THE WHITE HOUSE
WASHINGTON
November 15, 1983

JWC:

JAB, the President, and Mark Fowler met in the Oval Office on September 28, 1983. The meeting starter at 3:08 pm and lasted until 3:38 pm. Others in attendance were: Mr. Meese, Dick Darman, Craig Fuller, Dick Hauser, Ken Cribb, and Dave Gergen.

ADC

NOTE: JAB recalls leaving the above meeting early. However, the Diarist does not keep a record of when particular people leave Oval Office meetings.

JWC

NOTE: JAB did not attend

MINUTES
CABINET COUNCIL ON COMMERCE AND TRADE
Meeting #52, January 26, 1983
8:45 a.m., Roosevelt Room

Attendees: Messrs. Baldrige, Brock, Wright, McNamar, Niskanen, Wallis, Lovell, Dederick, Wunder, Trent, Harper, Gunn, Darman, Pratt, McMinn, Olmer, DeMuth, Garfinkel, Baroody, Cicconi, Byler, Dr. Anderson, Ms. Risque, and Ms. Small

Financial Interest and Syndication Rule

Secretary Baldrige led a discussion of whether the Administration should support a recision of the financial interest rule for FCC syndication. Associate OMB Director, Chris DeMuth noted that the economic and competitive environment within which the rule had been developed had changed significantly in recent years. He suggested that the original justification for the rule was no longer present. It was the sense of the Council that the current rule restricted competition and was therefore undesirable. No decision was taken as to whether or not the Administration would take a position. However, it was agreed that Commerce and Justice would file their comments with the FCC.

Steel

Under Secretary Olmer led a discussion of the Administration's policy concerning restraint agreements with U.S. trading partners on steel. He suggested that the negotiation of restraint agreements by the U.S. could result in the cartelization of global steel trade. Ambassador Brock outlined specific steel trade problems relating to Brazil and Japan facing the Administration. Ambassador Brock contended that a flexible negotiating approach would give him maximum leverage with these countries. CEA member Niskanen stated his view that it was important that the arrangement with the E.C. on steel be viewed as an anomaly rather than a rule. The Council agreed that the establishment of a pattern of bilateral restraint arrangements would be undesirable.

Office of Strategic Trade

Secretary Baldrige summarized the proposal introduced by Senator Garn to establish an Office of Strategic Trade. Secretary Baldrige noted that a number of organizational and manpower changes had been made to respond to concerns regarding the Commerce Department's administration of export controls policy.

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 2-14-83 NUMBER: 118500CA DUE BY: ______

SUBJECT: Cabinet Council on Commerce and Trade - February 16, 1983
8:45 a.m. - Roosevelt Room

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☑	☐
State	☑	☐
Treasury	☑	☐
Defense	☐	☑
Attorney General	☑	☐
Interior	☐	☑
Agriculture	☑	☐
Commerce	☑	☐
Labor	☑	☐
HHS	☐	☑
HUD	☐	☑
Transportation	☑	☐
Energy	☑	☐
Education	☐	☑
Counsellor	☑	☐
OMB	☐	☑
CIA	☐	☑
UN	☐	☑
USTR	☑	☐
CEA	☑	☐
CEQ	☐	☐
OSTP	☐	☐
______	☐	☐
______	☐	☐

	ACTION	FYI
Baker	☑	☐
Deaver	☐	☐
Clark	☐	☑
Darman *(For WH Staffing)*	☑	☐
Harper	☑	☐
Jenkins	☐	☑
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
CCCT/Gunn	☑	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☐	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS: The Cabinet Council on Commerce and Trade will meet Wednesday, February 16, 1983 at 8:45 a.m. in the Roosevelt Room. The agenda and background papers are attached.

NOTE: JAB did not attend this meeting.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☑ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

THE WHITE HOUSE

WASHINGTON

February 14, 1983

MEMORANDUM FOR MEMBERS OF THE CABINET COUNCIL ON COMMERCE AND TRADE

FROM: WENDELL GUNN
Executive Secretary

SUBJECT: Agenda for Meeting of February 16, 1983
8:45 am, Roosevelt Room

Attached are reading materials for this Wednesday's CCCT meeting. The items to be discussed are as follows:

1. DISC Replacement Proposal
2. FCC Synidication: The Financial Interest Rule

There is a possibility that the FCC syndication issue will be moved to the agenda of a Cabinet meeting with the President, to be held later on Wednesday or on Thursday. You will be notified when a final determination has been made.

Brock has 3 wks to present alt
before GATT comes down on us.
can suppt Treas prop'l

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

February 11, 1983

Memorandum for: Members, Cabinet Council on Commerce and Trade

From: Malcolm Baldrige
Chairman Pro Tempore

Subject: FCC Syndication and Financial Interest Rule

THE RULE

In 1970, the Federal Communications Commission (FCC) adopted its Syndication and Financial Interest Rule 1/ prohibiting the three major television networks (ABC, CBS, and NBC) from engaging in television program syndication and/or acquiring any financial interest in television programs produced by another entity (i.e., they are prohibited from producing programs for broadcast in which they are not the sole owner).

In July 1982, the FCC issued a Notice of Proposed Rule Making 2/ to review the impact of this Rule in light of changes in market conditions and evaluate the conclusions and recommendations made by the Network Inquiry Special Staff described below.

THE NETWORK INQUIRY

In January 1977, the FCC issued a Notice of Inquiry 3/ which sought information concerning the effects of its rules and whether less regulation was called for. The Commission epaneled a special staff which presented its conclusions and recommendations to the Commission in fall 1980. Without adopting or rejecting them, the Commission terminated the inquiry.

The Network Inquiry Special Staff concluded that the Rule was "misguided at best" and had "done little to further the Commission's goals of diversity or increased competition in the

---

1/ 47 CFR §73.658 (j). See generally Viacom International v. FCC, 672 F.2d 1034, (2d Cir. 1982).

2/ Amendment of 47 CFR §73.658(j); the Syndication and Financial Interest Rule, BC Docket No. 82-345 ("Notice") (1982) .

3/ Commercial Television Network Practices, Docket No. 21049, 62 FCC 2d 548 (1977).

program supply market."4/ The report stated that the Rule failed to increase competition in the syndication market because the market was competitively structured prior to its imposition.

Specifically, the Network Inquiry Special Staff concluded: (1) the program supply market for prime time television was not concentrated prior to the Rule 5/; (2) the program supply market is competevely structured today 6/; (3) the syndication market was competitive prior to the Rule 7/; (4) the syndication market remains competitive today 8/; (5) the Rule has resulted in inefficient risksharing by prohibiting network participation 9/; and (6) the Rule may have the unintended effect of handicapping the networks' ability to compete with new technologies. 10/

NETWORK ANTITRUST CONSENT DECREES

In 1972, the Department of Justice filed antitrust complaints against the three television networks charging violations of Sections 1 and 2 of the Sherman Act. The suits were dismissed without prejudice on procedural grounds 11/ but refiled in late 1974 12/ charging that: (1) ownership and control of prime time programming was concentrated among the networks; (2) the networks unreasonably restrained competition in the production,

---

4/ Federal Communications Commission Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation ("New Television Networks") Vol. I at 510 (1980).

5/ Federal Communications Commission Network Inquiry Special Staff, Background Report, "An Analysis of Television Program Production, Acquisition and Distribution," (hereinafter "Special Staff Analysis") in New Television Networks, Vol. II, 293 at 556.

6/ Id. at 561.

7/ Id. at 532.

8/ Id. at 566.

9/ Id. at 622.

10/ New Television Networks at 518.

11/ United States v. National Broadcasting Co., 65 F.D.R. 415 (C.D. Cal. 1974).

12/ United States v. National Broadcasting Co., Civ. No. 74-3601-RJK (C.D. Cal., 1974); United States v. CBS, Inc., Civ. No. 74-3599-RJK (C.D. Cal., 1974); and United States v. American Broadcasting Companies, Inc., Civ. No. 74-3600-RJK (C.D. Cal., 1974).

distribution, and sale of entertainment programming; (3) program supply to the networks was unreasonably restrained; and (4) the public had been deprived of the benefits of free and open competition in the broadcast of television entertainment programming.

In late 1976, NBC and the Department of Justice filed a stipulation providing for the entry of a consent decree to settle the litigation. A little more than one year later, a modified version of the proposed consent decree was entered by the district court. 13/ Slightly more than two years after that, in mid-1980, first CBS, then ABC followed by entering into similar consent decrees with the Department of Justice. 14/

The consent decrees incorporate the major provisions of the Commission's Syndication and Financial Rule, and thus also restrict network program production and distribution. In addition, the consent decrees provide for further limitations on network program acquisition activities not addressed by the Commission's Rule. Thus, with very detailed provisions, the decrees govern and limit the timing and terms of network-program supplier agreements concerning program production, distribution, options, and exclusivity. For example, the ABC consent decree limits to four years the length of time the network can initially negotiate for exclusivity to keep a program out of daily (stripped) syndication. 15/ Thus, as the Commission noted in its Notice, "in all significant respects, the requirements of the consent decrees are more restrictive than or equivalent to the restrictions of our syndication and financial interest rule." 16/

Although the consent decrees incorporate the major provisions of the Commission's Syndication and Financial Rule, they are neither identical to the Rule nor should they be thought of as such. Although the two sets of limitations on network activities have much in common, they are separable and are not directly affected by the Commission's proceeding.

13/ United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978), aff'd mem., No. 77-3381 (9th Cir. April 12, 1978), cert. denied sub nom, CBS v. U.S. District Court for Central Division of Calif., 48 U.S.L.W. 3186 (1979).

14/ United States v. CBS, Inc., Civ. No. 74-3599-RJK (C.D. Cal. July 31, 1980), reprinted in 45 Fed. Reg. 34,463, 34,466 (1980); United States v. ABC, Inc., Civ. No. 74-3600-RJK (C.D. Cal.) reprinted in 45 Fed. Reg. 58,441 (1980).

15/ United States v. American Broadcasting Companies, Inc., supra, 45 Fed. Reg. at 58,443.

16/ Notice at ¶26.

MAJOR ISSUES

In its Notice, the Commission asked for comments on a number of specific matters most of which can be grouped into four major issues for the purpose of discussion and analysis: (1) Risk/Reward Sharing; (2) Network Ability to Compete with New Technology; (3) Producer versus Network Control; and (4) Program Warehousing. In addition, the Commission inquired about the appropriateness of its involvement in this area. The four major issues can be viewed as falling into two basic categories: the first three address the networks' ability to act as monopsonists (the ability to exercise market power as a buyer) in their relationships with program suppliers, and the fourth addresses the networks' potential to act as monopolists in the distribution of syndicated programming.

Appropriateness of Commission Action

One of the most important issues surrounding the Rule is whether it is appropriate for the Commission to regulate the private contractual relationships between producers and the networks. Those who argue that the Rule is necessary claim that the networks have an unfair advantage in their bargaining with producers. Proponents of repeal, however, argue that the relationship between producers and networks are really quite equal and therefore it is inappropriate for the Commission to regulate these private negotiations.

The Department of Commerce has taken the position that there are several reasons why the Commission should question the appropriateness of the Rule. First, allocative issues such as the redistribution of revenues and profits from the networks to program suppliers should not be a concern of the Commission. Second, and related to this first concern, it is inappropriate for the Commission to be concerned with success or failure of individual firms in a market as long as the overall market remains competitive. Finally, if, as has been alleged, the issue is not one of allocation, but rather protection against anticompetitive conduct as a result of network market power, then antitrust enforcement by the Department of Justice is the appropriate remedy.

A primary intent, and result, of the Rule is redistribution of profits from the networks to the major Hollywood producers. 17/ This, however, is an inappropriate topic for Commission concern.

17/ Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competitiveness and Responsibility in Network Television Broadcasting, Report and Order 2[illegible] FCC 2d 382, 399 (1970) (hereinafter "Report and Order"); see also discussion in Special Staff Analysis at 725-31.

It is widely agreed by producers and network representatives alike that the Commission should not be concerned with the division of revenues or profits in a healthy competitive market. Nor should the Commission be concerned with the success or failure of any individual firm as long as the overall market remains competitive. There is an understandable difference of opinion, however, as to what exactly constitutes an allocative issue.

Even if the Special Staff was wrong and the networks could distort the market by exercising market power, the Department of Commerce believes that it is the Antitrust Division of the Department of Justice and not the Commission that should be responsible for enforcing the nation's antitrust laws. Unless a compelling case can be made to the contrary, to the extent that protection against anticompetitive behavior and undue market power is required, sufficient remedies rest with the Department of Justice and private antitrust litigants exercising their rights under existing law. To the extent that the Rule is concerned with allocating revenues and profits among firms and industry segments, it is an inappropriate activity of a government agency.

In its comments to the FCC on the Rule, however, the Department of Justice Antitrust Division states:

> Opponents of the rules have argued that, even if such network collusion is possible, the antitrust laws would effectively forestall it. The antitrust laws, of course can effectively attack overtly anticompetitive actions [citing Unites States v. NAB, 536 F. Supp. 149 (D.D.C. 1982)]. It is unclear, however, how likely detection and effective prosecution would be under the Sherman Act in cases of tacit collusion without explicit agreement. The networks have engaged in many parallel practices, including the number of reruns aired, the number of commercial minutes run on network programs, and the production fees paid for programming. It is difficult to ascertain whether these practices are the result of vigorous competition by the networks or of tacit collusion that has reduced competition. The costs of litigation to determine whether parallel network conduct regarding release of off-network syndicated programming [is unlawful (?)] would be substantial. Thus, the Department is not confident that the antitrust laws can be relied upon as the most effective tool for ensuring against possible anticompetitive network practices in this area. 18/

18/ "Comments of the U.S. Department of Justice in FCC BC Docket No. 82-345 (filed January 26, 1983) at pp. 40-41.

Risk/Reward Sharing

The networks argue that since they assume the primary financial risk for developing new television series they should be permitted to share in any profits at the "backend" (after network first run). They argue that the producers would have no product to sell in syndication if networks had not taken the risk, financed the pilot, chosen the program for prime time broadcast, and kept the program on the air for at least three to five years. The networks go on to argue that if they were permitted to have a financial interest in programming and/or to acquire syndication rights, they would be able to pay producers more than just a license fee at the time of production. In addition, the networks argue that preventing them from having a financial interest, or sharing the risk, works to the disadvantage of new entrants because it keeps them from financing small independent producers who otherwise would have no source of capital with which to produce their project.

The major producers (studios) reject the networks' arguments by pointing out that they, as the supposed beneficiaries of increased "frontend" payments in exchange for sharing "backend" profits, are not interested in increasing "frontend" payments. They state that they would rather have the networks pay less at the outset but be able to keep the syndication rights for themselves. They go on to state that if the networks are allowed to obtain partial financial interest and syndication rights that producers will have no choice but to agree to network demands for such rights since the networks are monopsonists.

In addition, producers claim that the networks now are able to "share in the profits" from a successful program by virtue of the significant advertising revenue generated from selling time during and adjacent to prime time programs. In addition, producers claim that the networks are even able to recoup their investment in pilot programs not developed into series by airing them in the summer and offsetting some of their investment with advertising revenues such programs generate. Because of this revenue, the studios claim that the networks are not taking the bulk of the risk when financing a new series but, rather, are merely end users of a product.

This view ignores the significant investment that each network makes in new programming annually as well as the enormous uncertainty of success in the process. As an example, for the four seasons from 1978-1982, CBS commissioned a total of 805 scripts of which 160 were made into pilots and only 51 became series. Only 12 of these, less than 1.5 percent of the original scripts, were successful enough to be renewed for at least one season. Contrary to the producers' assertions, the networks make a significant investment in programming and take a substantial risk in program development. It is also questionable to assert that the networks cover all their investment in program development by airing or "burning off" pilots and failed series during the summer. Shortly after Grant Tinker became president of NBC, that network wrote off approximately $38 million in programming that could not be used. Likewise, for 1981, ABC wrote off approximately $29 million in direct program development costs that could not be recouped (e.g., through summer broadcast). It should be noted that these costs reflect gross figures and do not include provisions for overhead or lost opportunities resulting from preemption of other (more popular) programs. To say that the networks do not take significant risks in the program development process is not accurate. To prohibit them from sharing in the potential rewards not only is unfair, but also threatens their future ability to compete effectively with unregulated competitors (e.g., cable and pay networks) for new programming.

Network Ability to Compete with New Technology

The networks claim that they are at a disadvantage competing with new delivery systems such as cable television (HBO is the example often used), MDS, DBS, and STV for program rights. They argue that since these delivery systems can also participate in program production by obtaining a minority financial interest and syndication rights which provide backend profits, they can outbid the networks for product. The networks want the ability to obtain a financial interest, including syndication, in order to "level" the bargaining table. The networks state that they need to "amortize" product over several distribution media in order to pay for increasingly expensive programming. The networks point to theatrical films and some sports as examples of programming for which they can no longer successfully bid against cable and STV. Therefore, they argue that the rule is skewing the development of the new media by giving them an unfair bidding advantage against the networks. Further, the networks point to the drop in network audience share as evidence of their claim that the new media are succeeding in the marketplace.

Those in favor of retaining the rule disagree that the rule prevents the networks from competing with the new media. They point to the FCC's 1981 Declaratory Ruling allowing CBS to acquire nonbroadcast rights to television programs, for the now failed CBS Cable; CBS's proposed MDS venture with Contemporary Communications, Inc. and its recently announced joint venture with HBO and Columbia Pictures to build a movie studio; and, ABC's multiple nonbroadcast projects with Hearst, ESPN, Sony, and Group W Cable.19/ The only activity the networks are restrained from, they point out, is broadcast television program syndication.

19/ Declaratory Ruling on Section 73.658(j)(1)(ii), 87 F.C.C. 2d 30 (1981), aff'd sub nom. Viacom International, Inc. v. FCC, 672 F.2d 1034 (2nd Cir. 1982).

The problems for the networks, however, are not insignificant. Although it has been predicted that, because of growth in the general population and number of households, the networks' audience in terms of households and viewers will remain relatively constant and will not decline along with their shares, it also is predicted that network costs for programming will increase significantly. Without the increases in audiences they have enjoyed over the past thirty years, the networks may find it increasingly difficult to compete successfully for new programming. The networks' inability to share in syndication and other subsidiary rights because of the Rule has therefore become more than just an inconvenience. In order to pay the high prices prime time programming demands, the networks need to be able to share in the non-network revenues generated through exploitation of subsidiary rights. The only alternatives are either to raise advertising rates or purchase less expensive programming. Given the increasingly competitive nature of the advertising business, it is unlikely that the networks would be able to raise their rates sufficiently to cover their increasing program costs. An undesirable alternative would be to increase the number of minutes devoted to advertising each hour. This would likely be counter-productive since advertisers would resist increased "clutter" and viewers would have additional incentive to desert the networks for advertising-free subscription services. Nor is purchasing less expensive programs a viable solution. It is difficult to envision producers being able or willing to provide the kinds of network prime time drama and comedy that comprise the bulk of the networks' schedules for very much less than they now charge. It has been suggested that, in order to cut costs, the networks may have to begin scheduling game shows and other low budget programs in prime time. One potential outcome of Rule retention, therefore, is that the producers objecting to repeal might find themselves without customers for the very programming they argue needs protection. Not only would the networks and producers suffer from such cutbacks, but so too would the independent stations that depend on expensive off-network programming for much of their schedule. The ultimate loser, of course, would be the public.

Producer Versus Network Control

Program producers (both studio and independent) claim that if the networks are permitted to obtain a financial interest in programming and re-enter the syndication business, producers will be at a critical disadvantage in bargaining and negotiating with the networks. First, they claim they would be unable to resist network demands for financial participation and syndication rights. Second, and more important for some, producers fear losing creative control of their programs if the networks regain a financial interest.

Experience does not support these fears. Prior to adoption of the Rule, the networks did not obtain a financial interest in all programs. While they commonly obtained syndication rights from producers who did not operate their own syndication business, this was not typically the case with programs produced by the major studios or other producers operating their own syndication business. Further, independents not desiring to negotiate directly with the networks could always enter into an "umbrella" agreement with a studio, much as they do today.

Regarding fears about creative control, with or without a financial interest in a program, the networks already have ultimate or final control over the nature of the programs they purchase for broadcast. Indeed, as a licensee (each with five owned and operated stations) with a responsibility to its affiliates, each network properly oversees the content of each program it broadcasts. It is in the mutual interest of networks and program suppliers to have successful programs. Disagreements about how to achieve that commercial success exist today and inevitably are part of the television program development and production process. It would be unfair, however, to characterize the network-producer relationship as an adversarial one in which all producers are in conflict with all three networks. To the contrary, most producer-network relationships are mutually beneficial. Repeal of the Financial Interest and Syndication Rule will not significantly alter these relationships.

The Commission has inquired about the imbalance in bargaining power between producers and the networks. Most producers as well as network representatives agree that while there may be an imbalance in favor of the network in initial negotiations, once a program qualifies as a "hit" (i.e., the network wants to renew it), the advantage shifts to the producer. Indeed, the Network Inquiry Special Staff found, that among the network-producer contracts that they examined, all had been amended for series appearing on the network for more than three years.20/ Therefore, to assert that the relationship between a network and a producer is one-way and imbalanced is to ignore industry practice. If the fear on the part of producers is that they will be forced into unfavorable contracts with the networks, they do not adequately recognize the shift in bargaining power that occurs when a program is successful enough to be renewed.

While the question of program control is an important one for producers, it is not addressed by the Rule in question. The networks today, with the Rule in place, appropriately control the programs they license and broadcast. Repeal of the Rule will not change the fundamental buyer-seller relationship between network and producer in which the networks have the ultimate control of choosing to broadcast or not to broadcast a particular program.

20/ Special Staff Analysis at 463.

<u>Program Warehousing</u>

The most difficult issue raised by proposals to repeal the Rule is whether independent television stations require special protection from potential network "warehousing" of programming. While the three preceding issues appear to be allocative and therefore outside proper government action, this issue potentially involves important competitive issues. However, as discussed below, there is little reason to believe that the potential for warehousing is a real threat and, more importantly, if it were to become a problem, the proper remedy lies more appropriately through antitrust enforcement by the Department of Justice rather than by Commission rule.

Independent television stations fear that if the networks are permitted to obtain syndication rights for network series and re-enter the syndication business, there will be a "conflict of interest" where the networks will control sale and use of programs used to compete with their network affiliate and O & O schedules. The independents claim that the networks would withhold popular programs from syndication in order to limit this competition. This claim goes on to argue that the result would be a lessening of competition in the program syndication business, weaker independent stations, and, therefore, higher overall advertising costs. There is little empirical support, however, for these claims, all of which hinge on the desire and ability of the networks to withhold programming.

Independent distributors also fear network reentry into syndication claiming that if the networks are able to obtain syndication rights at the time of initial negotiations for network first run, independent distributors will not have a chance to bid on such rights. They claim, therefore, that the syndication business would become more concentrated.

This alleged potential for withholding is based upon three questionable assumptions about network activity that, while theoretically possible, do not reflect the reality of sound business practice. First, the withholding argument is premised on the networks' ability to control virtually all off-network programming. In order to accomplish this, the networks would either have to buy syndication rights for all programs they develop or, since this would be prohibitively expensive, buy syndication rights only for those series that become hits. The problem with this assumption is that no one can predict which programs will be successful. One only has to look at the extremely high failure rate of program development to see the difficulty involved. The notion that the networks could control even a majority of syndicated programming is thus totally at odds with the state of the industry. The program syndication market is competitively structured and was so before the networks were restricted by the Rule.

The second questionable assumption underlying the alleged withholding threat is that the three networks will collusively form an undetected cartel to coordinate their syndication activities. Given the highly competitive nature of the television programming and syndication businesses, such coordinated action, or its potential success, is highly improbable. Not only would the networks have to avoid Justice Department detection and enforcement, they would have to avoid detection by potential private litigants. The latter problem would be particularly acute since the television distribution industry is extremely fluid with personnel moving among firms and industry segments many times during a career. Finally, the most difficult task for the cartel would be to enforce its agreements since the incentives to violate the agreement would be extremely high, given the assumed demand for scarce off-network programming. Those who argue that the networks would not have to act collusively, but only in parallel, fail to recognize the significant incentives to enter the syndication business, especially if there is a shortage of product.

The third questionable assumption is that the networks will engage in irrational business practices. That is, they would purchase, at considerable expense, program syndication rights and then choose not to exercise those rights. A primary reason the networks desire to reenter the syndication business, however, is to be able to share in the rewards associated with a successful television series by participating in syndication revenues. For the networks to "sit" on these rights, failing to exploit them, would be acting against their own and their stockholders' best interests. Further, since the networks would rarely be the sole owner of a program, they would open themselves up to lawsuits from partners if they were to act contrary to their partners' (and their own) interests. To argue that the networks would pay for rights they would not use is to ignore the fiscal necessities of the highly competitive television entertainment business.

Because of the highly unlikely event that the networks would have the desire or the ability to withhold programming, it is not even necessary to address claims that independent station viability would be harmed and therefore advertising rates would increase if the networks were permitted to engage in program syndication. It should be noted, however, that even if a convincing showing can be made that independent station strength is related to local market spot advertising rates, linking station health and advertising rates to any particular program or program type is a separate issue.

CONCLUSION

Although producer fears about repeal of the Commission's Financial Interest and Syndication Rule are genuine, they do not appear to be justified. Although some independent producers may find it difficult to remain "independent" (*i.e.*, outside an "umbrella" arrangement with either a major studio or a network), it is unlikely that the business of producing television programs, especially prime time series, will become any more concentrated. Although it is likely, as was the case before the Rule, that the networks will be able to obtain syndication rights from independent producers, there is no evidence such arrangements will do anything but shift a portion of the syndication business from the studios to the networks. However, if producers would rather work with the studios, there would be nothing preventing them from doing so through an "umbrella" arrangement giving the studios syndication rights.

Producer concerns about "creative control" are understandable but again unsupported. The networks already have significant control over program content and if producers fear network intrusion they will always be able to seek "insulation" by working through the studios as they do now.

Likewise, if individual program distributors fail because of the entry of more efficient competitors, this will not result in significant increases in concentration and, in any event,should not be the concern of an independent regulatory agency. If, on the other hand, business failure is the result of anticompetitive behavior and undue market power, then there are sufficient existing antitrust remedies available to the Department of Justice and private litigants.

Based upon available evidence, the only issue raised that may be more than allocative is the impact of eliminating or modifying the Rule on the availability of programming to independent television stations. If eliminating the Rule resulted in withholding popular off-network syndicated programs from syndication, then questions would have to be raised about network behavior. However, such an outcome is unlikely. And if the networks were able to create an effective cartel, they certainly would find themselves subject to Department of Justice and private antitrust litigant scrutiny and action.

The ability of the networks to withhold programming from the syndication market is based on three seemingly implausible assumptions: (1) networks would be able to control the vast majority of "important" programs in syndication; (2) networks would be able to maintain the cartel and avoid detection; and (3) networks would act irrationally and not exploit a valuable property.

Summarizing, the Commission's Financial Interest and Syndication Rule never achieved its intended effect of increasing both the number of producers and the amount of programming available for both network broadcast and syndication. Both program supply and program syndication markets are competitively structured today and were so before the Rule was promulgated. Overall, therefore, the Rule appears to have had little impact on the program market other than skewing market shares in the direction of producers, and permitting entry by some new firms. Repeal, however, would havethe positive effect of promoting competition in program supply by permitting independent producers to work directly with the networks if they so desire. Repeal also would permit increased competition in program distribution by permitting three additional entities (i.e., the networks) to compete.

Perhaps most importantly, to the extent that the Rule is concerned with allocating revenues and profits among firms and industry segments, it is an inappropriate activity of a government agency. In addition, to the extent that protection against anticompetitive behavior and undue market power is required, sufficient remedies rest with the Department of Justice and private antitrust litigants exercising their rights under existing law.