Business Solutions to the Alien Ownership Restriction

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I. INTRODUCTION

Since 1912, Congress has outlawed foreign ownership or control of a broadcast station.[1] This restriction is codified in its current form under the Communications Act of 1934 (1934 Act).[2] By looking at the extensive legislative history of these statutes, scholars have reached a consensus on two main reasons why Congress passed the rule. The first of the two reasons is based on national security. If a foreign-owned company were granted a broadcast license, it could use the station to broadcast propaganda or to jam American radio signals in times of war.[3] Secondly, the foreign ownership restriction can be viewed as a protectionist measure used to promote American ownership of American media, and to prevent foreign takeovers.[4]

There has been a growing movement in scholarship over the past several decades to eliminate this ownership restriction. Some argue that foreign ownership poses no threat to national security anymore, or that the President can suspend the license under his war powers if such a threat arises.[5] Others argue that this restriction on trade hurts American interests abroad on reciprocity grounds,[6] as well as American interests at home by limiting the market value of broadcast stations.[7] On constitutional grounds, some argue that the alien ownership restriction presents an unwarranted limitation on speech.[8]

At the same time, mass media has been simultaneously expanding and converging. Media companies have been discovering new markets and merging old ones with increasing rapidity over the last few decades. For example, the mobile phone ring tone market provided a huge boon to the cellular and music industries in the early- to mid-2000s ($600 million in

1. Act of Aug. 13, 1912, ch. 287, § 2, 37 Stat. 302, 302 (1912) (regulating radio communication).

2. 47 U.S.C. § 310(b) (2000).

3. Ian M. Rose, Note, *Barring Foreigners From Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1195 (1995).

4. *Id.* at 1189.

5. *See, e.g.*, John J. Watkins, *Alien Ownership and the Communications Act*, 33 FED. COMM. L.J. 1, 6 (1981).

6. *See, e.g.*, David H. Benz, Comment, *The Little Network that Could: FCC Restrictions on Foreign Ownership*, 6 IND. INT'L & COMP. L. REV. 239, 247 (1995).

7. Richard Cotton, Executive Vice President and General Counsel, NBC, Address at the Foreign Ownership in the Communications Industries—An Analysis of Section 310 Symposium, *reprinted in* 4 MEDIA L. & POL'Y 10, 14 (1995).

8. Rose, *supra* note 3, at 1204-15.

2006 alone),[9] and in the late 2000s, the introductions of so-called "smart phones" (such as Apple's iPhone) merged existing telephone and computer technologies into a single device.[10] While this revolution has tremendous potential, it has also created tremendous instability for the businesses involved. Companies have discovered that the best way to survive this instability is to fuse with other companies involved in different types of media, thus forming large, vertically integrated conglomerates.

The alien ownership restriction has played a strong role in this reshuffling of the media and entertainment industries. These conglomerates require huge infusions of capital, especially upon formation. In today's increasingly international economy, fewer and fewer companies are fully owned or controlled by American citizens. This presents an obvious problem for any entertainment conglomerate that has broadcast licenses—in order to raise capital from foreign sources, the conglomerate must either divest itself of any company with a broadcast license, or that company could run the risk of losing the license, which could ruin its business.

Much has been written about the foreign ownership restriction in its century of existence. There are excellent works arguing for the repeal of the statute, and other equally excellent works arguing for a reinterpretation of the statute for the sake of free trade. However, this Note approaches the foreign ownership restriction from a business perspective, and so does not argue for change, but rather explores the options available to a foreign-owned media conglomerate that wishes to have a presence in the American market. First, this Note will explain the necessity of the broadcast license within the conglomerate's business plan. It will then outline the rules governing foreign ownership and control. Finally, this Note will explore possible business solutions to mitigate the effects of the foreign ownership restriction.

II. CONGLOMERATION AND THE BROADCAST LICENSE

In order to understand the necessity of a broadcast license to the modern entertainment conglomerate, it is important to first understand how these conglomerates developed. The unification of smaller, independent, and diverse companies into a larger whole began in the 1970s, but reached its zenith at the turn of the twenty-first century.[11] While some visionaries took advantage of market synergies as early as the 1940s, the system as a

9. Brian Hiatt et al., *The Record Industry's Slow Fade*, ROLLING STONE, June 28, 2007, at 13.

10. *See, e.g.*, Apple – iPhone, http://www.apple.com/iphone (last visited Jan. 31, 2009).

11. Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 174 (2002).

whole did not begin to capitalize on these synergies until the 1970s.[12] As the following discussion will show, the broadcast license is one of the most integral pieces of the puzzle.

A. The Old Studio System

Everything starts with the movies, both chronologically and financially. Ever since a small band of first-generation Americans moved west from New York to escape the harassment of Thomas Edison and his lawyers, Hollywood has been the entertainment capital of the United States.[13]

The first few decades were known as the Golden Age of Hollywood, although the era was only gilded for some. Studios made extraordinary profits in the fledgling industry. Studio heads were able to count on high box office sales on the one hand, and extraordinarily low costs on the other. Actors were usually signed to seven-year contracts, and risked being blackballed if they broke their contract.[14] Writers were paid a weekly salary and were expected to churn out scripts to keep up with the rapid pace of production—up to six movies a month at some studios.[15] Rare was the contract that contained any kind of profit participation, where an actor or writer received additional sums based on the box office performance of the movie.[16]

Furthermore, the studios usually owned most of the theaters in which their movies were shown. Even when the studio did not own the theater, it still wielded tremendous power over the theater, often forcing the theater to book films in blocks of ten.[17] The studio would put one or two popular movies in a block with many less successful movies, thus forcing the theaters to either pay for everything or get nothing—i.e., no audience. While the system did not work well for the exhibitors, it was lucrative for the powerful studios.

High revenue and low costs kept the studios flush with profits all the way through the 1940s. In 1947, the six major studios earned $1.1 billion from their share of ticket sales, accounting for ninety-five percent of the studios' overall revenue.[18] This made the movie industry America's third-

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12. Merida Welles, *Takovers Take Over Annual Meetings*, N.Y. TIMES, April 8, 1984, at sec. 3, p. 4, *available at* 1984 WLNR 533541 (Westlaw).

13. EDWARD JAY EPSTEIN, THE BIG PICTURE: MONEY AND POWER IN HOLLYWOOD 5 (2006).

14. *Id.* at 8.

15. *Id.* at 7.

16. *Id.* at 8.

17. *Id.* at 6.

18. *Id.* at 5.

largest retail business, behind grocery stores and the automotive industry.[19] Furthermore, the studios' net receipts (revenue after distribution and advertising costs) were $950 million.[20]

B. The Foundation Crumbles

Two separate forces combined to revolutionize the movie industry. First, the Department of Justice (DOJ) began pressing an antitrust case against the major studios.[21] This case was an attempt to bring down the vertically integrated system where the content producers were also the content distributors (by virtue of owning the theaters). Second, television became an extremely popular form of entertainment. In just a few short years, it cut dramatically into box office sales.

1. Antitrust

In *United States v. Paramount Pictures, Inc.*,[22] the studios were locked in a decade-long losing battle to maintain control over their system. The five major studios (Metro-Goldwyn-Mayer, 20th Century Fox, Warner Bros., RKO, and Paramount) were engaged in two practices that awoke the ire of the DOJ.

First, the studios operated as vertically integrated businesses. A single company could undertake the production, distribution, and exhibition of a motion picture, without any help from outside companies.[23] While the studios claimed that it was necessary to own the means of distribution and exhibition in order to guarantee an outlet for the films they produced,[24] independent exhibitors complained that the major studios used this ownership for an unfair competitive advantage. When negotiating the exhibition of a movie with smaller, independent theater chains, the studios could threaten to show the movie only in studio-owned theaters, thus shutting the independent chains out completely.[25] Since the independent theaters had no substantial source for content outside the major studio production system, they were forced to accede to the studios' demands and receive less favorable contracts as a result.

Second, the studios were engaged in "block booking." In the words of the Supreme Court, "Block-booking is the practice of licensing . . . one

19. *Id.* at 6.
20. *Id.* at 7.
21. *Id.* at 11.
22. 334 U.S. 131 (1948).
23. Ricard Gil, An Empirical Investigation of the Paramount Antitrust Case 6 (unpublished manuscript, on file with the author).
24. *Id.* at 8.
25. *Id.* at 7.

feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced."[26] For instance, *Gone With the Wind* was attached to a handful of other, less lucrative movies, and independent exhibitors had to choose between showing all of them or none of them; they could not simply choose to show *Gone With the Wind* and pass on the other films.[27]

The *Paramount* case, which lasted from 1938 to 1948, was not the first time the studio system had run into antitrust issues. In fact, in 1921, the Federal Trade Commission (FTC) began pursuing the major studios for their vertical integration and use of block booking.[28] In 1928, the DOJ filed an antitrust suit against the studios and successfully attacked their vertical integration and block booking.[29] The victory was hollow, though, as the Great Depression and the National Industry Recovery Act forestalled enforcement of the sentence against the studios.[30] In 1938, the DOJ again brought suit against the studios, but this time settled on the condition that the studios phase out their block booking practices by mid-1942.[31] The studios failed to meet the 1942 deadline, but World War II caused the DOJ to delay reopening its action against the studios.[32] The DOJ finally prevailed in 1948 when the Supreme Court handed down its verdict in the *Paramount* case.[33] The Court held that block booking was an unfair practice and recommended divestiture of the studios' theaters, and remanded for findings on the issue of divestiture.[34]

Facing the prospect of continued litigation on remand, the DOJ offered an olive branch to the studios. If each of the studios would sign a consent decree forcing divestiture of theaters, the studios could forgo the millions of dollars in legal fees that surely lay ahead.[35] As an indication of just how much money was at stake, the studios did not view this as an attractive offer and dug in for another protracted battle. But RKO studios and its president, the mercurial Howard Hughes, saw the consent decree as an opportunity to shift the balance of power among the five major

26. *Paramount Pictures*, 334 U.S. at 156.

27. Peter Newcomb & Liz Conte, *You Want Michael Jordan? You Gotta Take Boomer Esiason*, FORBES, Nov. 23, 1992, at 96.

28. Gil, *supra* note 23, at 6.

29. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

30. Gil, *supra* note 23, at 7.

31. *Id.* at 7-8.

32. *Id.* at 8.

33. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

34. Gil, *supra* note 23, at 9.

35. *Id.*

studios.[36] As the weakest of the majors, RKO and Hughes believed that divestiture would be a much bigger loss for the other studios, and thus RKO could gain ground by signing the consent decree and pressuring the other studios to do the same.[37] While it is unclear what effects this move had on RKO and its market share, Hughes was successful at pressuring the other studios to follow suit in getting out of the exhibition game.[38] This brought on a massive shift in the way movies were made.

2. Television

Most studios initially treated the television business as competition. They attempted to shut television out in its infancy by refusing to license movies for network broadcast and by closing their studio doors to television producers.[39] Television was able to thrive in spite of this freeze-out. By bringing sports, news, game shows, and independent films directly into the homes of viewers, television was able to cut into the movie industry's entertainment market share.[40]

Some simple statistics demonstrate just how sharp the falloff in the box office has been. In 1947, before the advent of television and at the height of the movie-going era, the U.S. population was 144 million,[41] and 4.7 billion movie tickets were sold.[42] This constitutes a whopping 32.6 tickets sold per person per year. In 2003, the U.S. population was 290 million,[43] and 1.57 billion tickets were sold,[44] or a paltry 5.4 tickets per person per year. The "massive moviegoing audience that had nurtured the studio system . . . no longer exist[ed]."[45] In any given week of 2003, less than twelve percent of the population bought a movie ticket.[46]

Year	Tickets Sold	Population	Tickets/Person
1947	4.7 billion	144 million	32.6
2003	1.57 billion	290 million	5.4

36. *Id.*
37. *Id.*
38. *Id.* at 9-10.
39. EPSTEIN, *supra* note 13, at 12.
40. *Id.*
41. U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES (2000), http://www.census.gov/popest/archives/1990s/popclockest.txt.
42. EPSTEIN, *supra* note 13, at 17.
43. U.S. CENSUS BUREAU, TABLE 1: ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2007 (2007), http://www.census.gov/popest/states/tables/NST-EST2007-01.xls.
44. EPSTEIN, *supra* note 13, at 17.
45. *Id.*
46. *Id.*

Furthermore, the cost of making movies has shot up astronomically. In 2003, the studios spent $18 billion to produce, advertise, and distribute films under their own imprint or their subsidiaries' "independent" imprints.[47] However, these same films only recovered $6.4 billion from the worldwide box office.[48]

C. *The New System*

Why is Hollywood pumping more money into emptier theaters? This does not seem to be a smart business plan. The answer to this question lies in windows of exhibition that many in the entertainment industry call "revenue streams."[49] While the theatrical box office represented one hundred percent of the studios' revenue in 1948, it is only the tip of the iceberg now.[50] Studios now make the bulk of their profits from licensing their filmed entertainment for home viewing.[51] These new revenue streams are designed to capitalize on different consumer lifestyles and the varying amounts of money consumers are willing to pay. Some consumers prefer the social experience of going out to the movies, while others prefer to save money and stay at home; the industry has a broad spectrum of price points for a broad spectrum of consumers.[52]

As technology has advanced, more streams of revenue have been created. Even as late as 1980, studios were still dependent on theatrical release for the vast majority of their revenue.[53] Then came the video player. In the 1970s, Betamax players found their way into homes across the country. While the movie studios originally resisted this technology,[54] they eventually came to see an opportunity to create new markets for their intellectual properties: namely, selling movies on video for home viewing.

With the advent of VHS, DVD, and now Blu-Ray,[55] the home video market has easily become the biggest profit-producing stream of revenue for the studios.[56] Following home video release, films are then released for the different forms of television viewing (pay-per-view, pay television, network, pay television again, basic cable, and finally, syndication). With

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47. *Id.* at 19.

48. *Id.*

49. JASON E. SQUIRE, THE MOVIE BUSINESS BOOK 3 (3d ed. 2004).

50. Epstein, *supra* note 13, at 20

51. *Id.* at 19.

52. SQUIRE, *supra* note 49, at 333.

53. EPSTEIN, *supra* note 13, at 19.

54. *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

55. Matt Richtel & Eric Taub, *Taps for HD DVD as Wal-Mart Backs Blu-Ray*, N.Y. TIMES, Feb. 16, 2008, at 1.

56. EPSTEIN, *supra* note 13, at 19.

each new technology development, the market adjusts the sequence and duration of the various revenue stream windows. For a current example of a typical movie, see the following chart.

Typical Revenue Waterfall[57]

Medium	*Begins*	*Duration*
Theatrical	Initial theatrical release (ITR)	6 mo.
Home video	4-6 mo. After ITR	10 yr.
Pay-per-view	8 mo. After ITR	2 mo.
Pay television (1st)	1 yr. After ITR	18 mo.
Network	2.5 yr. After ITR	30 mo.
Pay television (2nd)	5 yr. After ITR	12 mo.
Basic Cable	6 yr. After ITR	60 mo.
Syndication	11 yr. After ITR	60 mo.

As the above chart demonstrates, the most successful movies can become franchises that provide steady streams of revenue even ten to fifteen years after the initial theatrical release. These streams can be substantial. This is why studios are willing to run an $11 billion yearly deficit between production and distribution costs and box office revenues. Home video, pay television, and free television bring in billions of dollars in additional revenue, completely eliminating the deficit and allowing the studios to make a tidy profit. In the chart below, note the growth of the various revenue streams over the past fifty-five years.

Major Studio Worldwide Revenues (in Billions of 2003 Dollars)[58]

Year	Theater	VHS/DVD	Pay TV	Free TV	Total	Theater %
1948	6.9	0	0	0	6.9	100
1980	4.4	.2	.38	3.26	8.2	53
1985	2.96	2.34	1.041	5.59	11.9	25
1990	4.9	5.87	1.62	7.41	19.8	25
1995	5.57	10.6	2.34	7.92	26.43	21
2000	5.87	11.67	3.12	10.75	31.4	19
2003	7.48	18.9	3.36	11.4	41.1	18

The information contained in the charts above is fundamental to understanding the advantages found in vertical integration in the entertainment industry. Since television and now other forms of home entertainment (e.g., video games and computers) have cut into theater attendance, studios realized that they needed to look beyond the box office for revenue. A few business leaders recognized that movie studios' biggest problems could be their biggest opportunity. By merging with other forms

57. SQUIRE, *supra* note 49, at 335.
58. EPSTEIN, *supra* note 13, at 20.

of media, studios could recapture, and even surpass, their losses from a slowdown at the box office.

1. Disney

Walt Disney may have been the first to realize that the value of films was not in the box office, but in the licensable properties the films create. He welcomed television with open arms, quickly creating the Mickey Mouse Club and other television programming designed to get Disney properties directly into the homes of families.[59] He partnered with ABC early on and this created a synergy for both companies. People tuned in to ABC to see their favorite film characters on television, and Disney in turn benefited from increased visibility, which helped at the box office and at the toy store.[60] In the time period since Walt Disney died, his company has grown into a huge conglomerate, snatching up other movie studios and adding the ABC television network in the process.[61]

2. Time Warner

Disney was not the only person to see the value in media synergies. Steve Ross, head of Warner Bros. Studios, was probably the first to envision a full-service media conglomerate. He "wanted to own the means to deliver entertainment to people's homes."[62] Accordingly, Ross began purchasing cable networks. He thought that the high bandwidth (and thus high channel capacity) of cable would allow the audience to be segregated based on interest (e.g., ESPN, HGTV, etc.).[63] This laser-like ability to reach consumers is highly desirable from an advertising perspective and provides a more affordable alternative to the shotgun approach of broadcast network advertising. Part of Ross's plan was to begin showing Warner Bros. movies on these networks.[64] As he began building the Warner Bros. conglomerate, he engineered mergers first with Time,[65] and then with Turner Broadcasting System,[66] and then with AOL,[67] giving the new conglomerate a presence in every form of media.

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59. *Id.* at 33.

60. *Id.*

61. *Id.* at 35.

62. *Id.* at 44.

63. *Id.*

64. *Id.* at 45.

65. Floyd Norris, *Time Inc. and Warner to Merge, Creating Largest Media Company*, N.Y. TIMES, March 5, 1989, at A1.

66. Mark Landler, *Turner to Merge Into Time Warner; a $7.5 Billion Deal*, N.Y. TIMES, Sept. 23, 1995, at A1.

67. Alex Kuczynski and Bill Carter, *Media Megadeal: The Empire; Potentially Big Effect Seen on Varied Units of AOL Time Warner*, N.Y. TIMES, Jan. 11, 2000, at C11.

3. Sony

While Ross began in the movie business and moved outward to cable, magazines, and the Internet, Akio Morita had a different path. He began making simple appliances in the basement of a bombed-out building in Tokyo in 1945, but quickly expanded his business into consumer electronics.[68] As co-developer of Betamax and DVD technologies, Morita understood that the content creator was the one who stood the most to gain from these new formats.[69] He purchased Columbia Studios and expanded the motion picture business into Sony Pictures Entertainment.[70] Sony has also expanded into television production, another valuable way to create content for home video and other revenue streams.

4. NBC Universal

General Electric, owner of NBC, became convinced that the network would find itself at an increasing disadvantage in acquiring content if it failed to partner with a major studio, especially in light of all the other major networks' affiliations with studios.[71] In 2003, General Electric purchased Universal Studios from the French company Vivendi and created NBC Universal, which is comprised of fourteen local television stations, six cable networks (USA, Trio, Bravo, the Sci-Fi Network, CNBC, and MSNBC), Telemundo (one of the largest Spanish-language channels in the United States), theme parks, and theater chains in Europe and Japan.[72]

5. Viacom

Sumner Redstone was an attorney who left practice to work for his father's theater chain, which he promptly renamed National Amusements.[73] In the late 1960s, Redstone decided that there was not a future in theaters, and looked to invest in movie studios.[74] He acquired Viacom, and then through Viacom, acquired Paramount Studios.[75] Since Viacom was producing about twenty-eight hours a week in television programming, Redstone thought that purchasing a television network would be the next logical step.[76] Accordingly, for $34 billion in Viacom stock, Redstone

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68. EPSTEIN, *supra* note 13, at 48.
69. *Id.* at 54.
70. Geraldine Fabrikant, *Sale to Sony Approved by Columbia Pictures*, N.Y. TIMES, Sept. 28, 1989, at D9.
71. EPSTEIN, *supra* note 13, at 79.
72. Joseph Adalian, *NBC Says: I Believe in U*, WEEKLY VARIETY, Sept. 14, 2003, at 1.
73. EPSTEIN, *supra* note 13, at 67.
74. *Id.* at 68.
75. Geraldine Fabrikant, *Viacom to Announce Deal to Acquire Paramount*, N.Y. TIMES, Sept. 12, 1993, at A37.
76. EPSTEIN, *supra* note 13, at 73.

purchased CBS Corporation, which included the CBS and UPN television networks, twelve broadcast stations in major markets, a massive group of radio stations, the largest billboard company in the world, and five cable networks.[77] In a 1997 interview, Redstone revealed his business strategy: "Whether entertainment is delivered by satellite or a slow boat to China, it's what's on it that's going to count. Content is king, and producing it takes a lot of creativity and innovation."[78] While content takes creativity, Redstone still believes content is only a means to an end; that is, attracting viewers. Viewers themselves are only a means to the ultimate end—advertising dollars.[79] With his conglomerate, Redstone was finally able to achieve that end.

6. News Corporation

Rupert Murdoch has a similar story to Redstone's. Murdoch's wealthy father owned several newspapers throughout Australia when he died, but left Murdoch only one.[80] From that small beginning, Murdoch built a national newspaper, and then expanded to newspapers in London and the United States.[81] His News Corporation did not stop with newspapers; Murdoch's next goal was to build a home-entertainment empire that would span the world through geosynchronous satellite networks. He bought what eventually became Sky TV, a European satellite subscription service, to begin this network.[82] However, he quickly realized that it would be hard to convince the market to pay for a service it could easily receive for free through broadcast television.[83] He determined that owning a movie studio would be the best way to get content to boost subscriptions. Murdoch set his sights on Warner Bros.[84]

However, Steve Ross, Warner Bros.' head, bought several broadcast television stations owned by the Chris-Craft Corporation in an extraordinarily shrewd move.[85] Since Murdoch was an Australian citizen, and Warner Bros. now controlled a company with several broadcast licenses, Murdoch was effectively blocked from purchasing the Warner Bros. conglomerate. If Murdoch had gone through with the purchase, his

77. Lawrie Mifflin, *Making a Media Giant: The Overview; Viacom to Buy CBS, Forming 2d Largest Media Company*, N.Y. TIMES, Sept. 8, 1999, at A1.

78. John Koch, *Sumner Redstone; The Interview*, BOSTON GLOBE, Oct. 26, 1997, at 12.

79. EPSTEIN, *supra* note 13, at 74.

80. *Id.* at 59.

81. *Id.* at 59-60.

82. *Id.* at 61.

83. *Id.* at 62.

84. *Murdoch Raises New F.C.C. Issue*, N.Y. TIMES, Jan. 17, 1984, at D4.

85. Sandra Salmans, *Chris-Craft, Warner in Stock Deal*, N.Y. TIMES, Dec. 30, 1983, at D1.

ownership and control of the broadcast television stations would have been in violation of the foreign ownership restrictions of § 310 of the Communications Act of 1934, and would have risked forfeiture of the licenses.[86] Ross had thwarted his plans, but not for long.

In 1985, Murdoch bought half the stock in the troubled Fox Studios, and in 1987, he bought the remainder.[87] Realizing that a broadcast network was absolutely necessary to his business plan, Murdoch decided to become a naturalized citizen of the United States.[88] Many feel that the Reagan administration gave Murdoch "inordinately preferential treatment" in expediting the naturalization process.[89] Regardless, Murdoch had finally removed his Achilles' heel. As a naturalized citizen, there was no longer a bar to his owning and controlling broadcast networks.

This newfound citizenship opened the door for Murdoch to purchase Metromedia, a small network of ten broadcast stations in New York, Los Angeles, and five other large markets, for $2 billion.[90] Murdoch then turned the stations into Fox, the first new network since the 1930s.[91] The network could reach twenty-two percent of the American population with its original ten stations,[92] and quickly grew as other stations affiliated with Fox.

7. Summary

As it now stands, six major media conglomerates own all the major movie studios and broadcast networks in America, sixty-four cable networks, and a whole host of other ventures in newspapers, magazines, the Internet, and the music business.[93] Furthermore, these conglomerates have shown a penchant for acquiring successful independent studios. Disney's $60 million acquisition of Miramax in 1993[94] and Viacom's 2006 purchase of DreamWorks for $1.6 billion[95] are two examples.

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86. 47 U.S.C. §310 (2000).

87. EPSTEIN, *supra* note 13, at 63.

88. *Id.*

89. David Gunzerath, *Rupert K. Murdoch*, MUSEUM OF BRDCST. COMM., http://www.museum.tv/archives/etv/M/htmlM/murdochrupe/murdochrupe.htm (last visited Jan. 31, 2009). *See also* William Safire, Editorial, *The Multinational Man*, CHI. TRIB., May 17, 1985, at C27.

90. EPSTEIN, *supra* note 13, at 63.

91. *Id.*

92. *Id.*

93. *Id.* at 82.

94. Robert Marich, et al., *Miramax Goes to Disney World; Weinsteins Will Stay on in Deal Pegged at $60 Mil*, THE HOLLYWOOD REP., May 3, 1993, at 1.

95. Jill Goldsmith, *Wall Street Backs DreamWorks Deal*, DAILY VARIETY, Dec. 13, 2005, at 1.

Mergers and acquisitions are perpetual in the entertainment industry. Keeping track of all the transactions between parent companies and subsidiaries can be difficult, but below is a table that provides a basic outline of the industry as it currently stands. While this is by no means exhaustive, it does show how the architects of this new system have strategically acquired companies in the various forms of media to build powerful conglomerates.

The Big Six Conglomerates

Conglomerate	Major Studio	Other Studios	Broadcast	Cable	Other
Sony	Sony Pictures, Columbia	United Artists, MGM			TV Production, Sony Electronics, Bertelsmann Music
NBC Universal	Universal	Focus Features, DreamWorks	NBC	USA, MSNBC, CNBC, Bravo, Trio, Sci-Fi	Universal Music (Vivendi), TV Production
Time Warner	Warner Bros.	Picturehouse, New Line Cinema	The CW	HBO, CNN, TBS, TCM, TNN, TNT	Warner Music, TIME Magazine, TV Production
Walt Disney	Disney, Touchstone	Miramax, Hollywood Pictures, Pixar	ABC	The Disney Channel, ABC Family	The Disney Store, TV Production, Radio Disney
News Corp.	20th Century Fox	Searchlight, Fox Faith	FOX	FX, Fox News, Fox Family	TV Production
Viacom	Paramount	Vantage	CBS, The CW	Nickelodeon, MTV, VH1	CBS Radio, CBS Outdoor, King World, TV Distribution

This vertical integration creates several synergies for the conglomerates. Commercials on television can be used to promote movies, and movies can then return the favor by delivering home audiences to advertisers when the movie reaches the free television exhibition window. In this new world where the networks and studios are merged, networks tend to buy most or all of their programming from the studio.[96] Thus, a corporation like Time Warner can release a Warner Bros. movie in the

96. EPSTEIN, *supra* note 13, at 79.

theaters, then release it on DVD and through pay-per-view, and finally cycle it through their pay-television networks, such as HBO, and their broadcast network, The CW. Meanwhile, the soundtrack for the movie can be released on the Warner Music Group label. Instead of having to make arms-length transactions for all of these licenses and release revenue to other companies, Time Warner is able to handle almost all forms of content delivery in-house and keep the revenues in-house as well. This can save companies millions of dollars as they undertake the transactions necessary to license and exhibit.

While Rupert Murdoch's difficulties in purchasing a movie studio and then television network are documented above, the next Part will flesh out the unique challenges § 310 presents to the entertainment industry as it takes on an increasingly international flair.

III. RULES GOVERNING FOREIGN OWNERSHIP

Congress first addressed its concerns about foreign ownership of media outlets in the Radio Act of 1912.[97] The Act as a whole was passed because radio stations were overpowering each other by interfering with each others' signals in the unregulated environment.[98] The foreign ownership restriction was added at the urging of the United States Navy, which was concerned with the national security risks of interference with coastal radio stations.[99] In the Radio Act of 1927,[100] Congress again included a foreign ownership restriction. The intent this time appears to have been to prevent the kind of foreign espionage that occurred in the opening days of World War I, when two German radio stations communicated with German naval vessels off the coast of the United States.[101] These restrictions stood until American communications law was fundamentally reorganized in the mid-1930s.

A. The Communications Act

Under the Communications Act of 1934, Congress reorganized the country's communications laws and established the Federal Communications Commission (FCC). The 1934 Act incorporated many existing rules, including the foreign ownership restrictions of the 1912 and

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97. Act of Aug. 13, 1912, ch. 287, § 2, 37 Stat. 302, 302 (1912) (regulating radio communication).

98. Erwin Krasnow, Member of Verner, Lupfert, Bernard, McPherson & Hand, Washington, D.C., Address at the Foreign Ownership in the Communications Industries—An Analysis of Section 310 Symposium, *in* MEDIA L. & POL'Y 10, 14 (1995).

99. *Id.*

100. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

101. Krasnow, *supra* note 98, at 10.

1927 Acts.[102] They were codified in the 1934 Act under § 310(b), which read in its original form:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;
>
> (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the [FCC] finds that the public interest will be served by the refusal or revocation of such license.[103]

Section 310(b) stood untouched for over sixty years, despite many changes in the communications business. Congress finally made sweeping changes in the Telecommunications Act of 1996 (1996 Act).[104] It is most notable for beginning the deregulation movement in telecommunications, but it also addressed foreign ownership restrictions.

The 1996 Act amended the 1934 Act by eliminating the foreign officer or director restrictions under § 310(b)(3). Congress rigorously debated a proposed "reciprocity rule" that would render § 310(b) wholly inapplicable when the applicant is owned or controlled by a company from a country that would (or is soon likely to) grant similar licenses to an American-owned company. Under a reciprocity regime, one foreign-owned company might be granted a carrier license, but another foreign-owned company might not, because the former country is in the practice of granting licenses to American companies and the latter country is not. In the end, Congress did not include any reciprocity rule.[105]

However, perhaps as a response to the change in rhetoric coming from Capitol Hill, the FCC announced that it would grant licenses to foreign carriers from countries with open markets, subject to a new rule called the

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102. Vincent M. Paladini, Note, *Foreign Ownership Restrictions Under Section 310(b) of the Telecommunications Act of 1996*, 14 B.U. INT'L L.J. 341, 350-51 (1996).

103. Communications Act of 1934, ch. 652, Title III, § 301, 48 Stat. 1064, 1081 (codified as amended 47 U.S.C. § 310 (2006)).

104. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

105. Paladini, *supra* note 102, at 357.

"Effective Competitive Opportunities test," or ECO test for short.[106] The test looks at four things in determining whether the foreign market is open: whether there are legal barriers to entry by foreigners, whether the interconnection is permitted under nondiscriminatory conditions, whether competitive safeguards exist, and whether a regulatory agency exists to protect the foreigner.[107] The FCC established the ECO test to promote effective competition in U.S. telecommunications services markets, to prevent anticompetitive conduct in foreign markets, and to encourage foreign markets to open up to U.S. companies.[108] At this time, the ECO test does not apply to broadcasters, though; only common carriers.[109]

B. Impact in the Entertainment Industry

We have already seen how Steve Ross at Warner Bros. used the foreign ownership restriction to block Rupert Murdoch from buying the studio.[110] By purchasing the Chris-Craft stations, Ross brought § 310(b)(4) into play. It ensured that Warner Bros. would have to be owned by an American citizen as long as it owned the broadcast stations.

As described above, Murdoch did eventually end up getting his broadcast network with the Metromedia purchase. However, his troubles with § 310(b) were only beginning. Soon after acquiring the twelve Metromedia stations, Murdoch pursued the purchase of another twelve stations as part of a joint venture. Unlike the first twelve, these stations were affiliated with ABC, CBS, or NBC prior to their purchase.[111] Murdoch also tweaked the big three networks by outbidding them for rights to broadcast NFL games. Fox's gains were beginning to draw attention from its competitors.

The NAACP[112] and NBC[113] filed petitions contesting Fox's ownership of broadcast licenses. Both petitions questioned whether Fox—as a subsidiary of Sydney's News Corporation—had violated the foreign ownership restrictions of § 310(b). Ultimately, the FCC decided that the structure of News Corporation and Fox did exceed the twenty-five percent rule found in § 310(b)(4).[114] However, the FCC agreed to waive the rule if Fox could demonstrate that such a waiver was in the public interest, as the

106. FCC Adopts New Rules on Foreign Carrier Entry Into U.S. Markets, Rep. No. DC 95-137, IB Docket No. 95-22 (Nov. 1995).
107. Paladini, *supra* note 102, at 362.
108. *Id.*
109. *Id.* at 363.
110. EPSTEIN, *supra* note 13, at 62.
111. Benz, *supra* note 6, at 241-42.
112. *Id.* at 243.
113. *Id.* at 244.
114. *Id.* at 263.

statute allowed.[115] After making the requisite showing of public interest, Fox was indeed granted the waiver.[116]

NBC's position in the challenge is even more interesting. In a November 1995 symposium, NBC Executive Vice President and General Counsel Richard Cotton spoke about the network's challenge to Fox. He claimed that NBC filed the petition out of fairness considerations; that NBC wanted to be on a "level playing field" with Fox.[117] Cotton maintained that NBC was seeking a declaration as to which of the interpretations was correct so that NBC could plan its future business accordingly. NBC had previously been in discussions "to finance and purchase stations with Sony, Matsushita, and other international firms," but these talks were abandoned after NBC concluded that the FCC would not allow such a joint venture.[118] Fox's success with the FCC has given the industry some hope that it may pursue joint broadcasting ventures with foreign partners.

At this symposium, Cotton explained that NBC struggled in the late 1980s with its investments in foreign markets because the foreign governments were imposing parallel ownership restrictions on NBC. In most of the partnerships, NBC was limited to a fifteen or twenty percent stake. Almost none of the partnerships succeeded because "the foreign partner did not possess the skills necessary to successfully manage the broadcast station."[119] In effect, these foreign governments had enacted reciprocal ownership restraints against U.S. companies, forcing NBC to watch helplessly as its foreign partners squandered its investment.

Cotton's statements more or less ring true with what other industry insiders said at the time. Many felt that in protesting Fox's license, NBC had put itself into a "win-win situation."[120] If NBC prevailed, Fox would lose time, money, and momentum in efforts to bring itself into compliance with § 310(b)(4). However, if NBC were to lose its petition, the U.S. market would become more open for foreign investors,[121] just as Richard Cotton had suggested. Furthermore, General Electric was toying with the idea of selling NBC at the time,[122] so a decision in Fox's favor could open the market up to a large bidding war for NBC between such foreign investors as Sony, Matsushita, and Bertelsmann.[123]

115. *Id.*
116. *Id.* at 264.
117. Krasnow, *supra* note 98, at 13.
118. *Id.*
119. *Id.* at 14.
120. Benz, *supra* note 6, at 247.
121. *Id.*
122. *Id.*
123. *Id.*

Instead of selling NBC, General Electric did quite the opposite. After determining that the network could not be sold to a foreign investor, General Electric negotiated to purchase Vivendi Universal in 2003. This deal was also affected by § 310(b). While companies were rushing to conglomerate, Vivendi Universal was shut out because (as a French company) it could never own an American broadcast network. Instead, Vivendi sold eighty percent of its stake in Universal Studios and twenty percent of its stake in Universal Music Group.[124] This gave Vivendi a twenty percent stake in the newly formed NBC Universal, which was well within the limit imposed by § 310(b). In exchange for this limited stake, Vivendi got to keep the eighty percent stake in Universal Music Group, which is now based out of France.[125] The General Electric-Vivendi business relationship seems to be working well, but it is likely that the merger could have been better structured had the foreign ownership restrictions not been in place. As an interesting side note, consider the amount of savings estimated by the synergy of joining this movie studio and this broadcast network with all their associated parts. At least one analyst found NBC Universal's estimate of $400 million to be plausible.[126] However, Time Warner's 1990 merger resulted in less revenue from synergies than the NBC Universal estimate, but company executives were still pleased with the outcome.[127]

This Part includes just two examples of how the foreign ownership restrictions have impacted the entertainment business. One could look to Sony and Matsushita's continual inability to acquire a U.S. broadcast television network for more examples. Sony has made the best of the situation by producing programming to air on the other studios' networks, but is still locked out of the synergies that corporations like Viacom and NBC Universal are able to harvest by producing and exhibiting their own content.

Studios are not the only party limited by the restriction; networks are hurt, too. When the pool of potential buyers is small, the final sale price is likely to be lower than if the pool of potential buyers is larger. If General Electric had opted to sell NBC in the mid 1990s, imagine how much higher the sale price could have been in an auction where Sony, Bertelsmann, Matsushita, and Vivendi were all allowed to bid.

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124. Bill Carter, *G.E. Finishes Vivendi Deal, Expanding Its Media Assets*, N.Y. TIMES, Oct. 9, 2003, at C1.

125. EPSTEIN, *supra* note 13, at 81.

126. *See* Carter, *supra* note 124.

127. Randall Rothenberg, *Time Warner's Merger Payoff*, N.Y. TIMES, Dec. 31, 1990, at A29.

C. Attempts at Circumvention

The FCC has, at times, relaxed the alien ownership restrictions under § 310(b)(4), especially where the aliens are citizens of nations with close and friendly ties with the United States, and the aliens would not exercise direct control over the subsidiaries that hold licenses.[128]

Furthermore, Congress provided the FCC with a way out from the statute's restrictiveness by looking to the public interest. The FCC has generally declined to go this route, but it has outlined four factors that might lead it to ignore § 310(b)(4):

> (1) [W]hether the alien's country of citizenship enjoys close and friendly relations with the United States; (2) the extent of foreign ownership or control of the corporation (i.e., whether the alien(s) hold(s) a majority or minority share); (3) whether the licensed facility involved is passive in nature (i.e., where the licensee exercises no control over the content of the transmission, such as a common carrier); and (4) the qualifications of the applicant.[129]

In addition to the above, one group of scholars has suggested that the FCC might consider the following factors: whether the aliens exercise control over or supervise operations at the licensee subsidiary, whether the foreign investment raises the traditional issues of concern that foreign investment brings, whether foreign participation will help ensure the continued vitality of a business, whether the transfer is temporary, whether the transfer is necessary to save a failing company or to nurture an infant industry, whether a transfer will protect against deterioration in programming, and whether the alien's home country allows investment by American citizens in similar investments.[130]

There are only two instances of the twenty-five percent restriction being waived by the FCC for broadcast licenses. The first broadcast waiver occurred in 1966, but the FCC severely limited the ability of the French bank to control the operations of its subsidiary licensee in that case.[131] The second instance occurred with News Corporation and the Fox Network in 1995, as discussed in the Part above.[132]

In an important ruling, the FCC has interpreted §§ 310(b)(3) and 310(b)(4) as noncumulative, so a foreign national may own both twenty percent of the company with the broadcast license and twenty-five percent of that company's parent company without violating the statute.[133]

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128. Ronald W. Gavillet, et al., *Structuring Foreign Investments in FCC Licensees Under Section 310(b) of the Communications Act*, 27 CAL. W. L. REV. 7, 16 (1991).

129. *Id*. at 17 (quoting 47 U.S.C. § 310(b) (2000)).

130. *Id.* at 17-18.

131. Banque de Paris et des Pays Bas, 6 F.C.C.2d 418 (1966).

132. Benz, *supra* note 6, at 264.

133. Data Transmission Co., 52 F.C.C.2d 439, 440 (1975).

These rulings may be helpful for a company like Vivendi that is only interested in making money off its investment, but what about the Rupert Murdochs of the world? When a foreign national wants to be able to control a licensee company or a parent of a licensee company, what alternatives does he or she have? Is there an alternative short of naturalization? More than a few authors have suggested that this statute should be repealed; it is a relic of a different era.[134] Is pushing for full-scale repeal of § 310(b) the best course of action for media and entertainment businesses?

IV. POSSIBLE SOLUTIONS

A. Eliminating the Rule

Outright repeal of the statute by Congress would be the cleanest solution—Congress can give, and Congress can take away. However, this is unlikely to occur for political reasons. Even if the idea were to gain traction, some American-owned broadcast stations would raise the specter of national security risks, and the media uproar would likely kill the repeal bill. A similar situation occurred in 2006 when President Bush began negotiating to hire a Dubai-based company to run many American ports. The ensuing media storm killed the deal.[135]

Another unlikely strategy would be for a business to file suit in an attempt to have the Supreme Court strike down § 310(b) as an unconstitutional restriction on speech. The Constitution does not discriminate between citizens and resident aliens in its Bill of Rights guarantees, and some scholars argue that § 310(b) denies resident aliens freedom of speech and freedom of the press.[136] While this argument has some merit, it is unlikely that the Supreme Court would find it convincing. Freedom of speech and the press is almost always balanced against the government interest at stake,[137] and this seems to be one of the situations where government interests outweigh individual interests. There are other ways for resident aliens to interject their speech; broadcast license ownership does not place a very substantial limitation upon them. It would be hard to imagine the Court striking down § 310(b). Rather, the Court

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134. *See generally* Rose, *supra* note 3.

135. Deborah Orin and Bill Sanderson, *'Dubai Dubya' in Dock Shock – Threatens 1st Veto on Bill to Nix Port Takeover*, N.Y. POST, Feb. 22, 2006, at 7, *available at* 2006 WLNR 6488571.

136. Rose, *supra* note 3, at 1183.

137. When the courts apply strict scrutiny, a "compelling state interest" can overcome a restriction on speech. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). When the courts apply intermediate scrutiny, an "important or substantial government interest" can overcome a restriction on speech. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

would likely defer to Congress, and if it took any negative action, it might be a minor carving-out of the applicability of the statute to resident aliens, as opposed to a full-scale striking down of the statute.

From its inception, opponents of this statute have argued that foreign ownership restrictions are unnecessary because of the President's War Powers.[138] Any perceived national security threat could be quickly overcome by suspension of the license. Furthermore, the President has other powers, such as the use of executive orders, to restrain the dangers of foreign-owned broadcasting in dangerous times. While such a suspension would be highly irregular, it is an option for protection when absolutely necessary.

B. Restructuring Corporations

The most practical response appears to be the restructuring of corporations in order to meet the requirements of §§ 310(b)(3)-(4). But even after owning twenty percent of the licensee company and twenty-five percent of its parent company, a foreign owner may not find itself in a sufficiently strong position to run the companies. Particularly salient are Richard Cotton's comments above about watching another company squander NBC's investment.

Conglomerates would do well to avoid crossing the line between creative structuring and clearly violating the rules. The FCC has interpreted "control" in the Act to mean "every form of control, actual or legal, direct or indirect, negative or affirmative."[139] The FCC looks to more than just control over finances when determining control of a corporation.[140]

While this may be the most practical response to the foreign ownership restriction, it is far from ideal from a business perspective. Millions of dollars are left on the table without the synergies created by full ownership of a broadcast network.

C. Divestiture of Companies Owning Broadcast Licenses

The best, and still far from perfect, solution to this problem for a foreign-owned or -controlled company is to divest itself of its companies that own broadcast licenses. From this position, the conglomerate may pursue two possibly overlapping courses of action.

First, the parent company could use its movie production facilities to produce television shows, thus functioning as a content supplier by selling programming to other networks. Warner Bros. Studios has a strong

138. 68 Cong. Rec. 3037 (1927).
139. WWIZ, Inc., 36 F.C.C. 561, 579 (1964) (internal citations omitted).
140. Watkins, *supra* note 5, at 15.

tradition of doing just this; its broadcast network (The CW, owned in partnership with Viacom/Paramount) is a relatively minor source of revenue, but Warner Bros. also supplies television programs to the big four networks.[141] This allows the foreign investor with a strong interest in providing content an opportunity to do so.

Second, the parent company could invest heavily in creating a strong non-broadcast network.[142] This is a tremendous opportunity afforded by the FCC's refusal to restrict alien ownership of cable and satellite systems on grounds that they pose no threat to national security.[143] While other networks had to rely on broadcast licenses to get their content into homes as they grew, a startup network could grow through cable and satellite. NBC applied this strategy to great success throughout the 1990s in foreign markets, mainly because it allowed NBC to hold majority stakes in relatively less-regulated cable and satellite networks.[144]

According to a 2003 study, eighty-six percent of Americans get their television through cable or satellite services.[145] The greatest opportunity for content generation and distribution to exist side-by-side in a single, foreign-owned company is through creating a superstation.

Currently, WGN is the only American superstation.[146] WGN and TBS pioneered the superstation concept some time ago, but TBS transitioned to an ad-supported cable network in the late 1990s.[147] The WGN superstation is run by WGN-TV, a traditional broadcast station based out of Chicago. The superstation shows about a hundred Major League Baseball games a year (divided between the Chicago Cubs and the Chicago White Sox), a dozen Chicago Bulls basketball games, and numerous first-run syndicated

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141. The following is a sampling of Warner-produced television programs: *The F.B.I.*, *The Dukes of Hazzard*, *Full House*, *Murphy Brown*, *The Fresh Prince of Bel-Air*, *Friends*, *MADtv*, *The West Wing*, and *Two and a Half Men*. *See* Television by Title, http://www.warnerbros.com/#/page=television (last visited Jan. 31, 2009).

142. Broadcast is but one form of multi-channel video program distributor (MVPD). Cable and satellite are the two main alternative MVPDs. Annual Assurement of Status of Competition in Market for Delivery of Video Programming, *Eighth Annual Report*, 17 F.C.C.R. 1244, 1246-47 (2002).

143. Watkins, *supra* note 5, at 12.

144. *Id.* at 14.

145. Frank James, *FCC Chief Warns of Future Shock; Michael Powell Envisions Calamity for Broadcast TV and Telephone Service Unless the Country Changes What He Regards as Outdated Regulations*, CHI. TRIB., Sept. 7, 2003, at C11, *available at* 2003 WLNR 15410860.

146. John Dempsey, *Trib's Troubles Don't Trip Up Superstation*, WEEKLY VARIETY, Jan. 21, 2007, at 18.

147. *Id.*

shows.[148] The network reached seventy million homes in 2006, and that number marks a significant growth over the previous half-decade.[149]

A media conglomerate looking to build a presence in television could construct a network very similar to WGN. The affiliated movie studio could supply a steady stream of films for the fledgling network. Also, any news resources of the conglomerate (such as newspapers, online resources, and cable news networks) could be incorporated into the new network. Finally, the conglomerate could make a substantial investment in creating original, scripted programming that competes with the major broadcast networks in terms of quality. As the network grows in popularity, it could expand to include sports and local news if the conglomerate determines that doing so would be profitable.

Indeed, this is not a unique idea—other networks (both broadcast and non-broadcast) have developed this same blueprint for success. Little known broadcast network Ion TV (formerly PAX) has begun expanding its offerings in an effort to build viewership.[150] The network began by airing inexpensive syndicated shows, but has recently purchased the rights to air "ER," "NCIS," and "Boston Legal." Ion TV plans to then expand to game shows, reality television, and finally, scripted series, as the network brand—and viewership—grows.[151] More established non-broadcast networks such as USA, FX, and TNT are now able to compete head-to-head with the major broadcast networks for viewers.[152] According to "NYPD Blue" creator Steven Bochco, who is currently producing "Raising the Bar" for TNT, "[t]he death grip that broadcast had on viewers is broken . . . . There are a lot of options out there, and people are loyal to the shows they like. The broadcast networks can't lay claim to the kind of exclusivity that they used to."[153]

This strategy of divesting ownership of broadcast licenses, creating content for other broadcast networks, and investing in a non-broadcast network will require substantial capital investment. Furthermore, building a network takes time, so the investment will not yield immediate returns. Despite these drawbacks, this strategy is the most likely path to success for a foreign-owned conglomerate that wishes to create and distribute content on television in the United States.

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148. *Id.*

149. *Id.*

150. John Dempsey, *Little Ion Looks for Off-Net Jolt*, WEEKLY VARIETY, Sept. 8, 2008, at 12.

151. *Id.*

152. Kimberly Nordyke, *Cablers Target Broadcast's Fall Domain*, THE HOLLYWOOD REP., Oct. 9, 2008, at 1.

153. *Id.*

V. CONCLUSION

There is no easy way around the foreign ownership restriction for a foreign investor. Indeed, the statute is very effective at achieving its stated goal. However, in the increasingly international media and entertainment business, § 310(b) has become a source of new and constant problems. Media and entertainment companies should use a two-pronged approach in overcoming the problems caused by this restriction.

First, businesses barred from holding broadcast licenses should invest heavily in developing a non-broadcast superstation. As fewer people receive their television signal from terrestrial broadcast than ever before,[154] it might be possible to create a strong enough presence on cable and satellite to compete with the traditional broadcast networks. While this option has great potential, it also requires a tremendous amount of initial investment.

Second, businesses should lobby for gradual changes in the way the FCC applies § 310(b). While there are strong arguments on both sides of whether to repeal the entire Section, it is important to recognize the value of stability. Indeed, it is in these conglomerates' best interests for any change in § 310 to come slowly, with adequate time for the market to respond and adapt to the changes made.

The best way to affect such a gradual change in the law is through business participation in FCC rulemaking and adjudication. If media companies apply gentle pressure, the FCC may gradually adjust its interpretation of the public interest exception to the twenty-five percent restriction found in § 310(b)(4). Slow change will give the FCC time to evaluate the consequences of its actions before causing major disruptions in the market, and it will also allow Congress to exert oversight in the process. If the FCC makes a decision that Congress deems ill-advised, then Congress will have recourse to pass a statute before too many licensees are affected.

This solution is superior for three reasons. First, it provides more stability to the entertainment and media businesses as the network broadcast economy gradually shifts from a national one to an international one. Second, it relies on an appointed commission (instead of elected officials) to undertake a potentially politically unpopular move. Third, it requires very few changes in the substantive law, but rather just a change in

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154. At the end of 2007, there were 112 million television households in the United States. Of those, 64 million (58%) subscribed to cable, and another 32 million (29%) subscribed to some other multi-channel video program distributor. In sum, 96 million households (87%) are no longer dependent on broadcast signals for television distribution. *See* Nat'l Cable and Telecomms. Ass'n, Statistics, http://www.ncta.com/Statistic/Statistic/Statistics.aspx (last visited Jan. 30, 2009).

the way the existing law is interpreted. This means that the change, if done through the FCC, is likely to have fewer unintended effects on other aspects of law and business.

As this Note has argued, a broadcast license is still necessary for a conglomerate to maximize its synergies. Conglomerates that are currently blocked from holding a broadcast license should be pursuing non-broadcast network options and lobbying the FCC for a more lenient application of the public interest waiver found in § 310(b)(4).