– see at http://www.minister.dcita.gov.au/media/speeches/digital_radio_-_commercial_radio_australia_conference

3. Department of Communications, Information Technology and the Arts, Introduction of Digital Radio: Issues Paper (December 2004).

4. http://www.dcita.gov.au/__data/assets/pdf_file/25532/ABC_-_submission.pdf. Similar observations about the "drivers" of digital radio were also made by Broadcast Australia in its submission – see at http://www.dcita.gov.au/__data/assets/pdf_file/26075/Broadcast_Australia_public_submission.pdf

5. http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio

6. http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio

7. See news release dated 14 October 2005, "Industry welcomes digital announcement", at http://www.commercialradio.com.au or http://www.commercialradio.com.au/pdf/Industry%20welcomes%20digital%20announcement%202005.pdf

8. http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio

9. See Porter, J: "World Audio's digital hopes off-air for now" in The Sydney Morning Herald, 15 October 2005 at http://www.smh.com.au/news/national/world-audios-digital-hopes-off-air-for-now/2005/10/14/1128796712358.html?from=moreStories

10. See MacLean, S, "Audio angry at being tuned out", in The Australian, 15 October 2005, at http://finance.news.com.au/story/print/0,10119,16922583,00.html

11. http://www.minister.dcita.gov.au/media/media_releases/introducing_digital_radio_to_australia

12. http://www.dcita.gov.au/__data/assets/pdf_file/25583/Commercial_Radio_Australia_-_submission.pdf

13. See news release dated 21 December 2001, "ABA Completes Radio Licence Area Plans", at http://www.acma.gov.au/ACMAINTER.65674:STANDARD:1674406071:pc=PC_91126

14. Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No 1 of 2003. This direction was made to address concerns about formats of existing commercial radio services in regional areas being changed to formats of more "narrow" appeal – eg racing radio.

15. http://www.acma.gov.au/ACMAINTER.65674:STANDARD:649793122:pc=PC_100296

16. See news release dated 14 October 2005, "Industry welcomes digital announcement", at http://www.commercialradio.com.au

Measuring Media Diversity - Recent Developments in the US

An important factor in promoting media diversity is how to measure it. Luke Waterson looks at what they're doing in the United States

Introduction

One of the key principles underlying the proposed reform of Australian media ownership laws is the need to preserve media diversity. This principle is common to many countries, including the United States.

In *Prometheus Radio Project v Federal Communications Commission*; United States of America, 373 F 3d 372 (3rd Cir, 2004)[1] (**Prometheus**), the United States Court of Appeal for the Third Circuit considered various mechanisms proposed by the Federal Communications Commission (**FCC**) to measure and protect media diversity in the context of cross-media mergers in the United States[2].

This article outlines some implications of the Prometheus decision for the development of media diversity regulation in Australia.

The Australian regulatory regime

The effect of section 60 of the *Broadcasting Services Act 1992* (Cth) is to prohibit a person from controlling more than one of the following types of media businesses operating in the same coverage area: a free-to-air television station, a commercial radio station and a newspaper (**cross media rule**).

Changes to the cross media rule were proposed in the Broadcasting Services Amendment (Media Ownership) Bill 2002 (**Bill**)[3].

A key condition in the Bill relating to the preservation of media diversity was the "5/4 voices test". In essence, the Bill required at least five separately owned and controlled "voices" (or four in regional areas) to remain after a cross-media merger (with each separately owned entity constituting a single "voice").

The Bill also contained a number of other mechanisms intended to preserve diversity - for example, a requirement for editorial independence between the merged businesses and a restriction on owning more than two types of media operation in the same area. However, the Minister for Communications, Information, Technology and the Arts has recently announced a proposal to remove these other mechanisms and focus on the "5/4 voices test":

> *"The simplest way to protect diversity is to place a floor under the number of media groups permitted in a market to preclude undue concentration of ownership. If we do this in an environment that allows us to balance any greater concentration of ownership amongst existing players with opportunities for new services, I think we will have a more attractive approach than the regime proposed last time"*[4]

The proposed FCC rules

In July 2003, the FCC announced a new set of rules (**Order**) regulating media ownership in the United States, including cross media ownership[5].

The Order established a single set of cross media rules based on a Diversity Index. The Diversity Index was a modified version of the Herfindahl-Hirschmann Index (**HHI**) which is used to analyse mergers from an anti-trust perspective.

The HHI measures concentration in a market by using a formula that sums the square of the market shares for that market. By squaring the market shares, the HHI reflects a greater sensitivity for market concentration than a simple firm count.

In devising the Diversity Index, the FCC used the basic methodology underlying the HHI but with specific modifications. The key modifications for present purposes were:

- *Weightings.* The FCC assigned weightings to each relevant media type based on the results of a national survey of consumer preferences for local news and information. A summary of the weightings is as follows:
  - free to air television = 33.8%
  - newspapers = 28.8%
  - radio = 24.9%
  - Internet = 12.5%
- *Calculation of market share.* This was simply done by assigning each outlet in a particular media category an equal "market share". So, if there were ten free-to-air television stations in a particular area, each one was given a "market share" of 10%. Where one person owned more than one of the same type of outlet in a market, the "market shares" were added together - for example, two commonly owned television stations would produce a "market share" of 20%. The "market share" was then multiplied by the weighting for that category (in the above example giving a weighted market share of 6.7% (20% x 33.8%)). Once all the weighted market shares for each category were calculated, they were squared and summed (in the same way as for the HHI) to produce a Diversity Index score for that market.
- *Derivation of cross media rules.* The FCC then calculated the average Diversity Index scores for each market and the increases in the score that would result if various cross media mergers occurred[6]. From these results, the FCC derived various cross-media rules - for example, an outright prohibition on cross-media mergers in markets with three or fewer television stations.

Prometheus

The cross-media rules in the Order were challenged on a number of grounds. The main grounds were based on the general judicial review provisions in the Administrative Procedures Act and the obligation of the FCC under section 202(h) of the Telecommunications Act 7. The applicable standards of review were summarised as follows:

> *"...In a periodic review under [section] 202(h), the [FCC] is required to determine whether its then extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified. Yet no matter what the [FCC] decides to do to any particular rule - retain, repeal, or modify (whether to make more or less stringent) - it must do so in the public interest and support its decision with a reasoned analysis"*[8]

In summary, the majority[9] remanded certain aspects of the Order relating to cross-media rules for further consideration by the FCC. This article focuses on the challenges based on:

- the weight given to the Internet/cable television as a media outlet;
- the equal market shares given to media outlets of the same type[10].

The role of the Internet/cable television

Despite the results of the national survey showing it was a source of local news and information, the FCC excluded cable television from the Diversity Index because it was doubtful whether it played a significant role in providing independent local news. The main reasons for the exclusion were the small number (and poor ratings) of local cable news channels (only 22 in the entire US and 5 of these in New York). The results of the survey were explained by suggesting that respondents were counting free-to-air services retransmitted on cable systems as cable television stations.

While agreeing with the exclusion of cable from the Diversity Index for these reasons, the majority concluded that similar reasoning applied to the Internet and so therefore the inclusion of the Internet in the Diversity Index (given the exclusion of cable television) was not rational[11].

The key reasoning underlying this conclusion was as follows:

- *Independent websites.* The majority drew a distinction between websites that provided independent sources of news and information and those associated with the local free-to-air television stations and newspapers. Websites in the latter category would need to be discounted (to be consistent with the FCC's analysis in relation to retransmitted free-to-air television channels on cable television). The majority could not find persuasive evidence for the significant presence of local news sites on the Internet.
- *Local news is the key indicator of viewpoint diversity.* The FCC had emphasised the "virtual universe of information sources" available on the Internet to support the role of the Internet as a source of viewpoint diversity. The majority, however, drew a distinction between the "aggregator" function of a media outlet (getting the news to one place) and its "distillation" function (making an editorial judgment on what to publish). The majority characterised many websites (for example, websites of individuals or local governments/community organisations) as having the first characteristic but not the second. They concluded that those entities and individuals who just happened to use the Internet to disseminate general information, even with a local flavour, were not significant for diversity purposes.

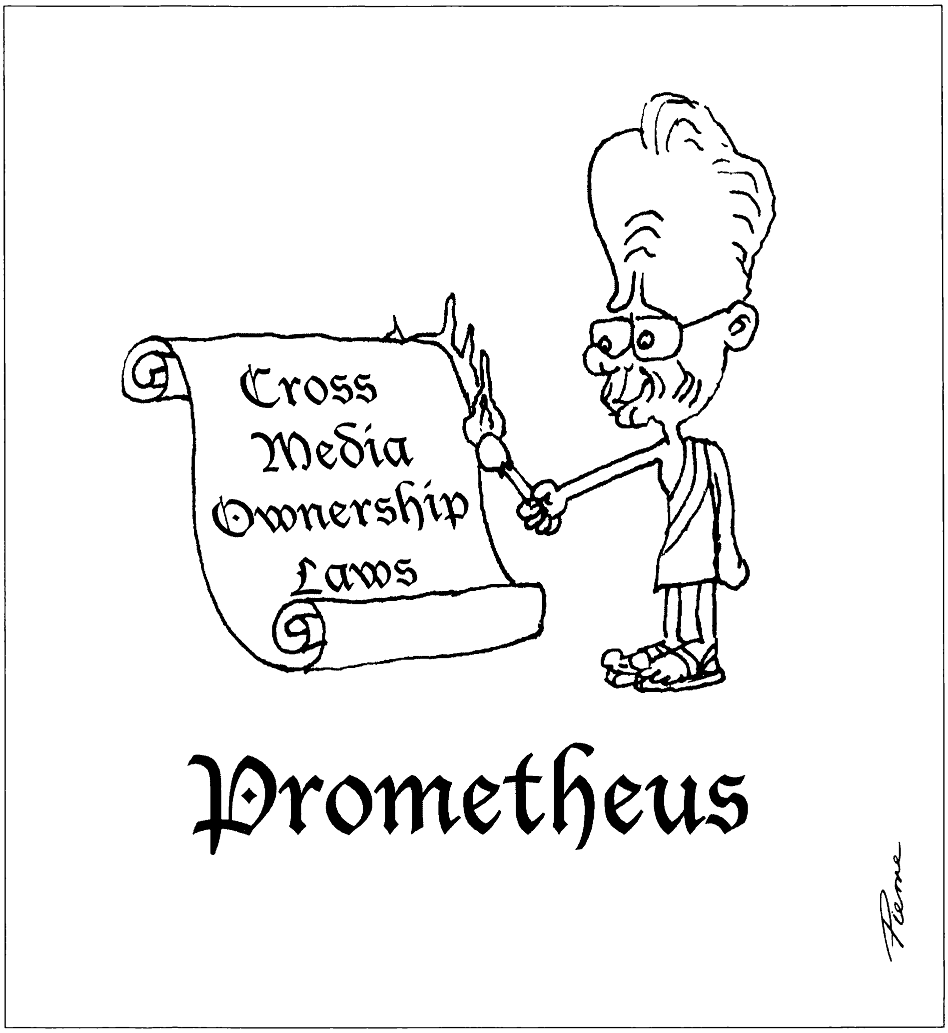
Equal market shares

As outlined above, the methodology underlying the Diversity Index assigns equal market shares to outlets of a particular media type. The majority upheld a challenge to this aspect of the methodology. The main reasons were as follows:

- *Irreconcilable with weighted aspects of Diversity Index.* The assignment of equal market shares to media outlets of a particular type was held to be inconsistent with the weighting of each media type. The latter weighting was done on the assumption that all types of media were not of equal importance for diversity purposes. The use of equal market shares was also inconsistent with the HHI. The main reason the HHI (and not a simple "number of voices" test) was chosen by the FCC as the basis for the Diversity Index was that it was more sensitive to the concentration of market shares.

- *Treating each outlet as equal leads to irrational results.* The majority gave the example that the market share of a New York community college television station was the same as that of a local television station owned by the national ABC network. It was also pointed out that the share of the community station was greater than the combined market share attributable to the New York Times organisation (which owned both newspapers and radio stations). The inference from the lack of individual weighting for each outlet was that they were all of equal importance for diversity purposes. The majority concluded that:

> *"A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third largest newspaper in America also requires us to abandon both logic and reality"*[12]



Implications for Australia

While it is prudent to take a cautious view when considering the domestic implications of a foreign decision, the issue of media diversity appears to be fundamentally the same in both Australia and the United States. Accordingly, and in light of the relatively general nature of the criteria for legal review in Prometheus, it is possible to draw some relevant comparisons with the Australian regulatory position.

The main points are as follows:

Role of the Internet as a source of media diversity

The reasoning of the majority in Prometheus effectively concluded that, while the Internet may be an effective medium for the dissemination of information, caution is required in assessing whether it currently provides independent sources of news necessary to significantly contribute to media diversity.

Turning to the Australian position, the Bill provided no direct role for the Internet as a potential source of media diversity. For example, the 5/4 voices test did not count Internet services. However, the Internet may have played some role in the development of the overall regulatory scheme. For example, in outlining the Government's latest proposals, the Minister recently stated:

> *The cross media rules would not include the national broadcasters, pay television, the Internet or out of area newspapers and other potential new services over other platforms which provide increasing and important additional sources of news and opinion.*[13]

The decision in Prometheus warns against any significant weight being given to the Internet as a source of media diversity. On balance, the Government's intended regime appears consistent with this approach.

Adequacy of 5/4 voices test

The 5/4 voices test is a simple "number of voices" or "firm count" test. This type of test was not preferred by the FCC because it did not have sufficient sensitivity for concentration compared to the Diversity Index. As set out in the minority judgment in Prometheus, a "firm count system" has the potential to both overstate and understate the level of market concentration compared to a system, like the Diversity Index, based on the HHI:

> *"... a market shared equally among ten firms ("Market A") would have an HHI of 1000 (10 times 10 squared). A firm count system would treat Market A as evenly concentrated*

with a ten-market firm having a market share breakdown of 30-30-5-5-5-5-5-5-5-5 ("Market B") because each market contains 10 firms. In contrast, the HHI supports the intuition that Market B is actually more concentrated, with an HHI of 2000. Furthermore, unlike the firm count system, the HHI recognises that a merger between two large firms creates a more concentrated market than a merger between two small firms. If the two 30% firms merged in Market B, its HHI would rise to 3800, while a merger of two 5% firms would increase the HHI to 2050. The firm count system would undiscerningly treat both mergers the same, however, by noting that both markets would now have 9 firms instead of 10"[14]

This raises the issue of whether a similar regulatory tool should be used in Australia - for example, to replace the 5/4 voices test. For the reasons set out above, in principle, a Diversity Index (or similar methodology) may be a better reflection of the true level of diversity in a market than a simple "firm count" test.

While a useful tool, the Diversity Index need not be the sole determinant of whether a cross media merger is allowed to proceed. It could, for example, form the basis of guidelines that would inform a final decision made against more general criteria - for example, in the same way as anti-trust merger guidelines. This system would give some objectivity and certainty for industry (through the application of the Diversity Index) while still retaining some overall discretion.

Weighting of media types and outlets

The Diversity Index is based on weightings for each media type based on a survey of consumer preferences. The majority in Prometheus were critical of the assignment of equal market shares to outlets of the same media type. On the other hand, the 5/4 voices test does not contain any weightings at all – each outlet is weighted equally regardless of media type or popularity. There is an argument that this approach has the general effect of overstating the level of diversity in a market by giving each "voice" an equal weight regardless of consumer preference. This effect may be magnified if no other "diversity protection measures" (such as editorial separation of the merged operations) are in place.

Conclusion

A key dilemma for policy makers and regulatory agencies is how to measure media diversity and devise legal mechanisms to preserve and protect it. The Productivity Commission has stated:

> *"...measuring market shares and relative influence across media is fraught with problems. But this should not discourage policy makers from seeking a better approach to regulating cross-media controls than we now have. As problematic as they may be, different measures of market share across different media (such as audience share and advertising revenue) would help establish whether a prima facie case existed that warranted more detailed examination of the public interest*[15]*"*

The Diversity Index is a laudable attempt by the FCC to develop a tool to measure media diversity in a precise and objective manner. The decision in Prometheus shows that there may be pitfalls in the development and application of such a tool. However, these pitfalls do not detract from the underlying utility of the Diversity Index and it should be considered as part of any media diversity test for the Australian cross media regulatory regime.

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[1] Scriria, Chief Judge, Ambro and Fuentes, Circuit Judges

[2] On 13 June 2005, the Supreme Court of the United States refused to reconsider Prometheus.

[3] The Bill lapsed prior to the 2004 Federal election.

[4] Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'The New Multimedia World', address to the National Press Club, Canberra, 31 August 2005

[5] Report and Order and Notice of Proposed Rulemaking 18 FCCR 13,620

[6] Prometheus op. cit., p. 409-411. In determining what was an acceptable/unacceptable score (or increase in score), the FCC had regard to the HHI thresholds used by the US Department of Justice and Federal Trade Commission ie an increase of 400 points is considered unacceptable, but the FCC adopted more conservative thresholds than those used in an anti-trust context.

[7] 5 USC 551; Pub. L. No 104-104, 110 Stat. 56 (1996)

[8] Prometheus op. cit., p. 395

[9] Ambro and Fuentes, Circuit Judges

[10] One of the other successful grounds for challenge was that the FCC did not consistently apply the Diversity Index scores in deriving the cross-media rules - for example, the rules would have permitted cross-media mergers which resulted in a higher increase in the Diversity Index score than mergers that would have been prohibited – see Prometheus op. cit., p. 409-411.

[11] Prometheus op. cit., p. 405

[12] Prometheus op. cit., p. 408. The majority did not accept the FCC's argument that the actual market share of outlets within a media type was not relevant because outlets freely changed the level of their news content therefore rendering consumer preferences too fluid.

[13] Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'The New Multimedia World', op. cit.

[14] ibid., p. 452. The Productivity Commission has recognised similar drawbacks of the existing cross-media rules in Australia: Productivity Commission 2000, *Broadcasting*, Report no. 11, AusInfo, Canberra at p 353.

[15] Productivity Commission op. cit., p. 364.