

American University Washington College of Law

Digital Commons @ American University Washington College of Law

PIJIP Faculty Scholarship

Program on Information Justice and Intellectual Property

2007

Summing Up the Public Interest. Review of Media Diversity and Localism: Meaning and Metrics

Victoria F. Phillips

American University Washington College of Law, vfphillips@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/pijip_facsch



Part of the [Communications Law Commons](#)

Recommended Citation

Phillips, Victoria F. "Summing Up the Public Interest. Review of Media Diversity and Localism: Meaning and Metrics, edited by Philip M. Napoli." *Federal Communications Law Journal* 60, no. 1 (2007): 157-182.

This Article is brought to you for free and open access by the Program on Information Justice and Intellectual Property at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in PIJIP Faculty Scholarship by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.



American University Washington College of Law

Washington College of Law Research Paper No. 2008-45

**SUMMING UP THE PUBLIC INTEREST: A REVIEW OF “MEDIA
DIVERSITY AND LOCALISM: MEANING AND METRICS,” EDITED BY
PHILIP M. NAPOLI**

Victoria F. Phillips

Summing Up the Public Interest: A Review of “Media Diversity and Localism: Meaning and Metrics,” edited by Philip M. Napoli

Victoria F. Phillips*

“Not everything that can be counted counts, and not everything that counts can be counted.”

-Albert Einstein

It has been more than ten years since Congress required the Federal Communications Commission (“FCC”) to review its media ownership rules and decide whether any of them are still necessary and in the public interest in light of changes in the media industry. It has not been an easy process. The battle continues.

In the past decade, there have been several rounds of public comment on proposed rule changes, numerous empirical studies, court challenges, revisions dramatically relaxing the rules in 2003, public and congressional outcry over these changes, more court challenges leading to a remand, and, most recently, a series of public field hearings and yet more studies. All of these activities have been undertaken amidst a swirl of controversy. And the industry and public still await any modifications to the rules. Current FCC Chairman Kevin Martin recently hinted at the imminent release of proposed rule changes, shortly after making public controversial empirical studies and only days after holding the last field hearing. Public interest group and congressional outcry screaming foul quickly hit fever pitch again.

The media industry still claims that it cannot survive in the new media landscape saddled by rules originating in a three network world. It demands

* Victoria Phillips teaches communications law and is Assistant Director of the Glushko-Samuelson Intellectual Property Law Clinic at American University’s Washington College of Law. She headed the Mass Media Legal Branch and served in the Office of General Counsel at the Federal Communications Commission and practiced communications law at Wiley, Rein and Fielding in Washington, D.C. before joining the WCL faculty. She also served as Assistant General Counsel of the National Endowment for the Humanities and clerked for Baltimore U.S. District Judge Edward Northrop.

further relaxation of the ownership rules to allow further consolidation and much needed economies of scale to preserve struggling media voices and allow them to compete. It contends that there has been ample time for study and debate. It says the time to act is now. Public interest, consumer groups and members of Congress from both sides of the aisle continue to maintain that any rule change allowing further consolidation of the nation's media is a grave threat to the core values of localism and diversity so vital to our democracy. They contend that the time is not right, arguing that any proposed revisions to media ownership rules are far from ready for prime time. Once again, they claim, the Commission is rushing to a predetermined outcome favoring consolidation based on a record they allege is rooted in biased and flawed studies, a tainted peer review process, and insufficient time for public review and comment.

Philip Napoli's, "Media Diversity and Localism: Meaning and Metrics," published earlier this year, is a thoughtful and timely addition to these raging media policy debates.¹ The collection of essays examines the concepts of diversity and localism underlying the Commission's public interest standard and explores their meaning for current communications policy and decision making. The volume arose out of a December 2003 conference at Fordham University organized by Napoli, a pioneer in the field of communications policy analysis, and the Director of the Donald McGannon Communication Research Center there. The goal of the gathering was to bring together scholars from a variety of disciplines to generate ideas, insights, and research approaches to inform the decision-making process in the ongoing media ownership debates and other contexts in which diversity and localism principles are relevant.

The goals of competition, localism, and diversity have long formed the foundation of the public interest standard underlying our system of American broadcast regulation. The bargain has been that it is a broadcaster's duty to serve the public interest in exchange for the free and exclusive use of the nation's valuable and scarce spectrum. Under sections 307 and 309 of the Communications Act, the FCC may grant the use of a broadcast frequency for a limited term to an applicant that demonstrates that the proposed service would serve "the public interest, convenience, and necessity."²

A number of the essays in Napoli's collection illustrate how these foundational tenets of the public interest standard have been shaken as competitive concerns have increasingly nudged localism and diversity goals to one side in the regulatory conversations and decision making of

1. MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS (Philip M. Napoli ed., 2007).

2. 47 U.S.C. §§ 307, 309 (2000).

the last two decades. But even amidst the thwarted attempt in 2003 by the Powell Commission to overhaul the media ownership rules and the Martin Commission's stated intention to forge ahead with relaxation of the rules, the rhetoric on both sides still invokes localism and diversity as bedrock principles that benefit the country in important ways. In name at least, even those favoring relaxation of the rules claim the proposed changes support the longstanding goals. They argue that consolidation will help to preserve them in the new and competitive media landscape by invigorating voices that would otherwise disappear. On the other hand, those opposing relaxation claim these goals solely as their own as they fight the trend toward consolidation. They feel they are struggling to salvage the little regulation that remains based on these vital broadcast policy objectives. Given the continuing debate, it is surely an appropriate time to turn to Napoli's volume to remind us of the values underlying these norms and the continued and perhaps greater need for increased attention to each in today's evolving and congested media marketplace.

As the foundational essays in the volume make clear, the concept embodied in the goal of localism in media policy is a simple one—broadcast licensees should serve the needs of their local communities. Local service is critical for an informed and engaged citizenry and, in such respects, is fundamental to our participatory democratic process. The Radio Act of 1927 embraced localism as a central goal. Its purpose was to provide “fair, efficient and equitable radio service to each of the [states and communities seeking such service].”³ Under the mandate of the Communications Act of 1934, the FCC was charged with allotting frequencies fairly and efficiently throughout the several states and their local communities.⁴ The hope was that these broadcasters would serve the public much like local newspapers—by providing programming that served the needs and concerns of the local community. Like the newspaper, the broadcaster would also ideally promote political participation and education and preserve unique local cultural values and traditions.

The essays also illustrate that over the years, the Commission has enacted specific rules and policies directed at promoting broadcast localism. In addition to structural ownership limitations for radio and television, the Commission's early programming policies favored fostering locally originated and oriented programming, particularly news and information. The FCC has also limited the power of networks over affiliates, required certain nonentertainment programming, required cable carriage of local broadcast signals, and required that a broadcast station's

3. Radio Act of 1927, ch. 169, § 9, 44 Stat. 1162, 1166 (1927).

4. Communications Act of 1934 § 307, 48 Stat. 1083-84 (1934) (current version at 47 U.S.C. § 307(b) (2000)).

main studio be located in the community it serves. In addition, at one time it even mandated formal ascertainment procedures that required licensees to affirmatively determine issues of concern to their communities and provide programming and public service announcements responsive to those needs. Many of these requirements have been eased or eliminated over the years, criticized as inefficient, anti-competitive, and administratively burdensome. Indeed, over the past two decades, robust media competition and a licensee's economic best interests have been deemed sufficient incentives to make licensees responsive to the community's needs.

Similarly, the volume provides ample evidence that the goal of diversity has time and time again been reaffirmed as a fundamental goal of our national broadcast policy. Like localism, it is also deeply grounded in the nation's core democratic values. The precursor to the FCC, the Federal Radio Commission, declared in 1929 that a station "should meet the tastes, needs and desires of all substantial groups among the listening public."⁵ The Supreme Court has observed that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁶ And the FCC has frequently echoed that language and did so even in the deregulatory June 2003 ownership decision, noting "a diverse and robust marketplace of ideas is the foundation of our democracy." Diversity of media ownership serves as a proxy for assuring that citizens are well informed through exposure to multiple points of view. In addition, it assures that multiple voices are heard. Several forms of diversity are discussed in the essays including viewpoint diversity, or the availability of media content reflecting a variety of perspectives; program diversity, or a variety of programming formats and content; outlet diversity, or multiple independently-owned firms; and source diversity, or the availability of content from a variety of producers. In addition, since the civil rights era, encouraging minority and female ownership of media outlets has become an increasingly central component of the diversity principle. As with localism, the FCC's vision of how to best achieve diversity has gradually shifted to a marketplace approach, favoring the elimination of specific rules designed to promote diversity in both programming and ownership, and relying instead on competition.

Napoli's volume is a thoughtful and first of its kind compilation of some of the ongoing research and writing addressing these fundamental goals. The essays draw on scholarship from a wide variety of disciplines beyond the law, including political science, communications policy,

5. Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32, 34 (1929).

6. Associated Press v. U.S., 326 U.S. 1, 20 (1945).

sociology, and economics. In organizing the collection, Napoli attempts to both address the conceptual and historical underpinnings of localism and diversity and demonstrate the use of performance metrics to assess the existing policies intended to preserve and promote these goals. He concludes with a series of essays proposing a rethinking of what changes in the new media landscape mean for traditional communications theory and metrics.

The first essays address the question of how to define the principles of localism and diversity in order to properly translate them into reliable performance metrics for use by decision makers. While media policymakers have long been challenged with crafting a regulatory framework to preserve and promote these goals, the last decade's ownership proceedings have relied increasingly on empirical studies attempting to address their relationship to media ownership and market conditions. But how can we measure goals like localism and diversity? The values underlying these terms are rich and complex. Can they in fact really be measured at all? Should they be measured at all? In introducing the volume, Napoli readily admits the difficulty in assessing norms such as localism and diversity.⁷ The two goals and the values underlying them are not easily reduced to measurable statistics. Not everything that can readily be counted should count for such an analysis, and many things that really should count in this analysis are in fact not counted at all. But as Napoli rightly points out, in the current policy and judicial environment, empirical evidence has taken on an increasingly important role in justifying agency policy choices.⁸ Indeed, in the FCC recent media ownership efforts, the reviewing courts have demanded it.

As many of the essays in the volume recount, the FCC's structural media regulations have been the subject of endless empirical analyses over the years. In the fall of 2002, the FCC released a series of twelve studies aimed at assessing the validity of the existing rules and their demonstrated effects on diversity and localism. The FCC also established a Federal Advisory Committee on Diversity in the Digital Age and an FCC staff Localism Task Force to examine issues related to these specific goals. Since launching its latest proceeding in response to the 2003 remand, the FCC also made good on its promise to hold six public field hearings and commissioned another series of studies on these issues. However, throughout the rather tumultuous process, the studies themselves and this very notion of the inherent difficulty in subjecting the norms to empirical assessment has often been at the very heart of the controversy.

7. MEDIA DIVERSITY AND LOCALISM, *supra* note 2, at xvi.

8. *Id.* at xix.

The battle over media ownership metrics has crescendoed in recent months with allegations by supporters of the rules alleging a predetermined outcome and tainted record based on flawed studies and a biased peer review process. This squabble was followed by accusations by Senator Barbara Boxer that the FCC had actually suppressed several other studies cautioning against loosening ownership rules. One allegedly suppressed study contradicted record evidence demonstrating that locally owned stations actually provide more local news than nonlocally owned stations. Another determined that radio station ownership has become much more consolidated since passage of the Telecommunications Act of 1996.⁹ These revelations were followed by calls for an investigation into these claims by the FCC Inspector General. Even more recently, the House Commerce Committee under Chairman John Dingell has initiated an inquiry to ensure that the FCC's "processes are fair, open, and transparent and serve the public interest." The Senate is also considering legislation to delay any FCC action on certain ownership rules. In light of these swirling controversies, Napoli's volume is a welcome entry into the fray. It provides a scholarly foundation for assessing some of the central questions in this debate.

Kicking off the volume are essays addressing the notion of structural regulation and its relation to the goals of diversity and localism. Economist Joel Waldfogel of University of Pennsylvania's Wharton School sets the pace in a piece asking why regulate media ownership at all?¹⁰ He explores research findings relevant to the development of media ownership policy and cautions that sensible media regulation first requires articulation of what aspects of the public interest are affected by media and second, concrete evidence that ownership really affects these things. Despite a consensus that media should stimulate civic participation and that this is an appropriate goal, he argues that we should demand more evidence of cause and effect.¹¹ Robert Horwitz, a University of California, San Diego communications scholar, looks at the history of the principle of diversity and how it has been discussed and analyzed throughout the history of the media ownership debates.¹² He finds that different kinds of media fulfill different functions in a democracy and that creating structures for facilitating a diverse media is necessary, but that real diversity will not be secured by ownership restrictions alone. He concludes that a mixed system

9. Telecommunications Act of 1996, 47 U.S.C. §251 et seq. (2000).

10. Joel Waldfogel, *Should We Regulate Media Ownership*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 3, 3 (Philip M. Napoli ed., 2007).

11. *Id.* at 5.

12. Robert B. Horwitz, *On Media Concentration and the Diversity Question*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 9 (Philip M. Napoli ed., 2007).

of mass media with different mandates and different modes of financing might instead provide the surest means to achieve this goal.¹³

These two foundational essays are followed by three empirical pieces on media ownership. Peter DiCola of the Future of Music Coalition explores the effects on employment caused by increased consolidation in the radio industry.¹⁴ The loss of jobs and wage reductions, he argues, affect localism and diversity goals as fewer local residents make programming decisions such as what news to report or what music to play.¹⁵ Economists Peter Alexander of the FCC and Brendan Cunningham of the U.S. Naval Academy explore the relationship between ownership and content diversity in television news.¹⁶ Their empirical evidence confirms that concentration in media markets leads to homogeneity in the news and information conveyed to consumers.¹⁷ Communications theorist Alexander Halavais of the University of Buffalo employs textual analysis to examine the impact of common ownership of newspapers on content.¹⁸ His results show a decreasing level of diversity in content among newspapers the larger their national reach. On the other hand, they show that local newspapers are more apt to maintain their local character.¹⁹

Another set of essays focuses on conceptual and methodological issues arising in assessing the goals of media diversity and localism. Stefaan Verhulst, Director of Internet Governance at the Markle Foundation, explores the role of mediators in the communications process.²⁰ He looks at the ways in which technological change is transforming their role and what this means for communications policymaking. When the number of intermediaries multiplies, consumers suffer from information overload. In addition, the withering of traditional intermediaries has rendered it increasingly difficult to differentiate quality information from the rest of the media noise. Verhulst posits that consumers sorely need new intermediaries to create access points for meaningful information yet worries about the lack of transparency, over-

13. *Id.* at 43.

14. Peter DiCola, *Employment and Wage Effects of Radio Consolidation*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 57 (Philip M. Napoli ed., 2007).

15. *Id.* at 76.

16. Peter J. Alexander & Brendan M. Cunningham, *Public and Private Decision Making: The Value of Diversity in News*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 79 (Philip M. Napoli ed., 2007).

17. *Id.* at 94.

18. Alexander Halavais, *Convergence of Newspaper Election Coverage: 1992 to 2000*, in DIVERSITY AND LOCALISM: MEANING AND METRICS 97 (Philip M. Napoli ed., 2007).

19. *Id.* at 108.

20. Stefaan G. Verhulst, *Mediation, Mediators, and New Intermediaries: Implications for the Design of New Communications Policies*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 113 (Philip M. Napoli ed., 2007).

commercialization, and audience fragmentation inherent in search engines and other digital gatekeepers.²¹ Communications scholar Sandra Braman of the University of Wisconsin, Milwaukee cautions against what she views as the potential overemphasis or “fetishization” of diversity as a policy goal.²² She worries that the mere accomplishment of diversity, however measured, might be deemed by activists as sufficient in itself to ensure a participatory democracy. Her piece reminds us of additional important policy goals that may go overlooked due to this overarching focus. Braman suggests that those engaged in battles to increase media diversity should also attend to issues such as access to information, education, integrity of the voting process, and the ability of citizens to truly participate in decision making. She questions whether there can be meaningful content diversity if citizens receive information but are unable for other reasons to connect it with their own political activism.²³ Economist Stephen Wildman, Director of the Michigan State University's James H. and Mary B. Quello Center for Telecommunication Management and Law provides a detailed critique and analysis of the Diversity Index used by the Powell Commission to attempt to quantify and weigh media voices in a community to assess when to justify relaxation of the rules in the 2003 order.²⁴ In a comparative piece, Stephen McDowell and Jenghoon Lee of Florida State University look to Canada's program production points system for broadcasting as a model for better using existing publicly available data in the station's public file to measure localism in programming.²⁵ Finally, longtime consumer advocate Mark Cooper, Director of Research at the Consumer Federation of America, explores how media markets can better be analyzed to account for the realities of citizen media usage.²⁶ In his new study of the same ten media markets used by the FCC in 2003, Cooper finds that the Diversity Index dramatically underestimated the concentration of local news markets because of the use of improper media weights and a failure to estimate audience size.²⁷

21. *Id.* at 124-25.

22. Sandra Braman, *The Limits of Diversity*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 139, 139 (Philip M. Napoli ed., 2007).

23. *Id.* at 149-50.

24. Steven S. Wildman, *Indexing Diversity*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 151 (Philip M. Napoli ed., 2007).

25. Stephen D. McDowell & Jenghoon Lee, *Tracking “Localism” in Television and Broadcasting: Utilizing and Structuring Public Information*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 177 (Philip M. Napoli ed., 2007).

26. Mark Cooper, *When Law and Social Science Go Hand in Glove: Usage and Importance of Local and National News Sources – Critical Questions and Answers for Media Market Analysis*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 193 (Philip M. Napoli ed., 2007).

27. *Id.* at 200.

In two essays exploring issues surrounding minorities and diversity in the media, legal scholar Leonard Baynes of St. John's University School of Law vividly chronicles the state of both underrepresentation and misrepresentation or "white out" of minorities in prime time network television, and Christine Bachen, Allen Hammond, and Catherine Sandoval of Santa Clara Law School lay an elegant foundation for the legal theories and social science evidence supporting policies promoting media ownership by minorities.²⁸ These essays are important contributions to a better understanding of why this aspect of the diversity goal has become a critical component of the ongoing debates.

Perhaps the most intriguing essays in the entire collection make up a final chapter entitled "Contextualizing Media Diversity and Localism: Audience Behavior and New Technologies." The three forward-looking pieces challenge our assumptions and move us forward to a new understanding of how the radical changes in the media landscape have transformed audience behavior. They explore how this transformation should inform a rethinking of the longstanding goals of diversity and localism. Communications scholar James Webster of Northwestern University analyzes diversity of exposure to assess how much increased channel capacity has actually led to a narrowing of content consumption habits for the typical viewer.²⁹ He argues that a critical component of the diversity question is how consumers do or do not make use of the universe of content. His findings suggest that there is abundant horizontal diversity as the mass media audience is widely distributed across several dozen national networks rather than many little media enclaves as assumed.³⁰ Political scientist Matthew Hindman of Arizona State presents an inventive cross-media analysis examining the distribution of audience attention and finding that Internet content produces levels of audience concentration greater than those in traditional media.³¹ His findings also suggest that the Internet disadvantages local content providers.³² Similarly, Sociologist

28. Leonard M. Baynes, *White out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 227 (Philip M. Napoli ed., 2007); Christine M. Bachen, Allen S. Hammond, IV & Catherine J. K. Sandoval, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 227 (Philip M. Napoli ed., 2007).

29. James. G. Webster, *Diversity of Exposure*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 309 (Philip M. Napoli ed., 2007).

30. *Id.* at 322.

31. Matthew Hindman, *A Mile Wide and an Inch Deep: Measuring Media Diversity Online and Offline*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 327 (Philip M. Napoli ed., 2007).

32. *Id.* at 337, 344.

Eszter Hargittai of Northwestern University looks at audience behavior online and the related impact on the content that online users access.³³ She finds that local content seems to be less within reach of most users as it is the hardest to aggregate in national databases. In addition, she confirms that sources tied to traditional media outlets are the easiest to access.³⁴ Wrapping up the volume is a contribution by legal scholar Ellen Goodman of Rutgers University Law School–Camden arguing that policymaking should more accurately consider the dynamics of media usage patterns, the changing nature of content distribution, and the realities of consumer demand.³⁵ While democratic theorists all agree that exposure to diverse content is important for robust democracy even if citizens do not seek it, Goodman contends that the new media landscape demands a new emphasis on content consumption in addition to content availability. She advocates the use of subsidies for new digital media that not only supply meaningful programming but that also engage an increasingly distracted and atomized audience in that content.³⁶

While Napoli's volume is not exactly ideal beach reading, it is an important contribution to the ongoing debates over public interest regulation of broadcast licensees sitting on what has been dubbed the "beachfront property" of the nation's airwaves. And while there is no doubt that the media marketplace has been revolutionized since most of these policies came into being and that audience patterns have surely changed, the scholarship confirms that the mainstream media are still the dominant and most accessible sources of our news and information—the lifeblood of democracy. But the commercial pressures on the media industry are also very real. Media policy making ultimately must navigate the constant tension between those pressures, democratic values, and the Constitution. The essays in this volume are deserving of thoughtful study and debate for a better understanding of how the values underlying media diversity and localism may not only be preserved as much as possible in the old media, but also promoted in creative and engaging ways in the new media landscape.

33. Eszter Hargittai, *Content Diversity Online: Myth or Reality*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 349 (Philip M. Napoli ed., 2007).

34. *Id.* at 360-61.

35. Ellen P. Goodman, *Proactive Media Policy in an Age of Content Abundance*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 363 (Philip M. Napoli ed., 2007).

36. *Id.* at 378.