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## **Big Media: Its Effect on the Marketplace of Ideas and How to Slow the Urge to Merge, 20 J. Marshall J. Computer & Info. L. 247 (2002)**

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## COMMENTS

# BIG MEDIA: ITS EFFECT ON THE MARKETPLACE OF IDEAS AND HOW TO SLOW THE URGE TO MERGE

“[T]here exists in America a control of news and of current comment more absolute than any monopoly in any other industry.”<sup>1</sup>

“Freedom of the press belongs to those who own one.”<sup>2</sup>

### I. INTRODUCTION

The free flow of information is the life-blood of democracy.<sup>3</sup> Access to diverse opinions and perspectives enables Americans to participate effectively in our democracy.<sup>4</sup> We depend on the media to provide us with such access and to hold public officials accountable for their policies and actions.<sup>5</sup> James Madison wrote, “[a] popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.”<sup>6</sup> The Founding Fathers enshrined the idea of a free press<sup>7</sup> in the First Amendment.<sup>8</sup> The Constitution does not extend this measure of protection to any other segment of American industry.<sup>9</sup>

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1. Upton Sinclair, *The Brass Check*, 241 (1919).

2. A.J. Liebling, *The Wayward Pressman*, 265 (1947) (discussing that large corporate ownership of media organizations is of a central concern).

3. Senator Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 Fed. Comm. L.J. 551, 551 (May 2000) (discussing the important role that mass media plays in the dissemination of ideas and opinions).

4. *Id.*

5. *Id.* at 552 (stating also that the greater amount of diversity that exists in the ownership of media organization allows media to perform its functions better).

6. *Id.* at 552-53.

7. *Id.* at 552.

8. U.S. Const. Amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

9. Wellstone, *supra* n. 3, at 551.

In the past decade, there have been many media corporate unions, most notably Disney and Capital Cities/ABC, Viacom and CBS, and the largest media merger to date, America Online ("AOL") and Time-Warner.<sup>10</sup> These media mergers may make good sense economically, but what about their impact on news organizations? The First Amendment prohibits only government interference in the "marketplace of ideas,"<sup>11</sup> it says nothing, however, about potential domination of the marketplace of ideas by large media organizations.<sup>12</sup> Although corporate control of the press has been a concern for more than a century,<sup>13</sup> the recent media merger trend has re-ignited fears over the possible degradation of journalism by corporate interests.<sup>14</sup>

Most Americans would agree that government-imposed censorship is unacceptable. Critics charge though the media regularly imposes self-

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10. See generally Aaron Moore, *Who Owns What*, Columbia Journalism Rev. <<http://www.cjr.org/owners>> (accessed Apr. 15, 2002) (offering a list of recent media mergers). This Web site offers access to news and information about companies involved in recent media marriages. See generally *id.* On the Web site, one can find information about recent mergers involving Disney, Hollinger International, AOL/Time-Warner, and many others. See *id.* The Web site is maintained by members of the *Columbia Journalism Review*. See *id.*; see generally ABC News, *Media Mergers Timeline* <[http://www.abcnews.go.com/sections/cbs\\_viacom\\_chronology\\_990907.html](http://www.abcnews.go.com/sections/cbs_viacom_chronology_990907.html)> (Jan. 10, 2000) (showing a timeline of recent media mergers dating back to the 1986 acquisition of the American Broadcasting Corp. by Capital Cities Communications, Inc.).

11. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (holding that broadcasting was to "function consistently with the ends and purposes of the First Amendment"). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee." *Id.* (citing *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945)). The court further stated that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Id.*; see Peter H. Nesvold, *Communication Breakdown: Developing and Antitrust Model for Multimedia Mergers and Acquisitions*, 6 Fordham Intell. Prop., Media & Ent. L.J. 781, 869 n. 20 (1996) (discussing the birth of the term "marketplace of ideas"). Most scholars, though, attribute the concept of a "marketplace of ideas" to Justice Holmes' dissent in *Abrams v. U.S.* *Id.* Justice Holmes wrote: "the best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. See Symposium, *Panel I: The Changing Landscape of Jurisprudence in the Light of the New Communications and Media Alliances*, 6 Fordham Intell. Prop., Media & Ent. L.J. 427, 434 (1996) [hereinafter *Panel I*] (stating also that the Free Speech Clause contained in the First Amendment does not mandate a "positive government program of action").

13. See e.g. Sinclair, *supra* n. 1, at 241; see generally Commission on Freedom of the Press, *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (U. of Chicago Press, 1947); see generally Robert W. McChesney, *Corporate Media and the Threat to Democracy* (Seven Stories Press 1998).

14. *Id.* at 24-26 (discussing the "death of journalism" caused by corporate interests).

editorial independence and the manipulation and dilution of news content.<sup>20</sup> When we as citizens feel that politicians are not serving our needs or interests, we can show our disapproval at the ballot box. We have no such recourse with the seemingly omnipotent media organizations. Just change the channel, right? What if that very same multimedia conglomerate owns the next channel over, and the next channel, and the next channel, and the next channel?

Misguided antitrust scrutiny, the passage of the *Telecommunica-*

15. See e.g. Andrew Kohut, *Self-Censorship: Counting the Ways*, Columbia Journalism Rev. ¶ 14 (May/June, 2000) (available at <<http://www.cjr.org/year/00/2/censorship.asp>>).

16. See *infra* nn. 204-96 and accompanying text (providing examples of self-censorship, news coverage reduction, and news content manipulation).

17. See James Talbott, *Will Mega-Media Mergers Destroy Hollywood and Democracy?*, 18 Ent. Sports Law 9 (Spring 2000).

18. *Interview: Mark Crispin Miller* ¶ 4 <<http://www.pbs.org/wgbh/pages/frontline/shows/cool/interviews/crispinmiller.html>> (accessed Nov. 27, 2001) (discussing the economic pressures placed upon media organization by company shareholders). Mr. Miller is a media critic and professor at New York University. *Id.* AOL/Time-Warner recently reported a \$54 billion loss, the largest in U.S. history. *Record \$54 Billion AOL Time Warner Loss*, Chi. Trib. ¶ 1 (Apr. 25, 2002) (available at <<http://www.chicagotribune.com/business/cnet/chi0204250217apr25.story?coll=chi%2Dbusinessstocks%2Dhed>>). This loss represents an amount greater than the annual gross domestic product of Ecuador, Croatia, Uruguay, Kenya, or Bulgaria. James Bates, *AOL \$50-Billion Loss is One From the Books*, Chi. Trib. ¶ 2 (Apr. 24, 2002) (available at <<http://www.chicagotribune.com/technology/la-042402losses.story>>). Viacom admitted a \$1.1 billion loss. Seth Sutel, *Viacom Posts \$1.1 Billion Loss*, Chi. Trib. ¶ 1 (Apr. 25, 2002) (available at <<http://www.chicagotribune.com/business/sns-ap-earns-viacom0425apr25.story>>).

19. See McChesney, *Corporate Media*, *supra* n. 13, at 24-26 (discussing the rash of layoffs and resignations within the industry); see Keith Conrad, *Media Mergers: First Step in a New Shift of Antitrust Analysis?*, 49 Fed. Comm. L.J. 675, 682 (discussing how profit motives have forced major job cuts in many large news organizations resulting in a reduction of substantive local and national news).

20. See generally e.g. Neil Hickey, *Coping with Mega-Mergers*, Columbia Journalism Rev. (Mar./Apr., 2000) (available at <<http://www.cjr.org/year/00/2/aoltw.asp>> (2002) [hereinafter Hickey, *Coping*]; see Robert H. Lande, *Statement of Professor Robert H. Lande on Behalf of The American Antitrust Institute at the Hearing on the America Online/Time-Warner Merger Before the Committee on Commerce, Science, and Transportation, United States Senate* <<http://www.antitrustinstitute.org/recent/59.cfm>> (accessed May 6, 2002) [hereinafter Lande, *Statement*]. “[A] handful of media firms would not be sufficient for the diversity of viewpoints in a democracy.” *Id.* at ¶ 7.

tions Act of 1996 ("Telecom Act"),<sup>21</sup> and fundamental changes at the Federal Communications Commission ("FCC"), have resulted in a flurry of media mergers. The current method of media merger antitrust scrutiny employs only an analysis of the potential economic effects of a proposed merger.<sup>22</sup> Very little if any regard is given to a merger's social and political implications. In line with Supreme Court cases, legislative history, an influential commentary, this Comment will propose a new antitrust model specifically-tailored for use in media merger review, which, like the marketplace of ideas itself, goes beyond mere economic considerations.

The *Telecom Act* effectively reworked 60 plus years of U.S. telecommunications law.<sup>23</sup> By scaling back or eliminating all together many longstanding regulations concerning market concentration,<sup>24</sup> and cross-ownership,<sup>25</sup> the *Telecom Act* has contributed to today's media merger fad.<sup>26</sup> Instead of increasing competition through deregulation,<sup>27</sup> the *Telecom Act* helped pave the way for companies like AOL/Time-Warner and Viacom to gobble up other media outlets and actually impede competition. This Comment will put forth proposals on amending the *Telecom Act* to stop, or at least slow down, this recent media merger frenzy.

The FCC has also contributed to the recent media merger trend by seemingly going against its core directives. The FCC was established by Congress to promote the "diversity of media voices, vigorous economic competition, . . . and . . . the public interest, convenience, and necessity."<sup>28</sup> The *Telecom Act* reaffirmed the FCC's public interest mission.<sup>29</sup> However, because of recent policy and priority changes at the FCC, and

21. Pub. L. No. 104-104, 110 Stat. 56 (1996).

22. See Nesvold, *supra* n. 11, at 818-20 (discussing the economic approach to antitrust analysis through the dominate Chicago School perspective); see also Conrad, *supra* n. 19, at 677.

23. Harold Feld, *The Need for FCC Merger Review*, 18 *Commun. Law.*, 20 (Fall 2000).

24. The *Telecom Act* all but eliminates governmental restrictions on the amount of television stations a person or corporation may "directly or indirectly own, operate, or control, or have a cognizable interest in nationwide." 47 U.S.C. § 336(c)(1)(A) (1996) (regarding national ownership limitations). The *Telecom Act* also raises the amount of national viewers that a group of television stations under the same ownership can serve from 25 percent to 35 percent. 47 U.S.C. 336(c)(1)(B) (1996) (regarding national ownership percentage limitations).

25. The *Telecom Act* abolishes cross-ownership restrictions of cable systems. 47 U.S.C. § 336(f)(1) (1996) (regarding elimination of restrictions on cable cross ownership).

26. See Nesvold, *supra* n. 11, at 846 (discussing the effects of the passage of the *Telecom Act*). The *Telecom Act* contributed "to the rise of media competition and consolidation." *Id.*

27. *Cf. id.* (discussing the overall purpose behind the *Telecom Act*). The *Telecom Act* "eliminat[es] regulatory barriers that block competition." See *id.* at 847.

28. 47 U.S.C. § 257(b) (1996) (discussing the FCC's public interest standard).

29. *Id.*

its relatively low profile during the review of two of the largest media mergers in history, this Comment calls into question its commitment to the public interest.

The trend toward corporate consolidation within the media industry poses a major threat to democracy and the marketplace of ideas<sup>30</sup> by allowing “too much power in too few hands [thus] impair[ing] freedom of expression.”<sup>31</sup> If the current laissez faire attitude toward media mergers is allowed to continue, then it is possible to foresee a day when an even smaller number of large media companies dominate the television and radio airwaves, telephony, and cyberspace.<sup>32</sup> Each and every proposed media merger should receive antitrust scrutiny that takes social and political concerns into consideration, the FCC should continue to maintain its “public interest” standard for merger review, and the *Telecom Act*, after its failure at sparking meaningful competition, should be amended to not allow further consolidation within the industry.

Part II of this Comment begins with an introductory discussion on mergers and acquisitions, including some of the advantages of such unions. It then will outline applicable antitrust law doctrines and introduce the *Telecommunications Act of 1996*. Part III of the Comment begins with a discussion on how media mergers have affected journalism, and discusses some of the major arguments for and against these types of corporate unions. Finally, the Comment will put forth proposals on how to stop, or at least slow down, the media merger trend by application of tougher and broader antitrust scrutiny, by amending the *Telecom Act*, and by greater FCC involvement in media merger review.

## II. BACKGROUND

### A. MERGERS AND ACQUISITIONS

#### 1. Introduction

A merger is the “permanent union of previously separated enterprises.”<sup>33</sup> A merger is achieved when a company purchases the holdings of another corporation, thus absorbing that firm into one larger com-

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30. See *Red Lion Broadcasting*, 395 U.S. at 390; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (remarking that the “debate on public issues should be uninhibited, robust, and wide-open”).

31. See *FTC Chief to Test Theory in Review of Turner Deal, Robert Pitofsky is Making it Clear He Believes Media Mergers Deserve Special Scrutiny*, Atlanta J & Const. ¶ 7 (Oct. 10, 1995) (available at 1995 WL 6555995) (discussing former Federal Trade Commission Chairman Pitofsky’s views on media mergers).

32. See Nesvold, *supra*, n. 11, at 786 (stating his view of what will ultimately occur if media mergers are allowed to proliferate unchecked). “[T]he public may soon find that four or five companies control nearly all the information delivered into homes over television airwaves, cable, or computer modems.” *Id.*

33. *Id.* at 799.

pany.<sup>34</sup> The purchaser then acquires the assets and liabilities of the acquired company.<sup>35</sup> “[M]ergers, joint ventures, and cooperation among competitors have increasingly become a competitive necessity in order to invest in and exploit research and development.”<sup>36</sup> The increased size gives corporations more time to respond to change before losses begin to seriously affect share prices.<sup>37</sup> Mergers may help an emerging firm gain credit, notoriety, respectability, or excellent tax benefits.<sup>38</sup> In the United States, antitrust laws, under the authority of Section 7 of the *Clayton Act*,<sup>39</sup> are used to ensure that certain mergers and acquisitions do not result in monopolies.<sup>40</sup>

Mergers allow two companies to achieve what is known in business circles as synergy.<sup>41</sup> Synergy is created, when the consolidated companies are worth more as a single entity than as separate companies.<sup>42</sup> Think of synergy as  $1+1=3$ .<sup>43</sup> The united companies can reduce overhead by eliminating transaction costs and duplicate operations,<sup>44</sup> thus improving overall product or service quality, and theoretically, boosting output.<sup>45</sup> Opponents of synergy call it an “annihilation of competition.”<sup>46</sup>

Mergers are classified into three major categories:<sup>47</sup> (1) horizontal mergers, which involve competitors selling the same product;<sup>48</sup> (2) verti-

34. Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings*, 7 (John Wiley & Sons 1996) (regarding the motivations behind mergers as well as the process of acquiring another company).

35. *Id.*

36. *Panel I, supra* n. 12, at 440 (discussing the need for corporate mergers within the communications industry as necessary to stay competitive).

37. Gaughan, *supra* n. 34, at 104.

38. *See* Nesvold, *supra* n. 11, at 789 n. 39.

39. 15 U.S.C. § 18 (1994).

40. *See* Symposium, *Panel II: The Economic and Regulatory Issues of Convergence*, 9 *Fordham Intell. Prop., Media & Ent. L.J.* 461, 465 (Winter 1999) [hereinafter *Panel II*].

41. Nesvold, *supra* n. 11, at 791.

42. *Id.*

43. *See* Gaughan, *supra* n. 34, at 104 (explaining that in chemistry the term synergy refers to when two chemicals come together to form a more powerful compound or reaction than the sum of their separate parts).

44. *Cf. id.* at 8 (explaining the motivations behind many mergers and acquisitions). One of the most common reasons why firms consolidate is expansion into other markets. *Id.* Other motivations include an improvement in management and various tax benefits. *Id.* at 104.

45. *See* Nesvold, *supra* n. 11, at 791.

46. *See* Conrad, *supra* n. 19, at 679 (quoting former FCC Commissioner Nicholas Johnson).

47. *See* Nesvold, *supra* n. 11, at 793.

48. *See* Gaughan, *supra* n. 34, at 7-8 (discussing the relaxation of federal antitrust laws). “If a horizontal merger causes the combined firm to experience an increase in market power that will have anti-competitive effects, the merger may be opposed on antitrust

cal mergers, which bring together companies that were once buyers and sellers of a product or service;<sup>49</sup> and (3) conglomerate mergers, which form new corporations from firms that served different markets.<sup>50</sup> Vertical mergers receive the most scrutiny from federal regulators<sup>51</sup> because they “act as a clog on competition, [ ] which deprives . . . rivals the fair opportunity to compete.”<sup>52</sup> Simply stated, vertical mergers allow a company to internalize all operations, thus leaving competitors without customers or suppliers.<sup>53</sup>

2. *Mergers are attractive to media organizations for a variety of reasons*

Among the typical economic benefits of consolidation,<sup>54</sup> there are three unique motives compelling media organizations to form large partnerships.<sup>55</sup> The first is that media mergers often unite massive production and distribution entities<sup>56</sup> allowing “self-dealing.”<sup>57</sup> Second, the new larger media companies will be in a better position to exploit their copyright holdings.<sup>58</sup> Third, media mergers allow companies “to repackage existing properties and create cross-promotions.”<sup>59</sup>

a. *Media mergers allow unification of production and distribution entities*

Large vertical mergers allow some companies to internalize all or

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grounds.” *See id.* “[H]owever, the government has been somewhat liberal in allowing horizontal mergers to go unopposed.” *Id.* at 8.

49. *Panel I, supra* n. 12, at 431.

50. Gaughan, *supra* n. 34, at 8.

51. *Cf. Panel I, supra* n. 12, at 431.

52. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 324 (1962) (citing Section 7 of the *Clayton Act*). The Court held that the *Clayton Act* does not forbid all vertical mergers, only those that “substantially [ ] lessen competition, or tend to create a monopoly.” *Id.*

53. *See Nesvold, supra* n. 11, at 797. *See also e.g. U.S. v. Paramount Pictures*, 334 U.S. 131, 149 (1948) (regarding the motion picture industry); *U.S. v. AT&T*, 534 F. Supp. 1336, 1348-57 (D.D.C. 1981) (regarding the telephone industry).

54. *See Nesvold, supra* n. 11, at 788 (discussing two major economic benefits of mergers and acquisitions). The first advantage is that mergers and acquisitions place goods and services in the hands of the “most effective managers.” *Id.* at 789. The second reason to consolidate with another firm is to achieve “economies of scale” or “synergies.” *Id.* at 790-91. The two companies typically become worth more together than apart. *Id.* at 791. It also follows that the newly formed corporation will be able to reduce transactional costs, and, in theory, improve overall quality and output. *Id.*

55. *See Conrad, supra* n. 19, at 680-81.

56. *Id.* at 680.

57. David Waterman, *CBS-Viacom and the Effects of Media Mergers: An Economic Perspective*, 52 Fed. Comm. L.J. 531, 536 (2000).

58. *See Conrad, supra* n. 19, at 680-81.

59. *Id.* at 681.



nearly all of their operations.<sup>60</sup> In the case of media organizations, vertical integration allows one company to own or control the stages of the production and distribution of a particular program.<sup>61</sup> The same company can then use its various properties to promote the project.<sup>62</sup> From an economic perspective, self-dealing has several distinct advantages.<sup>63</sup> First, self-dealing often reduces the overall cost of program production.<sup>64</sup> Second, common ownership often reduces the risk that a competing network will pick up a particular program.<sup>65</sup> Finally, ideas for programs are more effectively circulated between network executives and program producers and vice versa.<sup>66</sup>

Disney is one such company that internalizes a great deal of its production and distribution operations.<sup>67</sup> When Disney purchased Capital Cities/ABC for \$19 billion,<sup>68</sup> it was the second largest media merger in history at the time,<sup>69</sup> and involved an extensive film library that includes *The Lion King*, *Toy Story*, *Dumbo*, and *Snow White*.<sup>70</sup> ABC will almost certainly get first choice on Disney original programming.<sup>71</sup> As one commentator noted, “[o]ne of the reasons Disney wanted ABC was so that it could rerun its vast library of movies and cartoons on networks TV rather than on its lower-rated cable channel.”<sup>72</sup> Judson Greene, president of Walt Disney Attractions, said, “I think we wrote the book on synergy.”<sup>73</sup>

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60. See *Panel II, supra* n. 40, at 465.

61. See Waterman, *supra* n. 57, at 536.

62. See Conrad, *supra* n. 19, at 680.

63. Waterman, *supra* n. 57, at 538.

64. *Id.*

65. *Id.*

66. *Id.*

67. Cf. Conrad, *supra* n. 19, at 680.

68. *Id.* at 678.

69. *Id.* The Disney/ABC merger has since been surpassed by the \$80 million CBS/Viacom merger. See *Viacom and CBS to Merge in Largest Media Transaction Ever* ¶ 1 <<http://www.viacom.com/merger>> (accessed Oct. 2, 2000) (offering a detailed account of the mergers and the holdings owned by each company). See *AOL-Time Warner Merger* ¶ 1 <[http://www.pbs.org/n...usiness/jan/june00/aol\\_01-10a.html](http://www.pbs.org/n...usiness/jan/june00/aol_01-10a.html)> (accessed Oct. 2, 2000) (discussing the ramifications of the then proposed merger). This merger now holds the record for the largest media transaction in history. *Id.*

70. Conrad, *supra* n. 19, at 678. The merger also involved a massive broadcasting, entertainment, and merchandising empire. *Id.* It not only involved the ABC television and radio networks, but the Disney theme parks; the Disney Channel; movie production house Miramax; Touchstone Pictures; and Hollywood Pictures; cable staple ESPN; and numerous radio and television station across the country. *Id.*

71. *Id.* at 679 (discussing the advantages of synergized corporations).

72. Warren Cohen & Katia Hetter, *Tomorrow's Media Today*, U.S. News and World Report, 47-48 (Aug. 14, 1995).

73. See Conrad, *supra* n. 19, at 679.

b. *Media mergers permit effective exploitation on copyright holdings*

Consolidated media companies can harvest bigger profits by full exploitation of their copyright licenses through effective promotion and marketing.<sup>74</sup> For example, Time-Warner<sup>75</sup> from time to time packages together a few James Bond movies<sup>76</sup> and calls it "15 Nights of 007."<sup>77</sup> The packaging brings in more viewers than would a showing of a single film from the popular movie series.<sup>78</sup> The company can then cross-promote the Bond film festival, or any other programming event, on TBS, Cartoon Network, Turner Network Television, Cable News Network, and CNN Headline News, etc. The company can also run promotional advertisements in *Time*, *People*, and *Sports Illustrated*, and other publications it operates.<sup>79</sup>

c. *Vast holdings allow repackaging and cross-promotion*

Merged companies can use their vast resources to cross-channel promote original and special events programming.<sup>80</sup> For example, *Super Bowl XXXV* aired on CBS.<sup>81</sup> A broadcast of *MTV's Total Request Live*, hosted by Carson Daly, was the pre-game show.<sup>82</sup> Blockbuster, yet another Viacom property, sponsored the game and pre-game shows.<sup>83</sup> The company can then cross-promote the Super Bowl on CMT, BET, TNN, MTV, or on its vast network of Infinity Broadcasting radio stations.

## B. ANTITRUST LAW: A PRIMER

Trusts and monopolies are concentrations of wealth in the hands of a few individuals or corporations.<sup>84</sup> It is believed that these combinations of economic resources are harmful to the public and individuals because these trusts minimize, if not eliminate, competition, and generate for

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74. *See id.* at 680.

75. Time-Warner is now a division of AOL/Time-Warner. *See generally AOL-Time Warner Merger, supra* n. 69.

76. Conrad, *supra* n. 19, at 679.

77. *See The Man with the Golden Gun* (TBS Oct. 15, 2000) (tv broadcast) (promoting the movie as part of "15 Days of 007").

78. Conrad, *supra* n. 19, at 679.

79. *See id.*

80. *Id.*

81. *Super Bowl XXXV* (CBS Jan. 28, 2001) (tv broadcast).

82. *See CBS Sports Press Conference* ¶ 5 <<http://www.superbowl.com/u/xxxv/features/cbs012301.html>> (accessed Oct. 17, 2001).

83. *Super Bowl XXXV* (CBS Jan. 28, 2001) (tv broadcast).

84. Legal Information Institute, *Law about Antitrust: Overview* ¶ 1 <<http://www.law.cornell.edu/topics/antitrust.html>> (accessed July 13, 2001); *see Nesvold, supra* n. 11, at 819 (stating that "[t]he primary—if not exclusive—evil that antitrust jurisprudence is to protect against is the creation or exercise of market power").

consumers higher prices and lower quality.<sup>85</sup> Antitrust law's objective is to assure a competitive economy, based upon the view that, through competition, consumer needs will be satisfied at the lowest price with the least amount of sacrifice of scarce resources.<sup>86</sup> Promoting consumer choice is perhaps the most important role of antitrust law.<sup>87</sup> In seeking to create or preserve a climate conducive to a competitive economy, the antitrust laws rely upon the operation of free enterprise to decide what shall be produced, how scarce resources shall be allocated among the various factors of production, and to whom the various products will be distributed.<sup>88</sup> Ensuring economic freedom for competitors and consumers has been held to be as important as the preservation of our personal freedoms.<sup>89</sup> Antitrust law has been called the "Magna Carta"<sup>90</sup> of the free enterprise system.<sup>91</sup>

## 1. *Relevant Antitrust Statutes*

### a. *Sherman Act*

In 1890, Congress passed the *Sherman Antitrust Act*<sup>92</sup> to prevent trusts from creating unfair restraints on trade or commerce and reducing marketplace competition.<sup>93</sup> The *Sherman Act* was enacted to preserve economic liberty, and to eliminate unfair restraints on trade and economic competition.<sup>94</sup> "The [*Sherman Act*] was concrete recognition of the public's interest in controlling monopoly power, an interest that was not dependent for its indication in the initiative of private individuals injured directly by the monopolist's conduct."<sup>95</sup> The *Sherman Act* is still the chief source of U.S. antitrust law today and most states have similar

85. *Id.* See also *Natl. Socy. of Prof. Engr. v. U.S.*, 435 U.S. 679, 695 (1978) (discussing the role of competition in the overall quality of goods and services). No specific proof is required to prove that a combination will cause higher prices, there must be merely an "appreciable danger" of such harm in the future. See Kevin J. Arquit and Richard Wolfram, *Mergers and Acquisitions: United States Government Antitrust Analysis and Enforcement*, 1251 Practising Law Institute/Corporate Law and Practice Course Handbook Series 317, 323 (May 2001).

86. Ernest Gellhorn, *Antitrust Law and Economics: In a Nutshell*, 41 (West 1976).

87. Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503, 503 (Spring, 2001) [hereinafter Lande, *Consumer Choice*].

88. Gellhorn, *supra* n. 86, at 41.

89. Jerrold G. Van Cise, et. al., *Understanding the Antitrust Laws*, 26 (Practising Law Institute 1986).

90. See *U.S. v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (describing the importance of antitrust law).

91. Van Cise, *supra* n. 89, at 26.

92. 15 U.S.C. § 1 (2001).

93. Legal Information Institute, *supra* n. 84, at ¶ 2.

94. *Id.*

95. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1219 (1988).

statutes.<sup>96</sup>

Section 1 of the *Sherman Act* (“Section 1”), reads that: “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>97</sup> With this broad language, Congress left it to the courts to determine what types of business behavior would be prohibited under Section 1.<sup>98</sup> Over the years, courts developed two categories of antitrust analysis: “per se” and “rule of reason.”<sup>99</sup> *Per se* offenses are presumed to be violations of Section 1.<sup>100</sup> Price-fixing, group boycotts, and certain “tying” arrangements are examples of “per se” antitrust violations.<sup>101</sup> There are other business activities for which anti-competitive behavior is not so clearly defined.<sup>102</sup> For such situations, courts use the “rule of reason” approach to ascertain whether the business behavior’s pro-competitive benefits outweigh any anti-competitive effects.<sup>103</sup> The “rule of reason” analysis is applied to most vertical mergers.<sup>104</sup>

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96. Legal Information Institute, *supra* n. 84, at ¶¶ 2-4.

97. 15 U.S.C. § 1. The section reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Id.*

98. Conrad M. Shumadine & Michael R. Katchmark, *Antitrust and the Media*, 679 Practising Law Institute/Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series 7, 47 (Nov. 2001).

99. *Id.* at 47-48.

100. *Id.* at 47.

101. *Id.* at 49.

102. *Id.* at 47-48.

103. *Id.* at 48; see also *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918) (discussing the “rule of reason” approach). Justice Brandeis wrote:

The true test of legality is whether the restraint imposed as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The instrument of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose of end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Id.*; see also *Natl. Socy. of Prof. Engr.*, 435 U.S. at 690-92 (stating that the rule of reason approach attempts to balance the anti-competitive effects of a restraint on trade against its pro-competitive benefits to determine its impact on competition).

104. Shumadine, *supra* n. 98, at 51.

b. *The Clayton Act*

While mergers and acquisitions may receive regulatory scrutiny under Section 1 and, to a certain extent, Section 2 of the *Sherman Act*,<sup>105</sup> generally federal regulators will review vertical business consolidations under Section 7 of the *Clayton Act* ("Section 7").<sup>106</sup> Section 7<sup>107</sup> and its subsequent amendments,<sup>108</sup> regulate mergers and acquisitions by stating that "no person . . . shall acquire . . . any part of the assets of another person . . . where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."<sup>109</sup> In addition, unlike the *Sherman Act*, Section 7 does not require actual proof of the effect of anti-competitive or monopolistic behavior.<sup>110</sup> Only a "reasonable probability" of detriment to market competition will satisfy Section 7.<sup>111</sup> As one would expect, the "reasonable probability" standard allows the Government and private litigants great latitude in the merger review process.<sup>112</sup>

The Supreme Court in *Brown Shoe v. U.S.*<sup>113</sup> outlined modern anti-trust analysis.<sup>114</sup> The Court looked at legislative history and, although it did not set forth a definitive test for antitrust merger analysis, the Court did establish that economic principles should be the guide in Section 7's application.<sup>115</sup> In following the guidance in *Brown Shoe*, subse-

105. *Id.* at 304.

106. Arquit, *supra* n. 85, at 323.

107. 15 U.S.C. § 18 (1994).

108. Nesvold, *supra* n. 11, at 803 (discussing the amendments to the *Clayton Act*).

109. 15 U.S.C. § 18.

110. Shumadine, *supra* n. 98, at 304.

111. *Id.* at 304-05.

112. *Id.* at 305. In *FTC v. Proctor & Gamble Co.*, the Supreme Court explained Section 7's rationale:

The core question [under Section 7] is whether a merger may substantially lessen competition, and [that] necessarily requires a prediction of the merger's impact on competition, present and future. [Section 7] can only deal with probabilities, not with certainties. . . If the enforcement of [Section 7] turned on the existence of actual competitive practices, the congressional policy of thwarting such practices in their incipency would be frustrated.

386 U.S. 568, 577 (1967).

113. 370 U.S. 294 (1962).

114. *See* Nesvold, *supra* n. 11, at 802.

115. *See id.* at 802-03. Chief Justice Warren in his majority in the *Brown Shoe* case wrote that "[a] review of legislative history of [Section 7 and its subsequent amendment] provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers." *Brown Shoe*, 370 U.S. at 315. According to the Court, mergers shall be evaluated with several factors in mind. *Id.* at 321-22. Two such factors are: (1) how concentrated the particular industry is, and (2) whether the particular industry "had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies." *Id.*

quent cases have developed a three-prong test for antitrust merger analysis.<sup>116</sup> The first element is “defining the relevant market” of the merging firms.<sup>117</sup> This involves focusing in on the merging firms’ product and geographic market.<sup>118</sup> The second element of antitrust merger analysis involves estimating the merger companies’ potency in the respective markets.<sup>119</sup> The third factor for an antitrust merger inquiry involves examining certain “industry- and transaction-specific factors.”<sup>120</sup> Prongs 1 and 2 of the test involve an almost exclusive economic assessment of the proposed merger.<sup>121</sup> Prong 1 involves determining the product category and geographic area in which the merging firm operates.<sup>122</sup> Prong 2 involves calculation of other economic factors such as market shares and market concentration.<sup>123</sup> What is most troubling about current Section 7 merger analysis is that Prong 3 is examined from an economic approach as well.<sup>124</sup>

c. *The Hart-Scott-Rodino Act*

*The Hart-Scott-Rodino Antitrust Improvement Act of 1976*,<sup>125</sup> among other things,<sup>126</sup> requires merging companies to provide pre-merger notification to the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) of their intention to merge if the proposed merger falls within certain parameters.<sup>127</sup> Those parameters are: 1) that at least one of the two firms involved must have assets or net sales of \$100 million or more; and 2) the acquiring firm foresee holding either \$15 million or 15 percent of the acquired company’s assets.<sup>128</sup>

2. *Enforcement of Antitrust Laws*

United States antitrust law is primarily concerned with the types of mergers and acquisitions that could potentially lessen competition and place a small number of people or companies in control of a certain mar-

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116. See Nesvold, *supra* n. 11, at 805 (discussing subsequent cases interpreting *Brown Shoe*).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Nesvold, *supra* n. 11, at 805-14.

122. *Id.* at 805-10.

123. *Id.* at 810-14.

124. *Id.* at 814-19.

125. 15 U.S.C. §16(a) (1976).

126. See 15 U.S.C. §18(a) (giving the FTC and the DOJ independent merger review authority).

127. Arquit, *supra* n. 85, at 323.

128. Shumadine, *supra* n. 98, at 306.

ket.<sup>129</sup> Enforcement of the antitrust laws is handled primarily by the FTC and the DOJ.<sup>130</sup> With regard to media mergers, the FCC also has review authority under the *Communications Act of 1934* and Section 7.<sup>131</sup> However a private party can bring a cause of action against another corporation for alleged monopolistic trade practices.<sup>132</sup> Even after the government has approved a merger, a private party may still bring a cause of action against a proposed merger.<sup>133</sup> If a court, the FTC, or the DOJ finds a violation of the antitrust laws, it may issue an injunction against the company seeking the merger and order an immediate sell-off of stock and assets held in the other corporation.<sup>134</sup> Courts may also impose civil and criminal penalties in certain situations.<sup>135</sup>

### C. THE TELECOMMUNICATIONS ACT OF 1996

The *Telecom Act* was the first major rewrite of the nation's telecommunications<sup>136</sup> laws since the *Communications Act of 1934*.<sup>137</sup> It was signed into law on February 8, 1996<sup>138</sup> with the promise of opening up every sector of the telecommunications industry to healthy competi-

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129. See *Panel II*, *supra* 40, at 465. (discussing freedom of the press and antitrust merger analysis).

130. The DOJ and the FTC have joint authority to enforce Section 7 of the *Clayton Act*. See 15 U.S.C. § 25 (1994) (granting enforcement power to the DOJ). See *id.* at § 21(a) (granting enforcement power to the FTC).

131. 47 U.S.C. § 214(a) (1934) (requiring new communication technology to serve the public interest, necessity and convenience); see 47 U.S.C. § 257(b) (1934) (discussing the FCC public interest standard). "The [FCC] shall seek to promote the [ ] diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." *Id.*

132. Nesvold, *supra* n. 11, at 802. See e.g. *L.A. Memorial Coliseum Commn. v. Natl. Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

133. Nesvold, *supra* n. 11, at 802. See e.g. *CableAmerica Corp. v. FTC*, 795 F. Supp. 1082, 1086 (N.D. Ala. 1992).

134. 15 U.S.C. § 18 (1994) (granting the FTC power to order a person or corporation to divest assets and/or stock acquired in violation of Section 7).

135. Shumadine, *supra* n. 98, at 306. Penalties can include fines and imprisonment. *Id.* at 39. Individual states may also bring civil suits for damages. *Id.* at 42. Some state antitrust laws provide for the dissolution of a domestic corporation or the ouster of an out-of-state corporation upon the conviction of state antitrust violations. *Id.* at 46-47. Private litigants may bring suit for treble damages and reasonable attorney's fees. *Id.* at 44.

136. 47 U.S.C. § 153(43) (1996). "Telecommunications" is defined as "the transmission between or among points specified by the user, of information of the user's choosing, without changing in form or content the information as sent and received." *Id.*

137. *Panel II*, *supra* n. 40, at 465. The *Telecom Act* was essentially a rewrite of the *Communications Act of 1934*. *Id.*; see also ¶ 1 <<http://www.fcc.gov/aboutus.html>> (accessed Apr. 25, 2002). The *Communications Act of 1934* established the FCC and gave it the authority to supervise communications in the United States. *Id.*

138. Deonne L. Bruning, *The Telecommunications Act of 1996: The Challenge of Competition*, 30 Creighton L. Rev. 1255 (1997).

tion.<sup>139</sup> President Clinton, during the signing of the *Telecom Act*, said, “[t]oday, with the stroke of a pen, our laws catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light.”<sup>140</sup> It is considered by some to be one of the top three or four federal laws enacted in recent years.<sup>141</sup>

The *Telecom Act* relaxed greatly or eliminated all together many longstanding regulations,<sup>142</sup> most of which were passed more than a half century ago and now thought to be a hindrance on the industry.<sup>143</sup> The *Telecom Act* deregulates much of the telecommunications and media industries<sup>144</sup> “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications customers and encourage the rapid deployment of new telecommunications technologies.”<sup>145</sup> Despite the *Telecom Act*’s new reliance on competition over telecommunications regulation, it explicitly reaffirmed the FCC’s role in promoting the “public interest.”<sup>146</sup> The *Telecom Act* also explicitly reaffirmed antitrust law’s role in media merger review.<sup>147</sup>

The *Telecom Act*, inter alia, scaled back many television ownership regulations.<sup>148</sup> First, it all but eliminates governmental restrictions on the amount of television stations a person or corporation may “directly or indirectly own, operate, or control, or have a cognizable interest in nationwide.”<sup>149</sup> Second, the *Telecom Act* waives the government’s One-to-

139. *Id.*

140. *Id.* President Clinton also stated:

This landmark legislation fulfills my Administration’s promise to reform our telecommunications laws in a manner that leads to competition and private investment, promotes universal service and open access to information networks, and provides for flexible government regulation. The [*Telecom Act*] opens up competition between local telephone companies, long distance providers and cable companies; expands the reach of advanced telecommunications services to schools, libraries, and hospitals; and requires the use of new V-chip technology to enable families to exercise greater control over the television programming that comes into their homes.

Robert M. Frieden, *The Telecommunications Act of 1996: Predicting the Winners and Losers*, 20 *Hastings Comm/Ent L.J.* 11 n. 9 (1997).

141. McChesney, *supra* n. 13, at 42.

142. See Nesvold, *supra* n. 11, at 847.

143. Cf. Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 *Fed. Comm. L.J.* 1, 9 (Nov. 1996).

144. Nesvold, *supra* n. 11, at 847.

145. *Telecom Act*, Pub. L. No. 104-104, 110 Stat. 56.

146. 47 U.S.C. § 257(b).

147. 47 U.S.C. § 152(b)(1). The *Telecom Act* provides that “nothing in this Act . . . shall be construed to modify, impair, or supercede the applicability of any of the antitrust laws.” *Id.*

148. See Symposium, *Panel III: Implications of the New Telecommunications Legislation*, 6 *Fordham Intell. Prop., Media & Ent. L.J.* 517, 520 (Spring 1996) [hereinafter *Panel III*]. See also Nesvold, *supra*, n. 11, at 848.

149. 47 U.S.C. § 336(c)(1)(A) (regarding national ownership limitations).



a-Market rule in the top 50 media markets.<sup>150</sup> The One-to-a-Market regulation prevented cross-ownership of television and radio stations in the same market.<sup>151</sup> Third, the *Telecom Act* raises from 25 percent to 35 percent the amount of national viewers that a group of television stations under the same ownership can serve.<sup>152</sup> Fourth, the *Telecom Act* orders the FCC to reconsider its multiple ownership rules in general, which limit the ownership of more than one television station in a local market.<sup>153</sup> Finally, the *Telecom Act* directs the FCC to change its rules regarding so-called dual networks.<sup>154</sup> This change now permits a television station to affiliate with a person or corporation, who owns or controls two or more networks, except when those dual or multiple networks are composed of: (1) two or more of the four existing networks (ABC, CBS, NBC, and Fox) or, (2) any of the four existing networks and one of the emerging networks, such as the Warner Brothers Television Network or United Paramount Network.<sup>155</sup>

With regard to radio ownership, the *Telecom Act* abolishes all the government's rules limiting the number of FM or AM stations that one person or corporation may own or operate.<sup>156</sup> Before passage of the *Telecom Act*, a person or company could only possess twenty AM stations and twenty FM stations nationwide.<sup>157</sup> Under the *Telecom Act*, one person or corporation may now own up to and including five radio stations or fifty percent of the total number of stations, whichever is less, in smaller markets of 0-14 stations.<sup>158</sup> In markets having fifteen to twenty-nine radio stations, one person or corporation may own up to six

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150. 47 U.S.C. § 336(d).

151. Nesvold, *supra* n. 11, at 848.

152. 47 U.S.C. § 336(c)(1)(B) (regarding national ownership percentage limitations). This provision was challenged recently on constitutional grounds. See *Fox Television Stations v. FCC*, 280 F.3d 1027 (2002). The FCC is required to review each of its ownership rules every two years. 47 U.S.C. § 336(h) (1996). "The Commission shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.* *Fox Television Stations* arose out of the FCC's decision not to repeal or modify 47 C.F.R. § 73.3555(e) or The National Television and Station Ownership Rule ("NTSO"), and 47 C.F.R. § 76.501(a) or The Cable/Broadcast Cross-Ownership Rule ("CBCO"). *Id.* at 1034. The FCC's reasoning behind retaining the rules was essentially to promote competition in the industry and help safeguard diversity. *Id.* at 1036. The court called both rules "arbitrary" and "capricious." *Id.* at 1047-49. The court vacated the NTSO and instructed the FCC to modify the NTSO consistent with the opinion. *Id.* at 1053. The court also vacated the CBCO and ordered the FCC to repeal the rule. *Id.*

153. 47 U.S.C. § 336(c)(2) (concerning local television ownership limitations).

154. 47 U.S.C. § 336(e)(1).

155. Nesvold, *supra* n. 11, at 849.

156. 47 U.S.C. § 336(a).

157. 47 C.F.R. § 73.3555 (1995).

158. 47 U.S.C. § 336(b)(1)(D).

stations.<sup>159</sup> Markets with thirty to forty-four radio stations, one company may own or operate seven stations.<sup>160</sup> Finally, large markets, where there are more than forty-five radio stations operating, one person or corporation may own up to eight stations.<sup>161</sup>

In relation to multimedia companies, the *Telecom Act* affords them the opportunity to offer multiple services that were once forbidden.<sup>162</sup> The *Telecom Act* abolishes cross-ownership restrictions of cable systems.<sup>163</sup> It does this by allowing one person or business to own or operate both a cable system and a network of television stations.<sup>164</sup> Also, a typical telephone company can now offer many more services and features than it did just a few years ago.<sup>165</sup>

The *Telecom Act* also contained a section called the *Communications Decency Act*, ("CDA"),<sup>166</sup> a controversial provision aimed at restricting access by minors to indecent material, particularly over the Internet.<sup>167</sup> In 1997, the United States Supreme Court in *Reno v. ACLU*,<sup>168</sup> held the CDA to be unconstitutional because it violated First Amendment as an impermissible broad suppression of free speech.<sup>169</sup> Justice Stevens, in adopting the words of the lower court, said that the CDA "sweeps more broadly than necessary and thereby chills the expression of adults."<sup>170</sup> "[R]egardless of the strength the government's interest' in protecting children, '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."<sup>171</sup> The CDA fell prey to a long line of Supreme Court cases mandating that any content-

159. *Id.* § 336(b)(1)(C) (regulating markets with fifteen to twenty-nine radio stations, where one person or corporation may own up to six stations).

160. *Id.* § 336(b)(1)(B) (regulating markets of thirty to forty-five radio stations, where one company may own or operate seven stations).

161. *Id.* § 336(b)(1)(A) (regulating markets where there are more than forty-five radio stations operating, where one person or corporation may own up to eight stations).

162. See Nesvold, *supra* n. 11, at 851.

163. See *id.* at 848.

164. 47 U.S.C. § 336(f)(1) (regarding elimination of restrictions on cable cross ownership).

165. Catherine Arnst and Peter Burrows, *U.S. West's Gauntlet Won't Just Lie There*, Bus. Wk. 32 (Mar. 11, 1996).

166. 47 U.S.C. § 223 (a, d).

167. *Reno v. ACLU*, 521 U.S. 844, 868 (1997). "[T]he purpose of the [Communications Decency Act] is to protect children from the primary effect of "indecent" and "patently offensive" speech, rather than any "secondary" effect on such. *Id.* The "indecent transmission" made unlawful for someone to knowingly transmit an obscene message to minors. 47 U.S.C. § 223(a). The "patently offensive display" provision prohibits a person from knowingly displaying offensive message to minors. 47 U.S.C. § 223(d).

168. 521 U.S. 844 (1997).

169. *Id.* at 844.

170. *Id.* at 862.

171. *Id.* at 875 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983)).

based regulation of free speech must be "narrowly tailored" to "a compelling government interest."<sup>172</sup>

### III. ANALYSIS

Media mergers place a small number of conglomerates in control of the marketplace of ideas.<sup>173</sup> In an effort to bring this media merger frenzy under control, the government should employ increased regulatory scrutiny towards proposed media mergers. Regulatory agencies should apply a more aggressive antitrust model specifically tailored for the media. This new model should take into consideration social and political interests as well as traditional economic concerns. The *Telecom Act* should be amended to reinstate certain anti-concentration and market-share provisions. Finally, the FCC, armed with its public interest directive<sup>174</sup> and expertise in media-related issues, can play a crucial role in evaluating the possible affects of proposed media mergers.<sup>175</sup>

#### A. ANNOTATING THE NEWS: CORPORATE CONVERGENCE AND JOURNALISM

The recent wave of media mergers has enormous implications for the marketplace of ideas. These corporations, with their far-flung interests and elaborate news operations, have the potential to exert an enormous amount of control over the discourse of this country.<sup>176</sup> Because these

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172. *Reno v. American Civil Liberties Union: Supreme Court Strikes Down Portions of the Communications Decency Act of 1996 as Facially Overbroad Violation of the First Amendment*, 24 J. Contemp. L. 111, 130 (1998).

173. Conrad, *supra* n. 19, at 680.

174. 47 U.S.C. § 257(b).

175. Feld, *supra* n. 23, at 20 (discussing the need for the FCC to become for involved in the media merger review process).

176. Jim Parker, *The CBS-Viacom Merger: Impact on Journalism*, 52 Fed. Comm. L.J. 519, 523 (May 2000) (discussing the overall effects of news content manipulation by "corporate controllers"). "[L]arge "corporate controllers" employ a significant amount of "manipulation of and interference in news content in pursuit of their own corporate self-interest." *Id.*; see Norman Horowitz, *Commentary: Perspective on the Media*, L.A. Times B5 (Jan. 3, 2000) (available in 2000 WL 2197158) (discussing the proliferation of media mergers and the political power these corporate unions represent). "Forget campaign finance reform. The truth is, there is no more pervasive influence in our future elections than the likes of Redstone/Viacom/CBS, Levin/Time-Warner/Turner, Eisner/Disney/ABC, Murdoch/News Corp./Fox . . . Our nation could speak with many voices, but regrettably, it doesn't." *Id.* Mr. Horowitz goes on to pose the following:

Ask yourself this: Is it a good idea for Rupert Murdoch to control the Fox Network, 15 TV stations, Fox News, Fox Sports, Fox Family Channel, 20th Century Fox, Fox Animation, Fox Searchlight, the New York Post, the Times of London, HarperCollins, the Weekly Standard, Mushroom Records, and much more?

Is it a good idea for Time-Warner Chairman Gerald Levin to control the WB Network, HBO, TNT, TBS, CNN, CNNfn, CNNsi, Cinemax, Warner Bros., New Line Cinema, Hanna-Barbera, Castle Rock, Time, People, Sports Illustrated, Fortune,

companies are so vast, and so much a part of the political and social landscape of this country, it is likely that they themselves will grab headlines for good and bad reasons. With so much control over the marketplace of ideas, and the immense financial and synergistic forces at play, the issue becomes whether these telecom giants will always allow their news operations to report stories critical of the parent company. Behold the potential for self-censorship, news coverage reduction, and news content manipulation.

### 1. *The Case for Media Mergers*

Proponents charge that media mergers can have a positive effect on journalism and the marketplace of ideas.<sup>177</sup> Big media conglomerates allow news outlets to be less beholden to local advertisers and government officials, thus allowing for journalistic independence.<sup>178</sup> For example, local news operations may run into trouble airing stories that present car dealers, a major source of ad revenue, in a bad light.<sup>179</sup> “A small town editor who attacks his publisher’s pal, the mayor, can be in deep trouble, whereas big media can often tweak the powerful, and be resilient enough to withstand retribution.”<sup>180</sup>

Big media proponents claim that corporate convergence has helped bolster news operations in other ways as well.<sup>181</sup> “We’ve helped bankrupt stations get back on their feet and cover their cities and markets,” says Charles Sennet, senior counsel for the Tribune Company.<sup>182</sup> “We offer an enhancement of coverage, better information at a quicker rate.”<sup>183</sup> And becoming part of a larger news organization helps boost

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28 other magazines, Warner Books, Little Brown, Warner Bros. Records, Atlantic, Elektra, Sire, Rhino, Time Warner Cable, and much more?

Is it a good idea for Disney’s Michael Eisner to control ABC-TV and ABC Radio, 10 TV and 30 radio stations, ESPN, Disney Channel, A&E, E!, Lifetime, Miramax, Walt Disney Pictures, Touchstone Pictures, Hollywood Pictures, Hyperion Press, ESPN Magazine, Walt Disney Records, Lyric Street Records, the Go Network of Internet sites, and much more?

Is it a good idea for CBS’ Sumner Redstone to control Infinity Broadcasting (163 stations), 34 TV stations, UPN, MTV, TNN, Nickelodeon, Showtime, Paramount Pictures, Paramount TV, Spelling Television, Simon & Schuster, Blockbuster videos, SportsLine, and much more?

*Id.*

177. See e.g. Jack Shafer, *Big is Beautiful*, Slate ¶ 7 <<http://www.slate.msn.com/default.aspx?id=1004374>> (accessed Nov. 27, 2001).

178. *Id.*

179. *Id.*

180. Hickey, *Coping*, *supra* n. 20, at ¶ 13.

181. See e.g. Telephone interview with Charles Sennet, Senior Counsel, Tribune Co. (Dec. 4, 2001) (transcript on file with author).

182. *Id.*

183. *Id.*

the credibility of smaller operations.<sup>184</sup> Say you are a reporter with a small town newspaper and it is likely no one in Washington will care, but say you are a reporter with the *New York Times* or the Associated Press and heads will turn.<sup>185</sup>

In response to critics' charges that the media has too much control over the marketplace of ideas, merger proponents claim that there are still sufficient numbers of independent and alternative sources for news and views.<sup>186</sup> What NBC will not cover, CBS and ABC will.<sup>187</sup> Sennet agrees that there is enough competition with the Internet, independent newspapers, and radio, "[i]t's not like the Microsoft problem. I don't think you could possibly have that much control in the media."<sup>188</sup>

## 2. *The Case Against Media Mergers*

In all the supposed benefits that big media may offer the marketplace of ideas, the incidents of self-censorship, news coverage reduction, and content manipulation outweigh the benefits. However, examples are rare. There are few documented "smoking guns."<sup>189</sup> "The decision to avoid a story or issue is almost never put down in memo form."<sup>190</sup> Instead, these decisions are made in editorial meetings, on staff assignment boards, and by the journalists themselves, out of fear of some kind of retribution.<sup>191</sup>

### a. *A Survey of Conflicts*

In 2000, the *Columbia Journalism Review* and the Pew Center for the People and the Press surveyed journalists around the country on the problems brought forth by corporate convergence.<sup>192</sup> The study found that nearly twenty-five percent of journalists surveyed have at one time or another avoided pursuing a newsworthy story.<sup>193</sup> About thirty percent said that some stories are ignored because of potential financial conflicts with advertisers or their news operations.<sup>194</sup> Of the investigative

184. Jack Shafer, *supra* n. 177, at ¶ 11.

185. *Id.*

186. Parker, *supra* n. 176, at 528.

187. *Id.*

188. Telephone interview, *supra* n. 181.

189. Mark Lowenthal, *Smoke, Mirrors, and Censorship*, Albion Monitor ¶ 2 <<http://www.monitor.net/monitor/10-30-95/ml-smoke.html>> (Feb. 4, 2002).

190. *Id.*

191. Conrad, *supra* n. 19, at 682. Many reporters fear retribution if they cover a story that presents the parent company in a bad light. *Id.*

192. Kohut, *supra* n. 15, at ¶ 5.

193. *Id.*

194. *Id.*

reporters surveyed,<sup>195</sup> sixty-one percent believe parent companies exert influence on story selection.<sup>196</sup> Another survey conducted by the American Society of Newspaper Editors revealed that thirty-three percent of editors said they would not be able to publish a story that was critical of their respective parent companies.<sup>197</sup> These numbers evidence an alarming trend that necessitates government intervention through increased merger scrutiny, amendments to the *Telecom Act*, and greater FCC involvement.

*b. Staff Reductions*

Merged media companies are under tremendous pressure to succeed and to make money for company stakeholders.<sup>198</sup> In order to turn big revenues, corporations that own news organizations reduce the number of journalists they have on the payroll.<sup>199</sup> After the AOL/Time-Warner merger, four hundred employees at CNN, ten percent of its workforce, fell prey to corporate downsizing.<sup>200</sup> Around two hundred employees will lose their jobs at CNN/SI when it ceases operations in May 2002.<sup>201</sup> DrKoop.com, another AOL/Time-Warner news property, may also be eliminated in 2002.<sup>202</sup> "To do effective journalism is expensive, and corporate managers realize that the surest way to fatten profits is to fire editors and reporters and fill the news hole with [ ] fluff . . . The takeover of media organizations by conglomerates has caused the 'death of journalism.'"<sup>203</sup> This trend of downsizing will no doubt continue. Independen-

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195. *Id.* The investigative reporters surveyed are members of the Investigative Reporters and Editors, Inc. *Id.*

196. *Id.*

197. Conrad, *supra* n. 19, at 682 (citing a study by the American Society of Newspaper Editors). As companies grow larger and are present in an array of areas, the more likely the news organization of that particular company will come upon a story involving that company. *Id.* "One the problems of supergiants involved in the news is that supergiants always have other interests that get into the news. The question is how they handle issues and events in a way that ignore the fact that they control the news." *Id.* A great many reporters fear retribution if they cover a story that paints the parent company in anything less than a positive light. *Id.*

198. *Interview: Mark Crispin Miller, supra* n. 18, at ¶ 4 (discussing the economic pressures placed upon media organization by company shareholders).

199. Conrad, *supra* n. 19, at 679 (discussing how strict profit motives will cause cutting corners in news coverage). Local news department employ large numbers of journalists, hence these departments are often the first place executives look to trim fat. *Id.*

200. Neil Hickey, *CNN After The Merger*, Columbia Journalism Rev. ¶ 1 <<http://www.cjr.org/year/01/4/cnnmerger.asp>> (accessed Nov. 20, 2001).

201. *Media Layoffs* ¶ 1 <<http://www.journalismjobs.com/layoffs.cfm>> (accessed Apr. 10, 2002). This Web site contains a comprehensive list of media industry layoffs. *See generally id.*

202. *Id.*

203. *See* McChesney, *supra* n. 13, at 25 (discussing the rash of layoffs and resignations within the industry); *see also* Conrad, *supra* n. 19, at 682 (discussing how profit motives

dent media organizations, on the other hand, have more journalists on staff than organizations that are part of large media organizations.<sup>204</sup> Independent newspapers have an average of twenty-three percent more local and national news than publications controlled by large media organizations.<sup>205</sup>

c. *Examples of Self-Censorship, News Coverage Reduction, and Content Manipulation*

The examples that have come to light show just how insidious self-imposed media censorship and content manipulation can be. In 1993, ABC contracted the Emmy Award-winning documentarians Frank and Martin Koughan to do an exposé on the tobacco industry for the ABC program *Turning Point*.<sup>206</sup> Things seemed to be going fine until March 1994 when, according to Martin Koughan, ABC started getting nervous.<sup>207</sup> He claims that the film had already been approved by both ABC's editorial and law departments, and was scheduled to air when a *Turning Point* producer called saying that the show would have to be "reworked."<sup>208</sup> It seems in the intervening time, ABC was hit with a \$10 billion libel suit by Philip Morris.<sup>209</sup> ABC claimed that the program was "redundant" and "boring."<sup>210</sup> ABC never aired the documentary.<sup>211</sup> But what is perhaps most interesting is that ABC paid all the production costs (\$500,000), and retained all the rights to the film.<sup>212</sup> A film they claimed was "boring."<sup>213</sup> Was this a cave to the tobacco industry?

Another blow to ABC's integrity came in 1998.<sup>214</sup> After assurances by Disney executives that news operations at its then newly acquired ABC News would remain intact, there was a major setback.<sup>215</sup> Brian Ross was investigating a story about pedophiles that may have worked

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have forced major job cuts in many large news organizations resulting in a reduction of substantive local and national news).

204. *Id.*

205. Maura Christopher, *How Profits Shapes News Companies and the News*, Scholastic Update 10 (Apr. 26, 1985).

206. Lowenthal, *supra* n. 189, at ¶ 5.

207. *Id.* at ¶¶ 6-7.

208. *Id.* at ¶ 8.

209. *Id.* at ¶ 7.

210. *Id.* at ¶ 13.

211. *Id.* at ¶ 12.

212. *Id.* at ¶¶ 11-12.

213. *Id.* at ¶ 13.

214. See Rifka Rosenwein, *Why Media Mergers Matter* ¶ Synergy Snapshot (Dec. 1999/Jan. 2000) (available at <[http://www.brillscontent.com/features/mediamergers\\_1299.html](http://www.brillscontent.com/features/mediamergers_1299.html)>).

215. *Id.*

at Disney's Magic Kingdom in Florida.<sup>216</sup> His story never aired.<sup>217</sup> In an interview with National Public Radio made only a few days before the story was killed, Michael Eisner, chairman of Disney, said, "I would prefer ABC not to cover Disney . . . I think it's inappropriate for Disney to be covered by Disney."<sup>218</sup>

Another example of news coverage reduction and content manipulation involved NBC's the *Today Show* and a segment on consumer boycotts.<sup>219</sup> The program conveniently ignored a pending boycott of several General Electric ("G.E.") products.<sup>220</sup> A guest on the segment claims he was told not to speak of the boycott against G.E. products.<sup>221</sup> Lightening appears to have struck twice in the same place because the Chair of the Consumer Product Safety Commission lost her position as a *Today Show* contributor when she tried to announce a recall of certain G.E.-manufactured dishwashers on the popular morning program.<sup>222</sup>

Examples of news coverage reduction and content manipulation include: ABC's *Good Morning America* devoting nearly an entire program to Disney's 25th anniversary;<sup>223</sup> NBC trying to muscle its affiliates into carrying the American League playoffs instead of the first Bush-Gore presidential debate;<sup>224</sup> *Time* magazine placing Pokémon on the cover to promote its sister division's, Warner Brothers', release of *Pokémon: The Movie*;<sup>225</sup> and NBC News executives being told not to use phrases like

216. Jonathon Alter, *Big Media Gets Even Bigger*, Newsweek 42 (Jan. 24 2000). Some stories get killed because they are inaccurate, false, or would give rise to litigation. *Id.* "The trouble with big media mergers [ ] is that the public can never be sure of the answers to such questions." *Id.*

217. See Parker, *Journalism*, *supra* n. 176, at 524; see Elizabeth Lesly, *Commentary: Self-Censorship is Still Censorship*, Bus. Wk. 78 (Dec. 16, 1996) (available in WL 10771964) (discussing that media and news organizations change their content to appease their parent companies).

218. See Rosenwein, *supra* n. 214, at ¶ 20 (quoting Disney's Michael Eisner). "[B]y and large the way you avoid conflict of interest is to, as best as you can, not cover yourself." *Id.*

219. See Parker, *Journalism*, *supra* n. 176, at 523.

220. *Id.* at 524.

221. *Id.*

222. Andrew Jay Schwartzman, *Viacom-CBS Merger: Media Competition and Consolidation in the New Millennium*, 52 Fed. Comm. L.J. 513, 517-18 (May 2000).

223. See Parker, *Journalism*, *supra* n. 176, at 524.

224. Neil Hickey, *Unshackling Big Media*, Columbia Journalism Rev. ¶ 19 <<http://www.cjr.org/year/01/4/fchickey.asp>> (Apr. 10, 2002) [hereinafter Hickey, *Unshackling*].

225. Hickey, *Coping*, *supra* n. 20, at ¶ 11. Another example of movie manipulation involved the Touchstone Pictures release, "Bad Company." See *Bad Company-The Movie* <<http://badcompany.movies.com>> (accessed June 10, 2002). Touchstone Pictures, like ABC, is a Disney property. Aaron Moore, *Who Owns What: Disney*, Columbia Journalism Rev. § Movies <<http://www.cjr.org/owners/disney.asp>> (accessed June 10, 2002). Most major film critics gave the movie less than favorable reviews. See e.g. Roger Ebert, *Current Reviews: Bad Company*, Chi. Sun-Times ¶ 1 (June 7, 2002) (available at <<http://www.suntimes.com/output/ebert1/wkp-news-bad07f.html>>) (rating the film two stars out of



“Black Monday” to describe the 1987 stock market crash because it depressed G.E. stock.<sup>226</sup>

Another major news story that was conspicuously absent from the headlines was the passage of the *Telecom Act*. According to one study, in the nine months between introduction of the Telecom bill in Congress and the date it was signed into law, the big three networks spent a total of nineteen and a half minutes on the *Telecom Act*.<sup>227</sup> One Washington lobbyist commented that, “I’ve never seen anything like the Telecommunications Bill. The silence of public debate is deafening. A bill with such astonishing impact on all of us is not even being discussed.”<sup>228</sup>

d. *What Needs to be Done*

These examples demonstrate how much control big media corporations have over news and public affairs programming. How many important stories are killed that we will never hear about? Decisions are made to kill stories or not discuss certain issues because they may not coincide with corporate interests. “[I]t’s not a question of mis-reporting. It’s not a question of false reporting. It’s a question of not reporting.”<sup>229</sup> Instead

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a possible four); Lisa Schwarzbaum, *Bad Company*, Ent. Wkly. ¶ 1 (June 10, 2002) (available at <http://www.ew.com/ew/article/review/movie/0,6115,259831-1-0-badcompany,00.html>) (grading the film at a B minus); David Elliot, *Going From ‘Bad Company’ to Worse*, MSNBC.com <<http://www.msnbc.com/news/761874.asp?0dm+V31AL>> (accessed June 10, 2002) (calling the film “a bad action thriller”). On the other hand, Joel Siegal, film critic for ABC’s *Good Morning America* gave the film an excellent rating. *Good Morning America* (ABC June 7, 2002) (tv broadcast). Siegal did not disclose that Disney was the parent company of both ABC and Touchstone Pictures. *Id.* On that same day, Anthony Hopkins and Chris Rock, the film’s two lead actors, appeared on *The View* to promote the film. *The View* (ABC June 7, 2002) (tv broadcast). It seems suspect that Disney would give a favorable review to a film in which the company had financial stake.

226. See Parker, *Journalism*, *supra* n. 176, at 524.

227. Rosenwein, *supra* n. 214, at ¶ 12. The study was conducted between when the bill was introduced in May 1995, and its passage on February 1, 1996. *Id.*

228. McChesney, *supra* n. 13, at 43 (quoting Lobbyist Charles Bien, also discussing the lack of public debate over the *Telecom Act*). The public debate over the *Telecom Act* was virtually non-existent. *Id.* A robust public debate necessitates an informed citizenry. *Id.* And, of course how does that citizenry get informed? “Only through the news media, where news coverage is minimal and restricted to the range of legitimate debate, which, in this case, means almost no debate at all. *Id.* The news media was simply not reporting on this bill. *Id.* “[The *Telecom Act*] was covered (rather extensively) as a business story, not a public policy story.” *Id.*

229. Rosenwein, *supra* n. 214, at ¶ 9 (quoting Andrew Jay Schwartzman, president of the Media Access Group); see Media Access Project <<http://www.mediaaccess.org>> (accessed Apr. 16, 2002). The Media Access Group “is a non-profit, public interest law firm which promotes the public’s First Amendment right to hear and be heard on the electronic media of today and tomorrow.” *Id.* See also Lande, *Statement*, *supra* n. 20, at ¶ 25. “When a reader or viewer never learns about news events or particular editorial perspectives, he or she might not look to other sources for them. The readers or viewers often would have no reason to suspect that they have been deprived of a diversity of choices.” *Id.*

of introducing the stories or issues into the marketplace of ideas to let the public determine their importance, the media gatekeepers filter them out. As a substitute, the media allows a barrage of mindless celebrity "news," sensationalism, and the ubiquitous water skiing squirrel story.<sup>230</sup> These are the reasons why each and every proposed media merger should receive antitrust scrutiny that takes social and political concerns into consideration, the *Telecom Act*, after its failure at sparking meaningful competition, should be amended to not allow further consolidation in the industry, and the FCC should continue to maintain its "public interest" standard for merger review.

#### B. ANTITRUST LAW AS A REMEDY TO CURB MEDIA MERGERS

The media plays an essential role in the dissemination of ideas and hence, the promotion of democracy.<sup>231</sup> Because of this important gatekeeper function, mergers that involve media companies demand a more aggressive antitrust examination. The danger with large media marriages that place a small number of companies in control of the marketplace of ideas is not simply an increase in the subscription rate of one's favorite magazine or a cable rate hike, it is the gentile, often unnoticed shift in editorial viewpoints, and news coverage.<sup>232</sup>

Historically, United States antitrust regulation has been based primarily on economic factors.<sup>233</sup> For a new antitrust model to be effectively applied to media, it must take into consideration more than just the economic aspects of a proposed media merger. It must also regard the social and political aspects of each perspective media merger. The aim of antitrust law is to not only protect consumers from unfair prices increases, but also, and perhaps most importantly, protect consumer choice.<sup>234</sup> Consumers should be free to make choices by any criteria they

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230. See e.g. Conrad, *supra* n. 19, at 679 (discussing how strict profit motives will cause cutting corners in news coverage). "Walter Cronkite, legendary anchor of CBS Evening News for eighteen years, recently criticized CBS News for bumping important stories and relying on more entertaining ones." *Id.*

231. Wellstone, *supra* n. 3, at 551 (discussing the important role that mass media play in the dissemination of ideas and opinions).

232. See Lande, *Statement*, *supra* n. 20, at ¶ 4. "Communications media compete in part by offering independent editorial viewpoints and an independent gatekeeper function. Six media firms cannot effectively respond to a demand for choice or diversity competition." *Id.* "If AOL/Time Warner goes through, copycat media mergers are certainly likely. A traditional concern of merger enforcement is whether the merger being evaluated is likely to spark a trend to consolidation in the effected industry." *Id.* Media companies like Yahoo!, Microsoft, and Viacom are all wondering if they should jump on the media merger band wagon or get left behind by the AOL/Time Warner merger. *Id.*

233. Conrad, *supra* n. 19, at 677.

234. Lande, *Consumer Choice*, *supra* n. 87, at 503. It seems the Supreme Court agrees. See e.g. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 n. 5 (1998)

chose: quality, price, or as in the case of media organizations, by viewpoint diversity.<sup>235</sup> The federal government, through well-promulgated antitrust law, can be the guardian that protects the public from the gentile takeover of democracy by these telecommunications giants.

1. *Antitrust Law and the First Amendment: The Two Can Co-Exist*

At first blush, it would seem that any kind of governmental intervention in the marketplace of ideas might raise constitutional eyebrows as impermissible, content-based regulation. However, significant Supreme Court cases, legislative history, and commentary from a former influential antitrust regulator suggest that First Amendment values can actually be enhanced by antitrust scrutiny.

a. *Significant Supreme Court Cases*

In *Associated Press v. U.S.*,<sup>236</sup> the Supreme Court recognized that “[the First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”<sup>237</sup> *Associated Press* involved alleged trade restraints by the news organization.<sup>238</sup> The Associated Press (“AP”) was accused of placing unfair restrictions on new members joining the organization, and placing restraints on members’ dealings with non-members.<sup>239</sup> In stating that First Amendment values coincide with antitrust scrutiny, Justice Black wrote, “[f]reedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.”<sup>240</sup> Further, in assessing AP’s impact on the marketplace of ideas, the Court did not use the typical antitrust analysis elements of defining the relevant market, price, market share, etc.<sup>241</sup> Instead, the majority recognized that AP’s impact went beyond economic

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(discussing that certain monopolistic practices “might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing”); *FTC v. Indiana Fedn. of Dentists*, 476 U.S. 447, 459 (1986) (stating that “an agreement limiting consumer choice. . . cannot be sustained”); *U.S. v. Continental Can Co.*, 378 U.S. 441, 455 (1964) (observing that “price is only one factor in a user’s choice”).

235. Lande, *Consumer Choice*, *supra* n. 87, at 503.

236. 326 U.S. 1 (1945).

237. *Id.* at 20.

238. *Id.* at 4.

239. *Id.*

240. *Id.* at 20.

241. *Id.* at 17 (stating even though “an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the *Sherman Act*”).

concerns. Justice Frankfurter wrote, “[t]ruth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth . . . calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.”<sup>242</sup>

In 1994, in *Turner Broadcasting System v. FCC*,<sup>243</sup> the Court held that “[t]he government has an interest in ‘eliminating restraints on fair competition . . . even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.’”<sup>244</sup> Although *Turner Broadcasting* did not involve antitrust law directly, many of the same concerns raised in *Associated Press* came to light once again. The case involved the constitutionality of certain “must-carry” provisions of the *Cable Television Consumer Protection and Competition Act of 1992* (the “*Cable Act*”).<sup>245</sup> Sections 4 and 5 of the *Cable Act* required cable operators to set aside a certain number of channels for local commercial<sup>246</sup> and non-commercial broadcast stations.<sup>247</sup> In up-holding the must-carry provisions of the *Cable Act*, once again the Court recognized the appropriateness of antitrust scrutiny to the marketplace of ideas. Justice Kennedy wrote, “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order.”<sup>248</sup>

#### b. Legislative history

The legislative history of both the Celler-Kefauver Amendments to Section 7 and the *Telecom Act* support antitrust scrutiny of the marketplace of ideas, and support such review beyond traditional economic concerns.<sup>249</sup> Media mergers are reviewed primarily under Section 7 of the *Clayton Act*.<sup>250</sup> Section 7 is concerned with regulating the kind of mergers that tend to impede competition,<sup>251</sup> and place a person, company, or

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242. *Id.* at 28 (Frankfurter, J., concurring).

243. 520 U.S. 180 (1994).

244. *Id.* at 190. “Congress has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct . . . rises to the level of an antitrust violation.” *Id.*

245. *Id.* at 180. The legislative history of the *Cable Act* illustrates Congress’s concern for merging media. S. Rep. No. 102-92, at 32-33 (1991), 1992 U.S.C.C.A.N. at 1165-66. One such concern was that “the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both.” *Id.*

246. 47 U.S.C. §§ 534(b)(1)(B), 534(h)(1)(B).

247. 47 U.S.C. § 535(a).

248. *Turner Broad.*, 512 U.S. at 181.

249. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 *Antitrust L.J.* 249, 273 (2001).

250. Arquit, *supra* n. 85, at 323.

251. *See* Nesvold, *supra* n. 11, at 801.

a small group of companies in control of market segment which enables them to maintain a monopoly.<sup>252</sup> In debating the scope of the new amendments, members of the House discussed potential harm to the marketplace of ideas through mergers in the newspaper industry.<sup>253</sup> “[T]here should be preclusion of merging one newspaper with another where the effect would be only one newspaper,” said the amendment’s sponsor, Rep. Emanuel Celler.<sup>254</sup> “In any community there should be clash of opinion. We should not have opinion all one-sided. There should be both sides submitted to the populace.”<sup>255</sup>

As mentioned earlier, the *Telecom Act* was intended to increase competition through elimination of certain regulatory barriers.<sup>256</sup> Deregulation notwithstanding, Congress still intended the marketplace of ideas to come under continued antitrust review. Senator Howard Metzenbaum remarked that, “federal and state regulation of the telecommunications industry has been and will continue to be a poor substitute for aggressive antitrust review.”<sup>257</sup> Congressman John Conyers noted in the *Telecom Act* debates that, “[a]ntitrust law is synonymous with low prices and consumer protection, and that is exactly what we need in our telecommunications industry.”<sup>258</sup> This belief, of continued antitrust scrutiny involving the marketplace of ideas, was expressly provided for in the *Telecom Act*’s “antitrust savings clause.”<sup>259</sup> It provides that “nothing in this Act . . . shall be construed to modify, impair, or supercede the applicability of any of the antitrust laws.”<sup>260</sup>

### c. Commentary

Former FTC Commissioner Robert Pitofsky agrees that not only should antitrust law apply to the marketplace of ideas, but that antitrust scrutiny should go beyond traditional economic analysis. “[I]t is just bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”<sup>261</sup> “[A]ntitrust policy that failed to take political concerns into account would be . . . out of touch with the rough political consensus that has supported antitrust enforcement for almost

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252. 15 U.S.C. § 18.

253. Stucke, *supra* n. 249, at 260.

254. *Id.*

255. *Id.*

256. See Nesvold, *supra* n. 11, at 847.

257. Stucke, *supra* n. 249, at 289.

258. 142 Cong. Rec. H1145 (statement of Rep. John Conyers).

259. Stucke, *supra* n. 249, at 289.

260. 47 U.S.C. § 152(b)(2) (1996).

261. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1051 (1979). Pitofsky further states that “[a]lthough economic concerns would remain paramount, to ignore these non-economic factors would be to ignore the bases of antitrust legislation and the political consensus by which antitrust has been supported.” *Id.* at 1075.

a century.”<sup>262</sup> To do otherwise, says Mr. Pitofsky, will result in “too much power in too few hands [impairing] freedom of expression.”<sup>263</sup>

The *Associate Press* and *Turner Broadcasting* cases, legislative history, and comments by an influential former government regulator suggest not only First Amendment values are enhanced by antitrust scrutiny, but that media merger review should go beyond traditional economic analysis. Because of the media’s important gatekeeper function within the marketplace of ideas, and its role in the promotion of democracy, antitrust review of media mergers should reflect those unique attributes and take into consideration the political and social ramifications of each proposed merger. The media industry is like no other, and so consequently, antitrust law must regulate this industry like no other. “This is not a mere commodity we’re talking about. It’s something more fundamental—information in a democracy.”<sup>264</sup>

## 2. A New, Media-Specific Antitrust Model is Needed

As mentioned earlier, vertical mergers within the telecommunications industry are not *per se* illegal.<sup>265</sup> They are instead scrutinized under the “rule of reason” approach.<sup>266</sup> Since *Brown Shoe*,<sup>267</sup> a three-pronged test for rule of reason merger analysis under Section 7 has developed.<sup>268</sup> It involves: (1) an identification of a market; (2) an estimate of the degree of concentration in the market the proposed merger would cause; and (3) weighing certain “industry- and transaction-specific factors.”<sup>269</sup> What is most troubling about current Section 7 merger analysis is that Prong 3 is examined from an economic approach as well.<sup>270</sup> How can the free flow of information in a democracy be dependent upon whether a proposed media merger is just merely *economically* efficient?

Admittedly, a bright-line standard for non-economic merger analysis would be difficult to construct. Each merger affects the marketplace of ideas in different ways. However, continuing the current economically-centered antitrust paradigm, which allows mergers that dramatically reduce the number of independent news content suppliers, and simultane-

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262. Conrad, *supra* n. 19, at 697.

263. See *FTC Chief to Test Theory in Review of Turner Deal, Robert Pitofsky is Making it Clear He Believes Media Mergers Deserve Special Scrutiny*, *supra* n. 31, at ¶ 7.

264. Karl Taro Greenfeld, *The CBS-Viacom Merger*, *TIME* 48 (Sept. 20, 1999) (available at 1999 WL 25725375).

265. Shumadine, *supra* n. 98, at 51.

266. *Id.*

267. 370 U.S. 294 (1962).

268. See Nesvold, *supra* n. 11, at 805 (discussing subsequent cases interpreting *Brown Shoe*).

269. *Id.*

270. *Id.* at 814-19.

ously fails to raise regulators' eyebrows because those same mergers do not lead to higher prices, must not be allowed. Non-economic factors, such as diminished quality, reduced consumer choice, and the potential for self-censorship must be taken into consideration by antitrust regulators. When a corporation approaches a near or total monopoly, beyond price concerns, there is a danger that the company will become "the sole voice in the marketplace, or worse, extra-governmental."<sup>271</sup>

### 3. Case Study: The AOL/Time-Warner Merger

Before approving the AOL/Time-Warner merger, antitrust regulators should have asked the question: "do we want one company, or a small number of companies, to have this much control over the marketplace of ideas?" If the social and political aspects of the proposed media merger were taken into consideration, perhaps the answer to that question might have been "no." So far, other than staff reductions, no incidents of self-censorship, news coverage, or news content manipulation have surfaced. But with a corporation such as AOL/Time-Warner with assets so vast, the potential for such behavior exists. The potential to impede the dissemination of news and views should be of utmost concern to antitrust regulators. Antitrust law allows for the examination of potential effects of a proposed merger.<sup>272</sup> The "reasonable probability" standard under Section 7 gives regulators great latitude in the merger review process.<sup>273</sup> Actual harm need not be proven.<sup>274</sup> Should not the government's wide latitude include an assessment of the "reasonable probability" of harm to the marketplace of ideas?

Prong 3 of Section 7 analysis allows for the examination of certain "industry- and transaction-specific factors."<sup>275</sup> Typically, these factors are examined from an economic perspective.<sup>276</sup> However, to fully examine "industry- and transaction-specific factors" in the media industry, non-economic factors, such as the continue independence of journalism and the continued availability of alternative sources for news and public affairs programming, must be taken into consideration in the merger review process.

Media giants have a great impact, not just on the economic well-being of this country, but on the social and political discourse of America. Self-censorship, news coverage reduction, and news content manipula-

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271. *Panel I, supra* n. 12, at 435. Mr. Pitofsky avers that political considerations must come into play when a person, company or entity approaches monopoly status. *Id.*

272. Shumadine, *supra* n. 98, at 304.

273. *Id.* at 305.

274. *Id.* at 304.

275. See Nesvold, *supra* n. 11, at 805.

276. *Id.* at 814-19.

tion have occurred.<sup>277</sup> As the number of media mergers increases, the number of independent media organizations decreases. Antitrust analysis of media mergers should not merely focus on the economic aspects of a particular proposed merger; it should go further and consider social and political aspects as well.<sup>278</sup> If these non-economic concerns are not taken into consideration by antitrust regulators, further harm to the marketplace of ideas may continue. It is not the price of chewing gum or bananas at stake here; it is the potential for a monopoly on the marketplace of ideas.

### C. THE *TELECOM ACT'S* FAILURE TO PROVIDE MEANINGFUL COMPETITION

The *Telecom Act* was signed into law with the promise of opening up every sector of the telecommunications industry to healthy competition.<sup>279</sup> Increased competition through deregulation would, at least in theory, encourage the development of new technologies and ensure for consumers lower prices and higher quality services.<sup>280</sup> Now, looking back at the *Telecom Act's* first five plus years, it seems the consumer benefits envisioned by Congress and President Clinton have failed to materialize.<sup>281</sup>

#### 1. *The Telecom Act has Failed Its Primary Goal—Promoting Competition*

The passage of the *Telecom Act* was the impetus for today's media merger trend.<sup>282</sup> The *Telecom Act's* rollback of many anti-concentration

277. See *supra* nn. 206-98 and accompanying text.

278. Conrad, *supra* n. 19, at 677. "Several factors indicate that antitrust law is poised for a change that will directly effect the recent wave of media mergers. This new doctrine should not rely solely on economic concerns but rather should also take into account both social and political issues." *Id.*

279. Bruning, *supra* n. 138, at 1255.

280. See Nesvold, *supra* n. 11, at 847-48.

281. See *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster* ¶ 1 <<http://www.consumersunion.org/telecom/les-sonde201.htm>> (accessed Apr. 25, 2002) (discussing how meaningful competition has lessened and prices of services have slowly increased since the passage of the *Telecom Act*). In general, cable TV and phone rates have not decreased. See Ben H. Bagdikian, *The Media Monopoly*, xviii (Beacon Press, 2000). In some markets, the rates have increased. *Id.* Sen. Russ Feingold of Wisconsin agrees that the *Telecom Act* has had a negative impact on the telecommunications industry. See generally Sen. Russ Feingold, *Statement of U.S. Senator Russ Feingold on Market Concentration in the Radio, Concert, and Promotion Industries* <<http://www.senate.gov/~feingold/releases/02/06/2002613529.html>> (accessed June 25, 2002). "In just five year since its passage, the effects of the [*Telecom Act*] have been far worse than we ever imagined." *Id.* at ¶ 6.

282. See Nesvold, *supra* n. 11, at 846 (discussing the effects of the passage of the *Telecom Act*). The *Telecom Act* contributed "to the rise of media competition and consolidation." *Id.*



and market-share provisions enables the big to get bigger, and the small to get, well, smaller. The biggest media mergers in history have occurred since it's passing.<sup>283</sup> By scaling back or eliminating all together many longstanding provisions intended to safeguard competition and diversity, such as regulations concerning television<sup>284</sup> and radio ownership,<sup>285</sup> and cross-ownership in multimedia companies,<sup>286</sup> the *Telecom Act* actually encourages companies like AOL/Time-Warner and Viacom/CBS to merge because the restrictions on the amount of properties they may own or control are virtually eliminated.

Instead of engaging in robust competition, as was the hope of the *Telecom Act*, the large media cartels have elected to merge or form alliances, which actually impede competition and place market barriers to smaller, independent companies. These smaller companies are either forced out of business or face being gobbled up. Yet, the typical consumer would most likely be unaware of this because the number of available options may stay relatively the same. The problem is in the reduction of the amount of different sources from which those options come. If the idea behind promoting meaningful competition is to ultimately increase consumer choices but these media marriages actually reduce the number of available choices for news, views, etc., then the *Telecom Act* has clearly failed one of its primary goals. However, aggressive merger scrutiny by federal regulatory agencies, including the FCC,<sup>287</sup> and reinstatement of the anti-concentration and market-share provisions below, can help correct this problem.

## 2. Congress Should Reinstate Certain Anti-Concentration and Market-Share Regulations

Certain provisions of the *Telecom Act* have resulted in the exact opposite of their intended purpose. These rules should be repealed and the former regulations reinstated in order to help turn back the tide of media mergers and promote a multiplicity of voices and prevent concentrations of power within the media industry. Congress should reinstate the One-to-a-Market rule.<sup>288</sup> The *Telecom Act* waives the government's One-to-a-

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283. See *Viacom and CBS to Merge in Largest Media Transaction Ever* ¶ 1 <<http://www.viacom.com/press.tin?ixPressRelease=45001567>> (accessed Apr. 25, 2002). This merger held the \$80 million record until the AOL/Time-Warner merger. See Saul Hansell, *America Online to Buy Time Warner for \$165 Billion*, N.Y. Times ¶ 1 <[http://www.nytimes.com/learning/students/ask\\_reporters/articles/hansell-article1.html](http://www.nytimes.com/learning/students/ask_reporters/articles/hansell-article1.html)> (accessed Apr. 25, 2002).

284. See Nesvold, *supra* n. 11, at 848.

285. *Id.*

286. 47 U.S.C. § 302 (allowing massive cable and television cross-ownership).

287. See Dean Alger, *Megamedia*, 234 (Rowman & Littlefield, 1998) (stating “[t]he [Telecom Act] is fundamentally flawed, because unless you have extremely aggressive anti-trust enforcement, this law cannot and will not promote competition”).

288. 47 U.S.C. § 202(d).

Market rule in the top fifty media markets.<sup>289</sup> This regulation prevented cross-ownership of television and radio stations in the same market.<sup>290</sup> Congress needs to maintain or lower the national television ownership rule back to twenty-five percent.<sup>291</sup> The *Telecom Act* raised the amount of national viewers that a group of television stations under the same ownership can serve to thirty-five percent.<sup>292</sup> Congress should maintain the Dual Networks Rule.<sup>293</sup> Congress must reinstate rules regarding nationwide radio station ownership.<sup>294</sup> Finally, Congress should also reconsider eradication of cross-ownership restrictions on cable systems.<sup>295</sup> Congress should consider the above rule changes in order to help promote diversity and healthy competition within the media industry.

#### D. THE FCC SHOULD PLAY A MAJOR ROLE IN THE MEDIA MERGER REVIEW PROCESS

Since its inception in 1934, the FCC has been required to promote the “diversity of media voices, vigorous economic competition, technological advancement, and . . . the public interest, convenience, and necessity.”<sup>296</sup> The agency accomplishes this directive through radio spectrum allocation<sup>297</sup> and independent media merger review.<sup>298</sup> The mandated

289. *Id.*

290. Nesvold, *supra* n. 11, at 848.

291. 47 U.S.C. § 336(c)(1)(B) (regarding national ownership percentage limitations).

292. *Id.*

293. 47 U.S.C. § 336(e)(1).

294. *Id.* § 336(a). Senator Russ Feingold has had his sights set particularly on radio ownership concentration. See generally Sen. Russ Feingold, *Feingold Introduces “Competition in Radio and Concert Industries Act”* <<http://feingold.senate.gov/releases/02/06/062702medcon.html>> (accessed June 28, 2002). He recently introduced a bill aimed at prohibiting certain anti-competitive practices in the radio and concert industries. *Id.* at ¶¶ 1-5. The *Competition in Radio and Concert Industries Act of 2002* (the “*Competition Act*”) calls for ending payola-like practices for song airplay, and opening up the radio and concert industries to greater competition through increased local control and diversity. See generally Sen. 2691, 107th Cong. (2002). The *Competition Act* orders the FCC to revoke the license of any radio station that uses its cross-ownership market power to discriminate against musicians, concert promoters, or other radio stations. *Id.* § 3. It also prevents further relaxation of radio ownership limitations in local markets. *Id.* § 4. “Radio is one of the most important mediums we have for exchanging ideas and expressing our creativity. I am committed to fairness and competition and to ensuring that cross-ownership of promotion services or venues is not used to hurt musicians, concert promoters, or other radio stations.” See Feingold, *Feingold Introduces*, *supra* n. 294, at ¶ 1. “The [*Telecom Act*] opened the floodgates for concentration in the radio and concert industry . . . we need to repair the damage that has been done through this anti-competitive behavior.” *Id.* at ¶ 6.

295. See Nesvold, *supra* n. 11, at 848.

296. *Id.*

297. Feld, *supra* n. 23, at 21.

298. See James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 *Com-*

public interest standard gives the FCC wide discretion in evaluating a proposed merger.<sup>299</sup> The FCC may approve a merger or acquisition with or without conditions,<sup>300</sup> or the agency may outright reject a proposed merger it deems likely to be detrimental to the public interest.<sup>301</sup> If the protection of the public interest is indeed an integral part of FCC policy, then why has the agency seemingly disregarded its core objective to the advantage of corporate interests? The explanation for this is two fold: external political pressure and internal decision-making.

Recently, the FCC's merger review power has come under fire by critics who claim it duplicates DOJ and FTC merger review functions causing unnecessary expense and delay.<sup>302</sup> AT&T and MediaOne filed their merger application with the FCC on July 7, 1999.<sup>303</sup> The agency planned to give the proposed merger "very careful scrutiny."<sup>304</sup> On June 6, 2000, the FCC approved the merger, trailing DOJ approval by two weeks.<sup>305</sup> For this two-week lag, Senator John McCain publicly admonished the FCC as an agency "unable to lead or unwilling to follow."<sup>306</sup> Perhaps in response to this criticism, the agency kept a low profile during both the AOL/Time-Warner and Viacom/CBS merger review proceedings.<sup>307</sup>

The Bush-appointed majority, led by Michael K. Powell<sup>308</sup> and for-

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mLaw Conspectus 195, 197-98 (discussing the FCC's role in antitrust analysis of media mergers).

299. *Id.* at 197. The FCC is "entrusted with responsibility to determine when and to what extent the public interest would be served by competition in the industry." *Id.* at 197-98 (quoting *U.S. v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980)). See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to be Constitutional?*, 53 Fed. Comm. L.J. 427 (2001) (providing an interesting discussion on the public interest standard and the delegation doctrine).

300. Feld, *supra* n. 23, at 20.

301. *Id.*

302. *Id.* at 20-21.

303. *Id.* at 24.

304. Brenda I. Koerner, *Losing Signal*, Mother Jones 40, 41 (Sept./Oct. 2001).

305. Feld, *supra* n. 23, at 24.

306. Koerner, *supra* n. 304, at 92. Senator McCain was at the time chair of the Senate Commerce Committee, a body that reviews FCC nominations. *Id.* Two weeks after this public denouncement of the FCC, McCain received a \$10,000 presidential campaign contribution from AT&T. *Id.* AT&T edges out Viacom as McCain's third highest campaign contributor. *Id.* On another occasion, McCain stated that: "about the best you can say is that the FCC is wasting valuable resources that could more productively be spent elsewhere. But the real harm lies in the fact that the FCC is foisting needless burdens and restrictions on the merging companies that translate into higher prices for consumers." Feld, *supra* n. 23, at 21.

307. See generally *CBS-Viacom Merger Approved by FCC* <<http://tvsschedules.ab.com/schedules/library/weekly/aa050400a.htm>> (accessed Sept. 11, 2000) (discussing role of the FCC during the Viacom/CBS merger review hearings).

308. Michael K. Powell is the son of Secretary of State Colin Powell. See Hickey, *Unshackling*, *supra* n. 222, at ¶ 2.

mer US West (now Qwest Communications) lobbyist Kathleen Abernathy, has already rolled back, eliminated, or is considering the same for many longstanding agency prohibitions.<sup>309</sup> Among those being rolled back is the Dual Network Rule, which prohibits a single company from owning more than one broadcast network.<sup>310</sup> The Commission waved the Dual Networks Rule<sup>311</sup> to allow Viacom to keep an interest in UPN after it acquired CBS.<sup>312</sup> Other rules under roll-back consideration are: certain anti-concentration regulations, private sale of the publicly-owned broadcast spectrum, and whether to allow commercial uses of location-based services—technology used to track cell phone users.<sup>313</sup>

Perhaps the most troubling change at the FCC is the agency's position in relation to its public interest objective. In April 2001, Chairman Powell said before a meeting of the American Bar Association that the agency's public interest standard "[was] about as empty a vessel as you can accord a regulatory agency."<sup>314</sup> One observers agree stating that "[t]he public interest standard which the FCC purports to apply to recent communications mergers often fails to constitute any standard at all . . . Moreover, if and when the Commission begins an extensive investigation, companies generally have no means by which to determine the substantive standard which will govern approval."<sup>315</sup> Another finds the public interest standard vague, out-of-date, and generally an improper delegation of Congressional authority.<sup>316</sup>

Congress and the Supreme Court, however, still recognize the FCC's public interest standard as a viable, albeit inexact, guide for media

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309. Koerner, *supra* n. 304, at 42; see Hickey, *Unshackling*, *supra* n. 222, at ¶ 17. "News departments get reduced, and culturally diverse and public interest programming comes under pressure. Less popular programming disappears and journalists are evaluated by the corporate-profit-center logic of these huge organizations. The new chairman of the FCC doesn't care of whit about any of this stuff." *Id.* (quoting Mark Cooper, research director of the Consumer Federation of America).

310. *News Release: FCC Eliminates the Major Network/Emerging Network Merger Prohibition From Dual Network Rule* ¶ 3 <[http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/2001/nrmm0105.html](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0105.html)> (accessed Oct. 5, 2001). The dual network rule had for several years prohibited any of the four major broadcast networks, i.e., ABC, CBS, Fox, and NBC from merging with one another or with a so-called "emerging" broadcast network, i.e., WB or UPN. 47 U.S.C. § 336(e)(1). The change now allows a major network to merge with one of the emerging networks. *Id.*

311. *Id.*

312. Koerner, *supra* n. 304, at 42.

313. *Id.* at 44.

314. *Id.* at 42. Powell referred to the media corporations as "our clients" during his first trip to Capitol Hill as FCC chairman. *Id.*

315. Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24, Harv. J.L. & Pub. Policy, 503, 508-09 (2001).

316. See generally May, *supra* n. 299; see Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DePaul L. Rev. 1009 (1996) (arguing that the FCC's public interest standard is rarely helpful).

merger analysis. Twice within the past decade, Congress has considered modifying the FCC's merger review standard and each time backed away.<sup>317</sup> In both the *Cable Act*,<sup>318</sup> and the more recent *Telecom Act*,<sup>319</sup> Congress explicitly reaffirmed the FCC's public interest directive.<sup>320</sup> The Supreme Court has on several occasions reviewed the malleability of the standard and found it constitutional.<sup>321</sup>

If the FCC were to have looked at the AOL/Time-Warner merger, for example, from a public interest perspective, then the outcome of the merger review process may have been quite different. Before giving AOL/Time-Warner the green light, the FCC ordered the media giant to take a few modest steps to open up its instant messaging service to rival companies<sup>322</sup> and to make promises of ensuring consumers' continued unfettered access to broadband technology.<sup>323</sup> Before approving the Viacom and CBS merger, the Commission ordered a small divestiture of several radio and television stations<sup>324</sup> to bring Viacom into compliance with the thirty-five percent market share regulation.<sup>325</sup> The agency took no further action.<sup>326</sup> Viacom was allowed to keep all of its original networks, and all of CBS's large production and distribution facilities.<sup>327</sup> For Viacom, the sale of a few broadcast holdings, or for AOL/Time-Warner, to open up its instant messaging service to competition, were indeed small prices to pay to secure leadership positions atop the telecommunications industry. Employing tougher conditions and/or ordering divestiture of certain *major* assets would open the industry up to greater competition and be more beneficial to the public both in price and content. Instead the FCC, apparently giving in to political and corporate

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317. Feld, *supra* n. 23, at 20.

318. Pub. L. No. 102-385, 106 Stat. 1460 (1992).

319. 47 U.S.C. § 257(b).

320. Feld, *supra* n. 23, at 20.

321. See e.g. *FCC v. RCA Commun., Inc.*, 346 U.S. 86, 90 (1953); *U.S. v. Radio Corp. of Am.*, 358 U.S. 334, 350-52 (1959).

322. The concern is that consumers who use the AOL ISP will then be forced to use AOL's Instant Messaging service instead of one of their choosing. See *AOL, Time Warner Merger Clears Last Hurdle* ¶ 16 <[http://more.abcnews.go.com/sections/business/DailyNews/aol\\_approval\\_010110.html](http://more.abcnews.go.com/sections/business/DailyNews/aol_approval_010110.html)> (accessed Jan. 13, 2001) (discussing the terms and conditions of the FCC's approval of the AOL/Time-Warner merger).

323. See Aaron M. Wigod, *The AOL-Time Warner Merger: An Analysis of the Broadband Internet Access Market*, 6 J. Small & Emerging Bus. Law 349, 363-66 (Summer 2002) (discussing both the FTC's and FCC's initial concerns over broadband access in a post-AOL/Time-Warner merger marketplace).

324. *Id.*

325. 47 U.S.C. 336(c)(1)(B) (regarding national ownership limitations). Raising the national ownership limit from twenty-five percent to thirty-five percent. *Id.*

326. See generally *CBS-Viacom Merger Approved by FCC*, *supra* n. 307 (discussing role of the FCC during the Viacom/CBS merger review hearings).

327. *Id.*

pressure, gave its stamp of approval to both mergers without much debate.<sup>328</sup>

The FCC, in order to truly promulgate its public interest directive,<sup>329</sup> should look at the industry as a whole, and assess the potential effects of a media merger, not just in the economic sense, but in social and political arenas as well. This is the “true” public interest standard. The FCC, as a federal agency with expertise in new and developing technology, is in a unique position to protect the public’s First Amendment right to “diverse and antagonistic sources of information”<sup>330</sup> and encourage meaningful competition<sup>331</sup> within the telecommunications industry.<sup>332</sup> In keeping with these positive public interest values, the FCC should only grant approval to media mergers that are in accordance with these fundamental values. Bowing down to corporate and political pressure will only end up harming our democratic process and diminishing the integrity of the First Amendment.

The telecommunications industry is certainly like no other. The special characteristics of this growing and expanding industry necessitate the FCC’s continued involvement in media merger review. The FCC’s versatile public interest standard is able to adapt to the changing needs and concerns of the industry. The need for continued democratic discourse and healthy economic competition within the media industry far outweighs the need for quick and efficient merger reviews.<sup>333</sup>

#### E. THE INTERNET IS NOT YET AN EFFECTIVE TOOL AGAINST THE TELECOM TYRANTS

Finally, an observation about the Internet. Many claim that the Internet has successfully circumvented the global corporate oligarchy<sup>334</sup> and become a successful voice for the disenfranchised.<sup>335</sup> Unfortunately, this is not the case. An independent Web page is still no match for an established news organization that operates highly-rated 24-hour cable

328. *Id.*

329. 47 U.S.C. § 257(b). To promote the “diversity of media voices, vigorous economic competition, technological advancement, and . . . the public interest, convenience, and necessity.” *Id.*

330. Feld, *supra* n. 23, at 20.

331. By “meaningful competition” it is meant an industry with many production and distribution facilities competing with one another in fair competition.

332. Weiss, *supra* n. 298, at 198.

333. Feld, *supra* n. 23, at 21.

334. *Id.* at 33 (discussing the Internet as another venue for mega-media marketing).

335. *Id.* In the early to mid-90s, when the Internet was coming into its own, the hope was that the information superhighway would be able to bypass conventional media and allow people around the world to communicate directly. *Id.* Unfortunately these expectations for a “new world order” have been dashed. *Id.* Instead, a “new world economy” has prevailed. *Id.*

and radio networks,<sup>336</sup> and has substantial Internet properties of its own. Some Internet advocates claim all Web sites are on an equal footing with one another,<sup>337</sup> but have they ever counted the number of times a news operation's Web site is promoted during a particular newscast? The media giants use the Internet as simply another vehicle for promotion and advertising revenue.<sup>338</sup> Their Web sites are chock full of advertising banners and so-called "news," which is essentially program information presented in a news-type format.<sup>339</sup> The myth that the Internet has created a new and effective avenue for the dissemination of alternative or diverse news and views must be debunked.<sup>340</sup>

#### IV. CONCLUSION

The media plays an essential role in the promotion of democracy.<sup>341</sup> The media has a direct impact on what we see, hear, and think.<sup>342</sup> Ownership in a media organization can be a powerful tool that can easily be misused.<sup>343</sup> Big media mergers pose a threat to our democracy because these corporate unions block programming<sup>344</sup> and viewpoint diversity<sup>345</sup> and promote news and public affairs homogenization.<sup>346</sup> When large corporations control the marketplace of ideas, the public interest takes a

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336. Nesvold, *supra* n. 11, at 866.

337. McChesney, *supra* n. 13, at 33.

338. *Id.* See also *Panel II*, *supra* n. 40, at 472 (discussing that eventually, like television and other media, the Internet will be driven purely by marketplace forces, i.e., profit motives, value for shareholders, etc.).

339. McChesney, *supra* n. 13, at 34 (discussing how media organizations and advertisers have attempted to shape and mold the Internet according to their commercial whims).

340. *Cf.* Nesvold, *supra* n. 11, at 866 (discussing that the public has not perceived the Internet as an alternative source for news and views); see also McChesney, *supra* n. 13, at 34. The Internet is changing "from being a participatory medium that serves the interest of the public to being a broadcast medium where corporations deliver consumer-oriented information. Interactivity [is being] reduced to little more than sales transactions and email." *Id.*

341. Wellstone, *supra* n. 3, at 551.

342. Conrad, *supra* n. 19, at 698-99.

343. *Id.* at 699.

344. Conrad, *supra* n. 19, at 679 (discussing that the bringing of production and distribution outlets under one roof is just one of the many reasons why media firms consolidate).

345. *Cf.* Wellstone, *supra* n. 3, at 552 (discussing the overall effects that media consolidation has on diversity).

346. Eric Alterman, *Big Media Is Not Always Better* ¶ 2 <<http://www.Intellectualcapital.com/issues/issue306/item6646.asp>> (accessed Sept. 23, 2000) (quoting Mr. Alterman's opinion on the negative affect of media mergers on journalism). "The danger posed by all the mega-mergers, like that of CBS and Viacom, is only partially the reduction in the diversity of voices. No less worrisome is the likely homogenization of opinion all across the spectrum." *Id.*

back seat to the goal of making large profits.<sup>347</sup> In order to turn those big revenues, parent companies engage in self-censorship, news coverage reduction, and news content manipulation. They also reduce the number of journalists employed in their news departments.<sup>348</sup>

Antitrust law can be an effective weapon against massive media corporate consolidation.<sup>349</sup> However, antitrust analysis of media mergers should not merely focus on the economic aspects of a particular proposed merger.<sup>350</sup> The federal regulatory agencies should also take into account the social and political aspects of every proposed media deal. The Supreme Court on several occasions has stated that antitrust law should be used to ensure access to diverse news and opinions.<sup>351</sup>

The *Telecom Act* effectively ended over 60 years of federal communications law.<sup>352</sup> The *Telecom Act*, under the guise of enhancing competition, modified or eliminated many longstanding rules governing market concentration and cross ownership of telecommunication companies.<sup>353</sup> By removing these concentration and ownership barriers, the *Telecom Act* encourages media mergers, which in turn reduces the number of independent media organizations.<sup>354</sup> Therefore, the *Telecom Act* actually helps big media organization stymie competition and diversity in the marketplace of ideas. To reverse the ill effects of the *Telecom Act*, Congress should reinstate certain market-share and cross-ownership

347. *Panel II, supra* 40, at 472. (discussing freedom of the press and antitrust merger analysis). The leading media outlets are increasingly under more pressure to make money. *Id.* These pressures come externally from the marketplace, and internally from shareholders and executives. *See also* Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 Fed. Comm. L.J. 473, 477 (Mar. 2000) (discussing the affects of the *Telecom Act* not only on the radio industry, but the media industry as a whole). Promoting competition and encouraging diversity is the true definition of "public interest." *Id.* (paraphrasing Polices Report and Order, 7 F.C.C.R. 2755, ¶¶ 22-23). Allowing media mergers to proliferate is in direct conflict to this initiative. *Cf. id.* at 474.

348. Conrad, *supra* n. 19, at 682 (discussing how strict profit motives will cause cutting corners in news coverage). Local news department employ large numbers of journalists, hence this department is often the first place executives look to trim fat. *Id.* When regulators approved the Time-Warner/Turner Broadcasting merger, Ted Turner said, "[w]e're going to cut millions of millions of dollars and, like Superman, we're going up, up and away, in terms of ratings, magazine subscriptions [and] movie box-office share." *Id.* Time-Warner/Turner Broadcasting officials estimated that they would be cutting nearly 1,000 jobs after the merger. *Id.*

349. *Cf. id.* at 683-85.

350. *Id.* at 677.

351. *See supra* nn. 234-46 and accompanying text.

352. *See generally Telecom Act*, Pub. L. No. 104-104, 110 Stat. 56.

353. *Cf. id.*

354. *Cf. Newsold, supra* n. 11, at 846 (discussing the overall purpose behind the *Telecom Act*). The *Telecom Act* "eliminat[es] regulatory barriers that block competition." *Id.* at 847.



regulations.<sup>355</sup>

Finally, the FCC, through its public interest directive, can also play an important role in media merger analysis. The FCC, as an agency with expertise in telecommunications issues, can effectively evaluate the impact that a particular media merger will have on society.<sup>356</sup> The FCC should rigorously resist further efforts by Congress to roll back regulatory barriers that protect diversity and competition in the marketplace of ideas.

More media mergers will allow “too much power in too few hands impair[ing] freedom of expression.”<sup>357</sup> The Internet will not save us and 200 channels on the dial is not truly “diverse” programming.<sup>358</sup> The words of former FCC Commissioner Gloria Tristani best sum up the concern brought about by large media mergers:

How information is presented and what stories are covered and, often more important, what stories are not covered, has a significant impact on public perceptions and the discussion of public issues. More channels do not necessarily mean that additional views are being expressed. More channels often just mean that the same voices can express their views over and over again.<sup>359</sup>

The trend toward corporate consolidation in the marketplace of ideas must be reversed.

*Donald R. Simon*†

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355. See *supra* nn. 285-92 and accompanying text.

356. Feld, *supra* n. 23, at 20.

357. Robert Pitofsky *Is Making It Clear He Believes Media Mergers Deserve Special Scrutiny*, Atlanta J & Const. 9D (Oct. 10, 1995).

358. “Diverse programming” refers to news and views that represent a cross-section of opinions.

359. Ron Kaufman, *Mergermania 2000: There Can Only Be One!* ¶ 14 <<http://www.netreach.net/~kaufman/mergermania2000.html>> (accessed Sept. 25, 2000) (quoting former FCC Commissioner Gloria Tristani). Ms. Tristani’s view is shared by the International Federation of Journalists, which claim that: “[w]e are now seeing the dominance of a handful of companies controlling information and how that information reaches people. Unless action is taken to insure journalistic independence we face a dangerous threat to media diversity.” *Id.*

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