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## The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media, 22 J. Marshall J. Computer & Info. L. 569 (2004)

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## COMMENTS

# THE DESTRUCTION OF MEDIA DIVERSITY, OR: HOW THE FCC LEARNED TO STOP REGULATING AND LOVE CORPORATE DOMINATED MEDIA

### I. INTRODUCTION

Imagine a well-known, award-winning journalist is fired after expressing his opinion, critical of the U.S. government, concerning the War in Iraq.<sup>1</sup> This hypothetical situation has become a recent reality in U.S. journalism.<sup>2</sup> Peter Arnett, a renowned, Pulitzer Prize winning journalist was recently fired after agreeing to an Iraqi television interview where he expressed views, critical of the U.S. war in Iraq, held by many Americans in this present state of war.<sup>3</sup> Admittedly, Arnett's agreement to speak with the state-run Iraqi television station was a misjudgment on his part, but he also stated he was just reporting the truth.<sup>4</sup> In the interview, Arnett stated, American forces misjudged the Iraqi determination and there was a growing public opposition to the war and to President Bush regarding war conduct.<sup>5</sup> On Sunday, after the interview, NBC, Ar-

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1. Leon D'Souza, *Warmongers Can't Only Read Newspapers*, Utah Statesman via U-Wire ¶¶ 22-23 (Apr. 11, 2003).

2. *Id.*

3. Staff Writer, *Top of the Times: A Review of the Week's News*, Wash. Times, A2 (Apr. 6, 2003).

4. Scott Fornek, *Battling Circles Iraqi Capital*, Chi. Sun-Times 1 (Mar. 31, 2003). On the Monday morning following the incident on the "Today Show" on NBC, Arnett stated, "I want to apologize to the American people for clearly making a misjudgment." *Id.*

5. Jeannine Guttman, *Arnett Forgot His Purpose: To Provide 'Just the Facts'*, Portland Press Herald (Me.) 1C (Apr. 6, 2003). In the interview, in responding to the Iraqi reporter, Arnett stated, "[i]n answer to your question, it is clear that within the United States there is growing challenge to President Bush about the conduct of the war and also opposition to the war." *Id.* Arnett went on to comment on lacking U.S. reports about civilian casualties and to state his opinion with regard to the U.S. concern for the Iraqi people, "[t]he U.S. administration is concerned with the possibility of killing civilians because the international community is very concerned. . . . President Bush says he is concerned about

nett's employer at the time, initially supported Arnett's agreement to do the interview as Arnett giving Iraqi television a professional courtesy.<sup>6</sup> However, by Monday morning, NBC was no longer standing by their man, a man who has risked his life in war reporting from the Vietnam War, to the Gulf War and now, in yet another undeclared war against Iraq (a.k.a. "Iraqi Freedom").<sup>7</sup>

His firing from NBC must be *déjà vu* for Arnett.<sup>8</sup> In 1991, Arnett was disciplined after suggesting, during the first Bush administration's Gulf War, U.S. allies bombed a baby milk factory in Baghdad, which the military claimed was a biological weapons plant.<sup>9</sup> Then, in 1998, Arnett was reprimanded after he did a report for CNN in which he accused U.S. forces of using sarin nerve gas on a Laotian village in 1970.<sup>10</sup> CNN later chose not to renew his contract.<sup>11</sup> His established reputation and his lack of misconduct have led many to speculate Peter Arnett's firing by NBC most likely had more to do with corporate damage control than with questionable journalistic content.<sup>12</sup> Arnett is not the first American journalist to see this fate and he will not be the last.<sup>13</sup> With the large networks clearly more interested in protecting the interests of powerful yet silent, corporate giants, instead of protecting and encouraging their reporters to state the truth, NBC was more concerned with making sure Arnett made no statements which, directly or indirectly affected any advertisers' or corporate parent companies' revenue than with Arnett reporting the truth.<sup>14</sup>

Now imagine ABC criticizes a Disney employment practice, NBC reports General Electric is involved in a political cover-up, Fox critiques Rupert Murdoch's News Corporation's involvement with campaign finance violations or CBS denounces Westinghouse for its involvement

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the Iraqi people, but if Iraqi people are dying in numbers, then American policy will be challenged very strongly." *Id.*

6. Fornek, *supra* n. 4, at 1.

7. Lorrie Goldstein, *A High Profile Casualty of the Media War: It Wasn't What Arnett Said, But Where He Said it That Led to His Dismissal*, Toronto Sun 16 (Apr. 1, 2003).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Kevin Arnovitz, *In Memorandum*, Slate Magazine ¶ 87 (Apr. 7, 2003) (discussing what constitutes meaningful opposition to the U.S. war effort). By criticizing the actions of the military, Arnett was expressing his opinion, yet instead of supporting their journalist, NBC focused on the short-term and on political flak control in deciding to fire him. *Id.* at ¶ 88.

13. Howard Rosenberg, *TV and The Gulf War; Even a Limited View Behind Enemy Lines Worth the Look*, L.A. Times A9 (Jan. 26, 1991) (discussing Arnett's previous firing from CNN during the Gulf War).

14. Jeff Bleli, *NBC Dismisses Peter Arnett Over Interview with Baghdad TV*, L.A. Times 16 (Apr. 3, 2003).

with building weapons of mass destruction.<sup>15</sup> These hypothetical situations are not reality because at present, approximately six large media corporations control nearly ninety percent of all major media outlets.<sup>16</sup> With such large corporations in close relations and with their interests in cable, radio, publishing and television ownership continuing to expand, the public may wonder whether media critic A.J. Liebling was correct to assert, “freedom of the press is guaranteed only to those who own one.”<sup>17</sup>

In 1929, Justice Holmes stated, freedom of expression means “freedom for the thought that we hate,” not “free thought for those who agree with us.”<sup>18</sup> Justice Stewart, dissenting in *Branzburg v. Hayes*, emphasized the importance of a free press as crucial to democracy, finding “free press is thus indispensable to a free society.”<sup>19</sup> Free speech and press are essential tools to check governmental abuse of power, accomplished only when citizens are well and fully informed enough to exercise their veto power when public officials make bad decisions.<sup>20</sup> In his dissent in *Branzburg*, Justice Stewart went on to declare, as the media becomes increasingly consolidated, there is a continuing need for an independent, alternative press to disseminate a robust variety of information and opinion, essential to preserving the constitutional tradition of encouraging freedom through diversity of expression.<sup>21</sup>

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15. Ben White, *Seasoned Traders Play Market Like a Violin*, Washington Post E1 (Mar. 25, 2003). Disney owns ABC. *Id.* General Electric owns NBC. *Id.* Rupert Murdoch's News Corporation owns Fox. Gene Edward Veith, *The War is Showing Us How TV Can Make Us All Witnesses to a Historic Event*, 18 World Magazine 13 (Apr. 5, 2003). Westinghouse owns CBS. Matt Drudge, *Interview with Amy Goodman*, The Drudge Report ¶ 29 (June 5, 1999) (discussing ownership and how currently, Westinghouse is one of the predominate manufacturers of nuclear weapons in the world).

16. Sarah Turner, *Media Corporations' War Coverage Slanted*, The Daily Cardinal via U-Wire ¶ 6 (Nov. 7, 2001) (commenting on a Norman Solomon research study, which indicated that more than ninety percent of media and broadcasting publications are owned by less than a half-dozen corporations).

17. *Id.* at ¶ 1.

18. *U. S. v. Schwimmer*, 279 U.S. 644, 655 (1929).

19. *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972); see also *In re Gordon*, 9 P.3d 1106, 115 (2000).

20. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 527, 540 (1977); see also Erwin Chemerinsky, *Protecting the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. Rich. L. Rev. 1143, 1159 (Jan. 2000).

21. *Id.* at 727. Justice Stewart declared that since “[e]nlightened choice by an informed citizenry is the basic ideal upon which an open society is premised . . . , the press . . . is a precondition of government. *Id.* The independent press is better able to fulfill such robust action by their unique approach to reporting, investigating and criticizing the present state of politics and government. *Id.* Justice Stewart was commenting on the press in reference to the First Amendment implications of “allowing newsmen to withhold confi-

Presently, the traditional, mainstream media regularly engage in self-censorship, putting the public's interest in quality journalism behind their premiere loyalty to parent corporations, advertisers and the government.<sup>22</sup> Given the current state of war and corporate consolidation, the public deserves a strong alternative or independent media to report the unfiltered truth about our government's actions.<sup>23</sup> Alternative media outlets are known to publish uncensored, unpopular speech and expression, and presently, the alternative media face great obstacles as they struggle to compete in this conglomerate-friendly society.<sup>24</sup> However, despite the public's need for such aggressive and critical media, the mainstream media outlets have not yet met the challenge.<sup>25</sup> Instead, traditional media outlets have warmed up to the very corporate, economic and political powers they once criticized.<sup>26</sup>

As soon as the technology arose and perhaps in conscious response to the lagging "corporate media" trend, the Internet initially became a publishing forum for millions of sites, providing political and social content to anyone browsing.<sup>27</sup> The surge in its popularity in the 1990's led many enthusiasts to proclaim the Internet would become the great democratizer, leveling the playing field and giving everyone equal access to varying knowledge and ideas.<sup>28</sup> The Internet has also been seen as a tool for liberating the once subordinate ideas, escaping government and industry pressure.<sup>29</sup> As a result, many alternative and independent media groups have surfaced on the World Wide Web ("Web") in recent years, proposing to provide the public with quality journalism, combining dependable research and issue-focused public interest content, including passionate advocacy in order to promote democratic

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dential news information even though the information is directly relevant to the official proceedings." *Id.*

22. Turner, *supra* n. 16, at ¶ 8.

23. *Id.* If the White House and the Pentagon are involved killing innocent civilians, the public has a right to know. *Id.* Citizens want to know more about the government's military actions and depend on First Amendment rights to free speech and the press to provide an accurate, unbiased view. *Id.*

24. Rachel Coen, *Action Alert: FCC Moves to Intensify Media Consolidation* ¶¶ 5-6, [http://www.yilmazguney.com/media/writings/fcc\\_media.htm](http://www.yilmazguney.com/media/writings/fcc_media.htm) (accessed Feb. 15, 2003) [hereinafter Coen, *Action Alert: FCC Moves*].

25. Rachel Coen, *What's Wrong With the News* ¶ 1, <http://www.fair.org/media-woes/media-woes.htm> (accessed Feb. 15, 2003) [hereinafter Coen, *What's Wrong*].

26. *Id.*

27. *Am. Libr. Assn. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

28. The National Council for Civil Liberties, *Introduction*, in *Liberating Cyberspace: Civil Liberties, Human Rights and the Internet 1* (The National Council for Civil Liberties ed., Pluto Press 1999) [hereinafter NCCL].

29. *Id.*

participation.<sup>30</sup> However, while the Internet has provided an opportunity for increased interactivity with the political system and for diverse views to circulate freely, the increased communication available via the Internet does not excuse corporate media consolidation.<sup>31</sup>

Currently, Viacom, which owns CBS and UPN, joined Fox, owned by Rupert Murdoch and NBC, owned by General Electric, as one of several leading media groups dedicated to lobbying the Federal Communication Commission ("FCC" or "Commission") in the fight to remove all current restrictions on media ownership.<sup>32</sup> Oblivious to the media conglomerates' present state of control over mainstream media, on June 2, 2004, the FCC voted to relax the media ownership regulations that previously limited a media entity's ability to purchase additional media outlets in a current market as well as to add additional media outlets.<sup>33</sup> Under the new FCC regulations, a broadcast network can now own more networks nationwide, and under the relaxed cross-ownership guidelines, media corporations can now own more newspaper and broadcast media outlets in the same market.<sup>34</sup> The FCC's recent actions have been severely counter-productive to the FCC's stated goals to sustain a vital, diverse, media, representing varying viewpoints.

This Comment will investigate the current corporate consolidation climate and the fate of alternative media outlets in the midst of such adversity from traditional media outlets and in the absence of effective FCC regulations. First, this comment will examine the media in general

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30. Don Hazen, *Our Mission: The AlterNet Mission* ¶ 2, <http://www.alternet.org/mission.htm> (accessed Feb. 15, 2003). AlterNet.org describes is "an online magazine and information resource where pressing issues are subject to examination and debate." *Id.* at ¶ 1. While this is but one mission statement from AlterNet, many of the "About Us" pages from different alternative media sites state very similar goals as AlterNet. *Id.*

31. Cathy Bryan & James Tatam, *Political Participation and the Internet in Liberating Cyberspace: Civil Liberties, Human Rights and the Internet* 161, 168 (The National Council for Civil Liberties ed., Pluto Press 1999).

32. Peter Thal Larsen, *Viacom Set to Seek More US Acquisitions*, *Fin. Times* (London) 25 (Feb. 13, 2003). Viacom is currently "the world's biggest media group by market value and they will seek further US acquisitions after the expected loosening of the sector's ownership rules," further illustrating the trend towards media consolidation. *Id.* The FCC's current ownership restrictions seem to be the last stand against total corporate media domination. *Id.* "Mel Karmazin, Viacom's president and chief operating officer, [recently] said probable changes being discussed by the Federal Communications Commission would allow the group to take advantage of its strong balance sheet." *Id.* Karmazin went on to explain that "[t]here will be new acquisition opportunities available to us as the FCC completes its review-locally and nationally." *Id.*

33. Enrique Armijo, *A Colloquium on the Jurisprudence of Mercy: Capital Punishment And Clemency: Recent Development: Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 *N.C.L. Rev.* 1482, 1482-83 (2004) (citing Press Release, FCC, *FCC Sets Limits on Media Concentration* 1, 3 [hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf) (accessed July 3, 2004).

34. *Id.* at 4.

and how the alternative media differs from the traditional media. After scrutinizing the FCC's stated goals in regulation, this comment will examine the history of FCC regulation and the FCC's current deregulatory trend in the media industry, leading to greater media consolidation. Upon illustrating the FCC's current deregulation trend fails to accomplish any of the FCC's stated goals and upon determining that the Internet would fail to be an effective solution to the alternative media's struggle to compete against mainstream media conglomerates, this Comment will propose increased regulation is the best solution to the alternative media's predicament. Finally, this Comment will conclude greater FCC regulations best fulfill the FCC's stated goals, and by stimulating, rather than suffocating the alternative media, the general public will benefit from maximizing First Amendment objectives and ultimately, overall democratic participation.

## II. BACKGROUND

### A. DEFINING ALTERNATIVE MEDIA

#### 1. *The Media Generally*

Media is defined as the entity providing mass communication.<sup>35</sup> Traditionally, media has been a collective term to refer to communication mediums, like radio, television, newspaper, magazine, and cinema, but today, the term media also includes the Internet, which is the newest form of mass communication.<sup>36</sup> In modern time, the media is the preferred source of news, entertainment and politics worldwide.<sup>37</sup> As a result, the media business has become one of the twelve largest industries in the United States.<sup>38</sup> The media industry's influence on the American public is not surprising when we learn the ordinary American spends over 3,400 hours a year consuming media output, representing almost forty percent of our lives, which is more time than we spend sleeping and far more time than we spend working.<sup>39</sup> While the power of media influence, over nearly all aspects of modern life from morality to politics is surprising, the alarming issue is not the growing media power itself, but the centralized media power nexus that has resulted.<sup>40</sup> Ben Bagdikian,

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35. Herbert N. Foerstel, *Banned in the Media: A Reference Guide to Censorship in the Press, Motion Pictures, Broadcasting and the Internet* vii (Greenwood Press 1998).

36. *Id.* These forms of media have long-surpassed books as the most preferential and influential method of gaining information as the primary mediums for communicating and disseminating information to the public worldwide. *Id.*

37. *Id.*

38. *Id.* See also Richard Harwood, *40 Percent of Our Lives*, Wash. Post A19 (Nov. 30, 1996).

39. *Id.*

40. Foerstel, *supra* n. 38, at viii. The media power problem is traceable to four major media corporations, who effectively control the major sources of broadcast news media: the

a former journalism professor at the University of California, Berkeley wrote,

[A] shrinking number of large media corporations now regard monopoly, oligopoly, and historic levels of profit as not only nominal, but as their earned right. In the process, the usual democratic expectations for the media-diversity of ownership and ideas-have disappeared as the goal of official policy, and worse, as a daily experience of a generation of American viewers and readers. . . . It's no way to maintain a lively marketplace of ideas, which is to say it is no way to maintain a democracy.<sup>41</sup>

## 2. *The Difference Between Traditional and Alternative Media*

While the traditional media is the primary means of mass communication,<sup>42</sup> the alternative media could be deemed the secondary means of mass communication, emphasizing varying views, ideas and issues, generally absent in the traditional, mainstream commercial media.<sup>43</sup> Alternative media is often referred to as non-traditional, independent media and is often known for presenting dissenting political views, which are routinely marginalized in the mainstream media; the alternative media represents the interests and perspectives of individuals whose gender, race, ethnicity, sexual preference, class or ideology may set them apart from the masses, resulting in the consistent under representation of these same groups in the media.<sup>44</sup> The alternative press refers to a variety of media sources in many different mediums, including network broadcasting, newspaper, webzines, public access television, cable and magazines.<sup>45</sup> Since the established media often have a painfully slower reaction to controversial issues, the alternative media remains willing to take on issues the traditional media usually ignores and remains dedi-

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National Broadcasting Company (NBC), the American Broadcasting Company (ABC), the Columbia Broadcasting System (CBS) and the Cable News Network (CNN). *Id.*, at ix. Two of the four corporations, CBS and NBC are owned by parent companies that are defense contractors for the U.S. military, meaning they are involved in producing nuclear weapons. *Id.* Such background information clearly explains why a news reporter working for CBS or NBC would be unlikely to cover a story critical of nuclear power and why a reporter working for ABC would be just as unlikely to criticize the policies of its parent company, Disney. *Id.* The media consolidation on the Internet also explains why none of the media is likely to cover problems with a media industry controlled by few, powerful corporations. *Id.*

41. *Id.* See also Ben Bagdikian, *The Media Monopoly* ix, xxvii (4th ed., Beacon 1992).

42. *Id.*, at vii.

43. Laurie B. Mlatawou, *Alternative Media Outlets Strive to Shed New Light on Yugoslav Developments*, Wis. State J. 1B, ¶ 19 (May 30, 1999).

44. Coen Action Alert: *FCC Ready*, *supra* n. 37, at ¶ 14.

45. David Ward, *Bottom-Line Focus Can't Change Alternatives' Mission*, PR Week (U.S.) 13 ¶ 3 (Jan. 20, 2003).



cated to reporting information that is missing in the news.<sup>46</sup>

While the alternative media outlets share certain common interests with traditional media, they also differ in several significant ways.<sup>47</sup> First, the majority of alternative media outlets often have an activist pretext. For example, Indymedia, a popular online independent site, where a user can either read published articles from small-scale publications or can publish their own commentary, endeavors to erode the dividing line between the reporters and the reported and between active producers of content and the passive audience.<sup>48</sup> Instead of submissive reporting, independent media usually prefers to dig in and tackle controversial political issues including covering trends in music, art and lifestyles which are routinely forgotten by the mainstream press.<sup>49</sup> Also, many of the current independent media outlets arose as a counterculture, responding to a perceived public aversion to or lack of concern for certain social and political issues.<sup>50</sup> For example, Bedein, an American living and working in Israel for more than thirty years, started his own alternative publication, the Israel Resource News Agency, in order to give proper attention to underreported stories and to attempt to balance a slant he saw in journalistic reports on the Israel-Palestine conflict.<sup>51</sup>

Second, independent media is generally not profit-driven. A typical mainstream media institution places sales profits and advertising dollars at the top of its agenda.<sup>52</sup> In sharp contrast, alternative media outlets do not always depend upon advertisers or sales profits to sustain their publications.<sup>53</sup> Instead, a typical alternative media outlet, which is usually structurally and profoundly different from traditional media conglomerates, generally sees itself as part of a movement to establish new ways of organizing media and social activity, being committed to furthering social objectives as a whole, rather than purely in its own preservation.<sup>54</sup> Robert McChesney, a current associate research professor at the Institute of Communications Research at the University of Illinois at

46. Paul O'Connor, *Good Evening, Here Is the Real News*, *The Guardian* (London) 4 ¶ 9 (Aug. 20, 2001) (discussing the "one-sided coverage of Genoa and the May day protests," in the United Kingdom, but the article generally discusses all alternative media outlets).

47. Ward, *supra* n. 45, at ¶ 3.

48. O'Connor, *supra* n. 46, at ¶ 9 (discussing the "one-sided coverage of Genoa and the May day protests," in the United Kingdom, generally discussing all alternative media outlets); see ([www.Indymedia.com](http://www.Indymedia.com)) (accessed Oct. 15, 2004).

49. Ward, *supra* n. 45, at ¶ 4.

50. *Id.*

51. Bridget Gutierrez, *Mideast Reporting Examined; Jews Told That Some Stories Aren't Covered*, *San Antonio Express-News* 3B ¶ 3 (Jan. 27, 2003).

52. Michael Albert, *Alternative Media: What Makes Alternative Media Alternative?* ¶ 7, <http://www.zmag.org/whatmakesalti.htm> (accessed Feb. 15, 2003).

53. *Id.* at ¶ 8.

54. *Id.*

Champaign-Urbana stated, "Alternative media refer[s] to those generally nonprofit media that are not set up simply to make money for owners, but because people want to contribute to the political culture."<sup>55</sup> Given such a mission and in the absence of such profit pressures, alternative media can offer its journalists greater freedom.<sup>56</sup> For example, Rosemary Forrest, a former journalist for an alternative press publication described she liked "working for the alternative press because if you had a story you wanted to run with, they gave you the time and the space" to develop and write it.<sup>57</sup> Thus, with the freedom the alternative press provides, journalists can devote pages instead of paragraphs to a given issue, giving the reader a more complete account of the story.<sup>58</sup>

Finally, alternative media outlets are generally not aligned with corporations. Unlike the large, media conglomerates owned by just a few, large corporations, alternative media outlets are generally rogue entities, without any significant connection to the government or corporations.<sup>59</sup> Non-traditional media outlets exemplify thousands of marginalized groups, often slighted in the mainstream political conversation based upon their race, ethnicity, gender, sexual preference, or ideology, that have created their own unique forms of media to properly represent their ideas.<sup>60</sup> The alternative media have been able to reach the masses, but the concentration of media ownership into a few hands makes it nearly impossible for competitors to start up and be effective when there are so few dominating the flow of information.<sup>61</sup> Over the last twenty years, the commercial media market has become more concentrated and centralized into a few powerful hands, meaning the media is generally less able to provide varying, open discussion, where the pub-

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55. *Id.*

56. Ward, *supra* n. 45, at ¶ 13.

57. *Id.*

58. *Id.*

59. Mlatawou, *supra* n. 43.

60. Susan Herbrst, *Public Expression Outside the Mainstream*, The American Academy of Political and Social Science, 546 Annals 120, 122-23 (July 1996). Those "individuals who are not in the mainstream, who are different because of their demographic characteristics or ideological perspectives . . . are clearly part of the public, [but] they are largely ignored because they are few in number." *Id.* at 122. However, marginalized groups often have great importance in political society. *Id.* "[E]ven groups whose numbers are small and do not show up in opinion polls can be quite noisy and influential." *Id.* For example, a group called ACT-UP, an AIDS activists organization were able to successfully focus "the nation[s] attention on the spread of the disease and the need for more research funds." *Id.* While these groups are often ignored by the mainstream press, "we [as a society] can learn much about public expression by understanding those who are normally ignored by the mainstream press. . . , [because] by focusing on the margin-on those who stand outside the conventional public sphere-we can begin to understand the biases of mainstream media and institutions." *Id.*

61. Mlatawou, *supra* n. 43, at ¶ 40.

lic can actively participate in a vigorous, democratic, political culture.<sup>62</sup>

## B. THE INTERNET'S ROLE IN MEDIA

### 1. *A Brief Introduction to the Internet*

The Internet, which originated in 1969, began as the Advanced Research Project Agency's experimental project called ARPANET.<sup>63</sup> ARPANET was a network<sup>64</sup> that linked computers and computer networks owned and used by or for the military.<sup>65</sup> The network subsequently allowed researchers directed access to extremely powerful supercomputers, which were located at a few universities and laboratories across the nation.<sup>66</sup> The technology base for the Internet evolved beyond its national research origins to include universities, corporations and individuals around the world, into what we now know as the Internet, a global communications medium, which encompasses a series of redundant links between computers and computer networks, capable of rapidly transmitting communications, without direct human involvement or control.<sup>67</sup> The Internet, which now includes the "Web",<sup>68</sup> is cur-

62. *Id.* at ¶ 20.

63. *ACLU v. Reno*, 929 F. Supp 824, 831 (E.D. Pa. 1996). This Court considers the legal implications of the Communications Decency Act (CDA), a statute which restricts certain communications over computer networks, by first examining the nature and history of the Internet. *Id.* at 824. The CDA, passed in 1996, prohibits the telecommunications transmission of obscene or indecent communications of material considered patently offensive by persons under eighteen years of age. *Id.* The American Civil Liberties Union sued on behalf of numerous businesses, libraries, educational societies, and non-profit organizations who were challenging that the CDA violated the First Amendment by restricting free speech. *Id.*

64. *Id.* While some networks are closed networks, meaning that they are not linked to other computers or networks, other networks are open networks, meaning they "are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system." *Id.* The Internet is defined as a "global Web of linked networks and computers." *Id.*

65. *Id.*

66. *Id.*

67. *Id.* While at first called the ARPANET, when it first began to be globally popular, it was then referred as the "DARPA Internet" before it finally just became known simply as the Internet. *Id.*

68. Morgan Stewart, *Commercial Access Contracts and the Internet: Does the Uniform Computer Information Transactions Act Clear the Air with Regard to Liabilities when an On-Line Access System Fails?*, 27 Pepp. L. R. 597, 605 (2000). The term World Wide Web ("the Web") refers to a series of documents, including text, still images, sounds and video formats, stored in different computers all over the Internet. *ACLU v. Reno*, 929 F. Supp. at 836. "The World Wide Web (W3C) was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world." *Id.* The Web is currently the most technologically advanced information system on the Internet. *Id.*

rently more than thirty years old, accessed by approximately 180 million people worldwide, from home or work.<sup>69</sup> Presently, the Internet is generally considered to be the fastest moving technological innovation ever.<sup>70</sup>

## 2. *The Role of the Internet in Alternative Media*

Initially the Internet was mostly restricted to an economic, technocratic, young, white, male elite, yet currently, Internet access has broadened its user scope to include women, children, the elderly, people from various social and ethnic backgrounds and in general, many who were previously socially excluded from the Internet.<sup>71</sup> Individuals formerly excluded in traditional media began to develop their own Web sites and chat rooms to not only report the unfiltered truth, but also in an effort to engage community readers in problem solving, community action and awareness of current events in the United States and abroad.<sup>72</sup>

With the aid of the Web, individuals and organizations now have a platform to communicate and exchange shared information; the Web also encourages individuals to express various viewpoints because publishing on the Web simply requires the 'publisher' have a computer connected to the Internet with applicable software.<sup>73</sup> In years past, before the independents entered the Internet, virtually all of the independent weeklies were free and usually distributed in coffee shops in many cities worldwide.<sup>74</sup> When the alternative press entered the Internet, alternative media became no longer limited to distribution in a particular geographic location, as the Internet is not location-dependent.<sup>75</sup> Since the Internet is an open network, information on the Internet comes directly from a variety of sources and does not have to pass through the traditional media's filtering and editing process.<sup>76</sup>

## 3. *The Suggested Internet Solution*

Internet utopians predicted the Internet would be the present-day "Gutenberg's printing press. . . giv[ing] to the many the knowledge which

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69. Andrew Terrett & Iain Monaghan, *The Internet—An Introduction for Lawyers*, in *Law and the Internet: A Framework for Electronic Commerce* 1, 2 (Lilian Edwards & Charlotte Waelde eds., 2d ed., Hart Publ. 2000).

70. *Id.* at 11.

71. *Preface* in *Law and the Internet: A Framework for Electronic Commerce v* (Lilian Edwards & Charlotte Waelde eds., 2d ed., Hart Publ. 2000).

72. Hazen, *supra* n. 30, at ¶¶ 1, 2.

73. Ward, *supra* n. 45, at ¶ 13.

74. *Id.*

75. Bryan & Tatum, *supra* n. 31, at 162.

76. *Id.*

was previously confined to the few."<sup>77</sup> Predicting everyone would produce their own Web sites at minimal costs, the Internet optimists proclaimed the present corporate giants in traditional media outlets would soon find themselves swamped with countless high-quality competitors, crushing their domination in the communications market.<sup>78</sup> Many hoped the Internet would be the catalyst to social liberation, where marginalized views could reach a wider audience, free of state censorship and without editorial censorship by publishers and broadcasters.<sup>79</sup> Under this ideal, the Internet, in order to promote political change, would allow the public to hold the government to a higher standard of accountability and to generally improve the overall quality of political participation.<sup>80</sup>

However, despite such optimism, others, like author Mark Miller, warn the same gigantic players that control the elder media are planning shortly to absorb the Internet, transforming the Internet from a thriving common wilderness into "an immeasurable de facto cyberpark for corporate interests, with all the dissident voices exiled to sites known only to the activists."<sup>81</sup> Despite the general consensus that the Internet would surely launch new, commercially viable competition to challenge the media giants, in light of the recent AOL-Time Warner merger, many Internet analysts have come to believe the last nail has been hammered into the corporate coffin, making it clear that as a communications medium, the Internet is encouraging even greater corporate media concentration and convergence.<sup>82</sup> As the media conglomerates continue to grow, squeezing out alternative media outlets along the way, the Internet has become the new stomping ground for the mainstream media corporations, casting doubt on the viability of the Internet as a viable resolution to the alternative media's battle with corporate media.<sup>83</sup>

### C. THE CORPORATE MEDIA GIANTS

In *U.S. v. Kansas City Star*, the court stated, "[t]o monopolize freedom destroys it."<sup>84</sup> The framers of the Constitution intended to protect against the monopolization of First Amendment rights, like freedom of speech and of the press, wanting to protect the individual publisher,

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77. NCCL, *supra* n. 28.

78. McChesney, *supra* n. 33, at ¶ 4.

79. NCCL, *supra* n. 28.

80. *Id.*

81. Foerstel, *supra* n. 35, at ix.

82. McChesney, *supra* n. 33, at ¶ 8. It still remains unclear how the Internet will become a commercially viable alternative to corporate domination in the traditional media market. *Id.* at ¶ 11.

83. Foerstel, *supra* n.35, at ix.

84. 354 U.S. 923 (1957).

someone who stood apart from the government and who had no particular economic or political power, instead of protecting corporations who already had considerable economic and political power and who typically held a symbiotic relationship with the government.<sup>85</sup>

### 1. *Historical Consolidation*

From the beginning of nearly all mass media mediums, print publishing, radio, broadcast television, cable and telecommunications, smaller, independent groups have had trouble competing against their large-scale, well-funded corporate counterparts in the struggle to gain a piece of the media pie.<sup>86</sup>

#### a. *Newspapers*

In 1923, the thirty-nine percent of all cities across the nation with daily newspapers had competing daily papers.<sup>87</sup> By the 1930s, competition was slowly lessening as only approximately twenty percent of U.S. cities had a competing newspaper in their market.<sup>88</sup> Then, by the 1960s, the competition had dwindled to slightly more than four percent.<sup>89</sup> More than half of the newspapers in the sixties were independent, family-owned papers, but then, as second and third generation family owners began to lose interest, emerging corporations began quietly purchasing these papers.<sup>90</sup> Suddenly, the once immense and involved role of the press in the marketplace of ideas appeared to be diminishing in the wake of mergers and buyouts, and instead of having a robust exchange of political and social views, these single-paper markets became a typical monopoly offering only one point of view.<sup>91</sup>

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85. *Id.*

86. Marcelino Ford-Livene, *The Digital Dilemma: Ten Challenges Facing Minority-Owned New Media Ventures*, 51 Fed. Comm. L.J. 577, 578 (May 1999) [hereinafter Ford-Livene]. While many independent or minority-owned companies competing in these industries have no shortage of vision, creativity, or motivation, they also have no shortage of challenges, setbacks, and failures. *Id.*

87. Ralph Holsinger & Jon Paul Dilts, *Media Law* 626 (McGraw-Hill 1994).

88. *Id.*

89. *Id.* In the eyes of the Kennedy administration, television was becoming a "vast wasteland" controlled by disreputable networks. *Id.* The Justice department in the 1960s also viewed the newspaper mergers with regret, where "the rapid growth of newspaper chains with fewer and fewer owners smelled darkly of anticompetitive activity." *Id.*

90. *Id.* Increasingly, local newspaper owners were not individuals who lived in the community, but faceless corporations, with headquarters elsewhere, interested in one thing: profit. *Id.*

91. *Id.* at 626-27.

*b. Broadcast Networks*

The term “network dominance” describes the current state of network broadcasting, where ABC, CBS and NBC dominate the world of television broadcasting.<sup>92</sup> In broadcast television, approximately one-seventh of all networks are monopolies,<sup>93</sup> one-quarter are duopolies,<sup>94</sup> one-half are tight oligopolies<sup>95</sup> and the remainder are moderately concentrated.<sup>96</sup> There are some independent television stations, stations which are not affiliated with one of the larger networks, but they are usually not independent by choice, meaning they are only independent because the area they operate in are markets that already have an affiliate of one of the larger networks.<sup>97</sup> In fact, empirically, there are few, if any examples of independent, commercial television stations able to resist the invitation to become a large network affiliate in order to remain independent.<sup>98</sup>

*2. The Current Consolidation Trend*

Currently, nearly all national media outlets, including news, entertainment and commentary are controlled by six of the world’s largest corporations<sup>99</sup> and in the past decade, those already large and powerful

92. Stanley M. Besen, Thomas G. Krattenmaker, A. Richard Metzger & John R. Woodbury, *Misregulating Television: Network Dominance and the FCC* 4 (U. Chi. Press 1984) [hereinafter Besen].

93. A monopoly is “control or advantage obtained by one supplier or producer over the commercial market within a given region.” See *Black’s Law Dictionary* 819 (Bryan A. Garner ed., abr. 7th ed., West 2000).

94. A duopoly is “a market in which there are only two seller of a product.” See *Black’s Law Dictionary* at 407.

95. An oligopoly is “control or domination of a market by a few large sellers, creating high prices and low output similar to those found in a monopoly.” See *Black’s Law Dictionary* at 892.

96. Rachel Coen, *Media Giants Cast Aside Regulatory “Chains”: FCC Should Resist Attempt to Gut Ownership Restrictions* ¶ 8, <http://www.fair.org/activism/fcc-giants.html> (accessed Feb, 15, 2003) [hereinafter Coen, *Media Giants Cast*]. “Several public interest groups—including Consumers Union, Consumer Federation of America, Media Access Project, Center for Digital Democracy, and the Civil Rights Forum—recently filed a joint comment with the FCC in support of maintaining restrictions.” *Id.* These groups also noted that “while the number of [television] stations has increased from 952 to 1,678 between 1975 and 2000, the number of station owners has actually declined from 543 to 360 in the same period.” *Id.*

97. Besen, *supra* n. 92, at 4.

98. *Id.* Despite diligently searching, it is nearly impossible to find an example of an independent station rejecting an offer to become an ABC, CBS or NBC affiliate because they wanted to remain independent. *Id.*

99. Jonathan W. Lubell, *Are New Media Really Replacing Old Media? Broadcast Media Deregulation and the Internet: The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Acts*, 17 St. John’s J.L. Comm 11, 44 (2003).

corporations continue to acquire other, often equally large, media corporations.<sup>100</sup> In the past few years, three notable mergers have raised the most eyebrows: when Disney and Capital Cities/ABC joined forces, when Viacom and CBS merged and most recently, when AOL and Time-Warner united.<sup>101</sup> There are certainly practical, economical reasons for these mergers, yet they also have a significant impact on news organizations and thus, on society.<sup>102</sup>

In recent years, the media industry has gone through some exceptionally negative changes and deregulation and consolidation has shifted the balance of power into a small handful of companies with interests and investments spreading across the media landscape.<sup>103</sup> With such economic and political power, there is the potential abuse of power, where these corporations may try to decide what the general public will read, see, hear and ultimately, think.<sup>104</sup> With the present, oligopoly-like environment, these large conglomerates have great incentives to actively protect their iron grip on the market, including lobbying efforts to convince elected officials to support favorable legislation that will not threaten their powerful position.<sup>105</sup> These efforts will likely result in increasing consolidation, ultimately ignoring the interests of the general public.<sup>106</sup>

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100. Donald R. Simon, *Big Media: It's Effect on the Marketplace of Ideas and How to Slow the Urge to Merge*, 20 J. Marshall J. Comp. & Info. L. 247, 248 (Winter 2002).

101. *Id.*

102. *Id.*

103. Coen, *FCC Ready supra* n. 37, at ¶ 13. With deregulation, "we now live in a world dominated by profit-driven media conglomerates more interested in delivering viewers to advertisers than in serving the needs of the public." *Id.*

104. Peter K. Yu, *Bridging the Digital Divide in the Information Age*, 20 Cardozo Arts & Ent. L. J. 1, 39 (2002). See also Ben H. Badikian, *The Media Monopoly*, xli (6th ed. 2000). The six largest media corporations, referred to as the "Big Six" are General Electric, Viacom, Disney, Bertelsmann, Time Warner and News Corp. *Id.* at x. These six companies have great power and influence, and their market interests are intertwined as they each own stock in each other's corporations, cooperate in joint media ventures and share in the profits from the media's broadcasting and publishing industries. *Id.* As numerous, successful media mergers take place, the "Big Six" will only increase their net power and influence in our society and government. *Id.* After the AOL Time Warner merger, many of these corporations may consider similar, future consolidation. *Id.* The AOL Time Warner merger "is likely to force other giant firms, like Disney, Viacom, and News Corp., to make similar mergers with Internet and communications giants like Microsoft, AT&T, and MCI World, affecting commonly known cyber operations like Yahoo, Amazon.com, and eBay." *Id.*

105. *Id.* at 40.

106. Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 Marq. L. Rev. 385, 386-87 (Winter 1994) (discussing the media consolidation and how absent government regulation, the interest of the public is compromised).



## D. REGULATING THE MEDIA

1. *The FCC's Authority to Regulate the Media*

The FCC, one of many independent regulatory commissions in the U.S., gained authority to regulate the media industry via The Communications Act of 1934.<sup>107</sup> The Commission is a governmental organization with the delegated Congressional authority to implement federal communication policies.<sup>108</sup> In addition to regulating all radio, broadcast stations, interstate telecommunications, cable, satellite services, the FCC also has the power to grant licenses and to regulate other media outlets including print media.<sup>109</sup> After Congress initially approved the FCC's authority to regulate media in the 1934 Act, the FCC has had to expand its authority beyond the general, enumerated powers set forth in section 303 of the 1934 Act.<sup>110</sup>

In order to fulfill its broad regulatory power, the FCC has had to assume administrative, judicial and legislative functions.<sup>111</sup> The Commission's administrative authority includes the power to execute the necessary rules and regulations the FCC sees fit to enact; as an administrative body, the FCC must only implement polices that relate to public interest, convenience, necessity and are within the granted Congressional authority, but otherwise the FCC has wide discretion to regulate and to quasi-judicate.<sup>112</sup> The FCC also has a legislative function in making the necessary rules and regulations necessary for the Commission to function, prescribing such restrictions and conditions as may be necessary, as stated in the 1934 Act.<sup>113</sup> Judicially, the Commission is responsible for granting media licenses and for adjudicating any controversy.<sup>114</sup>

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107. Donald J. Jung, *The Federal Communications Commission, The Broadcast Industry, and the Fairness Doctrine* 7 (U. Press of Am. 1996).

108. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990). Through the Communications Act of 1934, Congress assigned the FCC the "exclusive authority to grant licenses, based on 'public convenience, interest or necessity,'" to individuals wishing to operate radio and television broadcasting nationally. *Id.*

109. Michael J. Aguilar, *Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitive ness in Broadcasting*, 65 Brook. L. Rev. 1133, 1157 (1999).

110. R. Terry Ellmore, *Broadcasting Law & Regulation* 38 (Tab Books 1982).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* While the FCC has a quasi-governmental function, the FCC's use of its administrative, legislative and judicial role is still regulated by the Federal Administrative Procedure Act of 1946, which sets forth specific guidelines which federal agencies must operate within. *Id.* This act outlines the requirements that agencies must follow such as "issues of rules, administrative procedures, the limitations of administrative powers, requirements for hearings, and allowances for judicial review of commission decisions." *Id.*

## 2. *The FCC's Goals*

Since its formation, the FCC has traditionally focused upon protecting the overall public interest by progressing three general goals: diversity, competition and localism.<sup>115</sup> The commission's goal of promoting diversity is based upon the First Amendment,<sup>116</sup> where diversity is achieved when the widest possible dissemination of information from diverse and antagonistic sources is commonplace and beneficial for public welfare.<sup>117</sup> The FCC's goal of diversity means the greater the media diversity of ownership in a particular area, the less chance there is that a single person or group can have an overreaching effect, in a political, editorial, or in a similar programming sense, on public opinion at the regional or national level.<sup>118</sup> In regulating the media industry, the commission has considered four fundamental aspects of diversity: viewpoint diversity, outlet diversity, source diversity and program diversity.<sup>119</sup>

First, in promoting viewpoint diversity, the FCC makes rules and decisions in order to ensure the public has access to the widest possible range of varying viewpoints and opinions.<sup>120</sup> In order to guarantee such viewpoint diversity, the Commission recognizes the public is best served by providing opportunities for various groups and individuals to participate in various media outlets.<sup>121</sup> By ensuring the public's access to the greatest possible variety of viewpoints, the Commission is also promoting an informed citizenry, which is crucial to a well-functioning democracy.<sup>122</sup> The Commission's primary means of encouraging viewpoint diversity is through implementing ownership restrictions.<sup>123</sup> In fact, in a recent federal case, the Court recognized the FCC's previous ownership restrictions provide viewpoint diversity.<sup>124</sup>

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115. 17 FCC Rcd 18503, Lexis 4671, \*3 (2002) [hereinafter FCC Rcd].

116. U.S. Const. Amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." *Id.*

117. Aguilar, *supra* n. 109, at 1158.

118. FCC Rcd, *supra* n. 115, at 40 (citing Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476, 1477 (1964)).

119. *Id.*

120. Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 *Cardozo Arts & Ent. L.J.* 491, 544 (1999) (discussing the FCC's concern with the public's need for a wide range of sources in the media).

121. *Id.*

122. FCC Rcd, *supra* n. 115, at 42.

123. Arlan Gates, Student Author, *Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in Telecommunications*, 58 *U. T. Fac. L. Rev.* 83, 101 (2000).

124. FCC Rcd, *supra* n. 117, at 42 (citing *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 160 (D.C. Cir. 2002)). In *Sinclair*, the Court found that "diversification of ownership

Next, outlet diversity refers to the control of media outlets by various, independent owners.<sup>125</sup> The FCC's dedication to outlet diversity ensures the public will have access to various programs and news from several, independently-owned media outlets, including radio, television and publishing.<sup>126</sup> The Commission's goal of promoting viewpoint diversity rests on the presumption that ownership diffusion into many different outlets provides the public with a range of viewpoint diversity.<sup>127</sup> In attempting to refrain from content-based regulation and in an effort to fulfill the viewpoint diversity goal, the Commission has stated its intention to continue to preserve a sufficient number of independently-owned outlets, which will increase the likelihood that independent viewpoints will be available in local markets.<sup>128</sup> Additionally, the Supreme Court has also upheld the FCC's policies regarding outlet diversity, illustrating the Commission's dedication to promoting overall diversity for the public interest.<sup>129</sup>

Then, source diversity guarantees the public has access to information and programming from multiple content providers.<sup>130</sup> To achieve its goal of source diversity, the FCC seeks to provide the consumer or viewer with content from a variety of content providers.<sup>131</sup> The Commission uses its ownership policies to provide the public with a wide array of content producers, contributing both to view point diversity, especially where the content is news and public affairs programming and program diversity.<sup>132</sup> Initially, the FCC aimed at promoting source diversity strictly through the broadcast media, however, the FCC has expanded this focus to also include other media outlets, most recent additions include cable and satellite mediums.<sup>133</sup> Finally, program diversity refers to the commission striving to offer varied programming formats and con-

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would enhance the possibility of achieving greater diversity of viewpoint. *Id.*; see also *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2001) (where the court agrees that diversity of ownership is related to diversity of viewpoints).

125. Garon, *supra* n. 120, at 544.

126. FCC Rcd, *supra* n. 115, at 44.

127. *Id.*

128. *Id.*

129. FCC Rcd, *supra* n. 115, at 45 (citing *FCC v. Natl. Citizens Comm. for Broad.*, 435 U.S. 775, 796-97 (1978)).

130. Joanna R. Zehler, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. Rev. 995, 1003 (July 1999) (discussing the Court's decision in *Metro Broadcasting v. FCC*, where the Court determined that the FCC's use of racial preference in granting broadcasting licenses was valid because the FCC was attempting to provide the public with a wider range of viewpoints from various sources).

131. *Id.*

132. FCC Rcd, *supra* n. 115, at 45.

133. *Id.* at 46. (discussing the review of the prime time access rules in section 73.658(k) of the Commission's Rules, 11 FCC Rcd 546 (1995)); see also 47 U.S.C. §611; 47 U.S.C. § 335.

tents to the public.<sup>134</sup> Over the years, the FCC has encouraged broadcasters to offer their audiences a variety of program choices because broadcasting was the dominant means by which the public received mass communication.<sup>135</sup>

Overall, when the media market itself does not provide the public adequate diversity, the FCC must then create policies, such as ownership restrictions, in order to advance the Commission's interest in providing the public with diversity.<sup>136</sup> The Commission, in assuming multiple owners of media outlets best provide divergent view points on controversial issues, have developed policies to include regulating media ownership, thus encouraging numerous independent media owners.<sup>137</sup>

The second general goal the FCC is dedicated to advancing is competition.<sup>138</sup> The Commission relies upon the idea that competitive markets best serve the public interest because in a competitive market, prices are usually lower, technology is more advanced and overall output is higher.<sup>139</sup> The FCC also wants to encourage independent media firms so there will be more firms competing for the same audience.<sup>140</sup> When the market alone is not sufficiently competitive to effectively serve the public interest in getting the best quality media at the lowest prices, the FCC steps in and uses its policies to shift the balance in favor of a more competitive market.<sup>141</sup> The Commission has traditionally relied on structural ownership rules, which focus on maximizing the number of independent ownership outlets, realizing that a larger number of owners would enhance competition in the media market.<sup>142</sup> However, the FCC has also attempted to encourage overall competition for smaller media companies.<sup>143</sup> The FCC's local ownership rules, primarily concerned with viewpoint diversity, also serve the public interest by deterring broadcasters from dominating television and radio markets, concentrating power to the detriment of small owners and the public interest.<sup>144</sup>

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134. *Id.* at 47.

135. *Id.*

136. Diane L. Hofbauer, "Cable Porn" and the First Amendment: Perspectives on Content Regulation of Cable Television, 35 Fed. Comm. L.J. 139, 161 (Summer 1983).

137. FCC Rcd, *supra* n. 115, at 52.

138. Matthew M. Greenberg, *The Communications Act: The Need for Tariff Reform*, 9 Admin. L.J. Am. U. 847, 893 (Fall 1995).

139. FCC Rcd, *supra* n. 115, at 58-59 (citing F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 19-28 (3d ed. Houghton Mifflin Co. 1990)).

140. Robert W. Cranall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 Or. L. Rev. 109, 184 (2001) (discussing the current state of corporate consolidation and the federal implications, including the FCC and the Sherman Act).

141. FCC Rcd, *supra* n. 115, at 61.

142. *Id.* at 61-2.

143. *Id.*

144. *Id.* at 62.

For the FCC, structural ownership limits are important aspects in maintaining competition in the media market.<sup>145</sup>

The final goal underlying the Commission's rules and policies is encouraging localism.<sup>146</sup> Early on, the FCC has continued to support local needs through adapting its policies as to protect and advance the interests and needs of the individual local communities.<sup>147</sup> To achieve the localism goal, the FCC grants licenses to stations in local communities and obligates these stations to serve the specific needs and interests of their given communities, including selecting appropriate programming for that particular community.<sup>148</sup> The Commission's media ownership guidelines, as they affect the needs of local media outlets, in turn impact the FCC's goal of localism.<sup>149</sup>

### 3. *The FCC's Regulations*

Nearly all western democracies in recent history have considered growing media concentration as a threat to freedom of press and to democracy, adopting laws to support a less concentrated media industry, but the U.S. has adopted and has been intervening in various communications mediums long before the age of the modern media.<sup>150</sup> The U.S. government's involvement in the media industry began nearly as soon as communications technology emerged.<sup>151</sup> The U.S. federal government first regulated communications in the Wireless Ship Act of 1910.<sup>152</sup> The Act required any steamer capable of carrying fifty or more persons had to have radio equipment as well as skilled personnel to operate the equipment.<sup>153</sup> When radio broadcasting popularized, the government had to step in and regulate because of interference problems.<sup>154</sup> Radio broad-

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145. Cristian De Francia, *Ownership Controls in the Economy: A Search for Direction*, 7 Va. L.J. & Tech. 1 (2002).

146. Aguilar, *supra* n. 109, at 1167 (discussing how Congress' passing the Telecommunications Act of 1996 was in conflict with the FCC's stated allegiance to the public interest in promoting its goals of diversity, competition and localism).

147. FCC Rcd, *supra* n. 115, at 74.

148. *Id.* at 74.

149. *Id.* at 76.

150. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 Fla. L. Rev. 839, 840 (Dec. 2002).

151. Mike Harrington, A-B-C, *See You Real Soon: Broadcast Media Mergers and Ensuring a "Diversity of Voices"*, 38 B.C. L. Rev. 497, 503 (May 1997).

152. Robert A. Heverley, *The State Role in Telecommunications Regulation: An Introduction*, 6 Alb. L.J. Sci. & Tech. 1, 2 (1996) (discussing the federal history of regulations in the telecommunications industry).

153. Harrington, *supra* n. 151, at 503.

154. Michael Ortner, Student Author, *Current Public Law and Policy Issues: Serving a Different Master—the Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 Hamline J. Pub. L. & Policy 139, 141 (Fall 2000) (discussing the history of radio and what events led up to the passing of the Telecom-

casts operate by transmitting messages along a frequency in the electromagnetic spectrum, so in order for such broadcasts to be heard clearly, only one transmitter should use the same frequency.<sup>155</sup> Before adequate regulations were in place, numerous transmitters were using the same frequencies, resulting in chaos because a receiver, capable of receiving more than one transmitter could hear neither broadcast clearly.<sup>156</sup>

The interference issue first gained notice in 1912, when the shipping industry experienced difficulties communicating with the shore because of interference.<sup>157</sup> With such "ship-to-shore" communication difficulties, the U.S. armed services began to push for federal regulations of the radio broadcast industry.<sup>158</sup> Additionally, when the *Titanic* sank, the federal government gained further encouragement to regulate the industry when information surfaced that radio communications played a crucial role in rescuing survivors.<sup>159</sup> Therefore, in response to such events, Congress enacted the Radio Act of 1912, requiring broadcasters to obtain licenses and forbade the operation of radio equipment without a license.<sup>160</sup> As World War I accelerated the use of radio, by the 1920's, radio broadcasting stations began to rapidly multiply, resulting in interference across the radio spectrum.<sup>161</sup> In an attempt to prevent such problematic interference, where there were too many radio stations sending out competing signals, the Department of Commerce, through the Radio Act of 1912, limited the number license applications it would process and the Secretary of Commerce required broadcasters to share frequencies.<sup>162</sup>

The Radio Act of 1912 did help reduce the amount of interference, but a crucial district court decision changed such success.<sup>163</sup> In *Zenith Radio Corp. v. United States*, the district court held, while the 1912 Radio Act required the Secretary of Commerce to issue broadcast licenses, the Secretary lacked the authority to impose any additional restrictions relating to broadcast frequency or hours of operation.<sup>164</sup> After the Secretary of Commerce requested an interpretation of the scope of the Radio

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munications Act of 1996, which resulted in the decline of ownership variety in the radio market).

155. Harrington, *supra* n. 151, at 503.

156. *Id.*

157. *Id.*

158. Wilfred Rumble, Student Author, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. Rev. 793, 810 (1994).

159. Harrington, *supra* n. 151, at 503.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 437 U.S. 443 (1978).

Act, acting Attorney General William Donovan issued a statement that the *Zenith* court was correct to limit the Secretary's authority and instead urged the individual broadcasters to self-police their use as to prevent any interference.<sup>165</sup>

While self-regulation was an appropriate interpretation of the Radio Act of 1912 in theory, in practice, the airwaves became chaotic and required additional governmental regulation.<sup>166</sup> Then, in 1927, Congress enacted the Radio Act of 1927, hoping to solve the interference issues by granting greater governmental involvement in broadcasting control.<sup>167</sup> Consequently, the Radio Act of 1927 clearly stated the radio airwaves could not be used without proper governmental approval.<sup>168</sup> To enforce the new regulations in the Radio Act of 1927, the Act also created the Federal Radio Commission (FRC).<sup>169</sup> The FRC was charged with allocating frequencies among applicants, but had to consider granting licenses based upon public convenience, interest or necessity.<sup>170</sup> The FRC was later transformed into a stronger body with the authority to regulate radio, telegraph and other emerging technologies.<sup>171</sup> Then, in 1934, Congress enacted the Communications Act of 1934, which created the FCC, the stronger body charged with regulating all interstate radio and wire communications.<sup>172</sup> The 1934 Act stated its purpose was to regulate interstate and foreign commerce in relation to the communications industry as to make sure the FCC regulated all communications to promote the general public interest.<sup>173</sup>

The FCC first placed restrictions upon corporate ownership in the media industry in 1940, where the FCC stated ownership restrictions would serve two objectives: to support the First Amendment ideal of protecting the public welfare by providing the public with access to diverse and antagonistic viewpoints, and to promote market competition in order to ensure the efficient use of resources.<sup>174</sup> After setting forth such sub-

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165. Harrington, *supra* n. 151, at 504-05.

166. Anne P. Jones & Harry W. Quillan, *Broadcasting Regulation: A Brief History*, 37 Fed. Comm. L.J. 107, 107-08 (Jan. 1985) (discussing the historical aspects of The Radio Act of 1912, specifically explaining the limitations of the Radio Act). While the Radio Act of 1912 did attempt to initiate regulations of the radio broadcasting industry, there remained many problems with interference. *Id.*

167. *Id.*

168. Harrington, *supra* n. 151, at 505.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Aguilar, *supra* n. 109, at 1157.

174. *Id.* at 1158. The initial ownership restrictions set forth by the FCC "prohibited the issuance of a license to any person or entity that already possessed a license in the same broadcast service unless the applicant could demonstrate that the issuance . . . would have

jective standards, the FCC began to place quantifiable limits on the initial ownership regulations, which illustrate the first step towards the current ownership policies, where regulations were used to control and encourage diversity, localism and competition in the communications industry.<sup>175</sup>

However, when Congress passed the Telecommunications Act (“the Act”) over thirty years later in 1996, deregulation became the objective in dealing with the communications and media market.<sup>176</sup> Specifically, the 1996 Act repealed existing ownership restrictions on the number of television and radio stations a single corporation or entity can own nationally.<sup>177</sup> With regard to radio, the Act eliminated the numerical limit on national and common ownership, meaning local regulations that required specific, minimum radio stations be present in a given market, were relaxed.<sup>178</sup> For television, the Act eliminated the national common ownership regulations and changed the ownership percentage from twenty-five to thirty-five percent, meaning no single entity could own more than thirty-five percent of the national viewing audience.<sup>179</sup> Because Congress was satisfied with the current state of ownership in the communications industry, Congress decided the previous ownership regulations were arbitrary and unnecessary due to the existence of numerous diverse radio and television stations nationwide.<sup>180</sup> As for the FCC’s waiver policy of allowing a single corporate entity to own both a television and radio communication medium in the largest twenty-five markets, as long as long as thirty independently owned stations existed before the merger went into effect, the Act extended this provision to allow the fifty largest markets to participate in the waiver.<sup>181</sup> Finally, the Act directed the FCC conduct a biennial review of the present ownership regulations to “determine whether any of such rules are necessary in the public interest as a result of competition.”<sup>182</sup>

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a pro-competitive impact. . . and would not result in the concentration of control of the broadcasting facilities in a manner inconsistent with the public interest.” *Id.*

175. *Id.* These initial quantifiable ownership regulations were based upon AM and FM radio regulations. *Id.* These initial quantified regulations included “limiting a single entity’s ownership to seven AM and FM stations.” *Id.* at 1159. Thereafter, those initial ownership restrictions were raised from allowing one company to own seven to twelve AM and FM stations. *Id.*

176. *Id.* at 1163. Congress, through its passing the Telecommunications Act of 1996, directed the FCC to relax the ownership regulations on media outlets. *Id.*

177. *Id.*

178. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 154 (D.C. Cir. 2002).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*



Recently, during the FCC's most comprehensive review of the 1996 Act in the FCC's history, the Commission decided to change its long-standing rules, relaxing longstanding ownership regulations.<sup>183</sup> The FCC's new rules affected three distinct media ownership rules.<sup>184</sup> First, the Commission changed the national ownership rule.<sup>185</sup> Previously, under the old rule, a broadcast network could not own additional networks unless they would combine to reach less than thirty-five percent of the national television viewing audience, but under the new national broadcast ownership rule, a broadcast network can now own multiple television stations as long as that company does not reach more than forty-five percent of the total national viewing audience.<sup>186</sup> Second, the Commission changed the cross-ownership rules.<sup>187</sup> Under the new regulations, the FCC lifted the ban on a media corporation owning a television and a newspaper in the same city, now allowing such ownership as long as there are nine or more television stations in that city.<sup>188</sup> Finally, the FCC changed the local ownership rule to allow the following: one media company may own up to three television stations in a market with eighteen or more television stations and one media company may own two television stations in a market with seventeen or fewer stations, as long as only one of the company's stations is among the top four in ratings.<sup>189</sup>

### III. ANALYSIS

The FCC's recent changes to the media ownership rules indicate the Commission is still dedicated to continuing the deregulation trend in the media industry. In deciding to relax the ownership regulations, the Commission stated while historically, "the FCC's policy has been 'to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming [to] safeguard against undue concentration of economic power,'" in changing the ownership regulations, the FCC decided, "the limits the rules set [previously] on ownership of broadcast television stations and cross-ownership of newspapers and television or radio stations no longer served the public interest."<sup>190</sup> The FCC has

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183. Armijo, *supra* n. 33, at 1483.

184. *Id.* at 1485.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Armijo, *supra* n. 33 at 1485.

190. *Id.* at 1483.

made an effort to regulate the media industry in the past.<sup>191</sup> However, the FCC's current policies, the FCC's recent decision to remove existing ownership regulations, is to the detriment of the alternative media and to the FCC's stated mission of promoting diversity, competition and localism.<sup>192</sup> After examining the ways in which the FCC's current deregulatory solutions affect alternative media and the ways the Internet will be an insufficient solution for the alternative media, this comment will consider the benefits of increased FCC ownership regulations for alternative media and ultimately, for society as a whole.

#### A. THE FCC'S FAILED SOLUTION

The FCC has proven its lack of concern with the current state of uncertainty regarding regulatory ownership, as they can no longer sustain the requisite evidence to justify loosening the ownership regulations.<sup>193</sup> Present FCC chairman Michael Powell declares, "the oppressor here is regulation," however, it is not difficult to see the FCC's dedication to public interest fading.<sup>194</sup> As the FCC continues down the path to-

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191. Elizabeth Jensen, *Merger Deal Off for CNN and ABC; Plan to Combine News Operations Falls by the Wayside as Companies' Attention is Diverted*, L.A. Times Bus. 1 (Feb. 14, 2003).

192. *Id.*

193. Coen, *Media Giants Cast*, *supra* n. 96, at ¶ 10. Powell seems to be confused not only about what the problems in the current media industry are, namely deregulation, but also about whose interests the FCC should be representing. Coen, *Action Alert: FCC Moves*, *supra* n. 24, at ¶ 7. In a recent appearance before the House subcommittee on telecommunications, Powell accidentally referred to the broadcast corporations as "our clients" when empirical evidence shows the FCC's long proclaimed dedication to protecting the public interest. *Id.* Powell has also mocked other issues in current media. *Id.* As the Internet has become an additional avenue for news and information gathering, there is increased concern regarding the economic access barriers. Ford-Levine, *supra* n. 86, at 586. Currently, a person's education, salary, neighborhood and socio-economic status is a barrier to accessing the Internet when these factors should not dictate a person's access to use information. *Id.* If these personal factors can become barriers, then "promise of this technology is inherently flawed." *Id.* In addressing this issue recently, Powell referred to this access problem, also known as the "digital divide," as the Mercedes divide. Coen, *Action Alert: FCC Moves*, *supra* n. 24, at ¶ 7. Mocking the public concern for unequal access to technology, which separates the "haves" from the "have nots", Powell stated that the digital is like a person who wants a Mercedes, but cannot afford to buy one, "I'd like to have one; I can't afford one." *Id.* Clearly, the FCC actions with Powell as the chairman illustrate a continued, discouraging problem of lacking media diversity in the industry. *Id.* at ¶ 8. Jim Naureckas, from FAIR, a public interest group devoted to media related issues, recently stated, "Powell has been very clear about his intentions to turn over more and more of the publicly owned broadcast spectrum to already huge media corporations," leaving the public's interest in accessing varying viewpoints to the wayside. *Id.* Naureckas went on to say that the "FCC's total lack of interest in protecting Americans as citizens or consumers is shocking and disgraceful." *Id.*

194. *Id.* However, despite a petition in support of public hearings from forty local and national consumer groups, chairman Powell rejected Copps' idea. Aliza Dichter, *Activists*

wards deregulation, the Commission's current policies end up frustrating its own declared goals in the free market, damaging the First Amendment and ultimately democracy.<sup>195</sup>

The current trend toward corporate consolidation within the media industry poses a clear threat to democracy and the marketplace of ideas by allowing far too much power in too few hands.<sup>196</sup> Many analysts predict if the current laissez faire attitude toward media mergers continues, then it is possible to foresee a day when an even smaller number of large media companies will dominate all aspects of the media world.<sup>197</sup> In fact, given the present state of deregulation in the media industry, the FCC has now adopted the most radical view of media consolidation any democracy has ever supported, where the FCC seems exclusively driven by a non-interventionist ideology and by a desire to protect business interests with little regard for the interest of the public.<sup>198</sup>

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*Fight Media Consolidation: Despite Opposition FCC May End Media-Ownership Limits* <http://www.media-alliance.org/mediafile/22-1/dichter.html> ¶ 6 (accessed Feb. 2, 2003). Powell's rejection is surprising considering that the FCC "is required by law to seek public comments before eliminating these [ownership] rules." *Id.* at ¶ 2.

195. Aguilar, *supra* n. 109, at 1165.

196. Donald R. Simon, Student Author, *Big Media: It's Effect on the Marketplace of Ideas and How to Slow the Urge to Merge*, 20 John Marshall J. Computer & Info. L. 247, 251 (Winter 2002). Following the Telecommunications Act of 1996, which began the media deregulation trend, public-interest advocates, consumer interest groups and labor unions have all voiced their concerns regarding the terms and negative implications that come along with increased deregulation. Dichter, *supra* n. 194, at ¶ 9. Upon examining the corporate ownership charts, the diminishing alternative media outlets and realizing the public's sufferance from fewer diverse sources of information, many public interest and activist groups have emerged or have been ignited over this trend. *Id.* For example, two activist groups, the Billionaires for More Media Mergers and the Angles of the Public Interest, have continued their strategy to combat corporate dominance in organizing campaigns and protests. *Id.* While grass-roots, community-based activism has been stirred by the deregulation trend, leading media-related public interest groups in Washington have also joined in the anti-deregulation plight. *Id.* The Center for Digital Democracy and the Media Access Project, two of the leading D.C. media advocacy groups, have been working long hours on high alert, organizing FCC filings, letters to Congress and legal challenges. *Id.* Illustrating that nearly all public interest groups are critical of the government's recent actions, a new coalition of children and family interest groups are also joining the march against consolidation. *Id.* Leading the children's groups, Children Now, is presently organizing parents and teachers in petitioning the FCC to reexamine how the effects of media concentration impacts children's programming. *Id.*

197. *Id.* As increased and continued media mergers mean lost jobs, lost diversity of content, the FCC must consider increased ownership regulations to protect diversity of views in the media. *Id.* ¶ 10. Victoria Riskin, president of the Writers Guild of America, argued that "the FCC is considering eliminating the rules that prevent a few corporations and wealthy individuals from gaining a veritable chokehold on free expression and public discourse over America's public airwaves." *Id.*

198. Dichter, *supra* n. 194, at ¶ 2. Former FCC chairman Reed Hundt made this statement about the current deregulation trend. *Id.* In response to the lack of concern for the

### 1. *The Present Media Market Lacks Adequate FCC Regulation*

Some who favor deregulation would argue greater FCC regulation is unnecessary because the free media market is an important vehicle of independence from political domination.<sup>199</sup> Many opponents of increased FCC regulation claim there is no justification for the current regulations.<sup>200</sup> These opponents claim there is already sufficient competition because of the proliferation of media sources.<sup>201</sup> In a recent report, the FCC released the results of twelve studies which all suggested media concentration was no longer a problem, implying the Commission should be able to repeal or soften the existing media ownership restrictions that are currently being reviewed.<sup>202</sup> However, in relying upon these studies, the FCC relies on information that fails to examine the implications of concentration for an informed democracy and the implications for cultural diversity, in lacking access to various political viewpoints and creative outlets.<sup>203</sup> However, unregulated, these markets can also be just as equally free to exist, in its consolidated state, as a source of oppression.<sup>204</sup> Clearly, the FCC's inaction and inability to create appropriate regulation has failed to create a freer state in the media market and thus, an appropriate government response is essential.<sup>205</sup> A government that stands aside in the face of an oppressive civil society is itself oppressive.<sup>206</sup>

### 2. *The FCC's Current Regulations do not Satisfy Its Own Goals*

Although the FCC has proclaimed its dedication to promoting the public interest through its ownership regulations which support diversity of viewpoints, competition in the market and localism, its current support of a deregulatory media market is merely frustrating these goals.<sup>207</sup> There seems little chance that these goals, purporting to be in the public interest, will be achieved when the present chairman, Michael

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public interest, activists and organizations are presently preparing petitions and coalitions to stand against continued deregulation. *Id.*

199. Mark Tushnet, *New Meaning for First Amendment: Free Speech May be Seen as a Tool for Protecting Those in Power*, 81 ABA J. 56, ¶ 19 (Nov. 1995).

200. Dichter, *supra* n. 194, at ¶ 7.

201. *Id.*

202. *Id.*

203. *Id.* Given the lack of conclusiveness in the FCC's studies, several labor and advocacy groups are currently analyzing and critiquing the FCC studies and are also conducting their own studies. *Id.* However, it is uncertain whether these alternative studies will be able to persuade the FCC to refrain from repealing existing ownership regulations. *Id.*

204. Tushnet, *supra* n. 199, at ¶ 19.

205. *Id.*

206. *Id.*

207. Aguilar, *supra* n. 109, at 1134.

Powell, seems to be confused about what the public interest is.<sup>208</sup> In a recent press conference, when he was asked what the term “public interest” means, Powell stated he had no idea.<sup>209</sup> These three essential principles, which support the public interest, have always guided the FCC and the judiciary when deciding on media issues.<sup>210</sup> However, when the Telecommunications Act of 1996 was passed, while the same public goals were reiterated in the text of the statute, in practice, the Act has resulted in consolidation and monopolization within the broadcast industry.<sup>211</sup>

Past congressional, FCC and judicial decisions illustrate a presumption that increased deregulation leads to an increase communications, but there must also be greater diversity, competitiveness and localism in the media industry.<sup>212</sup> However, neither diversity nor the increased number of mediums served as a substitute for broadcast diversity.<sup>213</sup> In terms of competition, the present state of deregulation by the FCC is also not beneficial for a richly competitive market.<sup>214</sup> Eliminating ownership regulations will result in a media market, where high prices and increasing demands for profit returns result in fewer overall media corporations.<sup>215</sup> While deregulation often results in a general increase in net media, the mere existence of media outlets does not serve to promote any of the governing goals, especially diversity or competition.<sup>216</sup>

### 3. *The Negative Implications for Alternative Media*

Nearly all mass media in the U.S. are owned by for-profit companies.<sup>217</sup> So, the goal of maximizing profits is often in conflict with the

208. Coen, *Action Alert: FCC Moves*, n. 24, at ¶ 6.

209. *Id.* Powell went on to explain that in his view, the public interest involves a commitment to the American consumer, but beyond that he did not know what the public interest refers to. *Id.*

210. Aguilar, *supra* n. 109, at 1164.

211. *Id.*

212. *Id.* at 1165.

213. *Id.* at 1165-66.

214. Dichter, *supra* n. 194, at ¶ 12.

215. *Id.* at ¶ 12. Such a market will likely also lead to fewer foreign and domestic news outlets and resources for news journalists. *Id.*

216. Aguilar, *supra* n. 109, at 1165-66. The technological changes which led to the development and colonization of the Internet have produced more voices in the media market. Hawthorne, *infra* n. 231, at 275. Such an increase in the number of voices has led corporate executives in the media industrial as well as government regulators to assume that these changes mean that there is less of a need to for regulation. *Id.* Such a mentality clearly explains how the deregulation trend began and why it will continue unless stricter regulations, specifically involving ownership are implemented. *Id.*

217. Rachel Coen, *Corporate Ownership* ¶ 1, <http://www.fair.org/media-woes/corporate.html> (accessed Feb. 15, 2003) [hereinafter Coen, *Corporate*]. For profit corporations are institutions that are legally obligated to put investments and profits ahead of all supplemental considerations. *Id.*

practice of responsible journalism.<sup>218</sup> Corporate media ownership is itself problematic and the fact that these companies are becoming increasingly larger and fewer also frustrates the independent media, especially as these giant companies continue to swallow their rivals.<sup>219</sup> Such corporate ownership has consequences for the alternative media.<sup>220</sup> For example, because of the corporate media dominance in the broadcast media industry, the alternative media faces considerable entry barriers.<sup>221</sup> The corporate media has collectively engaged in practices which either preclude or inhibit the development of potential competing networks.<sup>222</sup>

In addition to entry barriers, there are also significant democratic implications.<sup>223</sup> As the mainstream, corporate media become increasingly cozy with the same economic and political powers they should be monitoring, the public needs independent, aggressive and critical media, essential to an informed democracy.<sup>224</sup> Media watchdog organizations attempt to match corporate ownership consolidation and attempt to raise awareness on how indispensable the independent media are to maintaining a democratic society and lobby for aggressive action to break up such monopolistic media conglomerates.<sup>225</sup> So far, there appears to be a direct relationship between the ever-increasing mergers in the media industry and further limitations on the variety of viewpoints represented through those media outlets.<sup>226</sup> Therefore, as U.S. media outlets continue to be owned by for-profit corporate conglomerates, the fate of public information quality, possible through independent journalism, is compromised.<sup>227</sup> Instead of unobtrusively introducing stories and issues into the marketplace of ideas, letting the public determine their importance, the corporate media gatekeepers filter the information.<sup>228</sup> There-

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218. *Id.* at ¶ 2.

219. *Id.* "As news outlets fall into the hands of large conglomerates with holdings in many industries, conflicts of interest inevitably interfere with newsgathering." *Id.*

220. *Id.* The AOL-Time-Warner is the largest media merger to date. *Id.*

221. *Id.*

222. *Id.*

223. Coen, *Corporate*, *supra* n. 217, at ¶ 3.

224. Coen, *What's Wrong*, *supra* n. 25, at ¶ 1.

225. Coen, *Corporate*, *supra* n. 217, at ¶ 2. In addition to challenging the current state of corporate ownership affairs, these media watchdog groups continue to rally that "non-corporate, alternative media outlets need to be promoted by both the government and the non-profit sector." *Id.*

226. Coen, *What's Wrong*, *supra* n. 25, at ¶ 1.

227. *Id.*

228. Simon, *supra* n. 100, at 270-71. When, in 2000, the Columbia Journalism Review and Pew Center for the People of the Press and the Press conducted a national survey of U.S. journalists to study the how corporate consolidation effects the media, "[t]he study found that nearly twenty-five percent of journalists surveyed have at one time or another avoided pursuing a newsworthy story. . . [and] [a]bout thirty percent said that some stories are ignored because of potential financial conflicts with advertisers or their news opera-

fore, stricter ownership regulations are needed to combat the current consolidation trend in media.<sup>229</sup>

Absent such regulation, the mass media will continue to abuse their political and cultural power and maintain continued concentration until the public is left without viewpoint diversity, which is ultimately harmful for democratic participation.<sup>230</sup> Many oppose such regulatory efforts, but the regulatory goal is to ensure the media provides the requisite information to the public.<sup>231</sup> Greater regulation results in guaranteeing a participatory democracy, setting the framework for conditions which promote robust public discourse, ensuring important issues are covered in the media and guaranteeing adequate opportunities for the public to hear conflicting points of view.<sup>232</sup> Both the legislature and judiciary have recognized society's need for diverse voices in the media.<sup>233</sup> In light of the current consolidation trend, the government has a substantial interest in carefully monitoring these conglomerates.<sup>234</sup>

#### 4. *The FCC's Current Regulations Do Not Satisfy Alternative Media Goals*

The alternative media support a media forum where the fundamental freedoms in the First Amendment are embodied, including protecting the public's right to be informed through uncensored media and diverse voices.<sup>235</sup> While the First Amendment has long been a tool for vindicat-

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tions." *Id.* at 266. The survey also revealed that approximately sixty-one percent believe their parent corporations exert influence on story selection. *Id.* at 267. When the American Society of Newspaper editors conducted a similar survey, they revealed that "thirty-three percent of editors said they would not be able to publish a story that was critical of their respective parent companies." *Id.*

229. Baker, *supra* n. 150, at 875. Here, ownership regulation is proposed as a solution to a widespread populist perspective on the problem with power concentration in media consolidation. *Id.*

230. *Id.* Writers, musicians and others similarly concerned argue, "media concentration blocks out independent artists and prevents cultural diversity." Dichter, *supra* n. 194, at ¶ 11.

231. Donald Hawthorne, *Media Concentration and Democracy*, 1999 Ann. Surv. Am. L. 269 (1999).

232. *Id.*

233. Harrington, *supra* n. 151, at 534-35.

234. *Id.* "Given the number of outlets owned by the corporations and networks involved in today's media mergers, the public has good cause to be wary of such conglomerates," and the government has good cause to regulate, to protect public concerns. *Id.* The recent surveys by the American Society of Newspaper Editors, the *Columbian Journalism Review* and *Pew Center for the People and the Press* all revealed striking numbers which evidence an alarming trend, necessitating government intervention through increased merger scrutiny, including greater FCC regulations. *Id.*

235. Dichter, *supra* n. 194, at ¶ 4. In the digital age of cell phones and satellites, the FCC is currently one of the most powerful bodies in Washington and media regulation is one of the most high-priced issue in politics. *Id.* In 2000, the communications and electron-

ing the interests of individuals or groups without adequate social or political power, in the aftermath of post-deregulation via the Communications Act of 1996, currently, the First Amendment has become another tool by which the powerful preserve their privileges.<sup>236</sup> Such deregulation on media ownership will ultimately have negative implications for the public's right to access media information by decreasing the amount of quality journalism.<sup>237</sup> Therefore, it seems contemptible to be satisfied with the FCC's decision to relax the present ownership restrictions when such policies will only further denigrate the quality and diversity of information received by the public, having grave consequences for the free and open debate necessary to sustain a democracy.<sup>238</sup>

As the corporate consolidation trend continues without an appropriate FCC response, liberal and consumer groups recognize the loss of independent and diverse media voices pose a real threat to the vitality of democracy.<sup>239</sup> In fact, now the FCC has decided to repeal the existing ownership regulations and loosen the restraints on big media ownership, the FCC has used a selective review of facts in the marketplace to justify its decision to repeal the current regulations, amounting to a complete and total disregard for the importance of independently-owned, separate media outlets in a modern democracy.<sup>240</sup>

## B. THE LIMITATIONS OF THE INTERNET SOLUTION

With the advent of the Internet, Internet utopians have hailed the Internet as the new deity of the media world.<sup>241</sup> In the wake of perpetual corporate consolidation and FCC deregulation, many saw this emerging technology as the catalyst for a new, global publishing and

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ics industries donated over \$132.5 million to candidates and parties. *Id.* Additionally, lobbying expenses in the telecommunications industry is approximately \$125 million. *Id.* Media regulation is a prominent public policy issue, but for all the money and attention the issue gains inside Washington, media regulation is rarely considered a public issue in widespread media coverage. *Id.* at ¶¶ 4-5.

236. Tushnet, *supra* n. 199, at ¶ 5.

237. Dichter, *supra* n. 194, at ¶ 12.

238. *Id.* Robert McChesney, a media historian, commented that "[t]here's no possible argument that this could be good for the quality of journalism. There is no upside. The only questions is how bad the downside will be." *Id.*

239. Mark Jurkowitz, *Watching the Media Watcher FCC's Move to Review Ownership Regulations Stirs Debate on Chief's Free-Market Leanings*, Boston Globe C1, ¶ 11 (Sept. 15, 2002).

240. Dichter, *supra* n. 194, at ¶ 8.

241. Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 *Cardozo Arts & Ent. L.J.* 1, 40 (2002). See Lawrence K. Grossman, *The Electronic Republic: Reshaping Democracy in the Information Age* 3 (Penguin Books 1995) (discussing the impact that the Internet and resulting communications technologies will have on democratic participation and social reform).



broadcasting forum without geographical or governmental barriers.<sup>242</sup> Under the pretense that its mere existence will inevitably strengthen democracy and increase political participation, there seemed hope that Judge Stewart Dalzell's declaration in *ACLU v. Reno* that the Internet was "the most participatory form of mass speech yet developed," may become more than a virtual reality.<sup>243</sup> In reality, at least initially, by promoting independent and investigative journalism, the Internet provided a forum for diverse and varied viewpoints, ultimately facilitating in empowering citizens to engage in informed political deliberation.<sup>244</sup>

### 1. *The Internet and the Principle of Scarcity*

Historically, the principle of scarcity, when access to media outlets is limited, has been an underlying rationale for the government to regulate the telecommunications industry.<sup>245</sup> "Since scarcity has been the guiding rationale for the federal government's regulatory authority over communications media, [according to the FCC,] logic dictates, where scarcity is not present, the government's regulatory authority correspondingly decreases."<sup>246</sup> With the advent of new technologies, like the Internet, facilitating an increase in communication, some argue, spectrum scarcity decreases.<sup>247</sup> However, despite how logical and compelling the scarcity through increased technology argument might be, in *Red Lion Broadcast. Co. v. FCC*, the Supreme Court held technology might make spectrum use more efficient and decrease entry barriers, but the positive effect technology has on communication scarcity still does not justify an abandonment of media regulations, aimed to encourage diversity, localism and competition.<sup>248</sup> The Court went on to mention since incumbent broadcasters still held a considerable advantage over newcomers even considering technological advances, arguments contending that scarcity due to increased technology means there must also be decreased governmental regulation thus fails.<sup>249</sup>

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242. *Id.*

243. *Id.* (citing *ACLU v. Reno*, 929 F. Supp. at 883, *aff'd* 521 U.S. 844 (1997); see Jeffery Chester & Gary O. Larson, *Whose First Amendment?: Media Conglomeration as Free Speech*, *Am. Prospect*, 28 (Dec. 17, 2001). At the time of Judge Dalzell's statement, cyber culture "tended to be slightly more liberal toward equal rights, less supportive of traditional lifestyles and families, more interested in government and political affairs, with stronger than average levels of political efficiency." *Id.* (quoting Pippa Norris, *Digital Divide: Civic Engagement, Information, Poverty and the Internet Worldwide*, 40 (2001)).

244. *Id.* at 26.

245. Armijo, *supra* n. 33 at 1488 (citing *NBC v. U.S.*, 319 U.S. 190 (1943)).

246. *Id.* at 1489.

247. *Id.* at 1491.

248. *Id.* (citing 395 U.S. 367, 371-73 (1969)).

249. *Id.*

Notwithstanding the FCC's attempt to justify its continued deregulation of mass media rules on the lack of scarcity due to the existence of the Internet, the Internet's unique qualities prevent it from being a truly acceptable substitute for appropriate FCC regulation.<sup>250</sup> The Internet, through Internet Service Providers, is under no obligation or regulatory scheme to present information in the public's interest.<sup>251</sup> Because the Internet content is primarily focused upon attracting an individual user, most Internet content is narrower than traditional broadcast media, focusing on discrete topics to capture viewers based on individualized preferences rather than catering to the notion of public interest.<sup>252</sup> Therefore, it is not surprising that "courts have determined that the regulatory rationale of scarcity does not apply to the Internet."<sup>253</sup>

## 2. *The Internet Medium Excuse for the Media Industry*

The Internet, compared to traditional media, provides new communication technologies for the alternative press, which originally seemed to level the playing field.<sup>254</sup> However, instead of furthering alternative media's objectives, the Internet's ready-forum for publishing and broadcasting, has become another frustration for alternative media.<sup>255</sup> The Internet, for those who favor deregulation, has become a medium where, through technological innovation, numerous, diverse voices may now speak.<sup>256</sup> Much to the dismay of the independent media, the Internet has become an excuse, a media concentration scapegoat, where those in favor of deregulation, including the FCC, can justify inaction on media ownership issues in the traditional media market.<sup>257</sup> By claiming the development of a global, universally accessible Internet provides the best counterweight to the consolidation of mainstream media in the hands of a relatively few, multibillion-dollar, multinational corporations, the FCC can justify its decision to refuse to implement stricter standards for ownership rules and to repeal the few existing ownership regulations.<sup>258</sup>

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250. *Id.* (citing *Reno v. ACLU*, 521 U.S. at 868).

251. *Id.* at 1495.

252. Armijo, *supra* n. 33 at 1495.

253. *Id.*

254. Daniel A. Swartwout, *In Re Madden: The Internet to the New Journalism*, 60 Ohio St. L.J. 1589, 1600 (1999).

255. Yu, *supra* n. 241, at 41.

256. Hawthorne, *supra* n. 231, at 270. There is a perception on the part of the regulators that there is less of a need for media regulation because of the new opportunities the Internet has helped to create. *Id.*

257. Eric B. Easton, *Mitigating the Effects of Media Convergence and Consolidation*, 23 UALR L.J. 143, 145 (Fall 2000).

258. *Id.* See Dean Alger, *Megamedia: How Giant Corporations Dominate Mass Media, Distort Competition, and Endanger Democracy* (Rowman & Littlefield Publishers, Inc.

Alternative and independent media do enjoy greater freedom on the Internet, but the Internet is, by no means, the savior it promised to be.<sup>259</sup> The premise that the Internet alone will solve all media consolidation and diversity problems is fundamentally flawed because in order for this proposed solution to work, we must assume the same market pressures and problems that exist in the traditional media market will not infiltrate the Internet.<sup>260</sup> Basically, as long as the Internet stays free from corporate domination, it will continue to allow varying individuals and groups to become publishers and broadcasters, yielding and enhancing the overall quality and quantity of voices.<sup>261</sup> The Internet began as a highly participatory form of mass communication, where the democratic framework bred activism towards equal rights, politics and social issues, perfect for alternative media outlets.<sup>262</sup> However, the Internet is not free from corporate domination.<sup>263</sup> Since the mid-1990s, the Internet has been continually polluted with corporate waste.<sup>264</sup> Prior to its demise, the Internet was saturated with a pioneering and cooperative spirit, often seen in alternative politics, found in chat rooms and bulletin boards, but in the status quo, "the university community of online users in the early 1990s [has] been overtaken by a more commercially dominant corporate-interest shopping-mall Web of eBay and Amazon.com."<sup>265</sup>

Once corporations realized the potential, additional earning capacity in the Internet, they could not resist the urge to colonize the Internet with their profit-driven vision, refusing to allow the rich cyberspace potential to be wasted by liberal-minded non-profits.<sup>266</sup> The alternative, non-mainstream media treated the Internet surfer as a seeker of information, as an activist or as an equal citizen, where corporate presence on

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1998); see Paul Farhi, *How Bad is Big*, Am. Journalism Rev. 29 (Dec. 1999) (available in 1999 WL 11980102).

259. Yu, *supra* n. 241, at 26. See Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

260. Easton, *supra* n. 257, at 145.

261. *Id.* "As long as the infrastructure and architecture of the Internet remain free and open to all, the technology that allows each person to become a publisher will yield ways of enhancing the diversity of voices when a media oligopoly would homogenize, distort, or even silence them." *Id.*

262. Yu, *supra* n. 241, at 40.

263. *Id.* at 41.

264. *Id.*

265. *Id.*

266. McChesney, *supra* n. 33, at ¶11. As media corporations continue to strive for greater profits, the electronic commerce market on the Internet has been a great source of revenue, almost rivaling profits in the traditional media market. *Id.*

the Internet patronizes the surfer as a mere consumer.<sup>267</sup> In the status quo, the deregulation train shows no sign of slowing and many contend the situation will only worsen; independent media groups will once again be marginalized and left to the wayside with no recourse.<sup>268</sup>

### 3. *The Internet Alone Will Not Further Alternative Media Objectives*

The Internet's convergence of communications, entertainment and media as well as low geographical and monetary entry barriers seems, when compared with the traditional media, to provide the independent media a viable opportunity to reach their target audience and promote community activism.<sup>269</sup> The Internet does provide great potential for the alternative media, especially considering the present state of ownership concentration in the traditional media, yet the Internet still has many limitations.<sup>270</sup> Therefore, the Internet alone is currently an ineffective substitute for alternative groups using various communications mediums in the media industry: radio, television, publishing, and the Internet.<sup>271</sup>

#### a. *The Alternative Media Still Struggle to Reach an Audience on the Internet*

For alternative groups, the Internet, as a communications medium, has many practical limitations that frustrate the alternative media's objectives. For alternative media groups to promote political and community activism, they must first reach their desired audience, and reaching an alternative audience on the Internet is easier said than done.<sup>272</sup> The first obstacle alternative media groups must overcome is being able to reach any audience.<sup>273</sup> Because the Internet drastically reduces publishing costs, where anyone with a computer, a modem and a telephone line can become a publisher.<sup>274</sup> The same low geographic and economic

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267. Yu, *supra* n. 241, at 41. The most striking feature of the Internet thus far is that instead of stimulating greater socio-political awareness, it, instead, stimulates hyper-consumerism in media culture. McChesney, *supra* n. 3, at ¶ 25.

268. *Id.*

269. Ford-Livene, *supra* n. 86, at 579.

270. *Id.*

271. *Id.*

272. *Id.*, at 597.

273. Steve Mitra, Student Author, *The Death of Media Regulation in the Age of the Internet*, 4 N.Y.U. J. Legis. & Pub. Policy 415 (2000-01).

274. *Id.* The Internet exists primarily as a "platform through which people and organizations can communicate through shared information." *ACLU v. Reno*, 929 F. Supp. at 837. So that organizations and individuals with computers can all come together, the Internet allows provides this connection. *Id.* While it may seem, at first glance, like the Internet is a single entity consisting of one integrated system, in its present state "[n]o single organization controls any membership in the Web, nor is there any single central-

entry barriers that make the Internet attractive also make it problematic.<sup>275</sup> The ease by which anyone can create and maintain a Web site has caused the Internet to experience site proliferation because it seems every person who ever wanted to be published has published.<sup>276</sup> Now, that the number of Web sites has increased to over 93 million,<sup>277</sup> it seems everyone finds it difficult to get noticed on the Web.<sup>278</sup>

However, some Internet sites find it easier to attract an audience than others.<sup>279</sup> Large corporations on the Internet do not face the same plight as the alternative media groups because the established traditional media companies already have big brands, giving them an inher-

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ized point from which individual Web sites or services can be blocked from the Web." *Id.* at 838. Similarly, because the Internet is so open, this makes it very easy for media producers, like publishers "to reach their intended audiences without having to know in advance what kind of computer each potential reader has, and what kind of software they will be using." *Id.* Because the Internet takes many different forms of mass communication, where a person surfing on the Internet may just as easily speak, listen, read or watch, the distinction between types of mediums and between producer of media and receiver of media has been blurred. *Id.* at 843. Examples of this phenomenon are chat rooms, message boards, e-mail, newsgroups. *Id.* These various forms of mass communication provide the user "with the opportunity to both speak and to listen." *Id.* Therefore, unlike traditional media outlets, there are fewer barriers to prevent the receiver to become the producer of media on the Internet. *Id.* Clearly, "[t]he Internet is therefore a unique and wholly new medium of worldwide human communication." *Id.* at 844.

275. Ford-Livene, *supra* n. 86, at 579. Whether a person is an analyst, educator, industry professional, regulator, politician, lay person, attorney or technologist and whether that person is accessing entertainment, communication, education, commerce or technology, the Internet appears to have the potential to change the way individuals in present society are exposed to entertainment, communication, business relations, education and ideas. *Id.* However, despite its ability to become potentially revolutionary and beneficial, the Internet has also illustrated an equally strong potential to bring new challenges for small or independent media outlets struggling to compete in the present state of media concentration. *Id.*

276. Mitra, *supra* n. 273, at 415.

277. *Id.* at 416.

278. Ford-Livene, *supra* n. 86, at 597.

279. *Id.* However, it is important to note that just because a corporate media Web site has a well-established name in the traditional media, they are not guaranteed success, just as they are not in the traditional market. *Id.* The mere fact that large, well-known corporations have an initial advantage does not mean that the technological and innovative aspects of their sites will be superior to the smaller, alternative media outlets. *Id.* The large corporations are often slower to fully commit to putting serious resources towards their continued presence on the Internet due to slow, management red tape, impatient shareholders, who are not into taking financial risks and viewing their Internet presence as an afterthought, where their new media divisions are viewed as experiments. *Id.* at 598. Often these corporations, unsure of how devoted they wish to be to the Internet as an additional media outlet are willing to take fewer creative risks, finding it a challenge to compete with "young, renegade new media companies," with more dedication and are already loyal to the Internet medium. *Id.* Despite these limitations, overall, corporations on the Internet still have a significantly large advantage over the above-average independent media outlets in gaining an audience and maintaining their attention. *Id.*

ent advantage in the market.<sup>280</sup> Corporations who have already achieved "household name" status are more likely to be searched online because of their presence off-line.<sup>281</sup> Because of their established brand, distribution and economic power in the media market, large traditional media companies can use the non-traditional channels they already dominate to also promote their presence on the Web.<sup>282</sup>

The second challenge the alternative press must meet is contacting a specific audience.<sup>283</sup> For large media companies, reaching an audience on the Web is as easy as it is in the traditional media market because their content appeals to a broad audience, the public at large.<sup>284</sup> Unlike the corporate media, the alternative media must struggle to reach a narrow, targeted audience, which is much more of a challenge than the corporate media's ability to appeal to the masses.<sup>285</sup> As the independent media's content must appeal to a much more focused audience, their Internet agenda is, on face, more difficult to achieve.<sup>286</sup> Another reason alternatives find the Internet medium more problematic is in the present state of Internet content excess, reaching a desired, targeted audience on the Internet is like standing in the middle of a dense, remote forest, and trying to get someone to hear your voice.<sup>287</sup>

Finally, the alternative media also find it difficult to not only reach its desired audience, but also find a sense of community and ultimately activism in this audience.<sup>288</sup> Although the Internet is not limited to a particular geographical region, it has other limitations.<sup>289</sup> The alternative media's ability to reach an audience without regional boundaries on the Internet is beneficial for many alternative groups, however, these

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280. *Id.*

281. *Id.*

282. *Id.* at 597-98. See also Dichter, *supra* n. 194, at ¶ 13. Corporate media groups are able to promote their Web presence through other media mediums they already control through disintermediation, meaning that they can cut out the middleman and can advertise their Internet presence through traditional media channels and can advertise their traditional media presence on their Web site. *Id.* at 598.

283. Mitra, *supra* n. 273, at 415.

284. Ford-Livene, *supra* n. 86, at 597.

285. *Id.* In addition to merely breaking into the Internet, some corporate giants are also buying up large Internet content-based sites, with an established presence on the Web and using their preexisting marketing plans, in addition to their own multi-medium spread of advertising. *Id.* at 598. Such ownership decisions has led to further questions about the future of corporate presence on the Internet. *Id.* For example, whether these relationships with Internet search engines will result in preferential treatment for their affiliates' media content, marginalizing non-mainstream views and maintaining their stronghold over the Internet media market. *Id.*

286. *Id.*

287. *Id.*

288. Herbst, *infra* n. 290, at 128.

289. *Id.*

media groups cannot rely solely upon the Internet medium to reach its audience, still requiring access to television and cable stations, newspaper and radio mediums.<sup>290</sup> In order for a community group to construct a meaningful identity, they must maintain a local presence, like distributing a community publication, helping these groups to maintain a sense of solidarity and purpose and ultimately making politically-minded, activists out of the individuals in that group.<sup>291</sup>

In the Internet community, new media technology attracts large audiences through streamlined newsgathering and dissemination.<sup>292</sup> Regardless of its great potential, the Internet has failed to produce a great political awakening.<sup>293</sup> As profit considerations have forced groups and corporations on the Internet to emphasize news and entertainment, Internet media content has become less activist and more tabloid-style, where these media providers prefer to offer its audience scandal, crime and sex stories of a trivial political nature than highly substantive, well-researched articles.<sup>294</sup> Unfortunately, as a result, the Internet has failed to live up to its great expectations and has not yet stimulated the mass political participation it promised.<sup>295</sup> In fact, "the conceptualization of the Internet as an alternative media outlet is also not a true indicator of how the vast majority of Americans utilize it."<sup>296</sup> At present, only thirteen percent of persons polled stated they use the

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290. *Id.* at 128-29 (citing Susan Herbst, *Politics at the Margin: Historical Studies of Public Expression Outside the Mainstream* (Cambridge University Press 1994)).

291. *Id.* at 128.

292. Doris A. Graber, *International Relations and Politics*, 567 *Annals* 209 (Jan. 2000).

293. *Id.* at 209.

294. *Id.* Because media giants are desperate to maximize potential Internet profits, they have been forced to rely upon advertising on their sites. *Id.* As media corporations continue to strive for greater profits, the electronic commerce market on the Internet has been a great source of revenue, almost rivaling profits in the traditional media market. McChesney, *supra* n. 33, at ¶ 25. This desperation has led media corporations to make certain concessions on their Web sites, including permitting commercial and journalistic intermingling, a practice generally frowned upon in the traditional media market. *Id.* As media corporations continue to strive for greater profits, the electronic commerce market on the Internet has been a great source of revenue, almost rivaling profits in the traditional media market. *Id.* The present profit-driven approach to the Internet results in "the worst and profit-hungry attributes of commercial journalism," where instead of offering substantive content, there is a greater "emphasis on trivia, celebrities, and consumer news." *Id.* As media corporations continue to strive for greater profits, the electronic commerce market on the Internet has been a great source of revenue, almost rivaling profits in the traditional media market. *Id.* at ¶ 30. In fact, the convergence of journalism and advertising on the Web is so severe that "it is difficult for even journalists and editors to differentiate between the two," types of content. *Id.* As media corporations continue to strive for greater profits, the electronic commerce market on the Internet has been a great source of revenue, almost rivaling profits in the traditional media market. *Id.* at ¶ 31.

295. Graber, at *supra* n. 292, at 210.

296. Armijo, *supra* n. 33, at 1497.

Internet to learn news or other political information.<sup>297</sup> There is some evidence to support the notion that individuals use the Internet to access news information, but there is little to no indication individuals use the Internet to actually seek out alternative points of view.<sup>298</sup> Therefore, while the public's expansive use of the Internet and alternative media outlets may justify the FCC's recent changes in ownership policies at some point in the future, at present, "the Internet simply does not offer a true substitute for consolidated ownership of local television stations."<sup>299</sup>

In its present state, it is unlikely the Internet will eventually "be reformatted to cover crucial political issues more fully and enticingly," so the average citizen will have no choice but to be "well-informed and eager to participate in politics."<sup>300</sup> Therefore, it is equally unlikely the alternative press will be able to attract its desired audience and achieve political, community-based activism without the use of other mediums in the media industry.

*b. The Alternative Media Is Still Unable to Compete on the Internet*

The Internet, the leading rationale for ownership deregulation in the broadcast industry, has, in reality, not transformed the media industry by providing, much needed, diversity, competition and localism.<sup>301</sup> Alternative media may have Web sites, but their sites do not match the corporate media sites in access volume or in quality.<sup>302</sup> Presently, on average, one third of the time an Internet user is online, he is on a site controlled by AOL-Time Warner and fifty percent of the time that user is online, he is on a site controlled by Microsoft or Yahoo!.<sup>303</sup> Additionally, upon examining the top twenty U.S. news sites in the past year, statistics reveal the corporate media's influence is as strong a force on the Internet as in traditional media outlets.<sup>304</sup> Of those sites on the list, all of the sites were either the online version of existing newspapers and televisions networks, were sites affiliated with major news or broadcasting or were owned by other similar, large corporations like Microsoft and

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297. *Id.* In the same poll, seventeen percent of those polled stated that they used the Internet to check the weather on a daily basis, twenty-one percent of those polled stated that they used the Internet to check information regarding a hobby or interest on a daily basis, thirteen percent of those polled stated that they accessed the Internet to learn about movies, books, music or other leisure activities on a daily basis and twelve percent of those polled stated that they used the Internet to check sports scores on a daily basis. *Id.*

298. *Id.* at 1497-98.

299. *Id.* at 1498.

300. Graber, at *supra* n. 292, at 210.

301. Dichter, *supra* n. 194, at ¶ 13.

302. *Id.*

303. Yu, *supra* n. 241, at 41.

304. Dichter, *supra* n. 194, at ¶ 13.



Yahoo!.<sup>305</sup>

Another reason the corporate media companies find the Internet easy to dominate and alternative media find it difficult to compete is due to the media giants' ability to use the Internet as another vehicle for promotion and advertising revenue.<sup>306</sup> ABC and CNN can freely advertise their respective Web sites on their stations, but the alternative media, without a similar forum to freely promote their sites and generally, without the capital to pay for advertisements to promote their sites, struggle to compete against the corporate power circle.<sup>307</sup> While some viable alternative media sites, such as Indymedia.com, GVNNews.Net, AlterNet.com, just to name a few, do exist, their existence matters little if users have no knowledge of these sites or cannot access them.<sup>308</sup> Additionally, media conglomerates are not only developing their own Web sites, but they are also buying their way into the Internet mainstream by acquiring and uniting with established Internet companies, who have already spent millions on advertising, becoming a household name in their own right, making it even easier to play "keep away" from the alternative media outlets.<sup>309</sup>

Some Internet utopians, who favor the Internet as an alternative to mainstream media outlets, claim all Web sites are basically on equal ground,<sup>310</sup> but Internet realists note the idealists must have failed to even attempt to count how frequently in a given news broadcast the corporation's Web site is promoted during a particular newscast, illustrating the obvious advantage the mainstream media has online.<sup>311</sup> Unfortunately, a content-rich independent media site is still no match an established news organization, who operates a twenty-four hour cable network station, a radio network and a few well-funded Internet sites.<sup>312</sup>

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305. *Id.*

306. Simon, *supra* n. 100, at 284-86 (citing Symposium, *Panel II: The Economic and Regulatory Issues of Convergence*, 9 *Fordham Intell. Prop., Media & Ent. L.J.* 461, 465 (Winter 1999)) (discussing that eventually, like television and other media outlets, the Internet will be driven by purely market forces, like profit motives).

307. Dichter, *supra* n. 194, at ¶ 13.

308. *Id.*

309. Ford-Livene, *supra* n. 86, at 597. The Time-Warner and AOL merger is a good example of traditional media companies uniting with existing Internet corporations. *Id.*

310. Simon, *supra* n. 100, at 284 (quoting Robert McChesney, *Corporate Media and the Threat to Democracy* 33 n. 13 (Seven Stories Press 1998)).

311. *Id.* Corporate media sites are "chock full of advertising banners and so-called "news," which is essentially program information presented in a news-type format." *Id.* (citing McChesney *supra* n. 204, at 34) (discussing how media organizations and advertisers have attempted to share and mold the Internet according to their commercial whims). *Id.* at 286.

312. *Id.* at 283-84 (citing Peter H. Nesvold, *Communication Breakdown: Developing and Antitrust Model for Multimedia Mergers and Acquisitions*, 6 *Fordham Intell. Prop., Media & Ent. L.J.* 781, 866 n. 11 (1996)).

Access issues have become, yet another, concern for alternative media outlets because in recent years, large media and telecommunications corporations like AOL-Time Warner and AT&T have begun to take an interest in being involved with Internet Service Providing ("ISPs").<sup>313</sup> As corporate media giants expand their ownership on the Internet, the potential harm to the alternative media is great.<sup>314</sup> Presently, AOL-Time Warner and AT&T are considering ISP bundling, which would mean individuals who have cable-modem access through either Time Warner or AT&T would not be permitted to select another ISP.<sup>315</sup> With their bundling policies in place, these ISPs would have the power to use discriminating taste in deciding which Internet services to allow, and customers who want broadband access would just have to accept their choice.<sup>316</sup> Eventually, these media corporations, and potential control of ISPs, will be able to design communication platforms as to further their own interests, excluding the alternative media.<sup>317</sup>

Many Internet idealists claim the Internet has successfully thwarted the global corporate oligarchy and now provides an adequate forum for disenfranchised, specifically for the alternative media, in the status quo, but this is not the case.<sup>318</sup> The corporate media concentra-

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313. Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 942 (2001) [hereinafter Lemley]. Internet access is provided to the consumer by an ISP. *Id.* at 941. As the liaison between the consumer and the Internet, an ISP has great control over the way in which a consumer uses their access, especially now that most consumers rely on broadband access. *Id.* at 943. ISPs determine what types of services are available for consumers, for example, ISPs determine whether full-length streaming video is permitted, whether customers may resell broadband services and whether broadband customers may become providers of Web content. *Id.*

314. *Id.*

315. *Id.* Time Warner's actions before merging with AOL is a good illustration of how media giants approach the Internet. McChesney, *supra* n. 33, at ¶ 33. In addition to being a cable service provider, Time Warner produces more than twenty Web sites. *Id.* All of Time Warner's sites, with ample visible advertising, exemplify the consumer-driven culture on the Internet that alternative media sites attempt to counter. *Id.* In fact, the content on Time Warner sites, attempting to gain the greatest teen spending profits, target the youth by providing sports and entertainment media. *Id.* Clearly evidenced by its pro-advertising site production, Time Warner also offers advertisers long-term contracts for their continued presence on their Web sites. *Id.* at ¶ 33.

316. Lemley, *supra* n. 313, at 943. While at present, there is ripe competition in the ISP market, meaning that providers have great incentives to increase speed and content, offer low prices and provide customer support, it is not difficult to imagine a future market, where a few large ISPs exert control over access and content, raise prices significantly and become less concerned with customer support. *Id.* at 944-45.

317. *Id.* at 944 (citing Francios Bar & Christian Sandvig, *Rules from Truth: Post-Convergence Policy for Access*, (Sept. 2000) (unpublished manuscript, on file with the authors)).

318. Simon, *supra* n. 100, at 283 (citing Harold Feld, *The Need for FCC Merger Review*, 18 Commun. Law. 20 (Fall 2000)). Alternative media outlets remain in a struggle to stake a claim to Internet properties in the wake of corporate domination. Ford-Levine, *supra* n.

tion is spreading its cancer to the Internet, and the myth that the introduction of the Internet into the media world yields a new and effective avenue for disseminating alternative and diverse views and news is debunked.<sup>319</sup> The mainstream media conglomerates have dominated the Web by taking control of the big brand portal sites, funneling their broadband-ready Web content through these sites and spending millions of dollars on online and offline on marketing and promotional campaigns.<sup>320</sup> Therefore, the alternative media outlets cannot possibly compete in the Internet, media market.<sup>321</sup> With media conglomerates increasing their control over Internet access through broadband cable monopolies, their self-promotion and preferential treatment for their own content will only increase absent regulation.<sup>322</sup>

#### 4. *FCC Internet Regulation Would Not Solve Alternative Media's Problem*

##### a. *Proposed FCC Regulation on the Internet*

Since it seems the Internet has not actually provided any real challenge or alternative to the traditional power models in the media industry,<sup>323</sup> it is often suggested the FCC take action to regulate the present state of rising corporate control on the Internet in order to protect the interests of the general public.<sup>324</sup> To maximize the public interest, steps must be taken to insure diversification of ownership and a variety of voices will be heard on the Internet.<sup>325</sup> For example, regulatory agencies could force Web directories and Internet search engines to list Web sites by using objective criteria, ensuring users are directed to content sites based on their utility to what the user is actually searching for and not based on commercial relationships between sites and search engines.<sup>326</sup> Another proposed solution would require a corporate media site presenting a certain view mainstream view to also include a link to another con-

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86, at 607. The Internet, with rich potential to change the media industry corporate domination rules, the way we live and work and the way we learn and experience, has an uncertain future. *Id.* There is, however, one thing clear, alternative and independent viewpoints are still underrepresented and there is no reason to think things are likely to change for the better. *Id.*

319. Simon, *supra* n. 100, at 284 (citing Nesvold *supra* n. 206, at 866) (discussing the fact that the public has not yet found the Internet to be a legitimate source of alternative news or views).

320. Ford-Livene, *supra* n. 86, at 607.

321. *Id.*

322. Dichter, *supra* n. 194, at ¶ 13.

323. *Id.*

324. Yu, *supra* n. 241, at 42.

325. Mitra, *supra* n. 273, at 437.

326. *Id.*

tent site, where the reader could access an opposing viewpoint.<sup>327</sup> Finally, to ensure the alternative press has a strong, well-funded voice on the Internet, commercial, corporate sites could be financially regulated as to provide funding for an independent news outlet, similar to a PBS for the Internet.<sup>328</sup>

*b. Internet Regulation Is Not a Good Solution for Alternative Media*

From its beginnings, the Internet has been a decentralized, open network system.<sup>329</sup> As the Internet is open to anyone with a computer and a modem, unburdened by geographical barriers with diverse content which parallels human thought itself,<sup>330</sup> presently, no one owns or controls the Internet.<sup>331</sup> Due to its international and open nature, like posters on telephone poles, the Internet appears to defy the very idea of regulation.<sup>332</sup> Its unique characteristics and lack of geographical boundaries explain why the Internet has an extremely limited history of any extensive government regulation.<sup>333</sup> Therefore, despite the positive benefits that regulating access to the Internet and content on the Internet may have for alternative media outlets, where regulation would provide them a greater voice in cyberspace, these regulations, even if possible, would not solve all of alternative media's problems.<sup>334</sup>

The proposed Internet regulations are not currently possible. The FCC has recently adopted the "wait and see" approach, where the FCC has declared it will not attempt to regulate the Internet's current state of corporate presence unless corporations attempt to restrict access, where the problem will be pursued by the Federal Trade Commission ("FTC") for anti-trust violations.<sup>335</sup> Additionally, even if the FCC had not declined to act, the FCC is currently legally barred from attempting to preserve competition on the Internet, even if, as a matter of public policy, it should do so.<sup>336</sup> Critics also argue the Internet will not presently be reg-

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327. *Id.*

328. *Id.*

329. *ACLU v. Reno*, 929 F. Supp. at 838.

330. Kelly M. Doherty, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 Akron L. Rev. 259, 265 (1999).

331. *Id.* (quoting Robyn Forman Pollack, *Creating Standards of a Global Community: Regulating Pornography on the Internet- An International Concern*, 10 Temp. Intl. & Comp. L.J. 467, 178-79 (1996)).

332. *Id.* at 300 (quoting Pollack, *supra* n. 331).

333. *Id.* at 300 (quoting Pollack, *supra* n. 331).

334. *Id.*

335. Lemley, *supra* n. 313, at 954.

336. *Id.* The Communications Act of 1934 actually forbids the FCC from regulating in this area because companies that provide broadband Internet access are actually providing a "programming service" that is not regulated under the same umbrella as traditional cable service regulations. *Id.*

ulated because of the privacy implications that come with regulations, claiming Internet regulation would likely lead to potential invasions of privacy.<sup>337</sup>

Additionally, the required legal framework to regulate the Internet is presently unclear.<sup>338</sup> In order for the FCC to regulate any medium in the communications industry where content is involved, that medium must fall under one of the Supreme Court's categories under the Court's "spectrum of control" which determines the appropriate standard for considering First Amendment implications.<sup>339</sup> Content-based speech restrictions can only withstand constitutional scrutiny if they are narrowly tailored to serve a particular, compelling state purpose which would not unnecessarily interfere with or be an affront to First Amendment freedoms.<sup>340</sup>

Currently, certain mediums in the communications industry are more protected than others.<sup>341</sup> For example, the most protected medium in media regulation is the broadcast industry because a broadcast enters the home without invitation and has scarce frequencies while the least protected medium is telecommunications because users must take deliberate steps to gain access to this service.<sup>342</sup> Unlike the broadcast or telecommunications industries, the Internet, as a communications outlet, does not closely resemble any traditional media categories, which makes it difficult to justify content-based regulation.<sup>343</sup> In actuality, since the Internet has neither a history of extensive regulations nor a scarcity issue, unlike cable and broadcasting, it is unlikely that there would be an adequate justification for any enacted restriction which would place content-based regulations on the Internet.<sup>344</sup> The Internet is often de-

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337. Robert J. Batson, III, *Personal Privacy on the Internet: Issues and Guidelines for Practicing Attorneys*, 2 Transactions 9, 21 (Spring 2001). If the proponents of legislation to protect consumer privacy online criticize that such regulations would likely result in greater government privacy violations, legislation, such as media content-based restrictions, would certainly open the door to government intrusions of individual rights. *Id.*

338. Doherty, *supra* n. 330, at 290.

339. *Id.* at 291.

340. Marc S. Berger, *Keeping the Pace with the Expanding Internet: Can the Court's Keep Up?* 9 Alb. L.J. Sci. & Tech. 51, 55-56 (1998); *Buckley v. Amer. Cons. Law Found.*, 525 U.S. 182, 209 (1999); see, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988).

341. Doherty, *supra* n. 330, at 291.

342. *Id.*

343. *Id.* Ultimately rejecting the comparisons between the Internet and other media, the Court in *Turner Broadcasting Systems v. FCC*, concluded that there is no "basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." Berger, *supra* n. 340, at 65 (quoting *Turner Broad. Sys.*, 512 U.S. 622 (1994)).

344. Berger, *supra* n. 340, at 64. The *Turner* Court found that "communications over the Internet do not invade an individual's home," like a television or a radio broadcast does and therefore the justification used to regulate radio broadcasting the Court used in *FCC v. Pacifica Foundation* could not be similarly used in this case. *Id.* at 64-66 (quoting *ACLU v.*

scribed as a hybrid or convergence of many existing communications media,<sup>345</sup> and is not analogous to any one model in the traditional media industry, which explains why it is difficult to justify regulating the Internet.<sup>346</sup> Instead, the Internet is characterized as “rudderless, decentralized, and transnational,” making many predict any such attempts by the federal government to regulate, given the unique characteristics of the Internet, will result in a finding of unconstitutionality.<sup>347</sup>

Overall, the FCC’s desire for diversity of content, localism and competition and the alternative media’s need for community-based activism, converge into one goal of increased public democratic participation.<sup>348</sup> While their goals may be based on different objectives, the alternative media and the FCC each desire maximal First Amendment rights for a more democratic society.<sup>349</sup> The Internet is presently incapable of creating a more democratic, participatory public.<sup>350</sup> In addition to the limitations previously discussed, the Internet, as a mode of communicating with the public and as distinct from traditional media outlets, has great potential to create a narrow-view populace.<sup>351</sup> Inherent in its structure, the Internet has the great potential for users to limit their encounters on the Web to only the familiar and comfortable.<sup>352</sup> Unlike a traditional newspaper, radio or television broadcast, the Internet enables users to completely click away undesirable views by choosing only to regard views most similar to their own.<sup>353</sup> In this process, the Internet surfer is

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*Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)). The *Pacifica* Court upheld the regulation of speech over the radio on the grounds that the radio is easily accessible to the public, including children because the material invades the home without prior warning of its content. *FCC v. Pacifica Found.*, 438 U.S. 726, 727-28 (1978). While the Internet appears to have similar characteristics with radio and other communications mediums, the Court in *Reno v. ACLU* declared that the factors that have previously justified regulation in the cable and broadcast industries were absent in Cyberspace, failing to justify similar regulations on the Internet. Berger, *supra* n. 340, at 64 (quoting *Reno v. ACLU* 521 U.S. 844 at 868).

345. Berger, *supra* n. 340, at 65.

346. Berger, *supra* n. 340, at 73. Thus, the Supreme Court in general has “struggled in its application of a First Amendment standard to regulate Internet content.” *Id.* The *Reno* Court, by striking down the Communications Decency Act, a content-based regulation, has thus provided a standard for rejecting future attempts to regulate the Internet. *Id.*; see *ACLU v. Reno*, 929 F. Supp. at 883.

347. Doherty, *supra* n. 330, at 299.

348. Dichter, *supra* n. 194, at ¶¶ 1-2.

349. *Id.* at ¶¶ 9-10.

350. *Id.* at ¶ 13.

351. Annupam Chnder, *Management and Control of the Modern Business Corporation*, 69 U. Chi. L. Rev. 1479, 1479-80 (Summer 2002) (discussing Cass Sunstein’s book *Republic.com*). While the printing press helped to create modern nationalisms, as books and newspapers were written in the vernacular, which encouraged a shared concept of community in the public at large, the Internet has not done the same for the current society. *Id.*

352. *Id.*

353. *Id.*

given the instant ability to dispose of shared, community or society-based experiences, which are essential to a rich, democratic society.<sup>354</sup>

The ability of the like-minded to flock to chat rooms, newsgroups and Web sites results in an undemocratic Web universe, where individuals quickly find themselves in echo chambers of their own opinions, merely magnifying and confirming their own inclinations and resulting in a deeply polarized society.<sup>355</sup> Therefore, while the Internet was predicted to be a sufficient substitute for the lack of diversity that results from media consolidation in the traditional, mainstream media, there is currently no evidence quantifying to what extent the Internet acts as a supplements other traditional forms of media and no definite, empirical studies illustrating the Internet has yet developed into an economic or social substitute for radio television, radio and publishing mediums.<sup>356</sup>

### C. THE REGULATORY SOLUTION

#### 1. *The Proposal: Increase FCC Ownership Regulations*

In order to resolve the struggle alternative media outlets face in the media industry, I propose the best way to solve this problem is to amend the Communications Act of 1996. First, the Act should be amended to eliminate the bi-annual review of the ownership regulations. Second, the Federal Communications Act of 1996 should be amended to require all future amendments to the Act to incorporate the FCC's stated goals of diversity, competition and localism. Such consideration for the three stated goals includes strict adherence to media ownership rules, meaning if a corporation attempts to acquire additional assets through a merger or acquisition, that corporation must be reevaluated by the FCC board. During the reevaluation process, the FCC must consider the cor-

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354. *Id.* The Internet, in a sense, has developed into the ultimate filtering system for news media, meaning that people are often only exposed to information and entertainment that they choose themselves, through searching and book marking, where the Internet user often has a goal chosen in advance and will use shortcuts to filter through the unnecessary or off-topic information. *Id.* at 1485.

355. *Id.* at 1480.

356. *Sinclair Broad. Group*, 284 F.3d at 160. Even corporations, currently contributing to the media giant Internet culture, admit their power on the Internet will not likely retreat, spreading to new media outlets almost as soon as they develop. *McChesney*, *supra* n. 33, at 35. A former president of Time corporation predicted the current state of Internet domination by corporations when he stated in 1997, "I believe the electronic revolution is simply one new form of communications that will find its place in the chain of communications and will not displace or replace anything that already exists, just as television did not replace radio, just as cable did not replace network television, just as the VCR did not replace the movie theater." *Id.* Therefore, as all evidence thus far illustrates, unless something unforeseen disrupts their path, the media giants will simply swallow the Internet up with the rest of existing media empires, which they have already dominated with their corporate interests. *Id.*

poration's possible negative implications on the entire media market, specifically considering the FCC's stated goals. If the FCC foresees a potential for frustrating alternative media objectives, the FCC must deny the merger, without exception.

Additionally, the Act should be amended to state that no exceptions for individual corporations will be allowed with respect to the ownership guidelines. Finally, the FCC should amend the 1996 Act to separate the ownership rules for independent or small-scale media from the regulations for corporate media, where the FCC will officially establish a pro-independent media policy. Therefore, independent or minority media outlets will be given favorable treatment for a term of ten years, or until the FCC board unanimously determines that its goals of diversity, competition and localism are sufficiently reached.

## 2. *Ownership Regulations Benefit the FCC's Goals, Alternative Media and Society*

These proposed changes seem logical in light of the present state of the FCC's rules. First, the FCC should eliminate the charade of the bi-annual review of media ownership rules. In the years since the 1996 Telecommunications Act, the FCC has held several mandatory bi-annual reviews.<sup>357</sup> Each time the board meets to discuss the present ownership guidelines, further deregulation of these ownership rules commence.<sup>358</sup> The board's decision to continue deregulation is not in the public interest or in an effort to advance the FCC's goals.<sup>359</sup> However, instead of considering the social implications of their actions, the board has empirically acted without regard for public opinion or impact.<sup>360</sup> In fact, during the most recent bi-annual renewal process, Chairman, Michael Powell openly rejected efforts by political groups, as well as others on the FCC board, to conduct public hearings.<sup>361</sup> Powell has made it clear he will not be swayed by public opinion on the media ownership issue.<sup>362</sup> In

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357. Cohen, *Media Giants Cast*, *supra* n. 96, at ¶ 2.

358. Dichter, *supra* n. 194, at ¶ 7.

359. *Id.* at ¶¶ 5-7.

360. Cohen, *Media Giants Cast*, *supra* n.96, at ¶ 10.

361. Dichter, *supra* n. 194, at ¶ 7.

362. *Id.* While the FCC's deregulatory approach to the media in years past has created a potential for perpetual corporate domination of the media industry, now, including the Internet, there it is nearly impossible to find continuous coverage of this issue in mainstream publications. *Id.* at ¶ 14. With the FCC refusing to consider what opinions could surface from conducting public hearings and with the traditional media outlets shying away from this hot topic, it seems that the media industry is growing more and more disinterested in considering public opinion. *Id.* Therefore, unless something is done for this issue to become a topic of mass concern, the FCC will continue to support the corporations and slight the populace and will "forge ahead with its decisions, behind closed doors with no accountability to the public." *Id.*



fact, the current FCC regards market research, used to justify deregulation and to justify resulting consolidation, as the most important factor in considering further deregulation of media ownership.<sup>363</sup> With such little attention given to the public's concern for the negative effects of increased deregulation, the FCC's bi-annual renewal process has become nothing more than an excuse to create more protection for media consolidation.<sup>364</sup> Therefore, the bi-annual review should be eliminated from the Telecommunications Act of 1996.

Secondly, the FCC should incorporate its stated goals of diversity, competition and localism into any future changes to the present Act of 1996. In discussing the benefits of diversity, localism and competition, the Supreme Court in *Metro Broadcasting v. FCC*, declared since there is an affirmative correlation between a station's ownership and editorial content, the FCC's ownership regulations, in advancement of these stated goals, benefit the independent media outlets as well as the public.<sup>365</sup> In pursuing its three goals, the *Metro* Court found the FCC's ownership rules, if enforced in furtherance of these stated goals, would enhance society by increasing the possibility of achieving greater viewpoint diversity.<sup>366</sup> Since ownership in the media industry carries with it the power to select and manipulate the content and manner information is communicated to the public, when the Commission is dedicated to pursuing its stated goals of diversity, localism and competition, the less chance there is that one person or corporation can dominate mass communication, advancing a unified set of social, economic and political views.<sup>367</sup>

Next, the FCC should amend the Act of 1996 to deal with one of the biggest problems with the current FCC regulations; they are not properly enforced.<sup>368</sup> The FCC has been granting exceptions to their existing ownership regulations for over a decade, before the Telecommunications Act of 1996 started the official deregulation trend in the media mar-

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363. *Id.*

364. *Id.*

365. *Sinclair Broad. Group*, 284 F.3d at 160.

366. *Id.*

367. *Id.* While consumers have a greater variety of outlets to access than they once had, due to the highly concentrated, consolidated state of the broadcast industry since the passing of the Telecommunications Act of 1996, the result has been a decline in media outlets that a consumer can access because the big media firms buy out their competitors and merge with each other. *Id.* Once the corporations fully realized all of potential economic benefits, these media giants began to combine their efforts, effectively drawing a line in the sand, on one side, media providers interested in greater diversity and competition in the market and on the other side, media providers who were mostly interested in economic efficiency and service benefits. *Id.*

368. Cohen, *Media Giants Cast*, *supra* n. 96, at ¶ 6.

ket.<sup>369</sup> In the current state of media deregulation, some wonder why the FCC is “opening the door” to newer and larger consolidation in the traditional media industry, yet others criticize that the door to media ownership was never really closed because media companies have been merging and ignoring the FCC’s rules for many years.<sup>370</sup> Therefore, for the FCC to effectively promote diversity, localism and competition, no future special exceptions for particular companies should be allowed.<sup>371</sup>

Finally, the FCC should officially support additional outlets for alternative media. When the FCC supports the existence of additional, independently-owned media outlets, the general public benefits by having access to a wider range of diverse information sources.<sup>372</sup> As a general rule, diversification in any industry is preferable to concentration.<sup>373</sup> Market concentration in the form of a monopoly, duopoly or oligopoly negatively impacts society because these companies can use their control in their given market to charge a lower price than the competitive rate of return and then once they have effectively eliminated their competition, they charge a much higher price.<sup>374</sup> While diversification has important economic implications in general, in the telecommunications industries, the importance of diversification goes beyond mere concerns about sound economics and actually involves concerns about the effect on a well-functioning democracy and personal autonomy.<sup>375</sup> When the FCC regulates

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369. *Id.* The idea that the Congress or FCC is dedicated to preventing media corporations from gaining any more power in the industry is false. *Id.* In fact, the FCC has never strictly enforced its ownership regulations illustrates and while its stated mission would effectively thwart media giants’ power, when the FCC continues to create exceptions for corporate mergers and ownership deals, the FCC’s current deregulatory approach only makes the giants stronger. *Id.*

370. *Id.*

371. *Id.*

372. *Metro Broad.*, 497 U.S., at 569.

373. Mitra, *supra* n. 273, at 416.

374. *Id.*

375. *Id.* Because concerns about diversification of media outlets surpasses the purely economic issues, diversity in the media, as it relates to the ability of the public to access information, is of greatest concern when lacking diversity negatively implicates the First Amendment and democracy. *Id.* Essential to providing the public with access to various media outlets, fostering First Amendment principles and ultimately, greater democratic participation, is control over which individuals or groups can gain access to these outlets. *Id.* Additionally, the media industry can have an affect upon individual autonomy. *Id.* at 418. If we are constrained by our particular views of the world view, where we, as individuals receive motivation and weigh options which helps determine the course that our life may take, then the media’s ability to influence such a view is concerning. *Id.* Because we are affected by the information that we receive, we are at the media’s mercy, since they control the flow of information. *Id.* Since the communications industry directly influences how we view the world, there is “an inherent danger in a communications medium dominated by one or a few corporations that control or own vast amounts of information.” *Id.* While the few controlling media corporations seem to have and represent different inter-

the media industry, such diversification of control through maintaining diversity of ownership, in turn fosters diversity of viewpoints and promotes diverse expression, which is an essential aspect of essential First Amendment principles.<sup>376</sup> Diversity of expression is also an essential aspect of a well-functioning democracy because the exposure to eclectic ideas allows the citizenry to make informed choices in politics and also gives them the knowledge they need to challenge the ill-informed decisions made by its representatives.<sup>377</sup>

### 3. *The Pragmatic Limitations of the Deregulation Counter-Argument*

The FCC's recent decision to loosen ownership restrictions has resulted in many deregulation supporters to publicly claim the new, deregulatory rules have positive implications on the media industry.<sup>378</sup> The first issue which arises regarding the FCC's new policies involves the economic benefits of deregulation in the global economy.<sup>379</sup> When the FCC decided to remove many of the ownership caps on media ownership,

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ests, they share the same interest in corporate domination on the Internet. *Id.* Therefore, "[e]ven though such entities may purport to represent diverse viewpoints, over time, they may be able to steer individuals' tastes and preferences to their own benefit." *Id.* The regulations set forth by the FCC, who regulates the persons and entities who may access these media outlets, which attempt to regulate ownership of these media outlets, are therefore, in the best public interest. *Id.* at 417.

376. *FCC v. Natl. Citizens for Broad.*, 436 U.S. 775, 778 (1978). The rights vested in the First Amendment rest on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," because a when there is freedom in the press, unaffected by corporate interests, there is freedom in society. Donald Lively, *Modern Communications Law*, 172 (Praeger Publ. 1991). The freedom of the press means freedom to publish and disseminate information. *Id.* In the present state of corporate domination of the media, alternative media outlets are often denied access to the mediums to disseminate information. *Id.* Because the Constitutional freedom to publish is freedom for all, not for a few, there is no constitutional right to prevent other media competitors from publishing. *Id.* However, despite their ever-present domination of all aspects of the media industry, including the Internet, media giants continue to claim that such attempts by the government to restrict their right to own similar media outlets in the same market violate their Constitutional rights under the First Amendment. *Id.* The First Amendment does not provide the big media corporation the slightest support for their longstanding claim that FCC ownership regulations violate their constitutional right to freedom of the press. *Id.*

377. Mitra, *supra* n. 273, at 417. Since the birth of broadcast television, ownership regulations have been a part of the U.S. communications industry and are embodied in the FCC regulations prior to the Telecommunications Act of 1996. *Id.* at 418. The promotion of diversity of access and content are and "should remain important driving forces in any set of rules governing the communications industry." *Id.*

378. Michelle Russo, *FCC Sets Limits on Media Concentration: Unprecedented Public Record Results in Enforceable and Balanced Broadcast Ownership Rules* ¶ 1, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.doc) (last updated Feb. 27, 2004).

379. Dan Luzadder, *Canadian Media Deregulation Provides Insight Into FCC Proposal* ¶ 4, <http://ojr.org/ojr/law/1054219939.php> (accessed June 12, 2003).

many claim this made it easier for media corporations to merge.<sup>380</sup> When two or more media corporations merge, they are often able to greatly increase their profits, which benefits the national economy because they can combine resources and reduce costs by not having to employ as many people and by being able to save on advertising and overhead costs.<sup>381</sup> Also, since the loosened regulations have given media companies the ability to own multiple mediums in a given market and to own many different kinds of media outlets nationally, many argue when the large, established media corporations take over smaller, local companies, greater profits, benefiting the national economy is the end result.<sup>382</sup> The second issue that arises when the present state of deregulation is being discussed and justified is that deregulation results in better journalism quality, which benefits society as a whole.<sup>383</sup> Media corporations claim the lesser regulations make for better journalism because when a company owns multiple television stations or both a television and a newspaper, their staff can all work together to create richer and more sophisticated news reports in all of their media outlets.<sup>384</sup>

Another issue that is important to note is since the passing of the Telecommunications Act of 1996, the broadcast industry has continually been losing some of its primary audience to other media outlets, namely to cable, satellite and the Internet.<sup>385</sup> Those in favor of the FCC's current trend go on to claim the pre-existing ownership regulations actually stifled the ability of other, new technologies to also take some of the traditional media's audience.<sup>386</sup> Given these considerations, many contend there is no longer any need to strictly regulate ownership in the media industry.<sup>387</sup> Finally, the last issue, which deregulation supporters claim explains the FCC's recent actions, is the idea reducing ownership restrictions may actually create greater diversity for independent voices in the media market.<sup>388</sup> Here, the argument is that since the Telecommunications Act of 1996, where the initial deregulation trend first began, the media industry has gotten more, not less, diverse.<sup>389</sup> Therefore, it follows, according to these supporters that removing the previous restrictions, will eventually lead to greater media diversity be-

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380. *Id.* at ¶ 5.

381. *Id.*

382. Gene Metrick, *FCC Rules Would Feed Big Media* ¶ 14, [http://www.helenair.com/articles/2003/05/21/opinions\\_top/a05052103\\_01.txt](http://www.helenair.com/articles/2003/05/21/opinions_top/a05052103_01.txt) (accessed June 12, 2003).

383. Luzadder, *supra* n. 379 at ¶ 5.

384. *Id.* ¶ 4.

385. Staff Writer, *Regulatory Excess*, Las Vegas Review-Journal, 10B (Apr. 9, 2003) [hereinafter *Regulatory Excess*].

386. *Id.*

387. *Id.*

388. Russo, *supra* n. 378, at ¶ 9.

389. *Regulatory Excess*, *supra* n. 385, at 10B.

cause the smaller voices will now have an easier time finding a voice in a market that is freer from governmental entanglement.<sup>390</sup>

These arguments favoring deregulation as opposed to greater regulation in media ownership are valid in theory, but in practice, deregulation has been and will be unable to produce what has been claimed.<sup>391</sup> While it is impossible to really know the precise outcome of the present situation with the new FCC regulations will be, because Canada has a few more years of deregulation which is similar to what the U.S. is currently facing has, it might be beneficial to learn from Canada's mistakes.<sup>392</sup> Since its move towards deregulation, over the past twenty years, especially within the past eight years, Canada has experienced great media ownership consolidation.<sup>393</sup> In fact, at present, two media giants own most of Canada's news media.<sup>394</sup> Such rapid media consolidation has led to social problems because as more national information was filtered through only one pipeline of news, a few powerful corporations took control of the information flow.<sup>395</sup> Contrary to the arguments in favor of deregulation, the quality of journalism decreased when the lack of government regulation set in.<sup>396</sup> Once the corporate media giants began to control content, journalists and the public became outraged by such unnecessary control.<sup>397</sup> From Canada's experience, the U.S. can see that whatever temporary economic benefits deregulation have, the long-term effects of media ownership regulation will be to end in greater consolidation and a decline in journalistic quality, neither of which will end up being anymore beneficial for the American public than Canada's policies were for the Canadians.<sup>398</sup>

#### 4. *Ownership Regulation is the Best Solution to the Media Concentration Problem*

The proposed amendments to the Telecommunications Act are the best solution to preserve the role of alternative media and to combat corporate media consolidation. Unlike the FCC's current regulations, which favor the corporation over the individual, if the FCC were to adopt a greater regulatory approach, it would not only be favorably accepted by the public at large, but it would also likely be favorably received by

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390. *Id.*

391. Metrick, *supra* n. 382, at ¶ 3.

392. *Regulatory Excess*, *supra* n. 385, at 10B.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Regulatory Excess*, *supra* n. 385, at 103.

Congress and the Supreme Court.<sup>399</sup> Historically, the promotion of diverse, minority ownership has long been accepted when furthering legitimate First Amendment rights.<sup>400</sup> The Court in *Metro Broadcasting v. FCC*, concluded the public's interest in enhancing broadcast diversity is, at the very least, an important governmental objective, which therefore is a sufficient basis for rejecting the Commission's present ownership regulations.<sup>401</sup> The Court went on to voice support for Congress' conclusion that the American public benefits by having access to a wider diversity of information sources.<sup>402</sup> Therefore, the best way for the FCC to achieve its goals of diversity, localism and competition, beneficial to the public, as well as to benefit the alternative media is to increase FCC ownership regulations.<sup>403</sup>

#### IV. CONCLUSION

In the present state of political, economic and international turmoil, and in the wake of the War in Iraq, now, more than ever, the public needs a robust, grossly democratic populace. In time of war, where journalists like Peter Arnett are being fired for reporting the unfiltered truth, it is important to make sure the government and corporations are not influencing the flow of information that is released to the public. As more and more media companies swallow up their competitors, creating a media industry where government and corporate interests are filtered through the largest, mainstream media outlets, the public interest is compromised and these large media are given greater control of the communications industry. Considering the present state of corporate domination, the media market and the public desperately need diverse, independent media outlets.

Alternative media outlets are distinct from traditional media conglomerates because of their independently-owned, often not for profit status, which makes them effective watchdogs of the traditional media giants. The alternative media are not forced to rely upon advertising revenues and do not have to answer to governmental or corporate entities that own or control some aspect of them; the independent press can just report without filtering the news. Despite the importance of diverse, alternative media outlets, they are currently being forced out by the same corporate media groups they mean to challenge. In the current political state where corporate power prevails over grass-roots activism, alternative media outlets remain unable to compete in the traditional and

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399. Mitra, *supra* n. 273, at 417.

400. *Id.*

401. *Metro Broad.*, 497 U.S. at 569.

402. *Id.*

403. *Id.* at 579.

non-traditional media industry because the alternative outlets do not have the resources and revenue to directly challenge corporate media in the traditional media markets. If the current consolidation trend continues, the independent media will have little or no role in radio, broadcasting and publishing, where the corporations are free to do as they please, ignoring the public interest in unfiltered, truthful reporting.

The FCC, the governmental body charged with the task of regulating media ownership has failed its mission to protect the interests of the public. While claiming its regulations work in pursuit of encouraging goals for diversity of views, localism and competition in the media industry, the FCC's current deregulation initiative, beginning with the Telecommunications Act of 1996, fails to protect the public and discourages its stated goals. In order to preserve the essential democratic model of the market place of ideas, changes to the current regulations in the 1996 Act are needed to ensure diversity of content, localism and competition.

Some argue the present problem of media consolidation can best be solved by including the Internet as an additional medium when examining the number of media outlets in the present mass communication market. The Internet has been hyped as embodying the greatest forum for mass communication ever created. The Internet has been a resource for the alternative media, however, it is by no means a proper solution to the media consolidation problem. In practice, the Internet is plagued by the same corporate conglomerate interests as other communications mediums, where the alternative media continue to struggle to compete.

There is Internet potential for any and everyone to become a Web publisher, yet in practice, the corporate Web sites still have a greater advantage over the independent sites. Because of the corporate media's established presence and name recognition in the traditional media market, ability to sink millions into Internet design and advertising and ability to merge with existing powerful Internet corporations, corporate media enjoy a greater advantage on the Web than independent media. The corporate media have found the unregulated state of the Internet even easier to conquer than the traditional media outlets. While some claim the lack of regulatory red tape is the problem alternative media have competing with their corporate rivals on the Web, increased regulations on the Internet have too many negative implications to provide a viable solution to the current corporate dominance and would force the alternative media to rely solely upon the Internet to meet their target audience. Additionally, given the Internet's history as a free, unregulated medium, proposing governmental regulation, even if to promote greater democratic participation and diversity of viewpoints, is unwise. Alternative media, due to their small-scale, multi-approach to activism require more than one medium, even if this medium is far-reaching and without geographic limitations.

Therefore, the best solution to the media consolidation problem alternative media outlets currently face is to amend the Telecommunications Act of 1996. In order to best support the interest of the alternative media, the FCC must be committed to incorporating its stated goals of diversity, localism and competition into all aspects of its decision-making, repealing the biennial review of the ownership regulations, preventing exceptions to the current ownership regulations and dedicating its support for the alternative media outlets, instead of for the corporations is the best solution to the present state of media consolidation. Without these proposed regulations, freedom of press and ultimately overall democratic participation will likely continue to decline in such a corporate dominated media market.

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