


2. \(\text{See}\) Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1045 (7th Cir. 1992). Independent stations electronically connected to networks by cable or satellite are referred to as affiliates. \(\text{Id.}\) An affiliated station is further defined as a station having a regular affiliation with one of the three national television networks, under which it serves as that network’s primary outlet for the presentation of its programs in a market. It includes any arrangement under which the network looks primarily to this station rather than
mand the profits from the financing and syndication\(^3\) of successful television programs, and to control the distribution of programs throughout the country.\(^4\)

In response to public concern that the networks' dominance amounted to a monopoly,\(^5\) the Federal Communications Commission (FCC) adopted expansive regulations in 1970 to shift control of the television market from the networks to independent program suppliers.\(^6\) As part of the FCC regulations, the financial inter-

---

other stations for the presentation of its programs and the station chiefly presents the programs of this network rather than any other network.


3. Syndication is the licensing of successful television programs for broadcasting on a daily basis during non-prime time hours. Amendment of 47 C.F.R. § 73.658 (j)(1)(i), (ii), the Syndication and Financial Interest Rules, Tentative Decision and Request for Further Comments, 94 F.C.C.2d 1019, ¶ 5 (1983) [hereinafter Tentative Decision] (seeking comment on proposal to repeal Fin-Syn rules). Syndicators are typically "studios, multiple station groups, advertisers or companies set up specifically to act as syndicators." Id. Syndication rights are typically negotiated during the production process or while the program is in its first run. Id. ¶ 6. Negotiations include agreements on syndication revenues, duration of the syndication rights, programming territory and cash advances. Id. After a syndication agreement has been reached, the syndicator sells the program to individual stations. Id. If the program is purchased by a significant number of stations, the program goes into syndication. Id.

4. Schurz, 982 F.2d at 1045.

5. Id. The court in Schurz stated that the FCC decided to limit the networks because the networks already controlled a significant portion of the distribution system used to project television programs into American households. Id. The court described the FCC's fear of a network monopoly which motivated the FCC to implement the Fin-Syn rules:

[Networks] would . . . refuse to buy programs for network distribution unless the producers agreed to surrender their syndication rights to the network. For once the networks controlled those rights, the access of independent television stations, that is, stations not owned by or affiliated with one of the networks, to reruns would be at the sufferance of the networks, owners of a competing system of distribution. Market power in buying has the same misallocative effects as the more common market power in selling. The relation is especially close in this case because the networks can just as well be viewed as sellers of a distribution service as they can be as buyers of programs—the less they pay for programs, the more in effect they charge for distributing them.

Id.

est and syndication (Fin-Syn) rules\textsuperscript{7} limited the networks' ability to finance and syndicate television programming within the industry.\textsuperscript{8}

By 1978, changes in the television industry reduced the networks' dominance.\textsuperscript{9} Changes included the augmentation of alternative viewing sources, such as videocassette recorders, cable television, pay television and pay-per-view.\textsuperscript{10} Additionally, competition for premium programming such as major sporting events increased and the networks were increasingly unable to match the bids offered by cable and video companies for this programming because they could not profit from the syndication market place.\textsuperscript{11}

Accordingly, in 1991 the FCC modified the 1970 rules.\textsuperscript{12} In particular, the FCC relaxed the financial interest and syndication restrictions placed on the networks.\textsuperscript{13} The FCC's modified Fin-Syn rules had two goals: (1) to furnish the networks with greater oppor-

---

\textsuperscript{7} 47 C.F.R. § 73.658(j) (1970). The FCC adopted the Prime Time Access Rule (PTAR) concurrently with the Fin-Syn rules. 47 C.F.R. § 73.658(k) (1993). The PTAR limited the amount of network and off-network programming that a network affiliate in the 50 largest television markets could broadcast during prime time. Evaluation of the Syndication and Financial Interest Rules, Further Notice of Proposed Rulemaking, 5 F.C.C.R. 6463, ¶ 34 (1990). The FCC prohibited network television stations from presenting “more than three hours... of programs from a national network, programs formerly on a national network (off-network programs)... or, on Saturdays, feature films” during prime time hours. 47 C.F.R. § 73.658(k). A prime time program is defined as one that is exhibited between 7:00 and 11:00 p.m. eastern and pacific time or 6:00 and 10:00 p.m. central and mountain time. 47 C.F.R. § 73.652(g) (1992) (redesignated to § 73.662(d) in 58 Fed. Reg. 28,927-01, 28,932 (1993)). Programs such as children’s programs, public affairs programs, documentaries, news broadcasts and special news programs were exempt from the PTAR’s three hour limitation. 47 C.F.R. § 73.658(k).

8. See Amendment of Part 73, 23 F.C.C.2d at 382.

9. Schurz, 982 F.2d at 1046. The court acknowledged the “profound” changes in the television industry and stated: The three networks have lost ground, primarily as a result of the expansion of cable television, which now reaches 60 percent of American homes, and videocassette recorders, now found in 70 percent of American homes. Today each of the three networks buys only 7 percent of the total video and film programming sold each year, which is roughly a third of the percentage in 1970. ... And each commands only about 12 percent of total television advertising revenues. Where in 1970 the networks had 90 percent of the prime-time audience, today they have 62 percent, and competition among as well as with the three networks is fierce. They are, moreover, challenged today by a fourth network, the Fox Broadcasting Corporation, which emerged in the late 1980s.

\textit{Id.}

10. \textit{Id.}


opportunities in program production and syndication and (2) to maintain diversity in program sources for networks and local independent and affiliate television stations.14

In *Schurz Communications, Inc. v. Federal Communications Commission,*15 the United States Court of Appeals for the Seventh Circuit vacated the FCC's decision in 1991 to adopt the modified Fin-Syn rules.16 The court agreed with the networks' argument that the significant changes in the television industry's structure necessitated changes to the original Fin-Syn rules.17 The court determined that the FCC's 1991 Fin-Syn rules did not adequately address these changes.18 The Seventh Circuit stated that the FCC's justifications for the modified rules were inadequate although the rules appeared to be acceptable.19

The FCC has since modified the 1991 Fin-Syn rules and consequently has relaxed its firm regulatory grip over the networks.20 This Comment first discusses the background and evolution of the Fin-Syn rules. This Comment then analyzes *Schurz* and the FCC's actions in response to the court's decision. Against this backdrop, this Comment summarizes the FCC's 1991 and 1993 Fin-Syn rules. This Comment concludes that the FCC's modified 1993 rules adequately addressed the court's orders in *Schurz*.

II. BACKGROUND

A. Evolution of the Fin-Syn Rules

In 1934, Congress created the FCC pursuant to its interstate commerce powers.21 Congress established the FCC as an agency to

15. 982 F.2d 1043 (7th Cir. 1992).
16. Id. at 1043, 1055.
17. Id. at 1046. For a discussion of the networks' gradual market decline, see supra note 9 and accompanying text.
18. Schurz, 982 F.2d at 1049-55.
19. Id. at 1049-50; see Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) (discussing courts' obligations when reviewing agency actions, stating "our review must be 'searching and careful,' . . . and we must ensure both that the Commission has adequately considered all relevant factors . . . and that it has demonstrated a 'rational connection between the facts found and the choice made.'" (citations omitted)). For a further discussion of judicial review of administrative rulings, see infra note 73 and accompanying text.
21. 47 U.S.C. § 151 (1988). Section 151 states that the FCC was created: For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide [sic],...
oversee the foreign and interstate commerce of the communications industry. The FCC's authority to regulate the communications industry includes authorizing the use of communications signals, distributing and regulating television broadcast licenses and ensuring the availability of an efficient communications system. The FCC's broad regulatory power is only limited by the statutory requirement that the FCC "act in accordance with the public interest, convenience, or necessity."

As the television industry expanded during the 1950s, the FCC investigated the networks' programming practices. The FCC

and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication.

Id.

22. Id.

23. Schurz, 982 F.2d at 1048. The FCC's most powerful use of its broad regulatory power is its control of the networks' broadcast licenses. Id. The FCC has utilized its extensive power to condition the renewal of broadcast licenses "on the networks' accepting constraints intended to maximize the Commission's conception of the social benefits of broadcasting." Id.; see also NBC v. United States, 319 U.S. 190 (1943) (holding FCC's chain broadcasting regulations enforceable under 1934 Communications Act). The FCC's control over license distribution includes licenses held by network owned and operated stations. Schurz, 982 F.2d at 1048.

24. Schurz, 982 F.2d at 1048; see 47 U.S.C. § 151. The court discussed the broad standard with which the FCC must comply, stating "[s]o nebulous a mandate invests the Commission with an enormous discretion and correspondingly limits the practical scope of responsible judicial review." Schurz, 982 F.2d at 1048. Additionally, the court stated that "[w]ith the blessing of the Supreme Court the Commission has used this authority . . . to regulate activities by networks that are remote from the concerns with signal interference that first summoned federal regulation of the airwaves into being." Id.

The FCC is headed by five Commissioners who are appointed to five-year terms by the President, one of whom is designated as chairman. 47 U.S.C. § 154(a) (1988). The Commissioners must meet at least once each month to review all orders and take appropriate action. Id. § 155(d). They must attempt to render final decisions on non-hearing matters within three months and on matters requiring a hearing, within six months. Id.

found that the networks had accumulated power over the financing, development and syndication of television programming.  

The networks were able to extract concessions from program suppliers and select and cancel programs on the basis of the networks' own potential profit, irrespective of the public's interest in the program. Additionally, the networks, as owners and operators of the majority of television stations and affiliated stations, controlled the distribution of television programs to homes throughout the country. The FCC adopted the Fin-Syn rules in response to the FCC's findings that the networks controlled the production and distribution of programming.

The FCC created the 1970 Fin-Syn rules (1970 rules) to promote two public interest goals. First, the FCC sought to increase competition and diversity in programs supplied to the average network television viewer. Second, the FCC sought to spur the creation of a syndication market driven by competition and diversity.


27. Rosencrans, supra note 11, at 66-67. These concessions came "either in the form of profit sharing in the syndication rights or a distribution fee for the selling of these rights (or both)." Id. at 67 (citing Amendment of Part 73, 23 F.C.C.2d 382, ¶ 19 (1970)).


29. Schurz, 982 F.2d at 1045. The networks dictated what the American public would be shown at the most popular viewing times and restricted the public's access to alternative programming sources. Tentative Decision, 94 F.C.C.2d 1019, ¶ 15 (1983) (citing Notice of Proposed Rulemaking, 45 F.C.C. 2146, 2147 (1965)). The FCC specifically noted:

that network corporations . . . have adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear . . . but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs.

Notice of Proposed Rulemaking, 45 F.C.C. ¶ 4. The FCC ultimately decided that the networks' concentration of power was contrary to the principles established in the Communications Act. Tentative Decision, 94 F.C.C.2d ¶ 16; see 47 U.S.C. § 151 (1988).

30. Amendment of Part 73, 23 F.C.C.2d 382 (1970); see also Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971) (holding Fin-Syn rules were reasonable).


32. Id.

33. Id. The FCC hoped to promote diversity in the television programming marketplace by "curtailing the ability of the networks to supply the program market represented by the independent stations, and by protecting the producers for that market against being pressured into giving up potentially valuable syndication rights." Schurz, 982 F.2d at 1045-46. Thus an alternative source of supply would be
The 1970 rules: (1) prohibited television networks from acquiring any financial interest in the broadcast of programs not solely produced by the network, but allowed these programs to be aired on the network; (2) prohibited networks from engaging in the domestic syndication business or from having an ongoing interest in the syndication of programs for non-network broadcast distribution and (3) allowed networks to syndicate foreign programs that they had solely produced or that foreign entities had produced.\(^{34}\)

By 1978,\(^{35}\) the FCC questioned the necessity of the Fin-Syn restrictions and ordered an extensive study of the television industry's evolution and the concurrent effects of the rules.\(^{36}\) The study demonstrated that the networks' success in program distribution resulted from their ability to allocate production costs to numerous television stations in various markets.\(^{37}\) The study's authors also noted that the networks' power resulted from the existence of strict entrance barriers into the industry\(^{38}\) and not from the advantages available to independent stations through non-network television producers. *Id.* at 1045.


37. Rosencrans, *supra* note 11, at 68.

38. *Id.* The following describes the strict entrance barriers to television programming production:

Through their de facto control of time-rental of evening hours on the vast majority of television stations throughout the country networks control market entry. In turn this enables them to dictate the form and content of the so-called creative efforts by writers, directors, and producers. Indeed, in most cases program form and pilot development are determined by the direct intervention or known preferences of the network.
the Fin-Syn rules were designed to allay.\textsuperscript{39} However, the FCC acknowledged that entrance barriers to the programming market were eroding with the birth of satellite technology and the reformulation of many FCC policies, so that new networks would soon have the opportunity to enter the television industry.\textsuperscript{40} Guided by the 1978 inquiry, the FCC acknowledged that its intervention was unnecessary and concluded that the 1970 rules should be repealed.\textsuperscript{41}

This conclusion led the FCC to take affirmative steps in 1983 to remedy the perceived inadequacies of the 1970 rules.\textsuperscript{42} The FCC issued a \textit{Tentative Decision}\textsuperscript{43} in which it proposed revisions that would have repealed the majority of the Fin-Syn rules.\textsuperscript{44} Following the release of the \textit{Tentative Decision}, however, the major motion picture studios, seeking to preserve their dominance in the syndication market, started an influential lobbying campaign to delay the effects of the decision.\textsuperscript{45} Because the motion picture industry had dominated the $5 billion-a-year syndication market for over twenty-five years, it lobbied aggressively for the retention of the most stringent Fin-Syn restrictions.\textsuperscript{46} The industry's lobbying efforts resulted in the outst of the production process a formula is set out in terms of specifics designed to produce circulation through application of what network managers conceive to be the tastes and preferences of the largest undifferentiated mass audience. In this way networks make use of their economic power to dictate the terms of entry into television program markets and to prescribe the type and content of the product of that market.

\begin{flushright}
\textit{Amendment of Part 73, 23 F.C.C.2d 382, Appendix II, \# 12 (1970) (footnotes omitted).}
\end{flushright}

\textsuperscript{39.} \textit{Schurz}, 982 F.2d at 1047.
\textsuperscript{40.} Rosencrans, \textit{supra} note 11, at 68-69.
\textsuperscript{41.} \textit{Schurz}, 982 F.2d at 1047; \textit{see} Rosencrans, \textit{supra} note 11, at 68.
\textsuperscript{42.} Prior to the FCC's 1983 \textit{Tentative Decision}, the Second Circuit decided to loosen the firm grip of the Fin-Syn restrictions. \textit{See Viacom Int'l, Inc. v. FCC, 672 F.2d 1034} (2d Cir. 1982). In \textit{Viacom}, the Second Circuit interpreted the Fin-Syn rules as applying only to broadcast uses of material, rather than prohibiting network acquisition of rights to all subsequent uses of independently produced programming. \textit{Id.; see} Rosencrans, \textit{supra} note 11, at 68. The court held that the networks could continue their involvement in programming sales to cable and home video outlets and share in the profits from merchandising. \textit{Id}.
\textsuperscript{43.} \textit{Tentative Decision}, 94 F.C.C.2d 1019 (1983).
\textsuperscript{44.} \textit{Schurz}, 982 F.2d at 1047 (citing \textit{Tentative Decision}, 94 F.C.C.2d 1019 (1983)).
\textsuperscript{45.} Rosencrans, \textit{supra} note 11, at 70-72.
\textsuperscript{46.} \textit{See} Tom Shales, \textit{On the Air; The FCC and the Threat to Free TV; Regulations Haven't Changed with the Times}, \textit{WASH. POST}, Apr. 8, 1991, at CI; Cindy \Śkrzycki, \textit{Ruling Eases Hollywood's Grip on TV Syndication}, \textit{WASH. POST}, Apr. 2, 1993, at F1. The motion picture industry's lobbying efforts in Washington, D.C. were well received because the motion picture industry had significant ties to government officials. Rosencrans, \textit{supra} note 11, at 70. These ties included former President Ronald Reagan. \textit{Id}. In fact, the Los Angeles Times reported on a "secret" meeting

http://digitalcommons.law.villanova.edu/mslj/vol1/iss1/5
in congressional pressure which quelled any action regarding the rules for several years. The status of the 1970 rules remained unresolved because the FCC did not take immediate action to revive the Tentative Decision.

In 1990, the Fox Broadcasting Company (Fox) resurrected the debate over the Fin-Syn rules by requesting an exemption from the rules. The FCC initially announced it would conduct a new notice-and-comment rulemaking proceeding, in response to Fox’s request, to address the inadequacies of the rules. However, the television industry expressed an overwhelming interest in between then chairman of the FCC, Mark S. Fowler, and President Reagan at the White House. Id.; Douglas Frantz, Both Sides in TV Rule Fight Give FCC Star Treatment, L.A. TIMES, Dec. 13, 1990, at A1, A30-31. Fowler later disclosed to congressional investigators that he explained to the President that he agreed with both the Department of Justice and the Department of Commerce, and favored repealing the Fin-Syn rules. Rosencrans, supra note 11, at 70. Shortly after the meeting, President Reagan announced a two-year moratorium on any action concerning the Fin-Syn rules. Id.


48. Schurz, 982 F.2d at 1047; Rosencrans, supra note 11, at 70.

49. Fox is a newcomer to the television broadcasting industry. It was created through the production capability and film library of movie giant, Twentieth Century Fox. Schurz, 982 F.2d at 1053; see Fox Broadcasting Co., 5 F.C.C.R. 3211 (1990).

50. Schurz, 982 F.2d at 1047. The FCC stated: On January 30, 1990, Fox Broadcasting Company (FBC) petitioned for (1) resumption of rulemaking in BC Docket No. 82-345, the then pending docket reexamining the Commission’s financial interest and syndication rules, and (2) a limited waiver of the rule defining “network” that governs the applicability of those rules and the prime time access rule (PTAR). Fox Broadcasting Co., 5 F.C.C.R. ¶ 1. In its request, Fox attempted to: (1) avoid application of the prime time access rules by requesting a temporary waiver for itself and its affiliates; (2) entice the FCC to reconsider the proposed changes to the Fin-Syn rules that forbid broadcast networks from engaging in the domestic syndication of any program or the foreign syndication of independently-produced programs and (3) convince the FCC to re-examine the portion of the Fin-Syn rules that prohibit broadcast networks from obtaining any financial or proprietary right or interest, in the exhibition, distribution, or use of programs produced by others except for the exclusive right to network exhibition in the United States. See BC Docket No. 82-345 (1990)(terminated and reconsidered in MM Docket No. 90-162); Amendment of 47 C.F.R. § 73.658(j)(1)(i),(ii), the Syndication and Financial Interest Rules, 5 F.C.C.R. 1814 (1990); 47 C.F.R. §§ 73.658(j)(1)(i),(ii), (j)(4),(k) (1989). In addition, Fox requested that the FCC re-open a previous inquiry addressing the public interest in the repeal of the Fin-Syn rules. BC Docket No. 82-345. Acting on Fox’s request, the FCC issued a Notice of Proposed Rulemaking (NPRM) to assess the effectiveness of the rules. Id.; see Notice of Proposed Rulemaking in re the Syndication and Financial Interest Rules, MM Docket No. 90-162, issued March 14, 1990.

51. Schurz, 982 F.2d at 1047.
repealing the existing Fin-Syn rules, prompting the FCC to hold one day of en banc hearings on the matter.\textsuperscript{52} The FCC adopted the revised Fin-Syn rules in 1991 (1991 rules) without significant changes to the original Fin-Syn rules.\textsuperscript{53} These revised rules: (1) eliminated restrictions on network ownership and syndication of network programming of all “dayparts”\textsuperscript{54} and all non-prime time\textsuperscript{55} entertainment programming; (2) permitted networks to retain complete rights to all “in-house productions”;\textsuperscript{56} (3) permitted networks to fill up to forty percent of prime time entertainment schedules with in-house productions; (4) allowed networks to acquire all rights, including financial interests, domestic syndication rights and foreign syndication rights, in non-network productions; (5) allowed networks to syndicate network programs in foreign markets without limitation; (6) allowed limited network participation in first-run syndication; (7) created a new definition of network\textsuperscript{57} and (8) imposed reporting requirements on the networks.\textsuperscript{58}

B. \textit{Schurz}

In 1992, Fox and the networks petitioned the Seventh Circuit\textsuperscript{59} to invalidate the 1991 rules on the grounds that they were arbitrary

\textsuperscript{52} Id.; see also Rosencrans, supra note 11, at 70-71. The FCC decided to hold hearings on the Fin-Syn rules due in part to the interest expressed by “various segments of the television industry.” \textit{Schurz}, 982 F.2d at 1047. During the public hearings the FCC heard reactions to the various compromise solutions advanced by numerous parties interested in the debate. Rosencrans, supra note 11, at 70-71. Various members of the television industry, including independent producers and network and studio executives, utilized the hearings to strengthen their position in favor of relaxing the Fin-Syn rules. \textit{Id}. Meanwhile, the FCC continued to emphasize that the hearing did not indicate the FCC’s willingness to relax the rules. \textit{Id}.

\textsuperscript{53} 47 C.F.R. §§ 73.658(k), 73.659-73.662, 73.3526(a)(11) (1991). The decision to promulgate the new rules was made by a 3-2 majority of the FCC's Commissioners. \textit{Schurz}, 982 F.2d at 1047. Two Commissioners dissented, including the chairman of the Commission. \textit{Id}. Nonetheless, the new rules were passed and published, supplanting the old rules. \textit{Id}.

\textsuperscript{54} Dayparts refers to daytime hours, the hours from 9:00 a.m. to 6:00 p.m. in the Eastern and Pacific Time Zones and from 9:00 a.m. to 5:00 p.m. in the Central and Mountain Time Zones. \textit{See United States v. CBS}, 1980-1 Trade Cas. (CCH) ¶ 63,594, 77,171 (1980).

\textsuperscript{55} For a definition of prime time, see supra note 7.

\textsuperscript{56} The FCC defined “in-house productions” as network programs that are: “(1) solely produced by the network; (2) co-produced by the network with foreign production entities; or (3) co-produced by the network with outside domestic production entities that initiate such arrangements.” \textit{Second R & O}, 8 F.C.C.R. 3282, n.72 (1993).

\textsuperscript{57} \textit{See 47 C.F.R. § 73.658(j)(4) (1992).}


\textsuperscript{59} The networks petitioned the Seventh Circuit because of its conservative, economic-oriented approach. \textit{See Almanac of the Federal Judiciary, Vol. II
THE FCC'S FIN-SYN RULES

and capricious. The networks argued that the concerns which prompted the FCC to adopt the original Fin-Syn restrictions had expired, warranting the immediate repeal of the rules. The court partly agreed with the networks and vacated the 1991 rules.

During the Schurz proceedings the networks cited gradual changes in the television industry since 1970. The networks insisted that even if the original Fin-Syn rules were justified when they were adopted, the rules were unwarranted in light of changes in the industry. The court agreed with the networks that their power

(Prentice Hall Law & Business 1993). The Seventh Circuit's conservative majority is led by Judge Richard Posner who advocates a close relationship between law and economics. Id. Judge Posner believes that all law should follow the logic of economics. Id. Specifically, Judge Posner advocates a free market, "supply side" economic analysis. Id.

60. Schurz, 982 F.2d at 1048. The arbitrary and capricious standard that Judge Posner refers to is found in section 706 of the Administrative Procedure Act. 5 U.S.C. § 706 (1988).

In a related proceeding, outside producers and independent stations requested that Judge Posner disqualify himself. Schurz Communications, Inc. v. FCC, 982 F.2d 1057 (7th Cir. 1992) [hereinafter Schurz II]. The motion was based on a 1977 affidavit submitted by Judge Posner as an expert witness for CBS in an antitrust case. Id. at 1059; see United States v. NBC, 449 F. Supp. 1127 (C.D. Cal. 1978). The issues in both cases involved the degree to which television networks should be restricted from participating in the production and distribution of television programs. Schurz II, 982 F.2d at 1059-60.

Judge Posner denied the motion for disqualification for several reasons. Id. at 1062. First, the movants waited until two weeks after Schurz was decided to file their motion. Id. Consequently, Judge Posner determined that the motion was "untimely." Id. at 1060 ("Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them."). Second, the movants did not satisfy the disqualification standards set out in the statutory section entitled "Disqualification of Justice, Judge, or Magistrate." 28 U.S.C. § 455 (1993).

61. See Schurz, 982 F.2d at 1043. For a discussion of the FCC's original concerns regarding the networks' excessive power, see supra note 5 and accompanying text.

62. Schurz, 982 F.2d at 1055. The court found that the 1991 rules impaired the networks and acted as a barrier to new entrants in the production market. Id. Additionally, the court stated that the FCC's opinion accompanying the 1991 rules did not explain how the rules would promote diversity in programming. Id. The court was also unable to find a rational reason to adopt this rule. Id. Finding the FCC's opinion to be "unreasoned and unreasonable," the court vacated the FCC's order and remanded the matter for further proceedings. Id.

63. For a discussion on the gradual changes within the television industry, see supra note 9 and accompanying text.

64. Schurz, 982 F.2d at 1046. The underlying concern of the Fin-Syn rules, as Judge Posner described it, was that the networks would abuse their dominant position in program distribution to seize control over programming. Id. Judge Posner explained that the networks would, in reality, be paying more for their programming if they insisted on purchasing syndication rights simultaneously with the right to display the program on their network. Id. In addition, if the networks then refused to syndicate the program to independent stations, they would realize
had diminished, adding that the FCC's original concern regarding the networks' abuse of power never had a clear basis. Moreover, the court found it unclear how the 1991 rules would redress the networks' abuse of power.

The court agreed with two important aspects of the FCC's 1991 Report and Order. First, the court acknowledged that the structure of the television industry had changed significantly since the adoption of the original Fin-Syn rules. Second, the court reiterated that the FCC possesses the necessary authority to both regulate the networks in the public interest and to restrict network programming activities to promote program diversity.

no return on their original investment in the syndication rights. The networks' only return would be a "long-shot" chance to weaken their competition. Judge Posner acknowledged the "fierce" competition that existed among the three original networks and the heightened competition with the addition of Fox. Moreover, Judge Posner blamed the original Fin-Syn rules for the increased concentration in the production of prime time programming because the rules made television production a "riskier" business. Judge Posner stated that there was a 40% reduction in the producers of prime time programming in the twenty years prior to Schurz and the eight largest producers increased their share of prime time programming by 20% in the same period of time.

The court stated that television production is a risky venture because producers are constantly searching for a successful program that makes it into syndication after an extended "first run." Producers rely on syndication to recover the losses from other short-lived entertainment programs. By prohibiting networks from purchasing syndication rights producers are prevented from shifting the risk of production to the networks. The court stated that the networks are better able to bear the risk of production, leaving producers free to create new programs. Furthermore, independent stations would have a larger and more competitive supply of programs.

The court stated that the FCC possesses the necessary authority to both regulate the networks in the public interest and to restrict network programming activities to promote program diversity.

65. Id. Judge Posner acknowledged the "fierce" competition that existed among the three original networks and the heightened competition with the addition of Fox. Moreover, Judge Posner blamed the original Fin-Syn rules for the increased concentration in the production of prime time programming because the rules made television production a "riskier" business. Id. Judge Posner stated that there was a 40% reduction in the producers of prime time programming in the twenty years prior to Schurz and the eight largest producers increased their share of prime time programming by 20% in the same period of time. Id.

66. Id.

67. Id. Judge Posner reasoned that by prohibiting networks from buying syndication rights outside producers would be paid less for programs. Id. The court stated that television production is a risky venture because producers are constantly searching for a successful program that makes it into syndication after an extended "first run." Id. Producers rely on syndication to recover the losses from other short-lived entertainment programs. Id. By prohibiting networks from purchasing syndication rights producers are prevented from shifting the risk of production to the networks. Id. The court stated that the networks are better able to bear the risk of production, leaving producers free to create new programs. Furthermore, independent stations would have a larger and more competitive supply of programs. Id.


69. Second Notice, 8 F.C.C.R. ¶ 4. For a discussion on the gradual changes affecting the television industry, see supra note 9 and accompanying text.

70. The court stated that the FCC is empowered "to act in accordance with the public interest, convenience, or necessity." Schurz, 982 F.2d at 1048 (citing 47 U.S.C. § 303 (1988); FCC v. WNCN Listeners Guild, 450 U.S. 582, 593-94 (1981); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 810 (1978); NBC v. United States, 319 U.S. 190, 215 (1943)). The court noted that the FCC is armed with broad discretion and referred to the public interest standard as nebulous. Schurz, 982 F.2d at 1048. The court then discussed the resultant impracticability of "responsible" judicial review. Id. The court also noted further complications of its ability to review the FCC's judgment, calling the FCC's notice-and-comment rulemaking proceeding a "voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence." Id.

71. Schurz, 982 F.2d at 1048.
Despite these areas of agreement with the FCC, the court found that the FCC did not adequately address all of the objections raised during the Fin-Syn proceedings in its decision accompanying the 1991 rules.\textsuperscript{72} The court decided that an administrative agency’s statement which accompanies the promulgation of a rule must show that the rule is rational.\textsuperscript{73} The court applied the rational standard to the 1991 rules and determined that the FCC’s justifications for the rules were inadequate.\textsuperscript{74} Specifically, the court stated that the FCC failed to explain fundamental concepts, disregarded vital evidence and ignored formerly persuasive arguments.\textsuperscript{75} Consequently, the court held that the 1991 rules were not “adequately reasoned” and remanded the rules to the FCC for repeal or modification.\textsuperscript{76}

The court recognized that a decision to vacate the 1991 rules could be construed as reinstating the 1970 rules because the FCC’s order both adopted the 1991 rules and vacated the 1970 rules.\textsuperscript{77} In light of this possible interpretation, the Seventh Circuit issued a temporary stay of its decision and requested “supplemental briefs advising [the court] as to the best course to follow in this unusual situation.”\textsuperscript{78}

The court considered several options in a supplemental proceeding.\textsuperscript{79} The court ultimately decided between two options; al-

\textsuperscript{72} Second Notice, 8 F.C.C.R. 15.

\textsuperscript{73} Schurz, 982 F.2d at 1049 (“It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational — must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving.”); see Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)(“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))). For a further discussion on the court’s standard of review when confronted with an administrative agency’s rule, see supra note 19 and accompanying text.

\textsuperscript{74} Second Notice, 8 F.C.C.R. 5. For a further discussion on the inadequacies of the 1991 rules, see infra notes 95-120 and accompanying text.

\textsuperscript{75} Schurz, 982 F.2d at 1050.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 1055. The court did not want the public to think that the 1970 rules would “spring back” into effect. Id. Originally the court thought that one network had defended the resumption of the 1970 rules and had requested that the portion of the FCC’s order that vacated the “old” rules be left undisturbed. Id. In the supplemental proceeding, however, the court corrected itself, and stated that “no part[ies] to the proceeding ... had defended the old rules.” Id. at 1055.

\textsuperscript{78} Id. at 1056. The court stayed its decision for 30 days. Id. at 1055.

\textsuperscript{79} Schurz, 982 F.2d at 1055-56. The court, relying on the supplemental briefs, chose from five suggested alternatives. Id. First, the court could have vacated the FCC’s order, thereby reinstating the 1970 rules. Id. Second, the court
low the original rules to remain in effect or allow the television industry to operate without the Fin-Syn rules. The court chose the latter, issuing a decision that vacated the FCC's 1991 order, except for the portions that invalidated the 1970 Fin-Syn rules. However, the court stayed its decision to allow the FCC sufficient time to draft new or modified rules.

C. Developments After Schurz

After the Seventh Circuit issued its decision in Schurz, the FCC released a notice stating its intention to comply with the court's order. In this notice, the FCC expressed its intention to re-evaluate the 1991 order supporting the new rules. In 1993, the FCC could have vacated the entire FCC order except for the repeal of the 1970 rules, thereby allowing the networks' unsupervised reign over the production and distribution of television programs until further action by the FCC. The court chose between a 90 day or a 120 day stay. The court was operating under the assumption that the FCC would not be able to devise new or modified rules, even after a reasonable amount of time.

The court chose between a 90 day or a 120 day stay. The court was operating under the assumption that the FCC would not be able to devise new or modified rules, even after a reasonable amount of time.

80. Id. at 1057.

81. Id. at 1057.

82. The court chose between a 90 day or a 120 day stay. Id.; see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (giving Congress three months to enact new bankruptcy statute, while existing bankruptcy courts continued operations); Board of Trade v. SEC, 883 F.2d 525 (7th Cir. 1989) (imposing 120 day stay of judgment invalidating administrative regulation). Deciding on the 120 day period, the court suggested that the FCC take 30 days to rewrite the rules, 45 days to solicit comments from the public, 15 days to redraft the proposed rules in accordance with the public's comments, leaving the FCC with the statutorily required 30 day period between publication and the effective date of a new rule. Schurz, 982 F.2d at 1057; Administrative Procedure Act, 5 U.S.C. § 553(d)(3) (1988) (requiring rules to be published 30 days before they become effective, but allowing shortened periods "for good cause").

83. See Second Notice, 8 F.C.C.R. 223, ¶ 1 (1993). The FCC issued this notice in compliance with the 120 day deadline imposed by the court. Id. ¶ 10 (citing Schurz, 982 F.2d at 1043). For a discussion on the court's decision to stay its order for 120 days, see supra note 82.

84. Second Notice, 8 F.C.C.R. ¶ 10. The FCC also displayed its willingness to revise or rewrite the 1991 rules. Id. The FCC invited the submission of public comments to assist in its impending decision to either support the 1991 rules or propose revised rules. Id. The FCC limited these submissions by requesting all comments directly address the court's stated concerns. Id.

The FCC also ordered an Initial Regulatory Flexibility Analysis (IRFA) prior to the issuance of its Second Notice. Id. ¶ 11. The analysis, required by section 603 of the Regulatory Flexibility Act, 5 U.S.C §§ 601-612 (1988), examined the "expected impact of the [ ]proposed policies and rules on small entities." Second Notice, 8 F.C.C.R. ¶ 11 (analysis set forth in Appendix A).
issued modified Fin-Syn rules (1993 rules). The 1993 rules: (1) removed all restrictions on network acquisition of financial interest and syndication rights in programs on network stations, except for some reporting requirements; (2) prohibited networks from active domestic syndication; (3) eliminated affiliate favoritism restraints, but retained the prohibition on program warehousing; (4) retained the network restrictions on first-run domestically syndicated programming; (5) continued to permit networks to purchase foreign syndication rights and to actively syndicate them abroad; (6) continued to permit networks to own and syndicate non-prime time and non-entertainment network programming; (7) exempted "emerging networks" from all restrictions, except for modified reporting requirements and (8) resolved to eliminate all remaining Fin-Syn restrictions within two years after modified consent decrees are issued.

Soon after the FCC adopted the 1993 rules, the United States District Court for the Central District of California approved modifications to the network consent decrees. The United States, which acted as plaintiff in the consent judgments, consented to the modifications. The district court repealed two portions of both the 1978 consent decree entered with NBC and the 1980 consent decrees entered with ABC and CBS and consequently repealed portions of the remaining Fin-Syn restrictions. First, the court removed the provision that prohibited the networks from acquiring

85. See Second R & O, 8 F.C.C.R. 3282 (1993). The 1993 rules were adopted by the FCC on April 1, 1993, satisfying the 120 day deadline imposed by the court in Schurz. 982 F.2d at 1055.

86. See 47 C.F.R. § 73.660(c) (1992). Warehousing refers to the act of "delaying . . . the syndication of programming to the detriment of non-network stations." Second R & O, 8 F.C.C.R. ¶ 59; see also Tentative Decision, 94 F.C.C.2d 1019, 1096 (1983) (defining warehousing as network practice of withholding programs in effort to increase programs' market price).

87. The FCC stated that it will treat an entity as an "emerging network" if it does not qualify under the statutory definition of network as of the effective date of the 1993 rules. Second R & O, 8 F.C.C.R. ¶ 99; see 47 C.F.R. § 73.662(i) (1992) (now redesignated as § 73.662(f) in 58 Fed. Reg. 28,927-01 (1993)). If the exemption is met prior to the effective date, it remains intact, even if the "emerging network" subsequently qualifies as a network. Second R & O, 8 F.C.C.R. ¶ 99; 58 Fed. Reg. 28,927-01, 28,932 (1993) (adding new paragraph (g) to 47 C.F.R. § 73.662 which defines "emerging network" as "an entity not meeting the definition of a 'television network' . . . on June 5, 1993, but which subsequently meets this definition").


90. Id. at *1.

91. Id. For a further discussion on the network consent decrees, see supra note 35 and accompanying text.
financial interests in television programs used by non-networks and produced by others or from participating in the domestic syndication business. Second, the court deleted the provision that prohibited the networks from making the purchase of network rights to a program contingent upon the supplier's grant of any other right or interest to the networks. The court relied on the 1993 rules' two year sunset provision and the dramatic changes in the television industry to support its decision to partially lift the restrictions on the networks.

III. Analysis

A. The Schurz Court's Objections to the 1991 Rules

The Seventh Circuit based its decision to vacate the 1991 Fin-Syn rules on the FCC's inadequate justification for the rules. The court believed that the FCC's Report and Order supporting the 1991 rules insufficiently addressed the rules' effects on program sources and outlet diversity. The court criticized the FCC's majority report, identifying five particular issues for the FCC to address when modifying the 1991 rules.

First, the court charged the FCC with ignoring the networks' argument that the 1991 rules were unsuccessful because they did not, in fact, increase network access to the programming market.

93. Id.
94. Id.
95. Schurz, 982 F.2d at 1049-50; see also Second Notice, 8 F.C.C.R. 223, ¶ 5 (1993); Second R & O, 8 F.C.C.R. 3282, ¶ 5 (1993). The court stated that the FCC's report dismissed certain arguments raised during the proceedings without adequate explanation. Schurz, 982 F.2d at 1049-50. The court stated:

The Commission's articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decisions are passed over in silence. The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated . . . . The Commission must do better in articulating their justification.

Id. at 1050.
96. Schurz, 982 F.2d at 1049-50.
97. Id. at 1050. Acknowledging the length of the FCC's report, the court proceeded to describe the FCC's majority opinion as "boilerplate," "self-congratulatory" and replete with "multifarious contentions." Id. The court stated, "[s]tripped of its verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin." Id.
98. Id.; see Second Notice, 8 F.C.C.R. ¶ 6.
In the 1991 rules, the FCC imposed a thirty-day, two-step negotiations separation requirement on network acquisition of financial interests and syndication rights (back-end rights) which was intended to allow the networks to purchase syndication rights from non-network producers. The restriction on the acquisition of back-end rights necessitated a two-step negotiation procedure for network acquisition of Fin-Syn rights. The networks argued that the restriction on back-end rights actually reduced the networks' ability to effectively bid for available programming. Consequently, as the court noted, the number of potential buyers available to non-network producers decreased and diversity in programming sources diminished.

Second, the court explained that the 1991 rules would not prevent the networks from using their market power to purchase programming at favorably low prices. The court stated that the rules did not appear to be designed to prevent the networks from utiliz-


100. Schurz, 982 F.2d at 1051. The 1991 rules were “intended to grant the networks substantial new latitude in purchasing back-end rights in network prime time entertainment programming, by permitting network acquisition of financial interests and passive domestic and foreign syndication rights in all such programs, subject to the following restrictions.” Second R & O, 8 F.C.C.R. ¶ 13 (footnote omitted). The restrictions were:

(a) A network could only purchase such interests and rights in outside productions pursuant to negotiations separate from, and initiated no less than 30 days after, execution of the network license fee agreement . . . .
(b) Co-production arrangements between a network and a domestic producer could be initiated only by the outside producer, who would be provided a 30-day cooling-off period before the arrangement became binding.
(c) A network was required to certify that access to its schedule was not conditioned on the acquisition of such interests and rights.
(d) . . . [A] network could not condition access to its network on a producer granting interests and rights in other programs that would air elsewhere.
(e) Networks were required to maintain semi-annual reports in their owned and operated stations' public files.

Id.


102. Id.

103. Id.

104. Id.

105. Id. ¶ 7. The FCC believed that the court was suggesting that the networks would “play the market” as if it were at peak competitiveness regardless of the 1991 rules. Id. The networks would accomplish this by taking full advantage of their still existent market power. Id. As an example, the networks could insist that they pay reduced prices for back-end rights. Id.
ing whatever market power they possessed. The court reasoned that the new rules would limit network syndication, but producers' cost of production would increase and their programming fees would remain constant.

Third, the court contended that the 1991 rules limited competition with established networks by stunting the growth of new networks. For example, the court noted that Fox must supply fewer than fifteen hours per week of prime time programming to its affiliates to maintain its exemption from the 1991 rules. Although the consequences of this limitation on developing net-

106. Schurz, 982 F.2d at 1052.

107. Second R & O, 8 F.C.C.R. ¶ 7. The court suggested that rules forbidding business transactions with firms perceived to possess market power would not benefit inferior parties. Schurz, 982 F.2d at 1052. The court illustrated this point with the following hypothetical:

Suppose that in a competitive market a network would pay $2 million for first-run rights to some program and $1 million for syndication rights, for a total of $3 million, but that because of the lack of perfect substitutes for using this network to distribute his program the producer is willing to sell each of these rights to the network for half their competitive-market value (i.e., for $1 million and $500,000 respectively). The producer is made no better off by being forbidden to sell the syndication rights to the network. He gets the same meager first-run license fee ($1 million) and now must cast about for another buyer for the syndication rights. That other buyer is unlikely to pay more than the network would ($500,000); otherwise the producer would have sold the syndication rights to him in the first place.

108. Schurz, 982 F.2d at 1052. The court hypothesized that if it was correct, the 1991 rules "cannot increase the prices that producers receive." Id. Additionally, the court attributed the increase in production costs to the producers' inability to secure financing from the networks, therefore, the producers were exposed to greater and more costly risks. Id.; see Second R & O, 8 F.C.C.R. ¶ 7.

109. Schurz, 982 F.2d at 1053. For a discussion on the statutory definition of networks, see supra note 1.

110. Schurz, 982 F.2d at 1053. Specifically, the court referred to the emergence of the Fox network. Id. For a discussion of Fox's origin, see supra note 49.

111. Schurz, 982 F.2d at 1053. In 1990, Fox only supplied 12 to 14 hours of prime time programming per week to its affiliates in order to maintain its exemption from the 1991 rules. Id.; see Fox Broadcasting Co., 5 F.C.C.R. 3211 (1990). If Fox were to reach or exceed 15 hours of prime time programming per week, the Fin-Syn rules would also apply to Fox. Schurz, 982 F.2d at 1053. Citing the importance of program production to its overall growth as a network, Fox argued that its inability to expand its prime time programming has stunted its growth. Id.; see Second R & O, 8 F.C.C.R. ¶ 8. However, the court recognized the argument that the rules may "induce Fox to divest its production or network arms, so that the network can grow without constraining Fox's production activities." Schurz, 982 F.2d at 1053.
works were unclear, the court was concerned that the FCC failed to address the resulting argument that its rules may limit, and not foster, competition with the established networks.

Fourth, the court criticized the FCC's handling of administrative precedent. The court asserted that the FCC failed to reconcile its order supporting the 1991 rules with its Tentative Decision. Although the FCC did cite its 1983 Tentative Decision, the court was concerned that the FCC failed to discuss its conclusions.

Finally, the court was concerned that the FCC never defined the word "diversity" as it applied to television programming. Without an explicit discussion of the various types of diversity, it was impossible to ascertain the FCC's intended meaning of the word.

112. For a discussion on the Fox waiver, see supra notes 1, 50 and accompanying text.

113. Schurz, 982 F.2d at 1053. Since Fox's affiliates are traditionally vulnerable UHF stations, a weakened Fox translates into weakened independent stations. Id. The court was deeply troubled that the FCC did not mention this consequence in its report. Id.

114. Id. While administrative agencies are not restricted when dealing with agency precedent, Judge Posner stated that the FCC should have, at least, explained its departure from precedent. Id. (citing Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984); Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984)).

115. Schurz, 982 F.2d at 1053. The FCC made three significant findings in its 1983 Tentative Decision: (1) it rejected the notion that the major broadcast networks had significant market power by 1983; (2) it concluded that the Fin-Syn rules prevented efficient risk-sharing, thus supporting repeal of the financial interest restrictions and retention of the syndication constraints and (3) it decided that all Fin-Syn rules should be phased out by 1990. Id.; see Second R & O, 8 F.C.C.R. ¶9 (citing Tentative Decision, 94 F.C.C.2d 1019 (1983)).

116. Schurz, 982 F.2d at 1053. The court found that the FCC failed to reconcile its Tentative Decision with its report on the 1991 rules. Id. (citing Tentative Decision, 94 F.C.C.2d at 1019). Furthermore, the court stated that the FCC did not discuss the events of the eight years between the Tentative Decision and the 1991 rules. Id. In addition, the court noted that the FCC was guided by the following standard for evaluating the network restrictions: "the Commission should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public." Id. (citing Tentative Decision, 94 F.C.C.2d at 1055). However, the FCC never addressed this standard in its justification for the 1991 rules. Schurz, 982 F.2d at 1053.

117. Schurz, 982 F.2d at 1054. In its failure to define "diversity," the FCC never established the different meanings of the word or how these meanings related to each other. Id. The court briefly described the different meanings that have been attributed to the word diversity. Id. The court initially distinguished between source diversity and outlet diversity. Id. Source diversity refers to programming sources, such as producers, while outlet diversity refers to distribution outlets, such as television stations. Id. In addition, the court described a third form of diversity, namely "diversity in programming" which meant variety of programs. Id.

118. Id. The court assumed that the FCC considers source diversity and outlet diversity as "means to the end of programming diversity." Id.
Absent a definition, the court found it difficult to determine whether the FCC was properly promoting the intended goal of increased programming diversity.

The FCC noted the Seventh Circuit’s concerns regarding the 1991 rules and requested comments on how to resolve the court’s concerns. The FCC subsequently issued modified rules in 1993.

B. Post-Schurz Modifications to the Fin-Syn Rules

The FCC amended the 1991 rules in a Report and Order issued in 1993. The FCC’s decision to modify the rules came after it analyzed the continuing changes in television’s program production and syndication markets. The FCC’s modifications contained four general provisions.

First, the 1993 rules permit networks to acquire financial interest and syndication rights in network prime time entertainment programming. The FCC removed the network restrictions on the acquisition of Fin-Syn rights thus addressing the court’s concerns that the 1991 rules limited, rather than promoted, diversity.

---

119. Id. The court was concerned that the FCC may have interpreted diversity to mean “sheer number[s].” Id. The court did not agree that greater numbers of producers and outlets solely constituted diversity. Id.

120. Id. The court stated that the rules hinder the production of television programs, as well as the interest in diverse programming. Id. Judge Posner stated “[t]he rules appear to handicap the networks and by handicapping them to retard new entry into production; how all this promotes programming diversity is mysterious, and was left unexplained in the Commission’s opinion.” Id. at 1055.


123. Id. The FCC’s modified rules became effective on June 5, 1993, except for the reporting requirements that became effective upon approval by the Office of Management and Budget. Id. ¶ 120. In addition, the FCC issued a Final Regulatory Flexibility Analysis pursuant to the 1980 Regulatory Flexibility Act. Id. at Appendix B. For a discussion on the Initial Regulatory Flexibility Analysis, see supra note 84.


125. The FCC did not completely repeal the Fin-Syn rules. Id. However, in order for the rules to remain in effect after the two year sunset period proponents of the remaining Fin-Syn restrictions must persuade the FCC that retention is warranted. Id.

126. Id. ¶ 12. The FCC met the court’s objection that the 1991 rules limited network procurement of back-end rights by removing all restrictions on the acquisition of Fin-Syn rights in network prime time entertainment programming. Id. The court objected to the 1991 limitations on back-end rights because the court believed that the limitations had negative effects on program and source diversity. Id. ¶ 16 (citing Schurz, 982 F.2d at 1043).
and competition.\textsuperscript{127} The court also sought a more thorough justification from the FCC for its decision in 1991 to continue regulating network procurement of Fin-Syn rights.\textsuperscript{128} In 1993, the FCC stated that lifting the restraints on network participation in the programming acquisition process would inevitably bolster market competition and increase program diversity.\textsuperscript{129}

Second, the FCC amended its restrictions on network participation in the syndication of off-network programs.\textsuperscript{130} The 1993 rules permit networks to acquire domestic and foreign syndication rights in off-network programming.\textsuperscript{131} However, the rules still forbid the networks from actively syndicating these programs in the domestic market.\textsuperscript{132} The FCC requires networks to verify compliance when acquiring back-end rights.\textsuperscript{133}

\textsuperscript{127} Id. The FCC addressed the court’s concerns regarding Fin-Syn rights by referring to comments received during the remand period. The FCC then specifically addressed the concerns enumerated in Schurz. Id. ¶ 19-54. The FCC discussed at length the arguments presented on remand by both the Coalition to Preserve the Financial Interest and Syndication Rule (Coalition) and the networks. Id. ¶ 19-59. The Coalition argued that the programming market is not competitive and that the 30 day negotiations separation requirement ensures network compliance when acquiring back-end rights. Id. ¶ 19-29. The networks countered that they no longer possess significant market power and if they did the rules could not prevent them from using it. Id. ¶ 30-39.

\textsuperscript{128} See Schurz, 982 F.2d at 1049-50.

\textsuperscript{129} Second R & O, 8 F.C.C.R. ¶ 41. The FCC believed that there will be additional funding for non-network programming without the imposition of acquisition restrictions. Id. ¶ 40. For example, the FCC noted that independent producers will rely on the networks carrying their programs to finance programming deficits. Id. In turn, competition will sprout in the bidding for financial interests among production studios, independent syndicators and other program production financial sources. Id. In addition, networks may be more willing to take investment risks in particular programming, resulting in an increase in prime time entertainment program investments. Id.


\textsuperscript{131} Second R & O, 8 F.C.C.R. ¶ 57. The FCC responded to the two issues raised by the court regarding the syndication portion of the Fin-Syn rules. Id. ¶ 60 (citing Schurz, 982 F.2d at 1043). First, the FCC reconciled its Fin-Syn restrictions with the suggested restrictions enumerated in its Tentative Decision. Second R & O, 8 F.C.C.R. ¶¶ 70-75, 78, 83; see generally Tentative Decision, 94 F.C.C.2d 1019 (1983). Second, the FCC clarified how its rules promoted diversity. Second R & O, 8 F.C.C.R. ¶¶ 62-74.

\textsuperscript{132} Second R & O, 8 F.C.C.R. ¶ 57. The domestic restrictions in the 1993 rules ban the networks from actively syndicating off-network programs (including programs produced in-house) in the domestic market. Id. ¶ 68. This requires the networks to employ independent syndicators to distribute their off-network programming domestically. Id. ¶ 67. The FCC asserted that the 1993 domestic market restrictions were consistent with the goals of advancing diversity and competition and were consistent with its Tentative Decision. Id. ¶¶ 68-74.

\textsuperscript{133} Id. ¶¶ 71-72. The only issue left unresolved by this portion of the 1993 rules was the status of the gradual repeal of the syndication restrictions. Id. The FCC suggested a seven year phase out of syndication restrictions ending in 1990.
ance with the ban on active domestic syndication in their public files and to maintain additional reports with the FCC. Moreover, the 1993 rules retain the "anti-warehousing safeguard" and repeal the "affiliate favoritism safeguard." Third, the FCC adopted provisions to exempt "emerging networks" from most of the Fin-Syn regulations. According to the FCC, the exemption will enable developing networks to better compete with the established networks. Specifically, the exemption will increase the amount of broadcasting made available to independent stations.

Tentative Decision, 94 F.C.C.2d ¶ 209. The 1993 rules provide for all remaining syndication restraints to expire two years after modification of the relevant consent decrees. Second R & O, 8 F.C.C.R. ¶¶ 72, 112-13, 117. The FCC will conduct an inquiry 18 months after the consent decrees are issued to entertain arguments for the rules' retention. Id. ¶¶ 113, 118. Barring any FCC action extending the syndication restrictions, the rules will expire six months after the FCC inquiry begins, two years after modification of the consent decrees. Id. ¶ 119.

134. Second R & O, 8 F.C.C.R. ¶ 57. The reports required by the 1993 rules must be maintained semi-annually and are only necessary for stations that are owned and operated by the networks. Id. The reports must provide specific information on network program acquisition and syndication activities, in addition to certifying compliance with the active domestic syndication restriction. Id.

135. See 47 C.F.R. § 73.660(c) (1992). The FCC sided with independent stations in its decision to retain the "anti-warehousing safeguard." Second R & O, 8 F.C.C.R. ¶ 75. The FCC concluded that the need for warehousing precautions had not lapsed, citing its concerns regarding competition and outlet diversity. Id. ¶¶ 75-79.

The "anti-warehousing safeguard," adopted in 1991, required a network to make available its syndication rights in prime time entertainment programming, at the earlier of (1) four years after the program's network debut or (2) within 180 days of the final airing of the program on a network. Id. ¶ 59; see 47 C.F.R. §§ 73.660(c)(1), (2).

136. Second R & O, 8 F.C.C.R. ¶ 57; see 47 C.F.R. § 73.660(b) (1992). The 1991 rules contained a rebuttable presumption of affiliate favoritism if a network syndicated programming to more than 30% of the market where the program is sold. Second R & O, 8 F.C.C.R. ¶ 59. The FCC created the presumption because the independent stations expressed concern regarding the networks' ability and incentive to favor network affiliates in market distribution of syndication rights. Id. ¶ 80. However, the FCC agreed with the networks, finding that the affiliate favoritism safeguards were unnecessary due to the domestic syndication ban and the programming acquisition reporting requirements. Id. ¶¶ 80-82.

137. For a discussion on the 1993 definition of "emerging network," see supra note 87.


139. Second R & O, 8 F.C.C.R. ¶ 99. The court expressed concern that "emerging networks" would be discouraged from programming to the full 15 hour capacity. Schutz, 982 F.2d at 1053. Both the court and the FCC refer to Fox's development to illustrate how the Fin-Syn rules operate as a disincentive to developing networks. See id.; Second R & O, 8 F.C.C.R. ¶¶ 100-02. In an effort to avoid application of the Fin-Syn rules, Fox has limited its prime time programming to under 16 hours per week. Schutz, 982 F.2d at 1053. The restraints on "emerging networks" resulted in less programming choices for their affiliates, limited compe-
THE FCC’S FIN-SYN RULES

dependent broadcast stations. However, emerging networks will not be completely uninhibited by the exemption because they will still be subject to the FCC’s reporting requirements once they broadcast more than sixteen hours of prime time programming per week. Consequently, the “emerging network” exemption addresses the diversity and competition concerns expressed by the Schurz court, without deterring the development of new networks.

Finally, the 1993 rules preserve the 1991 restrictions on network participation in the domestic first-run programming market. The rules continue to permit networks to hold financial interests and syndication rights in domestic first-run syndication of programming produced entirely in-house. The FCC permitted this continuation because it recognized that the networks needed some leeway with respect to the first-run production market. However, networks will still be precluded from syndicating any first-run programming within the United States.

140. Citing Fox as an example, the FCC acknowledged that independent stations have been deprived of “quality first-run programming” because Fox, as an emerging network, refuses to break the 15 hour programming threshold. Recognizing that Fox has increased source diversity and bolstered the strength of marginal independent stations, the FCC dismissed application of the Fin-Syn rules to emerging networks as “unwarranted.”


142. Reporting requirements will be imposed on emerging networks when they supply prime time programming to interconnected affiliates. The reporting requirements are perceived as a method of monitoring the emerging networks’ programming practices to ensure that they do not engage in any conduct that contradicts the design of the Fin-Syn rules. In addition, the FCC views the reporting requirements as a minimal burden compared to the application of all of the Fin-Syn rules and believes that the reporting requirements are unlikely to discourage emerging networks from increasing their prime time programming. For a further discussion on the FCC’s reporting requirements, see supra note 134 and accompanying text.


144. The FCC asserted that the Schurz court paid little attention to syndication matters, preferring to question the relation between the 1991 rules and the Tentative Decision and any negative effects the 1991 rules had on diversity.

145. The 1991 rules also permitted networks to acquire financial interests and syndication rights in first-run syndicated programming distributed outside of the United States, regardless of where the programming was produced.

146. Id. ¶¶ 88-89.

147. Id. ¶¶ 93-95.
IV. Impact

The FCC responded to the Second Circuit's order with a comprehensive discussion supporting the 1993 rules. By promulgating the 1993 rules, the FCC sought to create a competitive balance between the networks and independent producers, without compromising the public's interest in programming selection. While the FCC's primary interest in modifying the 1991 rules was to increase programming for the television viewing audience, the FCC had a particular view towards maximizing programming diversity and increasing market competition. The 1993 rules are the cautious, but successful, result of the FCC's efforts.

During the court's proceedings to modify the 1991 rules, the FCC acknowledged that network dominance in the television industry had decreased significantly since 1970 and that intense competition between the networks existed. In adopting the 1993 rules, the FCC suggested that it was relying on these changes and safeguards on "emerging networks" to foster competition and increase diversity.

Based on these factors and the technological advances in the television industry, there is, justifiably, no longer a fear of network monopolization. The 1993 rules lifted many of the limitations on network acquisitions of financial interest and syndication rights. Additionally, the consent decrees that the United States entered into with the networks have already been partially repealed. Moreover, the court cited the 1993 rules' eventual elimination of the restrictions as one reason to grant the consent decree modifications.148 As one author stated, "should the FCC's remaining fin-syn rules expire as expected within the next two years, the big three [networks] will be able to plunge even deeper into the business of actively selling off-network as well as first-run programming."149

As a result of these modifications, networks will once again be permitted to compete in the television industry and market competition and diversity will inevitably increase. The FCC, confident that the 1993 rules will accomplish its goals, will dissolve the remaining Fin-Syn rules in two years, if not sooner.

Christopher J. Pepe