

DVD player, personal video recorder, and the Internet continues to add to the diversity in video programming and continues to undermine any rationale for fin/syn rules. Even accepting WGA's assertion that six companies own many of the major cable networks, the Networks argue that the market for video programming is more diverse today because six is double the number of companies that owned broadcast networks when the fin/syn rules were adopted.

498. Although CPD and WGA appear to be correct that fewer of the programs in the Networks' prime-time lineup are produced by independent producers than at times in the past, the evidence in the record does not address whether the decline in the number of independently-produced programs is attributable to changes in the regulatory environment (*i.e.*, the elimination of the fin/syn rules) or to other changes that have taken place in the media business in the intervening years that have increased the risk of producing prime time programming. "Whatever the pros and cons of the original financial interest and syndication rules, in the years since they were promulgated the structure of the television industry has changed profoundly." The Commission previously has questioned whether changes in the mix of programming on the prime time lineup can be attributed to regulatory changes or to business considerations.

499. Moreover, the reduction in independently produced prime time programming on a small subset of television networks is not, by itself, a public interest harm. Our concern is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers. The record does not demonstrate that consumers and viewers are harmed as a result of network financial interests in the programming they carry, particularly in light of the quantity and variety of media outlets for programming in today's media marketplace.

500. In particular, the record does not convince us that an "access" rule for independent producers will advance viewpoint diversity. CPD's argument, for example, is premised on the notion that the Networks are gatekeepers; if they are not, there are other outlets for independently-produced fare and no basis to impose fin/syn restrictions. To the extent that the Networks actually are gatekeepers, however, fin/syn rules cannot logically advance viewpoint diversity because the Networks, as gatekeepers, can filter messages at the distribution stage just as they can at the

production stage. Adopting the Fin/Syn Proposals, therefore, is not likely to promote viewpoint diversity.

501. Even if the Commission were to adopt a broader definition of "diversity" to include general entertainment programming, a gatekeeper at distribution still may filter unwanted programming whether or not the programming is produced in-house. For example, if a network were to decide that its prime time lineup should consist only of "reality programming," or that it should target a particular audience demographic, there is no reason to believe that it could not give effect to those plans with independently-produced programming as easily as it could with programming produced by itself or an affiliated company—it simply would make known its programming intent and allow independent producers to fill the void. The Fin/Syn Proposals, therefore, cannot be justified on grounds of programming diversity.

502. Both CPD and WGA also fail to justify their definitions of the relevant market for purposes of their proposals. CPD, for example, has targeted its proposal only at the four major broadcast networks, and only at their prime time schedule. However, aside from conclusory allegations that "the prime time television programming marketplace is a narrow, unique market," CPD has provided no reason to exclude other video programming outlets and other day-times, were we inclined to adopt a fin/syn-like rule. Viewers today have more programming choices available to them over-the-air, through cable, satellite, or home video, than ever before. Indeed, WGA considers a much larger market for these purposes (although it, too, provides little in the way of support for its market definition), and other commenters have suggested that non-prime time broadcast hours should be included in any analysis relating to programming diversity. Lacking the foundation of a sustainable market definition, the Fin/Syn Proposals cannot stand.

503. Finally, to the extent that the Fin/Syn Proposals are based on an assertion that the quality of independently-produced entertainment programming is superior to that of the Networks, we find the record devoid of evidence to that effect. *Cf.* MOWG Study No. 5, Program Diversity and the Program Selection Process on Broadcast Network Television by Mara Einstein (Sept. 2002). The Commission has no means or methodology to measure the quality of entertainment programming, and were we to favor one type or genre of programming over another, we would

run squarely into the teeth of the First Amendment. To be considered content-neutral, regulations must have neutral means and ends. It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns).

504. When the Seventh Circuit affirmed the Commission's decision repealing all of the fin/syn rules, it questioned whether the rules "ever had much basis" and cautioned that, if the Commission ever decided to re-impose similar restrictions, "it had better have an excellent, a compelling reason" to do so. *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994). None appears on this record. Accordingly, the Commission rejects the Fin/Syn Proposals. Aside from these reasons, we reject WGA's proposal because it is far from clear that the Commission has jurisdiction over the programming carried on cable networks.

Administrative Matters

505. *Paperwork Reduction Act of 1995 Analysis.* This R&O contains new and modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, will publish, as required by the Paperwork Reduction Act of 1995, Public Law 104-13, a separate notice in the **Federal Register** inviting the general public to comment on the information collections contained in this R&O and establishing a timeframe for accepting such comment.

506. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the estimated significant economic impact on small entities of the policies and rules adopted in the R&O. The analysis may be found in Appendix G of the full text of the R&O. This is a summary of the full FRFA. An Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) initiating this proceeding. This present FRFA conforms to the RFA.

A. Need for, and Objectives of the Report and Order (R&O)

507. The R&O is the culmination of the Commission's third biennial ownership review and addresses all six broadcast ownership rules. This review is undertaken pursuant to section 202(h) of the Telecommunications Act of 1996, which requires the Commission to