ATTACHMENT

Consumers Union

Publisher of Consumer Reports

Testimony of

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Before the

Senate Committee on
Commerce, Science, and Transportation

On

Media Consolidation

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Consumers Union[1] is concerned that meaningful public policy debate about the need for media and communications ownership restrictions has been distorted by ideology and the business interests of the commercial players who stand to gain or lose by manipulating this debate. We urge policymakers to reaffirm the goals of promoting competition, diversity and meeting community needs, and to refocus the ownership debate on the fundamental attributes of the various communications and media markets. While the antitrust laws can effectively prevent substantial reductions in competition, they are not effective tools for dismantling monopolies, promoting competition or preserving other public interest values. We believe that consumers' interests will best be served if the Federal Communications Commission (FCC) is instructed to maintain previous media ownership rules, until it can demonstrate how the public interest in more competition, diverse ownership and the needs of local and minority viewpoints can be met by altering or eliminating these rules.

The recent explosion of media and communications technology was expected to deliver consumers a brave new world of competition across all telecommunications and media markets. There is no doubt that today, consumers have the option of receiving news, information, entertainment from a far greater variety of media – newspapers, radio, television, the Internet – than ever before. Unfortunately, this growth in variety has not been accompanied by a comparable growth of independent, diversely owned competitive communications services and media voices.

Rather than the cross-market competition envisioned with the enactment of the 1996 Telecommunications Act, virtually every communications and media sector has witnessed an explosion of consolidation. The study attached as an appendix to this testimony, "Mapping Media Market Structure at the Millennium," provides the detailed empirical and analytical analysis upon which our testimony relies. The two major communications wires into the home, telephone and cable are now controlled by a few super-regional companies that focus their business on dominating their respective markets rather than challenging each other's core business. Long distance companies have not been able to crack the local phone companies' stranglehold on consumers, and the satellite companies still cannot compete on price with cable monopolies. Radio and newspaper chains grow larger, and national broadcast networks continue to buy more local broadcast stations. *See Appendix at 3-11.* And on the Internet, where "the number of potential online channels is infinite," about one-third of user minutes were controlled by cable giant AOL Time Warner last year.[2]

Has this consolidation opened the door to new competition? Hardly. Contrary to the claims of the major players in each communications sector, Internet service providers, national broadcast networks, newspaper and radio chains, and cable companies do not compete in a meaningful way against each other for consumers' news, information, entertainment and other communications needs.

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] "Online Media Consolidation Offers No Argument for Media Deregulation," Jupiter Media Metrix, Inc. June 4, 2001.

A careful market analysis reveals that there are several kinds of media markets (e.g., national v. local, primetime television v. daytime TV, national network news v. all other news programming), which support different business models (e.g., subscription-based v. advertiser-based). These markets are adjacent to each other rather than in competition with each other. *See Appendix at 3-11.* This is not to say that there is no form of competition or rivalry across media, but newspapers' classified advertising cash cow in no way resembles the high-priced pharmaceutical and auto advertising splashed across national television network primetime programming. These are separate markets that are not yet substitutes for one another. For example, the enormous growth of the Internet provides no basis for relaxing the national television broadcast ownership cap, given that only about half the country is on the Internet, and the Internet does not provide a service comparable to broadcast television.

And in moderately or highly concentrated media and communications markets, vertical integration—the combined ownership of content and distribution channels—can skew incentives to undermine journalistic independence. For a news program at a station that is independently owned and operated, the overriding concern should be credible and professional reporting that will bring viewers back. However, when a large media conglomerate gobbles up that same station, it becomes unlikely that the station will cover its parent aggressively when inevitable conflicts of interest arise. In markets with few direct competitors, this bias is more likely to go unnoticed and unchallenged. *See Appendix at 17-19.*

Even when it appears that the giants in one media sector are squaring off against the giants in another, each invoking the consumer's interest as its sole motivation in battle, often the consumer is more a hostage than the beneficiary of the warfare. For example, when ABC, backed by its parent, the Walt Disney Company (Disney), squared off against cable monopoly Time Warner over carriage terms for Disney's programming, consumers faced the following prospects: either Time Warner would win and consumers would still pay inflated cable rates without receiving Disney programming, or Disney would win, and Time Warner could increase consumers' rates in return for carrying Disney programming. And when cable and Internet giant AOL Time Warner sounds like it wants to challenge the national broadcast networks' dominance in TV news coverage through its popular CNN and Headline News cable channels, analysts believe this really means that AOL Time Warner wants to merge or partner with either ABC News or NBC News.[3]

The fundamental failure of media and communications policies to develop competitive transmission/distribution systems has left consumers at the mercy of powerful content and transmission companies whose most antagonistic, "competitive" behavior consists of fighting with each other over who gets the larger share of monopoly profits from consumers, and who often control content delivered to consumers.

As the FCC reviews its national television broadcast ownership cap, and newspaper/broadcast cross-ownership rules, it is critical that the Commission take a careful look at the fundamentally different characteristics of each media and communications market, in determining what regulations are appropriate to meet Congress' goal of protecting the public interest. And Consumers Union believes that it is important for the Commission to preserve critical elements of previous judicially and Congressionally approved definitions of the "public interest" – promote diversity based on independent ownership designed to expand competition, meet local community needs, and protect the viewing/listening public's First Amendment rights to hear and

[3] Jim Rutenberg, "Mix, Patch, Promote and Lift." New York Times (July 15, 2001).

be heard – rather than drifting toward a definition where variety (even if owned and controlled by few) equals diversity. *See Appendix at 19-20.*

Past Commission reviews of these ownership rules have involved only cursory analysis of the most critical economic forces at play in media markets and we believe it is time to correct that flaw. Especially at a time when the D.C. Circuit Court of Appeals can find a way to read an act of Congress (the 1992 Cable Act, Public Law 102-385, which was designed to promote cable competition by limiting concentration of ownership) as potentially allowing a single cable company to own systems serving as many as 60 percent of all cable customers[4], it is obvious that Congress' expert communications agency must do a better job in gathering data, analyzing market forces, and then demonstrating how congressionally mandated rules address market dysfunction.

However, we are troubled that the FCC's current Chairman has characterized the broadcast ownership cap as based on "a romantic notion, … an emotional one,"[5] that limits "are almost always poorly calibrated"[6] and that "there is something offensive to First Amendment values about that limitation."[7] We certainly hope that Chairman Powell will engage in a thorough analysis of the market forces that are affected by this rule and all others, rather than reach conclusions based on past shortcomings in the FCC's research. And we hope the Chairman has not forgotten than the First Amendment protects the public's free speech rights, not just the more limited right of commercial media enterprises.[8] As we point out above, just because many media ownership rules are old and markets have changed does not mean that markets, without these rules, can adequately promote diversity of ownership and competition.

Recent research on the economics of radio and newspaper markets raises fundamental concerns about whether deregulation of ownership in media markets can produce the kinds of consumer benefits and a robust marketplace of ideas, that are usually associated with competitive markets.[9] For example, data show that people whose tastes in radio programming differs from the largest group of listeners in a community tend to receive less content than they desire in the marketplace, and that this is likely the case for other media:

> A consumer with atypical tastes will face less product variety than one with common tastes…. The market delivers fewer products – and less associated satisfaction – to these groups simply because they are small. This phenomenon can arise even if radio firms are rational and entirely non-discriminatory.
>
> The fundamental conditions needed to produce compartmentalized preference externalities are large fixed costs and preferences that differ sharply across groups of consumers. These conditions are likely to hold, to greater or lesser extents, in a variety of media markets – newspapers, magazines, television, and movies.

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[4] *Time Warner Entertainment v. Federal Communications Commission*, No. 94-1035 (D.C. Cir., Mar. 2, 2001).
[5] Labaton, Steven, *"F.C.C.'s Chairman Would Curb Agency, Reach,"* New York Times, Feb. 7, 2001.
[6] Srinivasan, Kalpana, *"FCC Chief Wary of Broadcast Rules,"* Associated Press, April 25, 2001.
[7] Id.
[8] Red Lion Broadcasting Co., Inc., et al v. Federal Communications Commission et al, 395 U.S. 367 (1969).
[9] Waldfogel, Joel and George, Lisa, *"Who benefits Whom in Daily Newspaper Markets?"* National Bureau of Economic Research (2000). Waldfogel, Joel, *"Preference Externalities: An Empirical Study of Who Benefits Whom in Differentiated Product Markets"* National Bureau of Economic Research (1999).

> Radio programming preferences differ sharply between blacks and whites, between Hispanics and non-Hispanics and (to a lesser extent) across age groups.[10]

These findings indicate that, given the large fixed costs involved in offering media services, the wide variety of tastes in media markets, and the drive to maximize profits through maximum advertising revenue/audience size, market forces are likely to leave more local tastes under-satisfied by national firms, and more minority tastes under-satisfied even in local markets. *See Appendix at 19-20.* It is therefore necessary for the government to continue regulating – either through structural constraints like ownership caps, or behavioral requirements like "equal time," "reasonable access," or network/affiliate rules – to pursue the public interest goals of meeting local community needs and promoting diversity of views in media markets, even where competition exists.

Consumers Union therefore believes the FCC should leave the current national television broadcast ownership cap in place, while it initiates a much more detailed and extensive analysis of market structure than it has in the past. The current cap, which allows a national broadcast company to own local television stations that reach as many as 35 percent of the national television viewing audience, is already set at a level that often triggers antitrust scrutiny over the ability to control programming decisions in the marketplace. *See Appendix at 16-17.* With four national television networks already dominating primetime television viewing and the massive advertising dollars that come with it, there is a substantial danger that further ownership of local stations would lead to increased pressure on local stations to carry nationally-oriented programming which maximizes national advertising revenue, at the expense of locally-oriented programming. And the fact that the national television networks, no longer constrained by limits on vertical integration (the financial interest and syndication rules), have a financial incentive to favor programming they produce and syndicate is likely to increase pressure on local stations to carry network owned rather than locally popular programming. Certainly the local network affiliates – who may also be doing less than they should to meet community needs – are complaining about an excessive national profit orientation by the networks at the expense of local programming needs.[11]

Consumers Union urges the FCC, as part of its review of the broadcast ownership cap, to initiate an investigation which answers the following critical questions:

1. Since the national television broadcast ownership cap was raised from 25 to 35 percent, how much has local programming designed to meet community needs suffered?
2. How much has elimination of the financial interest and syndication rules affected local station's ability to preempt network programming to show programs that reflect community tastes?
3. How much does I, as opposed to theoretical, enforcement of the Commission's network/affiliate rules protect local broadcasters from unfair leveraging by the national broadcast networks?
4. Are these rules adequate, without a national ownership cap, to prevent unfair leveraging?

[10] Waldfogel, *"Preference Externalities"* at 27-30.

[11] Network Affiliated Stations Alliance, "Petition for Inquiry into Network Practices." (Federal Communications Commission, Mar. 8, 2001).

5. When there is no interference from the national broadcast networks, are local broadcast licensees meeting their obligations to serve local community needs, or is greater public intervention necessary to ensure diversity of local programming?

The FCC's newspaper/broadcast cross-ownership rule plays a very different role from the national broadcast cap in promoting a marketplace that protects the public interest. Consumers Union believes that this prohibition on a local newspaper owning a local broadcast outlet in the same community has much more to do with promoting checks and balances in media coverage of news and information (including matters affecting the business interests of newspapers and broadcasters) than competition. The fact that virtually every community in this country has only one financially stable community-wide newspaper, and that broadcast does not compete effectively with newspapers, should give the FCC pause as it considers relaxing or eliminating the cross-ownership rule:

> Wasn't it television and radio that were going to kill newspapers? "I don't really consider them competition in that old-school way," stresses Florida Sun-Sentinel editor Earl Maucker. "They reach a different kind of audience with a different kind of news…
>
> Publisher Gremillion, a former TV executive himself, seconds the point, "I don't believe people are watching TV as a substitute for reading the newspaper…"
>
> …Many newspapers are increasingly writing off local TV news as a serious threat, treating local stations instead as potential partners who can help spread the newspapers' brand name to new and bigger audiences.[12]

It is difficult to imagine the Thomas Paine pamphleteer tradition of print journalism – considered so valuable to our core beliefs that the Supreme Court granted it the most far reaching First Amendment protections[13] -- will be able to survive in a world where newspapers become marketing devices for broadcasters. Print journalists often assert an allegiance to their almost century-old creed:

> I believe in the profession of journalism. I believe that the public journal is a public trust; that all connected with it are, to the full measure of their responsibility, trustees for the public; that acceptance of lesser service than the public service is a betrayal of this trust.[14]

Compare these journalistic values with the image presented by Tribune Company executives, describing how the Chicago Tribune and Chicago television station WGN, among other media properties, view their business:

> Tribune had a story to tell – and it was just the story Wall Street wanted to hear.
>
> In charts and appendices, they showed a company that owns four newspapers— and 16 TV stations (with shared ownership of two others); four radio stations;

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[12] Stepp, Carl Sessions, *"Whatever Happened to Competition,"* American Journalism Review (June 2001).
[13] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[14] Kunkel, Thomas and Roberts, Gene, *"The Age of Corporate Newspapering; Leaving Readers Behind,"* American Journalism Review (2001) citing Walter Williams, *The Journalist's Creed* (1914).

> three local cable news channels; a lucrative educational book division; a producer and syndicator of TV programming, including Geraldo Rivera's daytime talk show; a partnership in the new WB television network; the Chicago Cubs; and new-media investments worth more than $600 million, including a $10 million investment in Baring Communications Equity Fund, with dozens of Asian offices hunting out media investments.
>
> …There was an internal logic and consistent language to their talk: Tribune, said the four men, was a "content company" with a powerful "brand." Among and between its divisions, there was a "synergy."
>
> …It was a well-scripted, well-rehearsed performance, thorough and thoroughly upbeat. And the word "journalism" was never uttered, once.
>
> …Even apart from TV and new media—at the Tribune papers themselves—the editor in chief rarely presides at the daily page one meeting. The editor's gaze is fixed on the future, on new zoned sections, multimedia desks, meetings with the business side, focus group research on extending the brand, or opening new beachheads in affluent suburbs. "I am not the editor of a newspaper," says Howard Tyner, 54, whose official resume identifies him as vice president and editor of the Chicago Tribune. "I am the manager of a content company. That's what I do. I don't do newspapers alone. We gather content.[15]

In highlighting the Tribune Co., we do not mean to suggest that there is anything wrong with the company's behavior. On the contrary, economic "synergies" may certainly help Tribune improve the quality of its media products. And we do not mean to suggest that other factors, like newspaper consolidation and newspaper ties with other corporate entities, do not also challenge print journalist's ability to follow their creed. However, when the two largest sources of news and information – television and newspaper[16] – come under the same ownership roof, there is special cause for concern about business pressures that could undermine the free marketplace of ideas.

Consumers Union believes that, particularly where there is only one local newspaper, the public interest is best served by prohibiting that newspaper from owning a local television broadcast outlet. Dangers ranging from favorable newspaper reviews of a broadcaster's programming, to positive editorials/opinion articles about business interests of a broadcaster or politicians who favor such business interests would be difficult to prevent if cross-ownership is broadly permitted:

> Down in Tampa, Media General has gone so far as to put its newspaper, the Tribune, in the same building with its local television station and online operation, the better to exchange stories and, ostensibly, resources. (It's still unclear what the newspapers get out of the bargain other than garish weather maps sponsored by the local TV meteorologist.) Tampa's has become the most sophisticated model of this kind of thing, and as such is drawing enormous interest from other newspaper companies.

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[15] Auletta, Ken, "The State of the American Newspaper." American Journalism Review (June 1998).
[16] Media Studies Center Survey, University of Connecticut, Jan. 18, 1999.

> Under the Tampa model, and presumably in most major city rooms of the future, news decisions for all these outlets are made in a coordinated way, sometimes in the same meeting. In effect the same group of minds decides what "news" is, in every conceivable way that people can get their local news. This isn't sinister; it's just not competition.[17]

Except where there is meaningful competition between local newspapers, we believe that lifting the newspaper/broadcast cross-ownership ban would significantly undercut the watchdog role that newspapers play over broadcasters and thereby undermine – particularly in the realm of political speech – Congress' goal of ensuring an open marketplace of ideas.

It is time for the FCC to engage in a careful analysis of media and communication markets, before it considers altering current ownership rules. Consumers Union believes that such a analysis will demonstrate the need to preserve the national broadcast network ownership cap and newspaper/broadcast cross-ownership rule in order to promote the publics interest in more media and communications competition, diversity of ownership, and protecting the First Amendment rights of citizens whose tastes do not correspond to those of the majority nationwide or in a particular community.

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[17] Kunkel, Thomas and Roberts, Gene, *"The Age of Corporate Newspapering; Leaving Readers Behind."* American Journalism Review (May 2001).

Appendix

MAPPING MEDIA MARKET STRUCTURE AT THE MILLENIUM

Prepared by
Dr. Mark N. Cooper

I. TECHNOLOGICAL PROMISE VERSUS ECONOMIC REALITY IN CONCENTRATED MEDIA MARKETS

A. Digital Day Dreaming

For the better part of the past decade public policy debate over the media has been preoccupied with a looming technological revolution. This "revolution," always just over the horizon, but never reached, promises that competition to cable and telephone monopolies will come from the next-generation Internet.[1] The cable companies have successfully argued for a decade that we should allow them to extend their monopolies because they will compete against local phone companies. The phone companies tell us we should allow them to extend their monopolies because they will offer a full range of video services that will compete against the cable companies. The TV networks argue that cable and the Internet have overtaken them. However, this cross-media competition is always just beyond our grasp and the solution offered is always less rules, more monopoly.

It cannot be denied that a kind of revolution has occurred. Gains in efficiency and worker productivity from computing technology[2] stimulated an unprecedented economic boom over the last decade.[3] Digitization, whereby images, voice and text are all converted to zeroes and ones, allows for services that were once transmitted over different networks to be transmitted over the same wire.[4] This "convergence" of television, telephone, and text services (such as email and fax) allows the theoretical possibility of powerful, all-purpose networks, transforming citizen participation[5] and promoting vigorous competition between network owners. These next-generation broadband networks, we are told, are poised to dethrone the incumbent monopolists, transform social interaction and education and remove the ability of powerful interests to control political and commercial speech.

With this impending convergence revolution, the story is that all this and more will be unleashed if only for fewer rules, further deregulation, and a little more elbow room for the biggest media conglomerates. They argue that we no longer need policies to prevent excessive concentration of influence and control over the mass media, to promote diversity of points of view in the media, and to ensure the availability of public interest and locally oriented programming. We are told that we no longer have to impose restraints on the unfettered play of economic interests in media markets because the new technology creates self-enforcing mechanisms that will ensure a vigorously competitive media economy and a more democratized sphere of political discourse.

B. The Public Policy Nightmare

Unfortunately, this story may be a fairy tale without a happy ending. If our only media policy is enthusiastically pro-consolidation, it is unlikely that this new technology will ever achieve its real potential.[6] Rather than becoming a means of expanding economic choice and political expression, concentration of ownership and control of the more powerful means of communications will result in controlled and restricted access,[7] commercialization at the expense of public spirited and diverse programming,[8] and homogenized national offerings, bereft of local content and relevance, with large segments of society left behind.[9]

It is true that a small class of users, "information intensives," is beginning to use certain media more interchangeably (e.g. they can afford satellite television, they are regular users of the Internet and in many cases have chosen to adopt broadband (high-speed) Internet services.[10] These users have the ability to access all types of media and are voracious media consumers. However, this is of course a very narrow segment of the population accessing applications that do not compete with the dominant media offerings. Indeed, despite the Internet's theoretically democratizing influence and potential, powerful media owners still have a great ability to "pull the plug," or direct the flow of communications. This new medium may be more prone to domination and control. There is also a concern that control and policymaking shifts out of the hands of "duly elected" governments. [11]

Network gate keeping of this sort is more than a speculative possibility—at the beginning of this month (July 2001), Charter Communications removed ESPNews from the homes of about 250,000 cable customers because ESPN would not agree to restrictions demanded by Charter on the distribution of ESPNews programming on the Internet.[12] Last year, Time Warner Cable removed Disney from its cable systems in a similar dispute.

Cable operators have not been shy about their ability to restrict subscribers' content. Kevin Leddy, Senior Vice President for New Products at Time Warner Cable told a New York Times reporter that "For the next few years, what you see on our screen will be our partners. If a programmer wants to have ability to have two-way communication with viewers, the cable operator has to be part of that."[13] AT&T, the largest cable company has taken a similar view, insisting that its brand be the entryway to the Internet and preserving its ability to steer traffic to its partners.[14]

Public policy is most critically important now for two reasons. First, the new interactive, multi-media hold the potential to increase the power of the TV medium—by adding interactivity and much higher visual quality to a medium that already has great communicative power with immense reach,[15] real time immediacy,[16] and visual impact—and expand its role in commerce and political expression.[17] Second, it is critical to ensure public values are reflected in the underlying infrastructure of the media marketplace at the early stages, as the networks are being designed and deployed. [18] Economic and contractual relations create barriers to access and give owners control, and, perhaps more importantly,[19] architectural decisions in the design of networks place speakers and non-owners at a disadvantage.[20]

D. Outline of the Report

The discussion is organized as follows. Section II describes the nature and role of different media in the current market demonstrating that different media occupy different product spaces in both the commercial marketplace and the marketplace of ideas.

Section III demonstrates that each specific product space remains concentrated, and therefore a source of concern for public policy.

Section IV demonstrates that national media markets present problems of concentration and vertical integration.

Section V argues that based on extensive empirical evidence, public policy cannot rely on economic forces alone to accomplish the goal of ensuring a marketplace of ideas that provides diversity and local content.

II. CHANGE AND CONTINUITY: DIFFERENT MEDIA OCCUPY DISTINCT PRODUCT SPACES

While the advocates of convergence equate all media, the reality is that different media serve different needs, have different content, and differ widely in their impact and effect. People use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. As a result, competition between the media is muted in the marketplace and, in some respects, the specialization of each is worth preserving because of the unique functions provided in the marketplace of ideas.

Exhibit 1 provides a description of the key characteristics of the relevant media market including audience size, media use and advertising spending over the past decade and a half. We include daily entertainment/information media, since they are most directly relevant to the central civic discourse concerns of public policy. Exhibit 2 shows the 1999 breakdown of advertising revenues, which underscores the fact that these are distinct markets.

Exhibit 3 presents the media product space as defined by three characteristics – media type, market-orientation and revenue base. There are two distinct types of media, video and non-video. There are two distinct markets, national and local. There are two different revenue models, advertising and subscription. Each of these media types largely occupies a separate product space. Competition across these product categories is weak at best. While there is some overlap, or competition at the edges of each product space, but the core of each is insulated from competition from the others. Some market characteristics have changed since many of the media ownership rules were first enacted, but it is not clear that the changes require us to dramatically alter the long standing public policies that prevent excessive control or influence over mass media, to promote diversity, and to ensure the availability of public interest/locally-oriented programming.

EXHIBIT 1:
MEDIA MARKETING DATA

	1985	1993	1998	2000p
UTILIZATION (% OF HH with)				
Broadcast	85	93	98	98
Cable	43	61	67	69
Radio	99	99	99	99
Newspaper	63	60	56	.
Internet	0	0	33	45
UTILIZATION (% of Adults Reporting Use)				
Broadcast	92	93	92	94
Cable	48	60	70	71
Radio	85	86	84	84
Newspaper	85	84	80	79
Internet	0	0	33	45
HOURS PER ADULT (per year)				
Broadcast	1320	1082	884	805
Cable	210	453	689	786
Radio	1200	1082	1050	1024
Newspaper	185	170	156	152
Internet	0	2	74	122
Total	2915	2789	2853	2889
ADVERTISING (Billion $, Nominal)				1999p
Broadcast	14.6	28	39	41
Cable	0.7	4	8	10
Radio	6.5	9	15	17
Newspaper	25.2	32	44	47
Internet	0	0	1	2
Total	47	73	108	117
Constant 1998 $				
Broadcast	18.1	31	39	
Cable	0.9	4.4	8	
Radio	8	10	15	
Newspaper	31.2	35.4	44	
Internet	0	0	1	
Total	58.2	80.8	108	
ADULT POP. (Million)	175	191	200	
AUDIENCE (Pop x Hours, billion)	510.1	532.7	570.6	
MARKET (constant 1998 $) (Pop x Income, billion)	2804	4043	4646	
DISPOSABLE INCOME				
Nominal	12941	19121	23231	
Real, 1996$	18229	20384	22569	

Source: U.S. Census Bureau, *Statistical Abstract of the United States: 2000* (U.S. Department of Commerce, 2000), Tables 17, 722, 909, 910, 911, 931, 932, 937, and various equivalent table in earlier editions.

EXHIBIT 2:

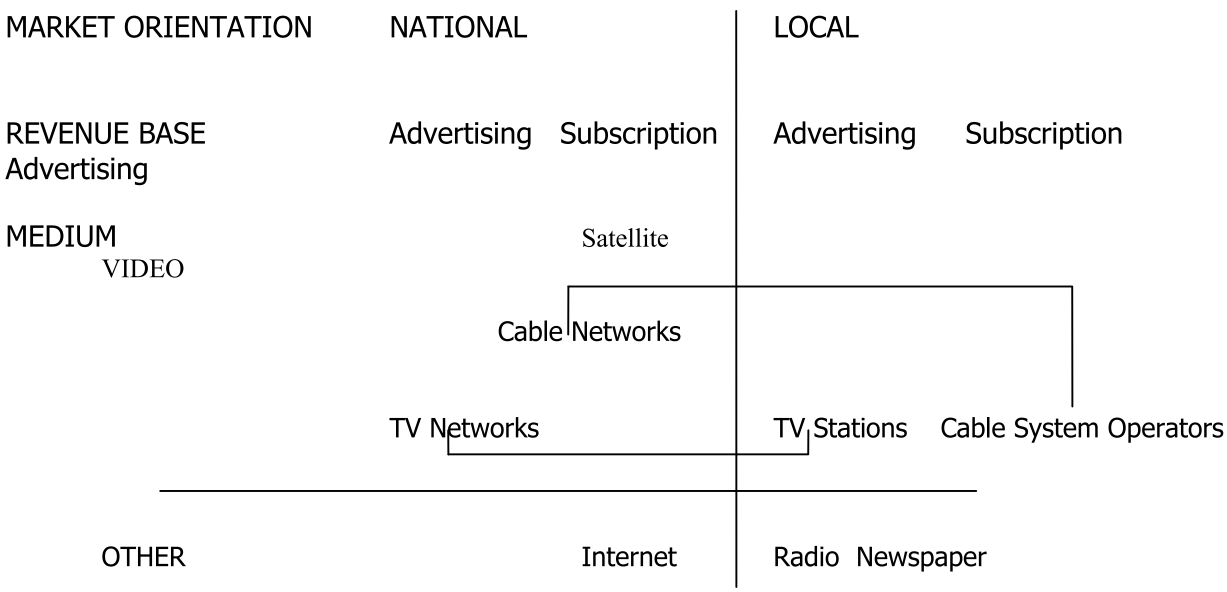
DISTRIBUTION OF NATIONAL AND LOCAL ADVERTISING AND TOTAL REVENUE BY MEDIA TYPES

	DISTRIBUTION WITHIN MEDIA TYPES PERCENT OF MEDIA ADVERTISING			% OF TOTAL REVENUE FROM NATIONAL ADVERTISING	DISTRIBUTION OF ADVERTISING ACROSS MEDIA TYPES			
					LOCAL		NATIONAL	
	LOCAL	NTL	TOTAL		$	%	$	%
NEWSPAPERS	87	13	100	6	41	59	6	13
RADIO	76	24	100	23	13	19	4	9
CABLE	30	70	100	25	3	4	7	16
BROADCAST	32	68	100	68	13	19	28	62
TOTAL	61	39	100		70	100	45	100

Source: Calculated from Exhibit 1 and U.S. Census Bureau, *Statistical Abstract of the United States: 2000* (U.S. Department of Commerce, 2000), Table 908, 927, 937.

EXHIBIT 3

THE MEDIA PRODUCT SPACE



The fact that the product spaces were different in the past cannot provide market discipline in the present.[21] The fact that some people would like the Internet to provide more a new form of more meaningful local content, or that cable might someday have a bigger impact on the prime time TV market cannot provide the market forces necessary to discipline a product space that they have failed to successfully enter or occupy.

A. Broadcast/Network TV

TV networks still dominate the most valuable viewing time – prime time – and capture the lion's share of national advertising dollars. They can be considered "prime-time programming juggernauts."[22]

Network advertising revenue growth has far outstripped population growth or any change in viewing habits (advertising revenue has grown about 117 percent as compared to adult population/audience = at most 14 percent; market size = 64 percent). Based on these entertainment/information media, broadcast's share of the total advertising pie has increased from 31 percent to 36 percent.

Network TV is primarily a nationally oriented medium. National advertising revenue accounts for the majority of its revenue. The TV networks account for the majority of national advertising dollars spent in these media.

As noted, TV networks dominate the national video product space with original prime time programming. Nevertheless, local advertising revenues and local stations play an important role in the TV market. The tension within the traditional broadcast industry has been fueled by the conflict of economic interests between local stations and national networks. This tension bears directly the provision of local content, one of the most prominent aspect of policy in electronic media.[23]

TV networks are in a different class than the other media in terms of advertising dollars. Broadcast remains in a different category than cable. Cable TV has only captured a limited amount of prime time, but has captured significant numbers of viewers during non primetime hours. This is the primary reason cable's average advertising rates remain low in comparison to broadcast.[24]

TV ratings and audience market shares show that the networks dominate prime time. The top 20 or so TV shows are all prime time network products. They fill about three quarters of the weekly prime time viewing hours (8 pm to 11 pm). The top 20 shows capture between 150 and 225 million household hours of viewing per week. Almost all of it these shows are original network programming. A small amount, 10 to 20 million households might be viewing a network movie.

Cable's top products are quite different. Of the top twenty cable network shows, about half are in prime time. They capture 20 to 40 million household hours. About half are rerun movies, not programming.

Equally important for public policy is the central role that the networks play in dissemination of news. Television has been the primary source of news for over a decade. On average, each night between 20 and 25 million households tune in to the early evening flagship news shows on the three major networks. In contrast, the four major cable news networks capture about 3 million viewers over the course of their entire early evening/ prime time news offering.

Combining news and all of primetime, which is the networks' bread and butter, the big three networks capture about ½ billion household hours of weekly viewing, including of course the dominant news shows. The top three cable networks capture about 1/5 of that and provide no news. From a commercial and information point of view, the networks are still king.

B. Cable TV

Cable provides local distribution of video content primarily capturing non-prime time viewing. Cable TV has taken a substantial bite out of network TV viewership. While total hours watching TV have been almost constant over the past fifteen years, cable's share has grown from 14 percent to almost 50 percent.

Cable systems operators are the local distribution system for cable, franchised at the local level, although federal preemption has scaled back the role of local franchising authorities. Lately there has been a strong trend to regionalizing the local cable companies so that contiguous areas are joined under one company. The large national cable networks built up over the past couple of decades have been created by buying up small MSOs. There has also been a strong trend toward vertically integration into programming, primarily by purchasing libraries of programs and sports entertainment. Cable has become a local distribution mechanism for national programming.

In contrast to network TV, which is funded entirely by advertising, cable is funded primarily by subscription revenues although national advertising revenues have been growing. Local advertising still plays a small role in cable and cable plays a small role in the local advertising market. Newspapers account for 13 times as much local advertising revenue and radio accounts for four times as much.

C. Satellite

Satellite occupies a much narrower product space than cable. It is a high-cost, niche distribution system. Given its cost characteristics, it does not compete with basic cable. Given that satellite still lacks robust local programming and its lack of original prime time programming, it is not yet a substitute for network TV or cable.

During the decade of the 1990s, satellite filled out its niche. It now has about 13 million subscribers, compared to cable's almost 70 million. However, it has failed utterly to control the abusive pricing practices of cable. DBS's large channel capacity and high front-end costs dictate the packaging of large numbers of high priced channels and/or long-term contracts. As a result, DBS is a small competitive fringe that is not capable of disciplining cable TV pricing. DBS still costs more than twice as much as cable does, not including the front-end system costs, which undermines its ability to compete on price.

In a sense, this failure is most evident since the passage of the 1996 Telecommunications Act, when cable TV returned to its historic pricing pattern, unrestrained by the pressures of satellite expansion. In real terms, cable rate increases were larger with the presence of an expanding satellite sector than without it. A recent study by the Federal Communication Commission failed to find a significant price disciplining effect of satellite on cable.[25] Cable makes much more money by increasing prices for basic cable than competing in the DBS niche. Even in the midst of the debate over delivery of local stations by satellite, the largest satellite provider made it clear that price competition for the basic package was not in the offing.[26]

The addition of high priced digital cable and cable modem Internet services strengthens cable's advantage over satellite. By adding services at the high end, cable operators will be able to attack the high-end niche that satellite occupies. Cable's monopoly in basic can now be leveraged to leapfrog satellite on the high-end of the market, particularly when it is bundled with high-speed Internet access. .[27]

The failure of satellite to discipline cable pricing abuse and the failure of cable to compete with local telephone service are among the greatest disappointments of the 1996 Telecommunications Act and they tell a great deal about the prospects for cross technology competition. Congress had great hopes for this form of competition. In fact, the only facilities-based competitor for local telephone service actually mentioned by the Act's Conference report was cable TV.[28] Similarly, Congress devoted a whole section to telephone competition for cable through open video systems.[29] Neither of these has proven effective competition. Open video systems are non-existent[30] and the only telephone company that has pursued entry into the cable business as a plain overbuilder -- Ameritech -- was purchased by another telephone company -- SBC -- that is exiting the cable business.

Moreover, the failure of satellite to discipline cable pricing and marketing abuse comes after the longstanding failure of over-the-air television to provide this economic function. In 1984, the Congress gave the FCC the authority to deregulate price in competitive cable TV markets. The FCC determined that three over-the-air channels were enough. In addition, it was expected that head-to-head competition between cable companies would grow and that competing technologies would add further competition.[31] As a result, cable systems serving about 80 percent of the country were deregulated. When competition failed to materialize, cable prices exploded and a public outcry ensued. [32]

In an effort to stave off legislation to reregulate cable, the FCC reconsidered its three over-the-air rule and switched to six over-the-air stations as a standard. However, the pricing abuse was too great and the FCC's standard too weak to forestall legislation. Congress reregulated rates in 1992 and placed a range of "procompetitive" conditions on the industry. It is obvious that in the current market environment, broadcast cannot compete with cable for multi-channel video service.

C. The Internet

The Internet has not yet evolved into a ubiquitous mass communications medium that can challenge the other media. It accounts for less than 4 percent of viewing hours and advertising dollars. It appears to occupy a new media space.[33] It provides a national, non-video national product.[34] The Internet is starting to look a lot more like cable than broadcast in its revenue model.

AOL's bundling is like cable's bundling, adding more and more features that glue in different segments of the market. AOL makes five times as much in subscription revenue as the entire Internet generates in advertising revenue. This is somewhat greater than the proportion of subscription to advertising on cable. The enthusiasm for the AOL Time Warner merger derives in part from the fundamental similarity of the subscription based models of cable TV, print publications and the Internet.

In this subscription model people pop on an off to meet their short, narrowcast needs, but are not glued to the tube and do not generate a great deal of advertising (or, for the moment ancillary revenues). It is a personal productivity device particularly well-suited to information intensive users.[35] For the vast majority, it is a shopping mall at the fingertips of subscribers, enhancing daily activities. Internet traffic is made up of a couple of hours on online time per week spread over a dozen sessions with a minute or so at any given page. The leading advertisers on the Internet are a completely different group than one sees on television.[36]

For a new generation of users, applications such as instant messaging hold the promise of someday serving as substitutes for telephone service. This obvious possibility communications does not necessarily extend to entertainment media. Moreover, given current interoperability disputes and the failure of public policy to identify a communications function to be supported by interoperability, instant messaging may never get to that point. Indeed, given the current state of affairs in which the same few companies own monopoly delivery wires, cable TV stations, and dominate high speed Internet the prospects that the Internet will be liberating, democratizing medium seem to be fading. Moreover, Given the current state of the dot.bomb revolution, relying on the Internet to discipline powerful media giants is wishful thinking at best.

D. Radio and Newspapers

Newspapers and radio serve local markets capturing a very different type of advertising dollar. Radio, newspapers and magazines are substitutes from an advertiser's perspective. The stability of their market shares indicates that they are not likely to be greatly eroded by new media in the near term.[37] There is some evidence that cable and newspapers are cross elastic, which reflects the fact that they are both local.

Radio and newspapers occupy the non-video local product space.[38] National advertising accounts for a modest share of radio and newspaper revenues. Newspapers dominate the local advertising market with classified ads comprising the majority of newspapers' revenues.[39]

Radio has fallen into a special niche -- "For many, it serves as background as they engage in other activities such as working or driving"[40] – that may derive from the different demands it places on the listener.[41]

E. Media Product Spaces Differ in the Marketplace of Ideas

The previous discussion places each media type in a largely commercial product space. We should not be surprised to find that the differences in commercial product space are also evident in the marketplace of ideas. These media play different roles in the realm of political discourse and news. [42] It is a mistake to define all media as the same in terms of their impact or to believe that new media will displace the old. The special role of TV in the marketplace of ideas has been examined from many points of view. Of special important are the unique impact of TV,[43] its influence on political attitudes and behaviors,[44] and its prominent place in election campaigns.

TV in general, and network TV in particular, has become the premier vehicle for political advertising. The differential impact of television advertising is clear.

> Clearly, television is a unique communications medium unlike any other, including print, radio, and traditional public address. Unlike most other media, television incorporates a significant nonverbal component, which not only serve to suppress the importance of content but also requires little deliberative message processing…
>
> A number of empirical studies have concluded that reliance on information from television leads to less understanding of policy issues than newspapers. Studies also indicate that when people use television for political news, they emerge less informed than those of equal education and political interest who avoid the medium.[45]

As suggested, newspapers provide a different type of information service with different impact. They also provide a different news function than video or radio, with much longer and in depth treatment of issues. In this they have adapted to a role that is distinct from television.

> The news business itself reflects the partitioning in its awards… Pulitzer prizes have been added for criticism, features, and explanatory writing, because those are aspects of news left for print excellence in television's wake… For while television editorializing can be intelligent and eloquent, and even promote political change, the star treatment accorded to television news personalities removes them from the civic discourse.[46]

One area of great significance is local news reporting. Newspapers devote greater attention to local news[47]

Television and radio have long been recognized as occupying different product spaces[48] although radio's role may be changing.[49] Generally, radio is seen as having less of an impact than television.[50] However, the difference may be exposure to political advertising on TV, while radio talk shows have a different impact.[51]

III. MEDIA MARKETS REMAIN CONCENTRATED

Newspapers, radio stations and cable TV stations have experienced substantial consolidation in the last fifteen years and have become highly concentrated. Network TV remains a concentrated market. The Internet has become more concentrated more quickly than anyone dreamed when measured either in terms of subscribership or usage.

A. Measuring Market Concentration

To understand the justification for concern in these markets we can refer to the U.S. Department of Justice (DOJ) merger guidelines.

The DOJ defines market levels of concentration to determine the extent of review of mergers.[52] DOJ is unlikely to challenge mergers between companies in markets that are in unconcentrated. To make this assessment, it calculates the index of concentration known as the HHI (Hirshman-Herfindahl index).[53] Another way to quantify market concentration is to calculate the market share of the largest 4 firms (4 firm concentration ratio or CR4).

Under Merger Guidelines issued early in Ronald Reagan's first term, the DOJ considers a market with an HHI of 1000 or less to be unconcentrated. Such a market would have the equivalent of ten equal sized competitors. In such a market, the 4-firm concentration ratio would be 40 percent (see Exhibit 4). Any market with a concentration above this level was deemed to be a source of concern and increases in concentration through mergers would receive scrutiny.

EXHIBIT 4: DESCRIBING MARKET CONCENTRATION FOR PURPOSES OF PUBLIC POLICY

DEPARTMENT OF JUSTICE MERGER GUIDELINES	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	HHI	4-FIRM SHARE
↑	5 EQUAL SIZED FIRMS	HHI= 2000	CR4=80
HIGHLY CONCENTRATED		HHI= 1800 OR MORE	
	6 EQUAL SIZED FIRMS	HHI= 1667	CR4=67
UNCONCENTRATED ↓	10 EQUAL SIZED FIRMS	HHI= 1000	CR4=40

Sources: U.S. Department of Justice, *Horizontal Merger* Guidelines, revised April 8, 1997, for a discussion of the HHI thresholds; Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Engelwood Cliffs, N.J., 1985), for a discussion of 4 firm concentration ratios.

The DOJ considers a market with an HHI of 1800 as the point where a market is considered highly concentrated. In terms of equal sized competitors, this level falls between five and six. A market with six equal sized competitors would have an HHI of 1667. In such a market, the four firm concentration ratio would be 67. A market with five equal sized competitors would have an HHI of 2000. The four firm concentration ratio would be 80 percent.

Shepherd describes these thresholds in terms of four-firm concentration ratios as follows:[54]

> Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy.
>
> Loose Oligopoly: The leading four firms, combined, have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.

Shepherd refers to collusion, but that is not the only concern of is not the only concern of market power analysis, or the Merger Guidelines. The Merger Guidelines of the Department of Justice recognize that market power can be exercised with coordinated, or parallel activities and even unilateral actions.

> Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.*/ In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-coordinated conduct --conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.
>
> */ Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation.[55]

Because of the critical importance of the media not only an economic marketplace, but as the cornerstone of the marketplace of ideas, we believe these industries should be held to close scrutiny. The critical level for scrutiny is the unconcentrated threshold (roughly the equivalent of 10 or more equal sized firms).

B. Media Markets

The Internet provides a most instructive starting point for the discussion, since, in theory, the number of Internet Service Providers is infinite, yet the market has become concentrated. TV networks and cable companies frequently argue that the number of outlets is all that matters, rather than the market share of the outlets. However, we believe this is the wrong approach since the distribution of attention is far more concentrated than the number of channels suggests.

For economic analysis we do not count stations, we count what the eyeballs watch. In no other market do we simply count the number of competitors. We always look at their market share. Recently, Microsoft asserted that there were seven different operating systems in the marketplace with over twenty thousand applications available and at least three different computing environments (handhelds, PCs and the Internet), and therefore they could not possibly be a monopoly. Even a conservative appeals court blew that argument away.[56] Market structure analysis must be grounded on the actual market shares, not merely the number of participants and the rapidly increasing concentration of the Internet underscored that point.

The increasing concentration of the Internet is stunning (see Exhibit 5). AOL's dominance of subscribership in the U.S. is widely noted (30 million subscribers, putting its market share above 50 percent). Its market share makes it a leading firm in a highly concentrated market.[57] Even more striking is the growth in the concentration of usage.

> Because the number of potential online channels is infinite, some assume that market dominance is an impossibility on the Internet. This is faulty reasoning. Gauging consolidation online simply requires a different measuring stick than it does off-line.
>
> Analysis of Media Metrix data over the past three years shows an incontrovertible trend toward online media consolidation…. Between March 1999 and March 2001, the total number of companies controlling 50 percent of user minutes online decreased by nearly two-thirds, from 11 to four.[58]

Because AOL has such a dominant position (over 30 percent of user time) the HHI is about 1200, well above the moderately concentrated threshold. The four firm concentration ratio also falls in the range where concerns about concentration and the abuse of market power begin.

Most local distribution markets for network TV are highly concentrated measured either in terms of viewers or advertising dollars. HHIs are well above 1800 and four firm concentration ratios are well above sixty percent in all but the very largest markets. The national market for viewers (HHI=1000) and advertising (HHI=1600) is moderately concentrated.

Although the FCC claims that the cable TV market falls just below the level of being moderately concentrated (HHI = 954), it arrives at this conclusion by ignoring AT&T's substantial ownership interests in Cablevision and AOL Time Warner and by including satellite in the same product space, even though it could not find significant cross-price elasticity between cable and satellite. Defining the market correctly as cable only and taking AT&T's ownership interests into account places the cable TV market into the highly concentrated category.

The recent wave of mergers has moved local radio markets into the highly concentrated range, with HHIs averaging above 2000. Newspapers have long been highly concentrated, with HHIs above 6000.

EXHIBIT 5:

MARKET AND PERIOD OF MOST RECENT DATA	LEVEL OF CONCENTRATION
Internet (2000)	
Subscribers	2500
Viewing Time	1200
Television (mid-1990s)	
Local Viewing - Advertising	
Largest Fifth	1600 - 700
2nd Fifth	2000 - 1600
3rd Fifth	2100 - 2300
4th Fifth	2700 - 2300
Smallest Fifth	2500 - 3100
National	
Viewing	1100
Advertising	1700
Cable Subscribers (1999)	
FCC - MPVD	
w/o Attribution of AT&T Ownership	1000
w/ Attribution	1400
Cable only	
w/o Attribution of AT&T Ownership	1900
w/ Attribution	2500
Radio Local Share (1997)	1600 - 2100
Newspapers Circulation (1999)	6000

SOURCES:

Internet: Jupiter Research, *Online Media Consolidation Offers No Argument for Media Deregulation*, 2001

Television: Cooper, Mark, based on Economists Incorporated, "An Economic Analysis of Broadcast Television National Ownership, Local Ownership, and Radio Cross-Ownership Rules," Before the Federal Communications Commission, *In Re: Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-122, May 17, 1995. These are consistent with the estimates for a couple of years earlier in Bates, Benjamin, "Concentration in Local Television Markets," *Journal of Media* (Fall) 1993, Table 1.

Cable TV: Calculated by the author based on Federal Communications Commission, *Seventh Annual Report In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, January 8, 2001, Table C-3.

Radio: Berry, Steven T. and Joel Waldfogel, "Mergers, Station Entry, and Programming Variety in Radio Broadcasting," National Bureau of Economic Research, April 1999, Table 2. Ekelun, Robert B., Hr., George S. Ford, and Thomas Koutsky, "Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration," *Journal of Law and Economics* (April) 2000, p. 170.

Newspapers: George Lisa and Joel Waldfogel, "Who Benefits Whom in Daily Newspaper Markets," *National Bureau of Economic Research*, October 2000, Table1, earlier estimates are somewhat higher, see Lacy, Stephen and Lucinda Davenport, "Daily Newspaper Market Structure, Concentration, and Competition," *The Journal of Media Economics*, 1993 (7), p.40.

IV. ALL MEDIA MARKETS ARE NOT LOCAL, NATIONAL MARKET SHARE IS A SOURCE OF MARKET POWER

Distribution of most media is "local" in the sense that a local TV or radio station, cable operator or telecommunications service provider establishes the link to the network. Video programming markets are national. Similarly, consumers make their choices from the menu of stations that is available in their local market. That does not mean that the market for content is "only local." Creation of dominant national players who control distribution of either cable TV channels or network TV shows confers market power to determine what the distribution companies can play in two ways. They may gain control over so many eyeballs (i.e. systems of stations) that they can make or break programming by refusing to allow access to the audience because the successful launch of a channel or show requires getting in front of enough eyeballs to succeed. This ability to influence the market as a purchaser of programming is called monopsony power. Dominant national players may also directly own programming and dictate what can be shown. Here the problem is leveraging through vertical integration.

A. Monopsony

Concern about the ability of program buyers to behave in anticompetitive ways – to abuse their monopsony power, are well grounded in economic law and experience. For example, the Merger Guidelines, first issued by The Department of Justice headed by Ed Meese in 1984 and revised slightly in April 1992 and April 1997, which are intended to prophylactically prevent the accumulation of excessive market power[59] identify monopsony along side monopoly power.

> Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.[60]

The merger guidelines identify the threat of abuse of market power by a monopsonist at a relatively low level -- 35 percent.

> Where products are relatively undifferentiated and capacity primarily distinguishes firms and shapes the nature of their competition, the merged firm may find it profitable unilaterally to raise price and suppress output. The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.[61]

This 35 percent figure is well grounded in antitrust practice in the sense that mergers have been successfully challenged at this level.[62] Similarly, a 30% limit is well grounded in monopsony complaints. For example, in the Toys R Us case, noted above, the market controlled was "20% of the national wholesale market and up to 49% of some local markets."[63]

These thresholds on market size are also well grounded in the literature on video media. One recent study of cable systems power over programming concluded as follows.

> Finally, our results are relevant to an important policy issue in the cable industry. Numerous claims have been made that larger cable MSOs, such as TCI and Time Warner have excessive influence over entry and competition of cable networks. Our analysis lends credibility to these claims. A basic cable network whose household reach was reduced from 70 million to a 60 million households multi-channel universe due to an MSO's carriage decision, for example, would not only have 10 million fewer homes to offer advertisers, but would be able to charge substantially less per household (about 17% less according to our log linear estimates for the 60 million households that are reached. The leverage of an MSO controlling access to a significant portion of all U.S. multi-channel households is thus greater than its percentage market share alone suggests. By threatening to withhold access to its subscribers, an MSO with a relative small national market share by usual antitrust standards might extract input price concession from the network, or otherwise engage in anticompetitive behavior that reduces program quality of diversity.[64]

The example given represents a 14 percent share of the 70 million household cable TV market. The resulting loss of revenue to a program denied access to 10 million households is 29 percent reduction. The citations point out that at the time, Time Warner had an 18 percent market share and TCI had about a 30 percent market share of the cable TV market. Denial of access to a single MSO with an 18 percent market share would reduce a program's revenues by over 30 percent according to this analysis. Denial of access to a single MSO with a 30 percent market share would reduce a program's revenues by over 40 percent according to this analysis. Clearly, a 30 percent market share conveys substantial leverage.

B. Vertical Integration

The previous discussions of concentration and monopsony power deal with horizontal concerns. Vertical integration between the segments of the industry may have an impact as well. The ownership of programming by distributors has long been a source of concern in the TV network and cable TV industries.

Vertical integration by dominant firms may create a barrier to entry requiring entry at two stages of production,[65] or foreclosing critical inputs for competitors in downstream markets.[66] Vertical arrangements may restrict the ability of downstream operators to respond to local market conditions.[67] Vertical integration not only removes important potential competitors across stages of production,[68] but also may trigger a wave of integrative mergers,[69] rendering small independents at any stage extremely vulnerable to a variety of attacks.[70]

Complaints about many of these problems have been aired in media markets. Each of the major players is interconnected with at least one other of the major players through cross ownership or joint ventures. Each of the major players has at least some cross-ownership or control in more than one of the distribution technologies.

There is a long history of vertical leverage being exercised in the cable TV industry. The introduction gave recent examples of denial of access to the audience in both cable TV and high speed Internet access. There is a long history of complaints about denial of access to subscribers by integrated MSOs and preferential access for affiliated programming. Evidence of these problems is both qualitative and quantitative.[71] The dominant, integrated firms get the best deals. One problem comes from most favored nation clauses that large operators often secure from programmers. Such clauses are supposed to guarantee an MSO of getting as good a price as any other operator, sometimes excluding Time Warner and TCI.[72]

Efforts to impose or obtain exclusive arrangements have become ever-present controversies in the industry, including efforts to prevent competing technologies from obtaining programming, as well as to prevent competition from developing within the cable industry.[73] Price discrimination against competitors and other strategies, such as placing programming of competitors at a disadvantageous position on the dial have also been evident in recent years.[74]

Allegations of anti-competitive cable practices are not limited to industry critics. The practices within the industry became so bad that even major players became involved in formal protests. Viacom and its affiliates, a group not interconnected significantly with the top two cabals in the industry, filed an antitrust lawsuit against the largest chain of affiliated competitors in its New York territory. Ultimately, it sold its distribution business to its competitors.

The landscape of the cable industry is littered with examples of these anti-competitive practices. These include, for example, exclusive deals with independents that freeze-out overbuilders,[75] refusals to deal for programming due to loopholes in the law requiring non-discriminatory access to programming,[76] tying arrangements,[77] and denial of access to facilities.[78]

The problem forcing new entrant to raise huge sums of capital to enter these industries is not hypothetical. It is a central part of the strategy of raising barriers to entry. AT&T/@Home stress the fact that Internet Service Providers who want access to broadband technologies will have to make the investment in the transmission capacity.[79]

The manifestation of this vertical problem in the network TV industry can be found in the relationship between affiliates and the networks, particularly as they have unfolded since the relaxation of rules governing ownership interests in programming and distribution.[80]

Networks have moved aggressively to branch out into programming, denying affiliates independent sources of programming.[81] They maximize the value of that programming by leveraging their control over popular prime time programming to force affiliates to take all prime time programming and not pre-empt with local programming, requiring promotion and carriage, in spite of making the same programs available to other outlets in the same market, as well as bundling less popular programs with flag ship offerings. [82] To leverage their vertical relations, the networks have created pooled news coverage, which is forced on affiliates, given an advantage in delivery, and favorable lead-ins.[83] They have attacked the financial base of the affiliated stations by restricting the sale of the stations or negotiation of retransmission rights and seizing digital signal rights.[84] All of the key levers of market power made available through vertical integration have been used to restrict both the availability of independent program and the freedom of affiliated stations.[85]

V. DELIVERY OF VARIETY DOES NOT ENSURE DIVERSITY

Having called into question the vibrancy of competition within and across media segments, we also must note that even if there were vigorous competition, it would not necessarily accomplish the public policy goal set out for the media.[86] Economic competition alone has never been the sole purpose of media policy.[87] In fact, the unfettered pursuit of profit in media markets exhibits tendencies that are contrary to the public policy goals.

A. Diversity of Source and Excessive Influence

The extremely powerful commercial thrust of the new media reinforces the central concern of media public policy.[88] Economic competition does not preclude the abuse of political influence over the media, nor does it ensure healthy competition of political interests. The economic interests of media owners continues to influence their advertising, programming choices[89] and how they provide access to political information[90] as it always has, only on a grander scale.

New technologies do not alter the underlying economic relationships because the mass-market audience orientation of the business takes precedence and there is no reason to assume that the emergence of a different medium, like the Internet will change behaviors of dominant firms.[91] Indeed, because the new media markets have moved quickly to vertical integration by dominant incumbents form the old media, the problems of raising capital and acquiring licenses that have afflicted the old media persist.[92]

D. Diversity of Content

Empirical evidence clearly suggests that concentration in media markets has a negative effect on diversity.[93] Greater concentration results in less diversity, while diversity of ownership across geographic, ethnic and gender lines is associated with diversity of programming. The dictates of mass audiences create a largest market share/lowest common denominator ethic that undercuts that ability to deliver diverse, locally-oriented,[94] and public interest programming.[95]

The drive to sell more subscriptions and reach a broader, yet highly targeted audience advertising that caters to their individual tastes will be intense, resulting in a commercialization on a grander scale.[96] The resulting T-commerce will be an electronic "direct mail on steroids" pumped up by the ability of viewers to click through digitally inserted advertising for purchases.[97] The high powered advertising will be targeted at demographically compatible viewers identified by detailed information created by the two-way network on viewing patterns and past purchases, [98] leading to growing concerns that certain groups are not likely to have fair access to the opportunities of cyberspace.[99] The new services may be expensive to deliver because of the cost of appliances, production equipment necessary to produce programming that takes advantage of the new appliance, and also because of the infrastructure necessary to deliver interactive services. [100] The cost of services, and the targeting of marketing points to a commercial model in which high-value, high-income consumers are the ones that marketers seek to woo.

Companies introducing technologies can identify the likely early adopters and innovators and orient their product distribution to maximize the penetration within that market segment. [101] There is a very strong base of support for the importance of income and education in the adoptions of high technology innovations like computers and telecommunications equipment.[102] The strong predictors of inclination to early adoption point directly to market segmentation strategies.[103] In other words, companies introducing technologies can identify the likely adopters and orient their product distribution to maximize the penetration within that market segment. The competitive energies of the industry are focused on the "premier" segment, with innovative offerings and consumer-friendly pricing, while the remainder of the population is ignored or suffers price increases. Minority or market segments are less well served.[104] Policies that promote ownership and participation of underrepresented points of view are a counterbalance to this tendency. To put the matter simply, minority owners are more likely to present minority points of view[105] and females are more likely to present a female point of view,[106] in the speakers, formats and content they put forward.

"[A]lthough the modern video marketplace opens up more places for their wares, it also generates pressures that limit receptivity to originality and controversy."[107] Simply put, the existence of multiple outlets providing more examples of similar shows does not accomplish the goal of providing greater diversity of points of view or different types of content.[108]

C. Public Interest and Local Programming

There is clear evidence that greater concentration will reduce public interest and culturally diverse programming[109] as well as locally-oriented programming. [110] News and public affairs programming is particularly vulnerable to these economic pressures.[111] As market forces grow, this programming is reduced.[112] The quality of the programming is also compromised.[113]

Commercialization can easily overwhelm public interest and diverse content.[114] The radio industry, which has been subject to the most unfettered process of rationalization demonstrate how local content can be homogenized off the air.[115] The growing impact of homogenization in the TV industry stimulated by the lifting of national ownership limits and restrictions on vertical integration into programming is also unmistakeable.[116] Insertion of local programming is restricted or eliminated. Stories of local importance are driven out of the high visibility hours or off the air. Pooled news services reduce the ability of local stations to present local stories and eventually erode the capability of producing them.

ENDNOTES

[1] Stefik, Mark, *The Internet Edge* (Cambridge, MA, MIT Press, 1999), p. 12.

> The ability of the Internet to cause action at a distance is akin to that of other communication technologies – including smoke signals, drum talk, mail, newspapers, radio, television, and the telephone. It enormously magnifies the most powerful feature of technologies like radio and television: wide dissemination of information. Its enormous fan-out allows an idea or an action originated at one location to be sent instantaneously to thousands or millions of other sites. In addition, like the telephone, the Internet is interactive. Some have described Internet technology in terms of "push and pull." Imagine a playground full of kids playing tug-of-war with long ropes, pushing and pulling, yanking and shoving, creating interaction at a distance

[2] Arthur, Brian, "Positive Feedbacks in the Economy," *Scientific* America, February 1990 (hereafter Arthur), p. 92...93.

> Conventional economic theory is built on the assumption of diminishing returns. Economic actions engender a negative feedback that leads to a predictable equilibrium for prices and market shares. Such feedback tends to stabilize the economy because any major changes will be offset by the very reactions they generate…

> The parts of the economy that are resource-based (agriculture, bulk goods production, mining) are still for the most part subject to diminishing returns… The parts of the economy that are knowledge-based, on the other hand, are largely subject to increasing returns. Products such as computers, pharmaceuticals, missiles, aircraft, automobiles, software, telecommunications or fiber optics are complicated to design and manufacture. They require large initial investments in research, development and tooling, but once sales begin, incremental production is relatively cheap…

> Increased production brings additional benefits: producing more units means gaining more experience in the manufacturing process and achieving greater understanding of how to produce additional units even more cheaply. Moreover, experience gained with one product makes it easier to produce new products incorporating similar or related technologies…

Gaines, Brian, R., "The Learning Curves Underlying Convergence," *Technological Forecasting and Social* Change, 57: 1998, p. 21.

> This improvement depends on the capacity of silicon to support minute semiconductor logic circuits, but this capacity could not have been fully exploited over nine orders of magnitude performance improvement without the use of the computer to support the design and fabrication of such circuits. This is one example of a positive feedback loop within the evolution of computers, that he computer industry has achieved along a learning curve that is unique in its sustained exponential growth because each advance in computer technology has been able to support further advances in computer technology. Such positive feedback is known to give rise to emergent phenomena in biology whereby systems exhibit major new phenomena in their behavior. The history of computing shows the emergence of major new industries concerned with activities that depend upon, and support, the basic circuit development, but that are qualitatively different in their conceptual frameworks and applications impacts from that development: for example programming has led to a software industry, human-computer interaction has led to an interactive applications industry, document representation has led to a desktop publication industry, and so on.

[3] Simpson, Ida Harper, "Historical Patterns of Workplace Organization: From Mechanical to Electronic Control and Beyond," *Current Sociology*, 47:1999; Evans, George, Seppo Honkapohja, and Paul Romer, "Growth Cycles," *American Economic Review*, June 1998. For economic relationships from the labor side see Longworth, Richard C., *Global Squeeze* (Chicago: Contemporary Books, 1998) (hereafter, Longworth) and from the business side see Whitman, Marina v.N., *New World, New Rules: The Changing Role of the American Corporation* (Boston; Harvard Business School Press, 1999). Even Bluestone, Barry and Bennet Harrison – *Growing Prosperity: The Battle for Growth With Equity in the Twenty-first Century* (New York, Houghton Mifflin, 2000) – who seek historical parallels to previous technological revolutions finally acknowledge the uniqueness of the current transformation.

[4] Owen, Owen, Bruce M., *The Internet Challenge to Television* (Harvard University Press, Cambridge, MA, 1999), p. 151.

From the point of view of digital communication technology, "information" is a bitstream" of zeros and ones, just like an old-fashioned dit/dah telegraph code. Digital technology works the same way regardless of content. Anything that can be digitized can be transmitted on a digital medium to one and all. and virtually any image can be digitized, including books, newspapers, paintings, movies, TV programs, music, personal conversations, speeches, political cartoons, brainwaves, and three-dimensional objects. Further, almost any current electronic communication medium is or can be made into a digital medium, including telephone systems, television broadcasting systems, cable television systems, and geosynchronous communication satellites. It is easy to see why convergence is a focal concept: everything seems headed in the digital direction very rapidly.

[5] Wilkins, Karin Gwinn, "The Role of Media in Public Disengagement from Political Life," *Journal of Broadcasting and Electronic Media*, 2000 (fall), p. 372.

Recent literature on political communities has suggested the importance of emerging computer technologies, as a link between the government and the public, and as a bridge across constituents… may promote democratic debate and participation. Even though these scholars admit that access to this channel is restricted to an elite, they believe that computer technologies have the capacity to foster social capital and citizenship, as an interactive technology that may serve as an alternative to dominant media systems. One key factor that may differentiate this medium is its potential for interactivity, thus blurring traditional boundaries between mediated and interpersonal communications.

[6] The specific objective of the policy has been ill-defined and its measurement has been debated. For reviews that combine a discussion of definitions with empirical research see Napoli, Philip M., "Deconstructing the Diversity Principle," *Journal of Communication,* 1999 (Autumn); "Rethinking Program Diversity Assessment: An Audience-Centered Approach," *The Journal of Media Economics,* 1997 (10). In this paper we are concerned with diversity of views in the broad sense. Diversity of sources is assumed (and can be demonstrated empirically) to be related to diversity of points of view and the willingness to provide public interest and locally-oriented programming, which are assumed (and can be demonstrated empirically) to be related to diversity of ownership

[7] Shapiro, Andrew, *The Control Revolution* (New York: Century Foundation Books, 1999) (hereafter Shapiro); Cooper, Mark, "Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed Proprietary Networks," *University of Colorado Law Review*, Fall 2000.

[8] Rifkin, Jeremy, *The Age of Access* (New York: Tarcher, Putnam, 2000).

[9] Castells, Manuel, *The Rise of the Network Society* (Oxford: Blackwell, Oxford, 1996); Sanyal, Bish and Donald Schon, "Information Technology and Urban Poverty: The Role of Public Policy," in Donald A. Schon, Bish Sanyal, and William J. Mitchell, *High Technology and Low-Income Communicates* (Cambridge, MIT Press, 1999), Cooper, Mark, "Inequality in Digital Society," *Cardozo Law Journal,* forthcoming.

[10] Stempell, Guido H., III, Thomas Hargrove and Joseph P. Bernt, "Relation of Growth of Use of the Internet to Changes in Media Use from 1995 to 1999," *Journalism and Mass Communications Quarterly,* 2000 (Spring), p. 77.

The Internet has arrived as a major mass medium, but it is not playing the role that many have assumed. The decline this survey showed in the use of both network and local TV news and newspaper and new magazine use cannot be pinned on the Internet. Our comparison of users and non-users of the Internet showed that the impact was not significant on both network and local news. It also showed that Internet users were more likely to be newspaper readers and radio news listeners than non-Internet users were.

How do we explain this? Perhaps the best explanation is that those people who use the Internet as a source of news are clearly information seekers.

[11] The concerns about political influence are both national (see, for example, Robert McChessney *Rich Media, Poor Democracy: Communications Politics in Dubious* Times (Urbana, Illinois: Illinois University Press, 1999) and international (see, for example, Dahl, Robert, "Can International Organizations be Democratic? A Skeptic's View," in Ian Shapiro and Casiano Hacker-Cordon, *Democracy's Edges* (1999).

[12] Schiesel, Seth. *"Charter Removes ESPNews From Some Cable Systems in Dispute."* New York Times, July 2, 2001.

[13] Hansell, Saul. *"AOL-Time Warner Rivals Preparing for Interactive TV Fight."* New York Times, September 11, 2000.

[14] Goodman, Peter S., "AT&T Puts Open Access to a Test," *Washington Post,* November 23, 2000

AT&T says it has yet to formulate business models with partners, but the software the company has designed for the Boulder trial – demonstrated at its headquarters in Englewood, Colo. Last week – clearly includes a menu that will allow customers to link directly to its partners. Company officials acknowledge that AT&T's network already has the ability to prioritize the flow of traffic.

But as a demonstration of the software last week made clear, AT&T's logo will remain an immutable part of every screen, flanked by menus that beckon customers with links to web sites for local news and shopping – AT&T's commercial partners, who will share revenues.

"We are not going to become invisible," said Susan K. Marshall, senior vice president of data services at AT&T Broadband, who is overseeing the Boulder trial. "To get to the Internet, you have to do something with that globe. It puts the brand in the customer's mind… so that I have the ability to drive some additional revenues.

Those savvy enough to navigate the system without instructions will be able to use familiar browsers such as Microsoft's Internet Explorer or Netscape. But AT&T's software will encourage customers to use its browser.

The reason for this subtle positioning is the value of owning the first screen… Thus, if AT&T's flashing logo and its browser become – as the company hopes – vehicles to lure customers to sites run by its partners, the dollars it collects will come at the expense of ISPs that otherwise would have claimed the revenue.

[15] Bagdakian, B, *The Media Monopoly,* 4th ed. (Beacon, Boston, 1992), p. 182, describes the economic and cultural impact of television.

[16]Gigi Sohn and Andrew Jay Schwartzman, "Broadcast Licensees and Localism: At Home in the 'Communications Revolution,'" Federal Communications Law Journal, December 1994; M. Griffin, "Looking at TV News: Strategies for Research," Communication, 1992.

[17] A.T. Kearney, *Digital Television in a Digital Economy: Opportunities for Broadcasters* (National Association of Broadcasters, April 1998), Chapter 1, notes that "the advent of digital television will place broadcast stations in the midst of the digital economy."

[18] Shapiro, p. 215,

The opportunity for truly open and effective community conversation will depend on whether our digital tools are primed, in design and use, for online escapism and total filtering, or whether we balance personalization with other values, such as broad exposure, social awareness, and community strength. If we fail to do so, the problem won't just be that we are all occupying different chat rooms or reading different news online. The insularity of cyber-experience could become the insularity of experience, period.

[19] Mark N. Cooper And Christopher Murray, "Technology, Economics And Public Policy To Create An Open Broadband Internet," paper presented at *The Policy Implications of End-to-End,* Stanford Law School, December 1, 2000

[20] Lessig, Lawrence, *Code and Other Laws of Cyberspace* New York: Pegasus, 1999), p. 205.

Now we are changing that architecture. We are enabling commerce in a way we did not before; we are contemplating the regulation of encryption; we are facilitating identity and content control. We are remaking the values of the Net, and the question is: Can we commit ourselves to neutrality in this reconstruction of the architecture of the Net?

I do not think that we can. Or should. Or will. We can no more stand neutral on the question of whether the Net should enable centralized control of speech than Americans could stand neutral on the question of slavery in 1861. We should understand that we are part of a worldwide political battle; that we have views about what rights should be guaranteed to all humans, regardless of their nationality; and we should be ready to press these views in this new political space opened up by the Net.

[21] Kraus, S and D. Davis, *The Effects of Mass Communications on Political Behavior* (University Press, 1996). Tankel, Johnathan David and Wenmouth Williams, Jr., "The Economics of Contemporary Radio," *Media Economics: Theory and Practice,* 2nd ed., Alison Alexander, James Owers and Rod Carveth, Eds. (Lawrence Erlbaum Associates, 1998).

[22] This is how CEO Sumner Redstone is reported to have referred to Viacom/CBS, *Communications Daily*, December 5, 2000 cited in Network Affiliated Stations Alliance, *Petition for Inquiry Into Network Practices*, March 8, 2001 (hereafter Petition).

[23] Petition.

[24] Waterman, David and Michael Zhaoxu Yan, "Cable Advertising and the Future of Basic Cable Networking," *Journal of electronic Media and Broadcasting,* 1999 (Fall); Survey evidence indicates that advertisers think cable and broadcast are "substitutes" for each other, but the market shares do not (see Reid, Leonard N., Karen Whitehill King, "A Demand-Side View of Media Substitutability in National Advertising: A Study of Advertiser Opinions about Traditional Media Options," *Journalism & Mass Communication Quarterly,* 2000 (77).).

[25] Federal Communications Commission, *Pricing Analysis,* February 2001. the study did find a weak subscriber effect. Even though satellite is not cross elastic on price, larger satellite subscribership does have a small effect in taking subscribers away from cable. There is also evidence that satellite is much more effective where cable quality is weak. Neither of these observations is inconsistent with our argument that satellite is not sufficiently competitive to discipline cable pricing.

[26] Mundy, Alicia, "The Price of Freedom," *MediaWeek,* March 29, 1999, p. 32.

> Congress has been moving at an unusual speed to pass a bill that would give DBS providers the right to beam local network signals to local subscribers …
>
> "It's not a cure-all," said Hartenstein, who has run DirectTV since its inception in 1990. For one thing, Hartenstein's business plan is not based on beaming local network signals to his customer base, soon expected to top 9 million. Instead, he is suggesting that subscribers buy new antennas to supplement their coverage. DirecTV is working with retailers to have the specialized antennas available at reduced prices. He calls this program "Distant/Terrestrial," meaning he sends you all the cable and movie channels you could dream of (for which he can charge), and you pick up the free network feeds with an extra antenna.
>
> Furthermore, Hartensteins' game plan does not include fighting for cable customers by undercutting cable prices. Analysts for the DBS and cable industries have figures out that the average American homeowner will cough up $30 per month for TV. Above that level, both camps believe, many consumers will bolt and run. Hartenstein seems determined to compete on quality and depth of service, not price.

[27] Boersma, Matthew, "The Battle for Better Bandwidth – Should Cable Networks be Open?," *ZDNet,* July 11, 1999; Clausing, Jeri, "Satellite TV is Poised for New Growth," *New York Times*, November 26, 1999, p. C-6

> What is going to happen is every few months there is going to be a new development," [Thomas Egan, a cable and satellite analyst with PaineWebber in New York] said. I think what will happen is they will try to compete less on price and try to compete more on services.
>
> Mr. Egan said expected cable companies to focus their energy on high-speed Internet and new digital services, while satellite companies would be focusing on increased programming

[28] Pub. L. 104-104, Conference Report, p. 148.

[29] Title II, part 5.

[30] Federal Communications Commission, *Seventh Annual Report In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, January 8, 2001.

[31] "Testimony of Thomas Wheeler, President of the National Cable Television Association, " before the *Subcommittee on Communications of the Committee on Commerce, Science and Transportation*, United States Senate, June 21, 1989, pp. 4-5.

[32] James A. Ordover and Yale M. Braunstein, "Does Cable Television Really Face Effective Competition?," Testimony of William B. Finneran, Chairman New York State Commission on Cable Television," in *Competitive Issues in the*

Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, at 561.

[33] Stempell, Hargrove and Bernt, p. 75 present the results of a unique longitudinal study that allowed for careful elaboration of research findings. They emphatically reject the notion that the Internet is stealing attention from other media.

> Our finding seem consistent with the speculation from many quarters that the Internet has taken people away form other media. However, [it], tells a different story. Almost exactly half of our sample indicated they are using the Internet at least once a week, so we compared use of other media by those who use the Internet and those who do not. Users and non-users of the Internet both used network TV news to about the same extent. Those who use the Internet were slightly less likely to use local TV news, but the difference was not statistically significant. Those who use the Internet were more likely than those who don't use it to be regular newspaper readers and regular radio news listeners. So the Internet is not stealing readers from newspapers or listeners from radio.

[34] It can be argued that before the advent of TV, radio occupied this product space (see Tankel and Williams).

[35] Stempel, Hargrove and Bernt, p. 78.

> Clearly an information seeking device helps explain the greater newspaper use by Internet users, and this information-seeking behavior may run two ways. Internet users may turn to their newspapers or newspaper readers may go to the Internet for more information on a given topic. Either is possible sequentially as a supplemental information-seeking behavior. What is at least not practical is going from either the Internet or the newspaper to TV news to seek additional information on a given topic. TV news is not organized in a way that makes this practical or even possible in many cases.

[36] This discussion is based on Nielson ratings for May and June 2001.

[37] Nowak, Glen J., Glen T. Cameron, Dean M. Krugman, "How Local Advertisers Choose and Use Advertising Media," *Journal of Advertising Research,* 1993 (Nov/Dec), find that targeting is the critical factor for local advertising. When interactive video media develop an effective targeting approach, an issue that is receiving significant attention, it could infringe more on the local revenue stream of radio and newspapers. The failure of the Internet to develop that local focus may account for the slow growth of advertising revenue garnered by that medium.

[38] Busterna, John, "The Cross Elasticity of Demand for National Newspaper Advertising," *Journalism Quarterly,* 1987 (64); Sentman, Mary Alice, "When the Newspaper Closes," *Journalism Quarterly*, 1986 (63)

[39] Reid and King.

[40] Johnson, Thomas J., Mahmoud A.M. Braima, Jayanthi Sothirajah, "Measure for Measure: The Relationship Between Different Broadcast Types, Formats, Measures and Political Behaviors and Cognitions," *Journal of Broadcasting & Electronic Media,* 2000 (44), p. 45. See also, Chaffee S. H. and S. Frank, "How Americans Get Their Political Information: Print versus Broadcast News," *The Annals of the American Academy of Political and Social Science*, 1996 (546).

[41] Stempell, Hargrove and Bernt, pp. 77, point out that the different demand may enable radio to continue its role even as the new media expand.

> Information seeks can listen to the radio while they are using the Internet. Obviously, they are not going to be paying full attention to both, but one involves seeing and the other involves listening, so both can be used at the same time.

[42] Brown, Allan, "Public Service Broadcasting in Four Countries: Overview," *The Journal of Media Economics,* 1996 (9); Moy, Patricia and Dietram A. Scheufele, "Media Effects on Political and Social Trust," *Journalism and Mass Communications Quarterly*, 2000 (77), pp. 746…751.

> The general trend of effects is one in which reliance on television news leads to lower levels of trust in government, while newspaper reading results in higher levels of trust…
>
> While the mass media have been blamed for diminishing levels of trust among the citizenry, we have shown that it is crucial to distinguish not only between types of media, but also between types of trust. Our analysis shows that use of different types of media has different effects on political and social trust.

[43] Albarran, Alan B. and John W. Dimmick, "An Assessment of Utility and Competitive Superiority of in the Video Entertainment Industries," *Journal of Media Economics*, 1993 (6); Bennett, W. Lance, Regina G. Lawrence, "News Icons and the Mainstreaming of Social Change," *Journal of Communication,* 1995 (45); McLeod, Douglas M., "Communicating Deviance: The Effects of Television News Coverage of Social Protests," *Journal of Broadcasting & Electronic Media,* 1995 (39); Dimmick, John, B. "The Theory of the Niche and Spending on Mass Media: The Case of the Video Revolution," *Journal of Media Economics*, 1997 (10); Sparks, Glenn G., Marianne Pellechia, Chris Irvine, "Does Television News About UFOs Affect Viewers' UFO Beliefs?: An Experimental Investigation," *Communication Quarterly*, 1998 (46); Walma Van Der Molen, Juliette H., Tom H. A. Van Der Voort, "The Impact of Television, Print, and Audio on Children's Recall of the News," *Human Communication Research,* 2001 (26).

[44] Wilkins, Karin Gwinn, "The Role of Media in Public Disengagement from Political Life," *Journal of Broadcasting & Electronic Media,* 2000 (44).

[45] Sinclair, Jon, R., "Reforming Television's Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements," *Communications and the Law*, March 1995.

[46] Cornfield, Michael, "What is Historic About Television?", *Journal of Communications*, 1994 (21), pp. 110-111.

[47] Coulson, David C. and Stephen Lacy, "Newspapers and Joint Operating Agreements," in *Contemporary Media Issues (E. David Sloan and Emily Erickson Hoff, Eds.) (Vision Press, Northport: 1998)* Lacy, Stephen, David C. Coulson, Charles St. Cyr, "The Impact of Beat Competition on City Hall Coverage," *Journalism & Mass Communication Quarterly,* 1999 (76).

[48] Clarke, Pere and Eric Fredin, "Newspapers, Television and Political Reasoning," *Public Opinion Quarterly,* 1978 (summer); Robinson, John P. and Mark R. Levy, "New Media Use and the Informed Public: A 1990s Update," *Journal of Communications,* 1996 (spring).

[49] The role of radio talk shows is the new development. Johnson, Thomas J., Mahmoud A.M. Braima, Jayanthi Sothirajah, "Doing the Traditional Media Sidestep: Comparing Effects of the Internet and Other Nontraditional Media with Traditional Media in the 1996 Presidential Campaign," *Journalism & Mass Communication Quarterly,* 1999 (76), find that nontraditional media do not have an impact on a variety of measures of knowledge and perceptions about the 1996 presidential campaign and to the extent they do, it was specifically radio talk shows, influencing views of Clinton negatively (see also Moy, Patricia, Michael Pfau, LeeAnn Kahlor, "Media Use and Public Confidence in Democratic Institutions," *Journal of Broadcasting & Electronic Media,* 1999 (43)).

[50] Berkowitz, D. and D. Pritchard, "Political Knowledge and Communication Resources," *Journalism Quarterly,* 1989 (66); Chaffee, S. H. and X. Zhao and G. Leshner, "Political Knowledge and the Campaign Media of 1992," *Communications Research,* 1994 (21); D Drew and D. Weaver, "Voter Learning in the 1988 Presidential Election: Did the Media Matter?" *Journalism Quarterly*, 1991 (68).

[51] Johnson, Braima and Sothirajah, 2000, juxtapose the earlier finding of a lack of influence for radio with more recent findings that radio talk shows have an impact. See also, Johnson, Braima and Sothirajah, 1999, and Stamm, K., M Johnson and B. Martin, "Differences Among Newspapers, Television and Radio in their Contribution to Knowledge of the Contract with America," *Journalism and Mass Communications Quarterly*, 1997 (74).

[52] U.S. Department of Justice, *Merger Guidelines,* revised 1997.

[53] Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Engelwood Cliffs, N.J., 1997, Fourth edition), p. 389, gives the following formulas for the Herfindahl-Hirschman Index (HHI) and the Concentration Ratio (CR):

$$H = \sum_{i=1}^{n} S_i^{2}$$

$$CR_m = \sum_{i=1}^{m} S_i$$

where

n = the number of firms

m= the market share of the largest firms (4 for the 4 firm concentration ratio)

S_i = the share of the ith firm.

[54] Shepherd, p. 4.

[55] Horizontal Merger Guidelines, at section 0.1. Lawrence Sullivan and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook,* Hornbook Series (West Group, St. Paul, 2000), pp. 596-597, describe the DOJ approach as follows:

> The coordination that can produce adverse effects can be either tacit or express. And such coordination need not be unlawful in and of itself. According to the 1992 Guidelines, to coordinate successfully, firms must
>
> (1) reach terms of interaction that are profitable to the firms involved and
>
> (2) be able to detect and punish deviations. The conditions likely to facilitate these two elements are discussed separately, although they frequently overlap.
>
> In discussing how firms might reach terms for profitable coordination, the Guidelines avoid using the term "agreement," probably because no agreement or conspiracy within the meaning of Section 1 of the Sherman Act is necessary for the profitable interaction to occur. As examples of such profitable coordination, the Guidelines list "common price, fixed price differentials, stable market shares, or customer or territorial restrictions." Sometimes the facilitating device may be as simple as a tradition or convention in an industry.
>
> The go on to not the mechanisms that might be used and the usefulness of the HHI index in this regard.
>
> Oligopoly conditions may or may not require collusion that would independently violate Section 1 of the Sherman Act. A supracompetitive price level may be maintained through price leadership (usually the leader is the largest firm), through observance of a well-established trade rule (e.g., a convention of a 50 percent markup in price among competing retailers), or through strategic discipline of nonconforming members of the industry…
>
> To the extent that one or very few members of a concentrated industry have much higher market shares than other members, the opportunities for strategic disciplining may expand… The expanded ability of the larger firm to coerce price discipline is reflected in the Herfindahl-Hirschman Index (HHI), which will assign a high concentration index to an industry with a very large participant. An industry with the same number of participants, each of them roughly equal in size, will have a lower index.

[56] Cooper, Mark, N., "Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case," *Hasting Law Journal*, 2001 (April), reviews the evidence.

[57] A Leading or dominant firm proviso was included in the 1982 Merger Guidelines but was subsequently dropped. Shepherd talks about firms with a 50 percent or more market share as leading firm and source of concern.

[58] Jupiter Research, *Online Media Consolidation Offers No Argument for Media Deregulation*, 2001.

[59] U.S. Department of Justice, Merger Guideline, Issued April 2, 1992, revised, April 8, 1997, at Section 0.1.

[60] Id.,

[61] Merger Guidelines, Section 2.22.

[62] Peter Asch, *Industrial Organization and Antitrust Policy* (John Wiley, New York; 1983), Chapter 14.

[63] *In re Toys "R" Us, Inc.,* FTC No. 9278 (October 13, 1998).

[64] Waterman, David and Michael Zhaoxu Yan, "Cable Advertising and the Future of Basic Cable Networking," *Journal of Broadcasting and Electronic Media* 1999 (43), p. 645.

[65] Scherer, F. M. and David Ross, Industrial *Market Structure and Economic Performance* (Boston, Houghton Mifflin: 1990, Third edition), p. 526, formulate the issue as follows "To avoid these hazards, firms entering either of the markets in question might feel compelled to enter both, increasing the amount of capital investment required for entry.

[66] Shepherd, pp. 289-290, describes this issue as follows:

> When all production at a level of an industry is "in-house," no market at all exists from which independent firms can buy inputs. If they face impediments or delays in setting up a new supplier, competition at their level will be reduced. The clearest form of this is the rise in capital a new entrant needs to set up at both levels.
>
> Ores, special locations, or other indispensable inputs may be held by the integrated firm and withheld from others. The integration prevents the inputs from being offered in a market, and so outsiders are excluded. A rational integrated firm might choose to sell them at a sufficiently high price.

[67] Shepherd, p. 294, argues that integration by large firms creates this problem. Restrictions may be set on areas, prices or other dimension … Only when they are done by small-share firms may competition be increased. When done by leading firms with market shares above 20 percent, the restrictions do *reduce* competition.

[68] Perry, martin K., "Vertical Integration: Determinants and Effects," Richard Schmalensee and Robert D. Willig, *Handbook of Industrial Organization* (Amsterdam, North Holland: 1989), p. 197.

> Potential competition may be important for some markets. If one such potential entrant merges with a firm already inside the market, the ranks of actual plus potential competitors are reduced by one. Unless the entrant is in a vertical relation, the conglomerate reduces the total degree of competitive constraint, even if only slightly.
>
> In addition, [Bain] pointed out that vertical merger also eliminated one of the most natural potential entrants into each stage. Indeed, these two theories are complements. It is difficult to argue that firms in neighboring stages are the most likely entrants without also believing that entry at both stages is more difficult than entry at one stage.

[69] Perry, p. 247.

> The first firms to integrate into neighboring stages reduce the number of alternative sources for other firms at either stage. This "thinning" of the market can increase the costs of market or contractual exchange. Subsequent integration by other firms then becomes more likely.

[70] Scherer and Ross, pp. 526-527.

> It is possible that business firms undertake vertical integration mergers not to enhance the level of monopoly power at some stage, but to redistribute it. Oligopolies often settle down into behavioral patterns in which price competition atrophies, even though some or all sellers suffer from excess capacity. Non-price rivalry then becomes crucial to the distribution of sales. One form of nonprice competition is the acquisition of downstream enterprises which, all else (such as prices) being equal, will purchase from their upstream affiliates. If acquisition of this sort deflects significant amounts of sales, disadvantaged rivals are apt to acquire other potential customers in self-defense, and reciprocal fear of foreclosure precipitates a bandwagon effect in which the remaining independent downstream enterprises are feverishly sought.

Shepherd, p. 290.

> Triggering: If there are 10 nonintegrated firms and only one of them integrates, then little affect on competition might occur. But if this action induces the other 9 to do the same, the ultimate impact of the first "triggering" move may be large. Any increase in market power is magnified.

[71] Ahn, Hoekyun and Barry R. Litman, "Vertical Integration and Consumer Welfare in the Cable Industry," *Journal of Broadcasting and Electronic Media,* 41.

[72] McAdams, John M. Higgins, "Hangover from Takeovers," *Broadcasting & Cable,* April 19, 1999.

[73] HBO, a subsidiary of Time, played a key role in the effort to prevent TVRO operators from obtaining programming (see Chan-Olmsted, op. cit., at 11), and the effort to sell overbuild insurance (Competitive Issues in the Cable Television on Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, at 127, 152-174. The recent efforts to impose exclusive arrangements have raised numerous complaints from potential competitors (see for example "Statement of William Reddersen on Behalf of Bell South Enterprises (hereafter, Bell South)," and "Testimony of Deborah L. Lenart on Behalf of Ameritech (hereafter, Ameritech)," Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, July 29, 1997.

[74] Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988. More recently, for example, The Time Warner-Turner merger as originally proposed included preferential treatment for TCI (see "Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney," In the Matter of Time Warner, File No. 961-0004. Efforts to exclude non-affiliated programs have also been in evidence, as Viacom's most popular programming (MTV) has been bumped.

[75] Bell South (p. 4) cites examples of suspected exclusive arrangements involving Eye on People, MSNBC, Viacom, and Fox, as does Ameritech (p. 7).

[76] The loophole will be terrestrial transmission to regional clusters, thereby avoiding the requirement to provide non-discriminatory access to satellite delivered programming. Bell South gives examples of Comcast in Philadelphia and Time Warner in Orlando (p. 5). Ameritech cites Cablevision in New York (p. 8).

[77] Bell South gives examples including NBC/CNBC, Scripps Howard/Home and Garden (p. 5).

[78]Testimony of Michael J. Mahoney on Behalf of C-TEC Corporation Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, July 29, 1997.

[79] McWilliams Brian, "Prodigy Stumps for Access to Cable," *Internet News.com*, July 23, 1999.

> Medin said if Prodigy and other ISPs don't like the current situation, instead of running to regulators for help, they should get behind DSL, or wireless or satellite access. Or, if they're so keen on cable, said Medin, they should string their own wires, or "overbuild" as it's called in the cable industry.

[80] Herskowitz, Marc L., "The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?," *Cardozo Arts and Entertainment Law Journal*, 1997 (15); Petition.

[81] Hershkowitz, pp. 111-12. See also Napoli, Deconstructing.

[82] Petition, pp. 8-12.

[83] Petition, pp. 23 –28.

[84] Petition, pp. 8-12, 15-18.

[85] Waterman, David, "CBS-Viacom and the Effects of Media Merger: An Economic Perspective," dismisses the threat of vertical leverage while admitting that it is extensive in this case. He concedes that Fox "favors" its own programming, but argues that even though the other networks self-deal, they also allow other programs on and sell to non-network stations. He fails to consider how much market is available outside of the vertically integrated TV networks. Others have pointed out that what is left may not be enough to support an unintegrated market (Hershkowitz).

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> Radio programming preferences differ sharply between black and whites between Hispanics and non-Hispanics, and (to a lesser extent) across age groups. Additional consumers bring forth additional products, but in this market the products brought forth are valuable almost exclusively to members of their own groups. This is an interesting finding, among other reasons, because it gives a non-discriminatory reason why markets will deliver fewer products – and one might infer, lower utility – to "preference minorities," small groups of individuals with atypical preferences.
>
> Is this an important effect in the economy, or a curious feature of radio markets?… The fundamental conditions needed to product compartmentalized preference externalities are large fixed costs and preferences that differ sharply across groups of consumers. These conditions are likely to hold, to greater or lesser extents, in a variety of media markets – newspapers, magazines, television, and movies

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Akousa Barthewell, "Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry," *Yale Law and Policy Review*, 1990 (8); Dubin, Jeff and Matthew L. Spitzer, "Testing Minority Preferences in Broadcasting," *Southern California Law Review,* 1995 (68); Bachen, Christine, Allen Hammond and Laurie Mason, and Stephanie Craft, *Diversity of Programming in the Broadcast Spectrum: Is there a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?,* Santa Clara University, December 1999); Mason, Laurie, Christine M. Bachen, Stephanie L. Craft, "Support for FCC Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity," *Comm. L. Pol'Y,* 2001 (6).

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[114] Rifkin, pp. 7-9.

> More and more cutting edge-commerce in the future will involve the marketing of a vast array of cultural experiences rather than of traditional industrial-based goods and services…
>
> While the industrial era was characterized by the commodification of work, the Age of Access is about, above all else, the commodification of play – namely the marketing of cultural resources including rituals, the arts, festivals, social movements, spiritual and fraternal activities, and civic engagement in the form of paid-for personal entertainment…
>
> Imagine a world where virtually every activity outside the confines of family relations is a paid-for experience, a world in which traditional obligations and expectations – mediated by feelings of faith, empathy, and solidarity – are replaced by contractual relations in the form of paid memberships, subscriptions, admission charges, retainers and fees

[115] Fairchild, pp. 557-559,

> News programming, especially local news, which has always been the most expensive kind of programming to produce, has been rationalized almost out of existence, with a significant amount of centralization and heavy reliance on national wire services and increased use of 'information management' services of public relations companies…
>
> In Washington DC, for example, consolidation has led to one news production team providing identical new to 10 stations form a central location, personalizing each station's news break with their call letters… Staff can choose which pieces of news they will include in their own newscasts, but have no control over news content and given the economic realities created and fostered by deregulation, few may actually have the means to make these choices…
>
> It is a fairly straightforward concept: a computer system allows the station to download programming minutes or even days in advance… All possible functions of a radio station, defined in advance, are covered by one of 99 preset computer command. 'Any station joining the network 'can expect to cut operating costs by 30 to 50 percent.' The advantage of the network,' writes one business reporter, 'is that the station need not worry about selecting the music, the programming staple of most stations on the network. 'Pelmorax uses programming consultant to tailor the music and Decima Research to ensure that its formats reach the right demographics.

[116] Network Affiliated Stations Alliance, "Petition for Inquiry into Network Practices." (Federal Communications Commission, Mar. 8, 2001).