

Broadcasting Regulations and Policies for Increasing Diversity: A Comparative Study of the US and Taiwan

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Broadcasting spectrum has long been considered as public trust and scarce resource. Even though the broadband and digital technologies are challenging the concept of scarcity, the fundamental belief to require broadcasting media to serve public interest has never been questioned. Diversity in media is seen as an achievement of serving public interests. Minority viewpoints in the media are less represented, and are sometimes even mis-represented because of minorities' lower social economic and political power. This brought about the policy considerations of promoting minority ownership and hiring. In the U.S., beginning in the 1970s, policies giving preference to minority ownership were developed¹. Taiwan's media policies have been long influenced by the U.S. Moreover, with the development of political democracy in Taiwan, a series of actions to encourage and facilitate diversity and minority viewpoints in media began in the 1990s. However, current trends in the U.S. include the FCC is relaxing its ownership regulations and allowing higher media concentration plus the courts' overturning the minority ownership preference decision, In Taiwan, the trend is toward policies that guarantee minority ownership and government-sponsored stations and programs.

In this article, the development of regulations and policies for diversity both in the U.S. and Taiwan will be addressed. A comparison of the policy background and content

¹ Howard Klemiman, *Content Diversity and the FCC's Minority and Gender Licensing Policies*, Journal of Broadcasting & Electronic Media, 412 (1991).

between these two countries will be investigated. Additionally, the impacts of these policies will be demonstrated and discussed.

The Theoretical Foundations for Broadcasting Regulations

The radio spectrum is seen as a natural and scarce resource. In the U.S., the radio spectrum has been held by the courts to be a public resource and broadcasters are public trustees². The airwaves belong to the people not any individuals or organizations. The holders of broadcast licenses are required to serve the public interest, convenience, and necessity. In Taiwan, the radio spectrum is also seen as a scarce public resource. In order to avoid monopoly and establish a fair competitive environment, the allocation and licensed of airwaves are authorized by government. The Radio and Television Act, article 4, illustrates that frequencies used by radio/television businesses are owned by the state and their allocation shall be planned by the Ministry of Transportation and Communications in conjunction with the regulatory agency³. Moreover, the media have long been considered a means to assist in communicating the government's policy to the people, especially before the recent democratization in 1990s. During the time, the leading group of media was the political elite who exercise their influence through the media system to other groups in society⁴. For example, The 1976 Radio and Television Act was enacted to "promote the healthy development of radio/television businesses; communicate national and public policies; support social education; provide elegant

² Patrick R. Parsons & Robert M. Frieden, *The Cable and Satellite TV Industries*, 271 (1998)

³ Radio and Television Act (2003), available at <http://www.gio.gov.tw/taiwan-website/1-about_us/6-laws/ra6.htm>

⁴ Joseph Man Chan, *Media, Democracy and Globalisation: A Comparative perspective*. Media Development, 39-40 (1/2002).

entertainment; and enhance public benefits, interests, and welfare.⁵ With the development of democracy in Taiwan, the deregulation of media and the elimination of government control are in process. Meanwhile, the voices for media diversity are rising.

The Regulatory Policies for Media Diversity

The Development of Media Diversity

In the U.S., the representation of diverse voices and opinions is seen as a way to serve the public interest. In the *Associated Press v. United States*, it stated that freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.⁶ Thus, the media ownership rules in the U.S. involve the balance and negotiation between the ideas of free market and diverse voices. However, the development of media diversity is mainly tied to the political atmosphere and social movements. With the rise of civil and women's rights in the 1960s, the action for avoiding media monopoly turned into the action for promoting media diversity. The regulations for promoting media diversity started to be established in 1970s. For example, the financial interests and syndication rules, the prime time access rules and the tax certificate policy. In Taiwan, actions for promoting media diversity also started from the development of democracy in the 1990s, for instance, the radio station licenses for minorities only, the public television act for airing minority programs, and the government-sponsored programs and channels for minority groups.

⁵ Radio and Television Act (1976), Article 1, available at http://www.gio.gov.tw/taiwan-website/1-about_us/6-laws/ra6.htm

⁶ *Associated Press v. United States*, 326 U.S. 20 (1945)

In the Matter of 1998 Biennial Regulatory Review defined that media diversity included three types of diversity: (1) viewpoint diversity, which “refers to helping the material presented by the media reflect a wide range of diverse and antagonistic opinions and interpretations,” (2) outlet diversity, which “refers to a variety of delivery services (e.g., broadcast stations, newspapers, cable and DBS) that select and present programming directly to the public,” and (3) source diversity, which “refers to promoting a variety of program or information producers and owners.”⁷ In the U.S., because the regulations for directing viewpoints or content will violate the First Amendment, the rules for promoting media diversity are ownership rules for media outlets and program sources to prohibit media monopoly and encourage diverse voices.

The Regulations for Outlet Diversity - Media Ownership Rules

The first media ownership rule to prohibit common ownership of stations in the same market was instituted in 1941.⁸ The local radio ownership rule initially prohibited a party owned more than one station in the same market. In 1993, local radio duopoly prohibition was eliminated to enhance the economic efficiencies. A single licensee to own local radio station combinations ranging from a freestanding AM and a similar FM in the smallest markets up to two AMs and two FMs in the largest markets.⁹ In 2003, the

⁷ In the Matter of 1998 Biennial Regulatory Review, Notice of Inquiry (1998), available at <http://www.fcc.gov/Bureaus/Mass_Media/Notices/1998/fcc98037.txt>

⁸ FCC's Review of the Broadcast Ownership, available at <<http://www.fcc.gov/cgb/consumerfacts/reviewrules.html>>

⁹ Loy A. Singleton, & Steven C. Rockwell, *Silent Voices: Analyzing the FCC "Media Voices" Criteria Limiting Local Radio-Television Cross-Ownership*, Communication Law and Policy, 390 (2003).

maximum of stations owned by an entity is relaxed up to eight.¹⁰ Also, the National TV Ownership Rule has been amended a number of times to increase the common ownership since it enacted in 1941. Currently, the national TV ownership rule prohibits an entity from owning television stations that would reach more than 39% of U.S. television households. The dual TV network remains. In 1946, similar to the concept of the local radio ownership rule, the dual TV network rule was enacted to prohibit any entity from maintaining more than a single television network. Today, the dual network rule restricts a merger between or among the big four television networks: ABC, CBS, Fox, and NBC.¹¹ Originally, any kind of cross-media ownership in the same market was banned. The Radio/TV Cross-Ownership Restriction (1970) prohibited common ownership of a radio and TV station in the same market.¹² The Newspaper/Broadcast Cross-Ownership Prohibition (1975) barred common ownership of a broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.¹³ Today, the restriction of radio/TV cross-ownership is changed. The rule permits the common ownership of at least one television and one radio station in a market. But, the prohibition for newspaper/broadcast cross-ownership still remains.¹⁴

Before the 1990s, the Taiwan government had long considered broadcasting media as a means to promote its policies. In order to use media to promote government policies, the Taiwan government directly invested in national television networks and radio stations to be the primary shareholder, and refused to accept the new applications

¹⁰ FCC Changes to Ownership Rules, PBS Online News Hours, Jun, 2003, available at <http://www.pbs.org/newshour/media/conglomeration/fcc_report_06-02.html?>

¹¹ FCC's Review of the Broadcast Ownership, supra note 8.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

for commercial broadcasting licenses until 1993. The major changes can be seen in the 2003 Radio and Television Act, Article 1 illustrates that the purpose of the act is to “promote the healthy development of radio/television businesses; ensure media professionalism and independence; protect the audiovisual rights and interests of the public; and enhance public benefits, interests, and welfare.”¹⁵ Compared to the 1976 act, the role of promoting public policies was eliminated. Moreover, government or political parties are banned from investing in any commercial media. Common media ownership or cross-media ownership issues were not seriously considered before 1993 because the applications for radio frequencies were frozen. After the commercial broadcasting market was re-opened, the media ownership rules started being considered. Unlike the U.S., a completely common ownership or cross-media ownership of broadcasting media in Taiwan is not permitted. There is merely a small part of shares of media is permitted. Any newspaper, terrestrial radio or television station is permitted to hold no more 10 percent of the total shares of other broadcasting media.¹⁶ Additionally, because the media market size is too small to support local or community television stations, local television or syndicated stations do not exist in Taiwan. Thus, the broadcasting regulations target local radio stations, national radio networks, and national television stations.

However, prohibiting common ownership does not successfully carry out media diversity. The minority voices are still invisible in mainstream media. In order to increase more minority media owners to present minority viewpoints, in 1978, the FCC instituted

¹⁵ Radio and Television Act (2003), supra note 3.

¹⁶ Enforcement Rules of the Radio and Television Act. From Law and Regulations Database of Republic of China (Taiwan), available at: <<http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=1885&msgType=en&keyword=radio+and+television+act>>

a tax certificate policy to encourage the owners of broadcast media to sell their media to minorities.¹⁷ According to the Statement of Policy on Minority Ownership of Broadcasting Facilities, the FCC implemented two programs that favored minority ownership: “First, the tax certificate policy encouraged and promoted minority ownership by giving a two-year like-kind-exchange transfer tax break (USC 1071) for the sale of licenses to minorities; second, the distress sale policy allowed for license owners that were under scrutiny by the FCC (and under threat of license revocation) to sell their station to a minority for 75% of the appraised value.”¹⁸ Successfully, these two programs increased the minority owners of broadcast media. Krasnow claims that prior the adoption of the minority tax certificate policy, minorities owned only 40 out of 8,500 broadcast stations. After more than fifteen years of the policy’s administration, there were 288 radio stations, 43 television stations, and 31 cable systems owned by minorities.¹⁹ On the other hand, this policy brought out concerns about discrimination and a means for its being tax giveaway. The Congress repealed the tax certificate policy in 1995.²⁰ In Taiwan, no tax policies have been instituted to favor minority groups. This might be because the progress for promoting minorities is still in the early stage. The concerns for minority media just started from very recent years. Also, any tax favor for any group will bring out a serious debate both in government and public.

For media diversity, besides looking at ownership rules, the broadcast license application process should be examined as well. Based on the Communication Act of

¹⁷ Erwin G. Krasnow & Lisa M. Fowlkes, *The FCC’s Minority Tax Certificate Program: A Proposal for Life After Death*, Federal Communications Law Journal, 668 (2005).

¹⁸ Prepared by KPMG LLP, for FCC, *History of the Broadcast License Application Process*, Broadcast Study, 12 (2000).

¹⁹ Krasnow et al, supra note 17, 670.

²⁰ Ibid at 671.

1934, the FCC was authorized to grant the broadcast licenses. The principles for examination of applications were to serve as “public, interest, and necessity.” When multiple applications existed, the FCC would hold a comparative hearing to award a broadcast license. The 1965 Policy Statement on Comparative Broadcast Hearings provided the guidance for a comparative hearing:

1. Diversification of control of the media of mass communications.
2. Full-time participation in station operation by owners.
3. Proposed program service.
4. Past broadcast record.
5. Efficient use of frequency.
6. Character.
7. Other factors.²¹

Diversification of control of media was the primary concern in the hearing process. If an applicant had financial interests in other media, this would be a factor to reduce the possibility that this applicant would be awarded a license.²² In order to increase the government income, Congress mandated that the FCC utilize a competitive bidding process to grant the broadcast licenses.²³ In 1997, the process of comparative hearings in the application and renewal of broadcast licenses was eliminated, and a competitive

²¹ Prepared by KPMG LLP, , supra note 18, 5

²² Ibid at 6.

²³ See Houg, Jing-In. *A Study of Non-profit Radio Stations for Under Priviledged Groups from Public Policy Perspective: Its Value and Survivability*, 41(2001), available at <<http://www.gio.gov.tw/info/2002html/90report/a.htm>>, cited from Peter C. Cramon, *Money Out of the Thin Air: The Nationwide Narrowband PCS Auction*, Journal of Economics & Management Strategy, 301(1995).

bidding process for commercial broadcast licenses was utilized. The first auction in 1999 generated about \$58 million from the distribution of 116 broadcast licenses.²⁴

In Taiwan, when the commercial broadcast licenses were re-opened in 1993, an examination process for licensing held by a “Broadcast License Examination Committee” was adopted to grant the broadcast licenses. The principles of licensing or renewal of a broadcast station are:

1. Promote the development of radio/television businesses
2. Balance the development of regions
3. Prohibit media monopoly
4. Meet local needs
5. If the above conditions are equal, the needs of different cultural and racial groups should be considered²⁵

As it can be seen, in the U.S., diversity was the primary consideration during the comparative hearing era. Currently, the bidding process suggests that economic and government income issues substitute for the concern for diversity in America. In Taiwan, originally, diversity was not the primary factor for licensing a broadcast station. In general, minorities were less competitive than the majority in the process of licensing because of their smaller market size and weaker financial support. Therefore, their applications usually were rejected during the beginning of the re-opened period.

Minority groups in Taiwan can be classified into two groups: Hakka people and indigenous people. Hakka people immigrated to Taiwan about four hundred years ago.

²⁴ Prepared by KPMG LLP, supra note 18, 15

²⁵ Houg, Jing-In. *A Study of Non-profit Radio Stations for Under Privileged Groups from Public Policy Perspective: Its Value and Survivability*, 41(2001), available at <<http://www.gio.gov.tw/info/2002html/90report/a.htm>>

They speak Hakka dialect and have their own ritual festivals and customs. The indigenous people have been in Taiwan more than one thousand years. Compared to Hakka people, the population of indigenous people is much smaller. There are a total of twelve tribes of indigenous people, each with its own cultures and dialect. Due to the long-term neglect of indigenous cultures in school and social education, most indigenous people, however, can not speak their own dialect. Their viewpoints and cultures are usually less represented in mainstream media. After the development of democracy in the last twenty years, their voices and rights are gradually gaining the public attention. In 1996, the first Hakka radio station was established via a special allocation. Later on, the Taiwan government allocated four radio licenses for Hakka people only and three radio licenses for indigenous people only.²⁶ Besides the minority radio station licenses, Hakka TV and Indigenous TV were established to provide 24-hour television programs which represent their cultures and viewpoints. Hakka TV, the first cultural group TV, was launched in 2003.²⁷ It is sponsored by the Council for Hakka Affairs. Indigenous TV was launched in 2005, and it is sponsored by the Council for Indigenous Affairs.²⁸

In sum, in the U.S., the trend of ownership relaxation in the U.S. has increased media common ownership and eliminated the policies which favor minorities. The pattern of policies and regulations in media diversity is from neglect to preference and finally turn toward economic consideration. In contrast, Taiwan's media policies for

²⁶ Government Information Office (Taiwan), *2004 Broadcast White Book*, 1 (2004), available at:

<<http://info.gio.gov.tw/lp.asp?CtNode=2989&CtUnit=682&BaseDSD=42&mp=3>>

²⁷ Hakka TV Web Site, *About US*, 2006, available at:

<<http://www.hakkatv.com.tw/index01.htm>>

²⁸ Indigenous TV Web Site, *About US*, 2006, available at:

<<http://www.ch16.com.tw/index01.htm>>

promoting media diversity are in the beginning stage. Certain radio frequency allocations and government-sponsored channels are seen as effective methods to promote media diversity. Moreover, the minority media are considered as a guarantee to provide their viewpoints and foster their cultures.

The Regulations for Source Diversity

Source diversity is measured by calculating the number of program owners or producers. The FCC assumed that a variety of program producers would present various viewpoints to serve the public interest. In 1969, the FCC began administering Equal Employment Opportunity (EEO) rules to broadcast licensees.²⁹ These regulations prohibit licensees from discriminating on the basis of race and gender. Initially, the FCC required broadcast licensees to adopt affirmative action (e.g., job training) targeted to minorities and women to increase the degree to which the personnel composition reflected the demographics of the surrounding market.³⁰ However, in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), the court held that the EEO rules were unconstitutional because they were not narrowly tailored to advance a compelling governmental interest and the FCC failed to provide any evidence supporting the relationship between workplace diversity and content diversity.³¹ To respond to the court's decision, the FCC revised its EEO rules. The new rules do not require broadcasters to hire any particular type of applicants. Instead, the new rules require

²⁹ See On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Brief for the Federal Respondents in Opposition, 2 (2001).

³⁰ Ibid at 3; Napoli, Philip M. *Deconstructing the Diversity Principle*, Journal of Communications, 13-14 (1999).

³¹ Ibid at 4.

broadcast licensees to disseminate the information of job openings widely to ensure that all qualified applicants, including minorities and women, have sufficient opportunities to compete for jobs.³² These new rules no longer examine a licensee's hiring decision; instead they focus on a licensee's recruitment effort. However, these rules are still in the revision process.

In another effort to achieve source diversity, the FCC instituted the Financial Interests and Syndication rules (fin-syn) and Prime Time Access Rule (PTAR) in the 1970s to prohibit broadcast networks from dominating their broadcasting programs. The fin-syn rules barred television networks from having financial interests in the television programs they aired beyond first-run exhibition. The PTAR limited the amount of network programming that local television stations owned by or affiliated with a network may air during prime time.³³ Initially, the fin-syn rules applied to the entire programming of the networks but were ultimately limited to programming that aired during the prime time hours (8 p.m. to 11 p.m.).³⁴ The objectives of fin-syn rules were not only restrict the television network from dominating the American people's program choices, but also to increase program diversity to serve the public interest. The fin-syn rules were repealed in 1995, and the PTAR was repealed in 1996 because the broadcast networks no longer dominated the broadcasting market in today's multichannel market.³⁵

A completely different media culture and business model exists in Taiwan. Before cable TV boomed in the 1980s, the broadcast networks were the only outlets for

³² Robert G. Finney, *Prime Time Access Rule*, The Museum of Broadcast Communications Web Site, available at: <http://www.museum.tv/archives/etv/P/htmlP/primetimeac/primetimeac.htm>

³³ Ibid.

³⁴ Einstein, Mara, *Media Diversity: Economics, Ownership, and the FCC*, 40 (2004)

³⁵ Ibid at 110.

production companies to air their programs. Thus, the broadcast networks had the privileged power to decide whose programs could be broadcasted. As a result, the television networks gradually began to work like landlords to rent out their broadcast hours to production companies or broadcast popular foreign programs to gain high ratings. Today, they usually only produce their own news program (because news programs indicate their political power) and have financial interest in prime time series (usually one or one and half hour dramas aired at 8 p.m.). Unlike the U.S., Taiwan's government has implemented a rule to regulate television networks and radio stations to at least 70% of their own total programming. One of the primary purposes of this rule is to restrict television networks from working like landlords neglecting the public interest. However, all non-imported programs, no matter whether produced by the networks or production companies, are counted in the networks' production. This has led long criticism and debate about the effects of this rule.

In the U.S., source diversity is defined as a dimension of media diversity. Unfortunately, the EEO failed to assure that minority employment would bring about diverse programming. The fin-syn and PRAT rules also failed to carry out the objective of source diversity. Einstein argues that the production business is still dominated by a few production companies. By 2002, the top six programming suppliers accounted for more than 80% of the programming.³⁶ In Taiwan, however, the concept of source diversity has not been discussed. Today, the Taiwan government devotes efforts to reducing television networks' imported programs rather than increasing program suppliers. Also, there is no rule to require broadcasters to employ minorities. Different

³⁶ Einstein, *supra* note 34, 171

cultural groups' employment is only achieved in their own media, such as Hakka and indigenous people's radio and television stations.

The Regulations for Content Diversity

Media content contains two aspects: the type of program and the viewpoints of program. The only regulation for program type, the Children's Television Act (CTA), was enacted in 1990 to require the broadcast networks to present children's educational program regularly.³⁷ Under CTA, the broadcast networks are required to air children's programming at least three hours a week during the period of 7:00 to 10:00 p.m. to serve the educational and informational needs of children ages 16 and under.³⁸ However, the purpose of CTA is to support children's education rather than encourage media diversity. In the U.S., no any regulations require media to present diverse or minorities programming. Einstein argues that content regulation is the most effective means to promote media diversity. Take CTA as an example, which guarantees that broadcasters provide children's educational program regularly.³⁹

Viewpoint-diversity is the ultimate goal for promoting media diversity. The Communications Act of 1937 first required stations to offer equal opportunity to all legally political candidates if they had allowed airtime to any candidate, known as the Fairness Doctrine.⁴⁰ The Fairness Doctrine required broadcasters to present controversial public issues with a fair and balanced coverage. The case of Red Lion created a landmark to require the media to present different perspectives:

³⁷ Ibid at 212.

³⁸ 47 C. F. R. § 73 671.

³⁹ Einstein, supra note 34, 212.

⁴⁰ Val E. Limburg, *Fairness Doctrine, U.S. Broadcasting Policy*, The Museum of Broadcast Communications Web Site, available at:
<<http://www.museum.tv/archives/etv/F/htmlF/fairnessdoct/fairnessdoct.htm>>

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and [401] ruling at issue here are both authorized by statute and constitutional.⁴¹

However, the Fairness Doctrine unexpectedly resulted in a chilling effect. Because of the Fairness Doctrine, rather than presenting both sides of a controversial issue, broadcasters avoided creating controversy or editing controversial topics. Because of the chilling effect and the variety of outlets available in the current media market, in 1987, the FCC dissolved the Fairness Doctrine.

The fundamental problem for content regulations in the U.S. is its violation of the First Amendment. In Taiwan, even though “free speech” and “press speech” are common values shared by the public, the Taiwan government and the public consider that the broadcasters are responsible for public issues and education because they use the public spectrum resource. Moreover, the media are seen as a powerful method to influence people’s thoughts. Thus, the government usually implements content regulations to fulfill that the broadcasters achieve their social responsibilities. For example, the Enforcement Rules of the Radio and Television Act set up the guidelines for programs. Article 22 of the act, “the news programs, include news reports, news analyses, or live broadcasts shall be objective, fair, factual, comprehensive and not of an advertising nature”. Article 23, “the educational and cultural programs shall aim at enhancing Chinese culture, promoting social education, supplementing school education, and developing children's intelligence

⁴¹) Red Lion Broadcasting Co., v. FCC, 395 U.S. 367 (1969), available at: <http://www.bc.edu/bc_org/avp/cas/comm/free_speech/redlion.html>

and ability.”⁴² Thus, to increase diverse voices, in particular with minority viewpoints, the Taiwan government enacted content regulations requiring broadcasters to air different cultural programs. The Article 28 of Enforcement Rules of the Radio and Television Act regulates that “A professional station or a station with a specific mission shall devote at least 60 percent of its total broadcasting time to the broadcast of professional and specific programs.”⁴³ Minority radio or television stations are established to serve specific missions and they must obey this regulation. Additionally, according to the Public Television Act, enacted in 1997, the public television station (PTV) is required to broadcast diverse types of program and maintain pluralism. Programs presenting the perspectives of Hakka and indigenous people are aired regularly on PTV.⁴⁴

The Effects of Regulations on Media Diversity

Media diversity contains three dimensions: outlet, source, and content. In the U.S., the FCC has implemented structural regulations for promoting media diversity, for example, dual radio and television rules, financial interests and syndication rules, and prime times access rules. However, the structural rules have not effectively increased the minority voices. The essential reason is the business model of broadcast industry. The radio and television stations operate in a dual product market. It is necessary for each media program to attract mass audience to gain advertisers’ support. Thus, no matter who owns the media, the owners inevitable neglect the minorities and cater to the majorities. Einstein argues that the effective means to promote media diversity is to regulate the

⁴² Enforcement of the Radio and Television Act, supra note 16.

⁴³ Einstein, supra note 34, 22.

⁴⁴ The Public Television Act, Government Information Office (Taiwan), available at <<http://info.gio.gov.tw/ct.asp?xItem=15056&ctNode=2036>>

content directly, not everything around it.⁴⁵ In Taiwan, the government focuses on content regulations and the government-sponsored media to promote media diversity. These media are required to produce and broadcast minority-related programs regularly. Apparently, this is the successful and effective way to guarantee diverse voices.

⁴⁵ Einstein, *supra* note 34, 211.