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J.D. Candidate, 1997, Fordham University School of Law.

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Cover Page Footnote

This Note is dedicated to my family for their constant love and support. I would also like to thank Robert D. Joffe, Esq., Partner, Cravath, Swaine & Moore, New York, for his invaluable comments and criticism, Professor Thane Rosenbaum for his inspirational teaching, and the editors of the Fordham Intellectual Property, Media & Entertainment Law Journal for their tireless efforts. I am especially grateful to Elizabeth A. Bloomer, without whose love and encouragement, this Note would not have been possible.

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H. Peter Nesvold*

INTRODUCTION

Mergers and acquisitions are back.[1] Through the third quarter of 1995, corporate marriages had already totaled over $564 billion,[2] and surged to an astounding $866 billion by year-end.[3] Compared to the 1980s' high of $311 billion set in 1988,[4] the staggeringly high level of recent merger activity shatters all records set in the past decade.[5] Of particular interest is the unabated pace of consoli-

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1. *See* Richard Lapper, *Survey of Capital Sources—Year End Review*, FIN. TIMES, Jan. 16, 1996, at 1 (commenting on the flourishing merger and acquisition activity in the United States); Steven Lipin, *Let's Do It: Disney to Diaper Makers Push Mergers and Acquisitions to Record High*, WALL ST. J., Jan. 2, 1996, at R8 [hereinafter Lipin, *Disney to Diaper Makers*] (reporting that the number of corporate mergers in the United States and abroad reached a record in 1995); *Mergers Setting Pace to Break Record of 1994*, L.A. TIMES, Sept. 30, 1995, at D2 [hereinafter *Mergers Setting Pace*]; Steven Lipin, *Mergers, Acquisitions Rose 20% in 1st Half to Record*, WALL ST. J., July 3, 1995, at A3 [hereinafter Lipin, *Mergers, Acquisitions Rose 20%*]; *see also Mergers, Acquisitions Soar in Information Technology*, WALL ST. J., July 26, 1995, at B8 (information technology industry).

2. *Mergers Setting Pace*, *supra* note 1, at D2; *This Year's Crop of Mergers Ready to Shatter Record*, AUSTIN AM.-STATESMAN, Sept. 30, 1995, at D8; *Bells Ring for Corporate Marriages: Mergers Just Shy of '94 Record*, CHI. TRIB., Sept. 29, 1995, at C3.

3. *Westinghouse Selling Unit*, CINCINNATI ENQUIRER, Jan. 4, 1996, at B8; Lipin, *Disney to Diaper Makers*, *supra* note 1, at R8; *Mergers Reach $866 Billion*, CHI. TRIBUNE, Jan. 2, 1996, at 1; *Corporate Mergers Post Record: $866 Billion in '95*, ST. LOUIS POST-DISPATCH, Dec. 30, 1995, at 7A.

4. *Mergers Set Record in '88*, N.Y. TIMES, Jan. 31, 1989, at D19.

5. Records set in the 1980s include $311 billion, set in 1988; $220 billion in 1987;

dation within American industry that has resulted from such transactions. Industries as diverse as technology, defense, health care, transportation, utilities, financial services, and media are all experiencing an ever-accelerating stream of transactions.[6] Moreover, the size of such deals are soaring at an equally breathtaking rate: this past year saw Disney's $19 billion acquisition of Capital Cities/ABC, Chemical Banking's $10 billion merger with Chase Manhattan Corporation, and Hoechst AG's $7 billion purchase of Marion Merrell Dow.[7] Driven not only by across-the-board competition[8] and rising stock prices,[9] but also by dramatic and far-reaching regulatory and marketplace changes,[10] corporate America is scrambling to assemble ideal strategic fits, capture market share, and control the points of product distribution.[11] As a result, the billion dollar deal in today's mergers and acquisitions scene is

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$191 billion in 1986; and $144 billion in 1985. *Mergers Set Record in '88*, *supra* note 4, at D19; Deborah A. DeMott, *Directors' Duties in Management Buyouts and Leveraged Recapitalizations*, 49 OHIO ST. L.J. 517, 517 (1988).

6. *See Tristate Trends for '96*, CINCINNATI ENQUIRER, Dec. 31, 1995, at F1 (banking and financial services); *see, e.g.*, *Stocks-In the News*, BUFFALO NEWS, Jan. 7, 1996, at 19B (health care, defense, technology); *United States*, MERGERS & ACQUISITIONS REP., Jan. 1, 1996, at 5 (transportation); *Utilities: Colorado Utility to Seek Termination of Contracts Covering Over 2,000 Workers*, DAILY LABOR REP. (BNA), 1995 D.L.R. 173 d16 (Sept. 7, 1995) (utility); *Merge Overkill: When Big Media Gets Too Big, What Happens to Open Debate?*, VILLAGE VOICE, Jan. 16, 1996, at 30 [hereinafter *Merge Overkill*] (media).

7. *Merge Overkill*, *supra* note 6, at 30 (discussing the Disney–Capital Cities/ABC deal); Michael J. Mandel, *Land of the Giants*, BUS. WK., Sept. 11, 1995, at 34 (discussing the Chemical Banking-Chase Manhattan merger); *1995-96 Review and Outlook; It Was a Year of Merger Fever-and 1996 Could Be Too*, L.A. TIMES, Dec. 31, 1995, at D22 (discussing Hoechst's purchase of Marion Merrell Dow).

8. *Cf.* Irwin Stelzer, *Fools Rush into Merger Craze*, SUNDAY TIMES, Feb. 18, 1996, at Business (explaining that electricity utilities are combining to position themselves for increasing competition).

9. *Id.*

10. *See* discussion *infra* part III.A (discussing recent legislation that has increased merger and acquisition activity in the telecommunications industry).

11. *See* Mandel, *supra* note 7, at 34; Stelzer, *supra* note 8, at Business (explaining that the motivations behind many mergers in 1995 were cost savings, the control of distribution channels, and regulatory changes); Elizabeth Mooney, *Paging Market Share Indications Company Success, Says Analysts*, RADIO COMM. REPORT, Feb. 5, 1996, at 29 (explaining that market share is a leading motivation for mergers and acquisitions in the media industry).

becoming commonplace.[12]

Despite the cheers and exhilaration of Wall Street investors that inevitably follow each mega-deal,[13] an increasing number of commentators are concerned with the antitrust implications of many of these corporate consolidations.[14] Left unattended, critics argue, such transactions could result in unfairly maintained market power by a few industry giants.[15] Critics further speculate that, at a minimum, mergers and acquisitions result in dwindling consumer choices and higher fees and prices paid by the public.[16] Consequently,

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12. *Exploiting Your Brands on the Internet*, BRAND STRATEGY, Oct. 27, 1995, at 4, 4-5 (explaining that mega-mergers in the multimedia industry are now almost commonplace); John Higgens, *System Swap Game Not an Easy One to Play*, MULTICHANNEL NEWS, Mar. 6, 1995, at 14 ("billion-dollar system acquisitions have become commonplace in recent months"); *Biotech Looks Healthy for '95*, U.P.I., Dec. 28, 1994, *available in* LEXIS, Nexis Library, CURNWS File (arguing that multi-billion dollar mergers in the biotech industry will soon become commonplace); *see also Career Choices*, BOSTON GLOBE, Oct. 15, 1995, at 23 ("The banking industry is reorganizing, with mergers of banks into larger, mega-institutions becoming commonplace . . . .").

13. *See* Stelzer, *supra* note 8, at Business.

14. *See, e.g.*, *Antitrust Immunity Not Supported By Data, Attorney General Concludes*, HEALTH CARE DAILY (BNA) (Jan. 3, 1996) (reporting concern over antitrust immunity for health care mergers); Marvin Kitman, *A Cable-Merger Monster*, NEWSDAY, Oct. 1, 1995, at 18 (media mergers); Mark Landler, *Turner to Merge into Time Warner; A $7.5 Billion Deal*, N.Y. TIMES, Sept. 23, 1995, at 1 (reporting that some consumer advocates are concerned about the Time Warner–Turner Broadcasting merger, because it would link a leading provider of cable programming with the two largest cable distributors in the country); Bryan Gruley, *Time Warner, Turner Facing Scrutiny on Deal*, WALL ST. J., Sept. 21, 1995, at A24 (reporting that federal regulators are eager to probe possible antitrust issues involving the proposed merger of Time Warner and Turner Broadcasting); Paul Farhi, *Regulators Look at Turner Talks About a Merger*, WASH. POST, Sept. 1, 1995, at C1 (media industry).

15. *See* Arthur Gottschalk, *Utility Merger Mania Sparks Antitrust Anxiety*, J. OF COMMERCE, Dec. 7, 1995, at A1; Farhi, *supra* note 14, at C1 (reporting that federal antitrust officials are concerned that the combination of Time Warner and Turner Broadcasting might restrict competition in the market for movie distribution on pay cable networks, because the combined company would have a tremendous ability to produce movies and then distribute them on wholly or partially owned pay cable channels); *Consumer Groups Voice Concern Over Recent Media Mergers* (CNN television broadcast, Sept. 25, 1995) [hereinafter "CNN Broadcast"] (reporting that a merger between media giants Time Warner and Turner could result in higher costs, less freedom of choice and lack of diversity in programming).

16. *See* Kimberly Blanton, *Smaller Banks Hope to Give Run for Money; Megamergers Set Stage for Battle Over Customers*, BOSTON GLOBE, Dec. 14, 1995, at 62;

many critics argue that economic efficiency should be subordinate to the decentralization of social, political, and economic power.[17]

Understandably, no industry receives such anti-merger scrutiny as incessantly as media does.[18] Besides the danger that newly-wed

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see also Tony Munroe, *Proposed Merger to Face Scrutiny*, BOSTON HERALD, Dec. 14, 1995, at 42 (discussing Massachusetts Attorney General Scott Harshbarger's antitrust investigation of the proposed $2 billion Bank of Boston-BayBanks merger, and his vow to protect the interests of consumers); CNN Broadcast, *supra* note 15; Paul Farhi, *Time Warner, TBS Agree On $7.5 Billion Merger; Deal to Create World's Largest Media Company*, WASH. POST, Sept. 23, 1995, at A1 (quoting the Consumers Union and Consumer Federal of America as warning that the Time Warner-Turner Broadcasting merger "will thwart the development and expansion of widespread communications competition, and will lead to higher cable and telephone prices").

17. Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 262 (1995) (describing the antitrust "traditionalist" as one who "sees private economic power and its distribution as comprising the central challenge confronting a free society, and considers the maintenance of a dispersed and decentralized private power structure to be the paramount objective of antitrust policy"); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1227 (1988).

The fear that large, powerful economic organizations have damaging political consequences dates back at least 100 years. *See id.* (citations omitted); *see also* Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 570 (1947) ("Federalism, the separation of Church and State, capitalism, the antitrust tradition, the separation of powers—all the main slogans of our political and social life betray the same jealous preoccupation with the problem of power, and the same healthy suspicion of government or any other overwhelming concentration of authority.").

In fact, the fear that overly concentrated industries may dominate social and political institutions has its roots with many of the world's most esteemed thinkers. For example, Woodrow Wilson once declared, "[i]f monopoly persists, monopoly will always sit at the helm of the government . . . . If there are men in this country big enough to own the government of the United States, they are going to own it . . . ." WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 286 (1918), *quoted in* Adams & Brock, *supra*, at 267. Similarly, in 1776, Adam Smith emphasized the dangers of unchecked economic ambition: a businessperson's "interest is never exactly the same with that of the public," and she or he "generally [has] an interest to deceive and even to oppress the public . . . ." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 250 (Random House ed. 1937) (1776), *quoted in* Adams & Brock, *supra*, at 272.

18. *See, e.g.*, Daniel Pearl, *Media Consolidation Has Left and Right Worried About Big Firms Gaining a Lock on Information*, WALL ST. J., Aug. 31, 1995, at A10; Kitman, *supra* note 14, at 18; *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., Oct. 10, 1995, at 9D [hereinafter *FTC Chief to Test Theory*]; Michelle Quinn,

media mega-companies will take fewer risks in programming, news, and information, resulting in an arena of bland content,[19] such mega-companies could also threaten the "marketplace of ideas."[20] As noted by Robert Pitofsky, the chairman of the Federal Trade Commission ("FTC"), "too much power in too few hands will impair freedom of expression."[21] Moreover, the potential for manipulation by the media is especially ripe today, as the mergers come in an era when, as one commentator notes, "antitrust enforcement has become as loose as the language in movies."[22] Also, with a deregulated telecommunications[23] industry that has resulted from

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Media Mergers Raise Troubling Questions Fears of Higher Prices, Bland Content, S.F. CHRON., Sept. 23, 1995, at D1; David Lieberman, *Washington Weighs Media Deals*, USA TODAY, Sept. 11, 1995, at 2B; Mike Meyers, *Experts Ponder: Is This a Merger of Peril or Promise?*, STAR TRIBUNE, Aug. 1, 1995, at 10A; *Merge Overkill*, *supra* note 6, at 30.

19. Quinn, *supra* note 18 (quoting the warning of Ben H. Bagdikian, author of "Media Monopoly"—a book that traces how the consolidation of media companies affects news, movies, TV and politics—that "[g]reater market control means you don't need such good writers for programs or even try to meet different tastes").

20. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (holding that the Federal Communication Commission's "fairness doctrine," requiring that public issues be presented by broadcasters and that each side of those issues be given fair coverage, is constitutional) ("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.") (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)). The concept of the "marketplace of ideas" first appeared in Supreme Court jurisprudence in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."); *see* Joseph H. Kaufman, *Beyond* Cohen v. Cowles Media Co.*: Confidentiality Agreements and Efficiency Within the "Marketplace of Ideas"*, 1993 U. CHI. LEGAL F. 255, 260 (1993); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 (1984). Legal commentators often use the concept of the marketplace of ideas to "explain and justify" the First Amendment freedom of expression. *Id.* at 2; *see also* Kaufman, *supra*, at 260. Many of these commentators regard the marketplace as "essential to our society's efforts to discover truth." Ingber, *supra*, at 1; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open").

21. *FTC Chief to Test Theory*, *supra* note 18, at 9D. Nonetheless, Mr. Pitofsky has also been quoted as saying, "you can't violate the First Amendment through a merger." Kirk Victor, *Merger Man*, NAT. J., Jan. 20, 1996, at 121.

22. Meyers, *supra* note 18, at 10A.

23. The term "telecommunications" means "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." Telecommunications Act of 1996,

startling congressional legislation,[24] allowing television studios to own and resell programming and permitting television and radio station owners to control multiple outlets in each market,[25] the public may soon find that four or five companies control nearly all the information delivered into its homes over television airwaves, cable, or computer modems.[26]

This Note argues that a new antitrust model is necessary to

Pub. L. No. 104-104, § 3(a)(48), 110 Stat. 56, 61 (1996) (to be codified at 47 U.S.C. § 153(a)(48)); *see also* Patrick Flanagan, *The 10 Hottest Technologies in Telecom: A Market Research Perspective*, TELECOMMUNICATIONS, May 1995, at 31 (defining "telecommunication" as "cable, interactive media, and other emerging forms of communication, as well as the standard inclusion of voice, data, and video transmission").

24. Congress recently passed the Telecommunications Act of 1996 ("Telecom Act"). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.). The Telecom Act is comprehensive legislation that rewrites the Communications Act of 1934 and "provide[s] for a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition . . . ." Joint Explanatory Statement of the Committee of Conference to the Telecommunications Act of 1996 [hereinafter "Statement Accompanying the Telecom Act"]; *see* Edmund L. Andrews, *Future Riding on Telecommunications Bill; Deregulation Will Change How People Use Telephones, Watch TV and Use Computers*, ROCKY MOUNTAIN NEWS, Dec. 24, 1995, at A3 (maintaining that the Telecom Act effectively rewrites the ground rules for almost every part of the communications industry: telephone, cable television, broadcasting, and even cyberspace). In addition to other purposes, the Telecom Act is intended to open all telecommunications markets to competition. Statement Accompanying the Telecom Act, *supra*. As a result, the Act has significant implications to the entire media industry. *See* discussion *infra* part III.A (discussing details of the Telecom Act and its implications to the media industry).

25. Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(c)(1)(A)); *see infra* notes 399-413 and accompanying text (discussing the Telecom Act's effect on television and radio station ownership rules); *see also* Dennis H. Leibowitz, *Media Mergers: The Underlying Economic Dynamics*, N.Y. L.J., Dec. 1, 1995, at 5; Quinn, *supra* note 18, at D1.

26. *See* Lieberman, *supra* note 18, at 2B; Pearl, *supra* note 18, at A10 (quoting Ben Bagdikian, former dean, University of California, Berkeley Graduate School of Journalism, as warning that "[w]e're evolving into a pattern in which a relatively small number of huge firms control every step in every process in the mass media"); Paul Farhi, *Media Giants' Bedfellowship Raises Questions About Competition*, WASH. POST, Jan. 7, 1996, at H1 (quoting William Bennett, former Secretary of Education, as maintaining, "[i]n this new world of communications, it seems like five or six companies control just about everything").

analyze multimedia mergers and acquisitions. Part I provides a brief introduction to mergers and acquisitions, including the primary benefits and adverse competitive effects of such transactions. Part I also explains the fundamentals of antitrust merger law and economics, and reviews the practical steps in an antitrust merger analysis. Part II examines how courts have historically ruled in media antitrust cases. Part III argues that previous court decisions are ineffective for analyzing the rapidly changing multimedia industry, and proposes a new antitrust model for analyzing multimedia mergers and acquisitions. Finally, this Note concludes that the proposed model should be adopted, because it addresses both First Amendment and economic-based concerns.

I. INTRODUCTION TO MERGERS AND ACQUISITIONS AND ANTITRUST LAW

The strategic importance and long-term consequences of mergers and acquisitions are well-settled in the corporate world.[27] Driven largely by the industrial struggle to achieve a critical competitive scale, corporate consolidation is often viewed as an essential element for success in today's global markets.[28]

Against this background, an increasing number of mergers and acquisitions are raising significant antitrust concerns.[29] Nevertheless, the law that restrains anticompetitive mergers is often inconsistent and unpredictable.[30] According to the late Phillip Areeda,

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27. *See* J. WILLIAM ROWLEY & DONALD I. BAKER, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS vii (1st ed. 1991) (explaining that multinational authorities struggle to balance competition policy with other traditional goals, such as preserving employment, promoting exports, and generally protecting home-based industry); *see also* Peter Lorange et al., *Corporate Acquisitions: A Strategic Perspective, in* THE MERGERS AND ACQUISITIONS HANDBOOK 3 (2d ed. 1994) ("The diversified company . . . constantly faces the choice of acquisition versus internal development to achieve [long-term] growth.").

28. *See* ROWLEY & BAKER, *supra* note 27, at vii; Mandel, *supra* note 7, at 34.

29. ROWLEY & BAKER, *supra* note 27, at vii; *see, e.g.*, *Antitrust Immunity Not Supported By Data, Attorney General Concludes*, HEALTH CARE DAILY (BNA) (Jan. 3, 1996) (health care); Gruley, *supra* note 14, at A24 (media industry).

30. *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES ¶ 100, at 1 (4th ed. 1988).

a leading commentator on antitrust law,[31] "contemporary vitality of a precedent is often affected less by what it says than by present perceptions of the problem."[32] This is not to say, however, that there are no settled antitrust doctrines, approaches, or policies.[33] In contrast, while relatively few, there are established standards for applying the law.[34] This part introduces those standards and describes the underlying framework for antitrust merger analysis.

First, this part examines merger and acquisition theory, including the economic benefits and potential adverse competitive effects of corporation consolidation. Second, this section discusses federal antitrust merger law and the economic principles that guide its application. Finally, this section analyzes the practical steps in the antitrust merger analysis.

A. *Mergers and Acquisitions*

Because much of antitrust law seeks to halt the consummation of anticompetitive mergers and acquisitions,[35] developing an analytic model for antitrust analysis of the media industry logically requires an understanding of merger theory. This sub-section explains the perennial economic benefits that drive merger and acquisition activity and the corresponding competitive threats that such transactions pose.

1. Economic Benefits of Mergers & Acquisitions

The fundamental driving force behind mergers and acquisitions, like other investing and speculating activities, is the search for hidden value.[36] Nevertheless, just as beauty is in the eye of the

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31. Mr. Areeda published a number of textbooks and a seven volume treatise of antitrust law—the most comprehensive analysis in this area. *Id.* ¶ 102, at 2.

32. *Id.* ¶ 100, at 1.

33. *Id.*

34. *Id.*

35. *See infra* notes 113-15 and accompanying text (explaining that antitrust law seeks to preclude mergers whose potential anti-competitive effects outweigh their likely benefits).

36. *See* Geoffrey T. Boisi & Stuart M. Essig, *Development of the M&A Market, in* THE MERGERS AND ACQUISITIONS HANDBOOK, *supra* note 27, at 21 (explaining that a primary motivation of mergers is capitalizing on the underutilization of an asset). An asset may have hidden value to the extent that its current owner may not be operating the

beholder, value is in the hands of the possessor.[37] An asset's value is a very subjective measure because the asset's worth or productivity may vary significantly, depending on who owns it.[38] This is true for two primary reasons.[39] First, mergers and acquisitions facilitate the flow of assets to the most effective managers.[40] For

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asset to its fullest capacity. *See infra* notes 40-43 and accompanying text (explaining that mergers and acquisitions facilitate the flow of assets into the hands of the most efficient and effective managers).

37. William J. Edwards, *Planning Models for M&A Analysis*, *in* THE MERGERS AND ACQUISITIONS HANDBOOK, *supra* note 27, at 39.

38. *Id.*; *see* Boisi & Essig, *supra* note 36, at 21.

39. Ultimately, the reasons behind a merger are as varied as the imaginations of attorneys and investment bankers. There are, however, other less significant motivations behind mergers and acquisitions. For example, a merger may help the acquiring firm gain liquidity, credit or commercial status and respectability. LAWRENCE SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 204, at 615 (1977). However, not all reasons behind mergers make such economic or business sense. Rather, tax reasons alone motivate many mergers. *See id.* There are primarily two reasons for this. First, mergers may enable some companies to utilize tax attributes that they otherwise would lose. SULLIVAN, *supra*, § 204, at 615. For example, a company cannot take advantage of certain tax shields, such as a tax-loss carryforward, if it has no profits. RICHARD BREALEY & STEWART MEYERS, PRINCIPLES OF CORPORATE FINANCE 822 (4th ed. 1991). In some cases, that company could utilize the carryforward, should it merge with another company that is showing profits. *Id.* Nevertheless, the Internal Revenue Service will disallow the deduction if the companies undertook the merger or acquisition just to use the tax-loss carryforward. *Id.* at 822 n.5; *see* I.R.C. §§ 381-82, 384 (1994) (limiting generally the use of preacquisition losses to offset gains). Second, a company may contemplate a merger for no other reason than to replace non-tax deductible dividend payments on equity, with deductible interest payments on acquisition debt. SULLIVAN, *supra*, § 204, at 615. Many commentators allege that such highly-leveraged transactions, which are known as "funny money" mergers, result in a corporate America that is over-leveraged and dangerously risky. *See* Professor Merton H. Miller, Nobel Memorial Prize Lecture at the Royal Swedish Academy of Sciences (Dec. 7, 1990) (on file with author) (arguing that finance theory does not support such concerns); SULLIVAN, *supra*, § 204, at 615 (calling a funny money merger "bizarre").

Some commentators also allege that mere financial manipulation is the motivation behind many mergers. BREALEY & MEYERS, *supra*, at 824-25. For example, in an "elastic equity" or "boot strap" merger, an acquiring firm, whose stock sells at a high price-earnings ("P/E") ratio, purchases another firm, whose stock trades at a low P/E ratio, with the hope that the acquired assets will gain in market value upon coming into the new owners' hands. *Id.*; SULLIVAN, *supra*, § 204, at 615. Critics argue that such deals generally cannot succeed, however, because investors will see through the transactions' chicanery. BREALEY & MEYERS, *supra*, at 826.

40. *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990) ("Competition . . . drives out inefficient and marginal producers, releasing resources to

example, investors who bear superior managerial or technical skills may identify corporations that are underutilizing their assets.[41] Such investors are generally willing to purchase the assets for a premium, because they know that they can manage those assets more efficiently.[42] Therefore, the assets are worth more in the hands of the investors than in the hands of the selling corporations.[43]

Second, a merger or acquisition allows two previously unrelated

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higher-valued uses . . . ."); BREALEY & MEYERS, *supra* note 39, at 823. According to other commentators:

> We view the market for corporate control, often referred to as the takeover market, as a market in which alternative managerial teams compete for the rights to manage corporate resources . . . . In this perspective, competition among managerial teams for the rights to manage resources limits divergence from shareholder wealth maximization by managers and provides the mechanism through which economies of scale or other synergies available from combining or reorganizing control and management of corporate resources are realized.

Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control*, 11 J. FIN. ECON. 5, 6 (1983), *quoted in*, Adams & Brock, *supra* note 17, at 292. "Economies of scale" are defined as "savings that are acquired through increases in quantities produced." WILLIAM BAUMOL & ALAN BLINDER, ECONOMICS: PRINCIPLES AND POLICY 500 (2d ed. 1982). "Synergy" is defined as "the combination of two separate phenomena which, when combined, function more efficiently together than they would individually." MARC BOSC, ET AL., THE M&A HANDBOOK 31 (1st ed. 1990); *see also* Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1151 n.4 (W.D. Ark. 1995) (defining "operational synergies" in the newspaper industry as "the economies of scale that can be achieved by combining functions or departments, including accounting, administration, press rooms, and composing departments"). The efficiency theory is not without its critics, however. Many argue that claims of synergy are often exaggerated. *See, e.g.*, J. Fred Weston, *The Payoff in Mergers and Acquisitions*, *in* THE MERGERS AND ACQUISITIONS HANDBOOK, *supra* note 27, at 65.

41. BREALEY & MEYERS, *supra* note 39, at 823; *see* Boisi & Essig, *supra* note 36, at 21.

42. The theory of ineffective managers is grounded in the problems of agency costs, which indicate that individual owners of a large corporation, with dispensed ownership, do not have sufficient incentives to expend the substantial resources required to monitor the behavior of managers. Weston, *supra* note 40, at 65, 68. As a result, the mere possibility of a takeover attempt of an inefficient firm, and the corresponding threat that poorly performing executives could lose their jobs, promotes profit-maximizing behavior. *Id.* at 68.

43. *See* Boisi & Essig, *supra* note 36, at 21 (explaining that companies profit "from the reallocation of corporate assets to more productive uses").

companies to achieve "economies of scale"[44] or "synergies."[45] Under economic theory, two entities, when combined, may be worth more than if they had remained independent.[46] This is especially true where a merger allows the companies to either eliminate overlapping cost centers[47] or reduce transaction costs between the two firms.[48] As a result, the unified firm may reduce costs, improve quality, and boost output. Synergies also result where the combined enterprise is less risky than the constituent corporations.[49] Consider, for example, the union of two companies whose revenues are seasonal,[50] or the integration of a manufacturing firm with its sole supplier, which merely breaks even every year.[51] In either scenario, merging the firms creates value, because the combined

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44. BREALEY & MEYERS, *supra* note 39, at 821. Two merging companies will enjoy economies of scale where the combined entity's average unit cost of production decreases as a result of the merger. *Id.* at 821, 821 n.4.

45. Boisi & Essig, *supra* note 36, at 21; *see, e.g.*, Weston, *supra* note 40, at 65.

46. Boisi & Essig, *supra* note 36, at 21; Weston, *supra* note 40, at 65; *see* BREALEY & MEYERS, *supra* note 39, at 817-18 (stating that mergers result in "economic gain only if the two firms are worth more together than apart").

47. *See* discussion *infra* part I.A.2.a (discussing horizontal mergers).

48. *See* discussion *infra* part I.A.2.a (discussing cost savings that drive many horizontal mergers); BREALEY & MEYERS, *supra* note 39, at 822.

49. BOSC ET AL., *supra* note 40, at 33.

50. BREALEY & MEYERS, *supra* note 39, at 824. An example of this would be the 1989 merger between two electric utilities, Utah Power & Light, which serves customers in Utah, and PacifiCorp, which serves customers in California. *Id.* at 822. Utah Power's peak demand comes in the summer for air conditioning, while PacifiCorp's peak comes in the winter for heating. *Id.* The savings from combining the two firms' generating systems were estimated in 1990 at $45 million annually. *Id.* Many conglomerate mergers are prompted by this type of savings. *But see id.* (arguing that mergers which are motivated by risk diversification are dubious, because corporate diversification does not affect value in perfect markets, as long as investors' diversification opportunities are unrestricted).

51. *See* Lorange et al., *supra* note 27, at 5 ("Vertical acquisition is usually undertaken when the market for the intermediate product is imperfect, because of scarcity of resources, criticality of the purchased products, or control over production specifications of the intermediate product."). For example, a major airline that scheduled flights for customers, but did not own any airplanes, would be an administrative nightmare. BREALEY & MEYERS, *supra* note 39, at 822. With this difficulty in mind, it would make sense for the airline to merge with a "rent-a-plane" company that owns its own planes. *Id.* This is an example of a vertical merger. *See* discussion *infra* part I.A.2.b (discussing vertical mergers).

entity is more economically stable.[52]

Thus, mergers and acquisitions may yield substantial economic benefits to both the investor and society.[53] The investor, on the one hand, recognizes a profit for its superior managerial or technical skills, or its ability to create economies of scale.[54] On the other hand, society also gains.[55] To understand this, one must turn to "welfare economics,"[56] the branch of economic theory that is concerned with the optimal allocation of resources.[57] According to the theory of optimal resource allocation, economic resources should be shifted to their most efficient and productive uses.[58] By redeploying resources in this manner, one of an economic system's major goals is reached: to make anyone better off, as long as someone else is not made worse off.[59] This shifting of resources to their most productive uses is known as allocative, or Pareto, efficiency,[60] and ultimately betters an economy as a whole.[61] Thus, it follows that "in a competitive market, buying out competitors is not merely permissible, it contributes to market stability and promotes the efficient allocation of resources."[62]

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52. BOSC ET AL., *supra* note 40, at 33.

53. *See supra* notes 40-52 and accompanying text (explaining that investors profit from mergers and acquisitions); *infra* notes 56-62 and accompanying text (explaining that society benefits from mergers and acquisitions).

54. *See supra* notes 40-52 and accompanying text (explaining that the potential for profit is the motivation for many mergers).

55. *See infra* notes 56-62 and accompanying text (explaining that mergers benefit society because they shift resources to their most productive uses).

56. *See* PAUL SAMUELSON & WILLIAM NORDHAUS, ECONOMICS 292 (14th ed. 1992) (explaining that welfare economics is concerned with efficiency and "the best way to organize economic activity").

57. *See* EDWIN MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 401-02 (5th ed. 1985).

58. *See* SAMUELSON & NORDHAUS, *supra* note 56, at 292-93.

59. *Id.* at 293, 729 (defining allocative efficiency); *cf.* MANSFIELD, *supra* note 57, at 237 ("a perfectly competitive economy shifts resources in accordance with changes in consumer demand").

60. SAMUELSON & NORDHAUS, *supra* note 56, at 291.

61. *Id.* at 149 ("An economy is efficient if it is organized to provide its consumers the largest possible bundle of goods and services, given the resources and technology of the economy.").

62. *Syufy*, 903 F.2d at 673.

2. Potential Adverse Competitive Effects of Mergers

Notwithstanding the valuable benefits that result from certain mergers and acquisitions,[63] such transactions may pose significant potential for adverse competitive effects. Generally, the degree to which competition may suffer varies depending on the kind of deal that two firms are contemplating.[64] Based on the market relationship of the consolidating parties, a merger will be classified into one of three categories: (1) horizontal—when the parties are competitors;[65] (2) vertical—when the parties are or could become buyer-seller;[66] and (3) conglomerate—in every other case.[67]

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63. *See supra* notes 36-62 (discussing the financial benefits of mergers).

64. This statement assumes that the merging parties have not yet consummated the deal, because under the Hart-Scott-Rodino Antitrust Improvements Acts of 1976, parties to a proposed merger must furnish certain information to the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") before they may complete the transaction. 15 U.S.C. § 18a (1994); *see also* U.S. Dep't. of Justice & Fed. Trade Comm'n., Horizontal Merger Guidelines § 0 (1992) [hereinafter "1992 Merger Guidelines"], *reprinted in* 57 Fed. Reg. 41,552 (1992) (stating that the 1992 Merger Guidelines, which were issued jointly by the FTC and DOJ, are forward-looking). In addition, courts will resolve doubts as to the necessity of issuing a preliminary injunction which prevents a merger in favor of granting the injunction. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). Courts generally favor preventing the merger at first because once the proposed merger or acquisition is consummated, "it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs.'" *Id.* at 261 (quoting Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973)).

65. *See* Brown Shoe v. United States, 370 U.S. 294, 334 (1962) (analyzing a merger that was partially horizontal); BREALEY & MEYERS, *supra* note 39, at 820; BAUMOL & BLINDER, *supra* note 40, at 522.

66. *See Brown Shoe*, 370 U.S. at 323 (analyzing a merger that was partially vertical); BREALEY & MEYERS, *supra* note 39, at 820; BAUMOL & BLINDER, *supra* note 40, at 522. For example, a merger is vertical where it combines, into a single firm, "various stages of production—such as mining ore, making ingot, transforming ingot into useable forms, fabricating end products, and distributing products through wholesalers and retailers to ultimate consumers." AREEDA & KAPLOW, *supra* note 30, ¶ 400 at 625. Henry Ford was the world's first major vertical integrator. STANLEY FOSTER REED & ALEXANDRA REED LAJAOUX, THE ART OF M&A: A MERGER AND ACQUISITION BUYOUT GUIDE 22 (2d ed. 1995). Ford's company had its own iron mills and the railroads that connected them. *Id.* Ford even grew the rubber for the company's tires. *Id.*

67. AREEDA & KAPLOW, *supra* note 30, ¶ 500, at 793; BREALEY & MEYERS, *supra* note 39, at 821. Conglomerate mergers can, in addition, be subdivided into three subcategories. Joseph P. Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers?*, 71 CALIF. L. REV. 348, 348 n.2 (1983).

a. Horizontal Mergers

Horizontal mergers generally receive more intense scrutiny than any other merger category.[68] According to the United States Department of Justice's ("DOJ") Merger Guidelines ("1992 Merger Guidelines"), this is especially true where the merger creates or facilitates the exercise of "market power":[69] the ability to sustain prices above those which supply and demand would set if the market were competitive.[70] There are primarily two situations in which the enhanced market power that results from a horizontal merger may trigger anticompetitive pricing.[71] First, the unified corpora-

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The first is "pure" conglomerate mergers, when there is no economic relationship between the former firms. *Id.*; United States v. General Dynamics Corp., 258 F. Supp. 36, 56 (S.D.N.Y. 1966). A popular classroom example of a "pure" conglomerate merger is the union of a gun manufacturer with a producer of butter. The second sub-category is product extension mergers, in which a producer of one product or service acquires the producer of a closely related product or service. Bauer, *supra*, at 348 n.2. An example of a product extension merger would include one between a national manufacturer of household liquid bleach and a national producer of soaps, detergents, and cleaners. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 568-69 (1966). Finally, there are geographic or market extension mergers, in which a producer in one market acquires a similar company in an adjacent market. Bauer, *supra*, at 348 n.2. An example of this would be the combination of a bank that competes exclusively in the city of Denver with another bank, offering similar services, some fifty miles away. *See* United States v. First Nat'l Bancorporation, 329 F. Supp. 1003, 1006-07, 1011 (D. Colo. 1971), *aff'd*, 410 U.S. 577 (1973).

68. THOMAS W. BRUNNER ET AL., MERGERS IN THE NEW ANTITRUST ERA 16 (1st ed. 1985) (discussing horizontal mergers).

69. 1992 Merger Guidelines, *supra* note 64, § 0.1 ("Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time."). It is well-recognized that the Merger Guidelines do not have the force of law. *See* Olin Corp. v. FTC, 986 F.2d 1295, 1300 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994); *Community Publishers*, 892 F. Supp. at 1153 n.6. Nevertheless, many courts still cite them. *Id.* More importantly, courts do not usually allow the government to take positions that are inconsistent with the Merger Guidelines. *Id.* at 1161.

70. United States v. Archer Daniels Midland Co., 781 F. Supp. 1400, 1402 (S.D. Iowa 1991); 1992 Merger Guidelines, *supra* note 64, § 0.1.

71. In addition to the two situations described, a market can exhibit noncompetitive pricing in one other manner: express agreement by the firms within the industry to charge a price above competitive levels. BRUNNER ET AL., *supra* note 68, at 17. Nevertheless, such criminal behavior, which is also known as "overt price-fixing," is covered by Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), and falls outside the scope of this Note. *See* discussion *infra* part I.B.1 (explaining that this Note focuses on the Clayton Act rather than the Sherman Act, because the Clayton Act generally deals with

tion's market power may be significant enough to raise market prices unilaterally.[72] Unilateral market power is particularly likely where the corresponding reduction in competition between two firms, which produce and sell in similar markets, results in market domination.[73] Second, by intensifying market concentration, a horizontal merger may impede competitive pricing where the market's remaining firms have the opportunity to tacitly coordinate pricing decisions.[74] It is important to note, though, that merely allowing fewer firms to operate in a particular market does not inherently stifle competition.[75] Rather, fewer firms may actually *stimulate* competition, by increasing the combined firm's economies of scale, which, in turn, enables the merging companies to compete more effectively with larger corporations that dominate the market.[76] Consequently, antitrust law bars only those horizontal mergers that facilitate oligopolistic behavior.[77]

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anticompetitive mergers and acquisitions).

72. 1992 Merger Guidelines, *supra* note 64, § 0.1.

73. *Id.*

74. *See Archer Daniels Midland*, 781 F. Supp. at 1421. As the court explained in *Archer Daniels Midland*:

> The presumption that increased concentration is likely to lead to a reduction in competition is based on the rationale that a reduction in the number of competitors in a market makes it easier for competitors to coordinate pricing and other terms of sale, and thus more likely that they will do so.

Id. For a more in-depth discussion of market concentration and its effects on competition, see *infra* part I.C.2.

75. *See supra* note 62 and accompanying text.

76. *See Brown Shoe*, 370 U.S. at 319 (explaining that Congress recognized the benefit to competition that might flow from a merger between two small companies, where the effect of the merger is to enable the combined companies to compete more effectively with larger corporations that dominate the market).

77. *See* 1992 Merger Guidelines, *supra* note 64, § 0.1 (stating that the DOJ and the FTC will not challenge mergers that are either competitively beneficial or neutral). An oligopoly is an economic condition where only a few companies sell substantially similar or standardized products. *See* United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41, 49 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956). Oligopoly markets often exhibit the lack of competition, high prices, and low output of monopoly markets. Harkins Amusement Enters. v. General Cinema Corp., 850 F.2d 477, 490 (9th Cir. 1988).

b. Vertical Mergers

Antitrust law does not, however, scrutinize all mergers as strictly as it does in the case of horizontal transactions.[78] In contrast, it treats vertical mergers[79] relatively leniently because such transactions are less likely to create competitive problems.[80] This is because the merging firms, as non-competitors, generally have no immediate ability to coordinate their actions and exercise market power.[81] Even so, vertical mergers are not "invariably innocuous" as a consequence.[82]

Vertical integration,[83] by tying a customer to a supplier, threat-

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78. BRUNNER ET AL., *supra* note 68, at 16 (explaining that horizontal mergers receive more scrutiny than any other category of merger); E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1, 42-44 (1982).

79. Both vertical and conglomerate mergers are collectively referred to as "non-horizontal" mergers. U.S. Dep't. of Justice, Merger Guidelines § 4.11 n.25 (1984) [hereinafter "1984 DOJ Merger Guidelines"], *reprinted in* 49 Fed. Reg. 26,823 (1984); *see infra* notes 99-105 and accompanying text (discussing conglomerate mergers). According to the 1984 Guidelines, while a non-horizontal merger could be characterized as either "vertical" or "conglomerate" under traditional usage, the more specific label adds nothing to the analysis. 1984 DOJ Merger Guidelines, *supra*, § 4.11 n.25.

80. Although the FTC and the DOJ jointly issued revised horizontal guidelines in 1992, the 1992 guidelines do not discuss non-horizontal mergers. *See* U.S. Dep't. of Justice & Fed. Trade Comm'n, Statement Accompanying Release of Revised Merger Guidelines (1992) [hereinafter "1992 Merger Guidelines Statement"], *reprinted in* 57 Fed. Reg. 41,552 (1992). In fact, the agencies explicitly stated that the 1992 guidelines did not affect or change any former policies regarding non-horizontal mergers. *Id.* As a result, the 1984 merger guidelines are still the appropriate standard for analyzing non-horizontal mergers. *Id.*

81. 4 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 1000, at 207 (1980); ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 225-45 (1978); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 143 (1984); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 17 (1981).

82. 1984 DOJ Merger Guidelines, *supra* note 79, § 4.0; AREEDA & KAPLOW, *supra* note 30, ¶ 502, at 794 (explaining that vertical and conglomerate mergers are to be feared because of their potential impact on market concentration in the future).

83. Vertical integration may result not only from mergers, but also from internal expansion. *See, e.g.*, United States v. Columbia Steel Co., 334 U.S. 495, 525-26 (1948) (discussing internal expansion and vertical integration in the railroad industry). For example, a milk bottler, wishing to expand vertically, may find it cheaper to develop milk production facilities, rather than to acquire them. While the end result on competition may be identical in either case, in the eyes of antitrust law, "corporate growth by internal

ens to "act as a 'clog on competition,'"[84] and "deprive[s] . . . rivals of a fair opportunity to compete,"[85] because it forecloses the competitors of either party from a segment of the market otherwise open to them.[86] For at least a time, "[e]very extended vertical arrangement . . . denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement."[87] In other words, while a vertical merger does not reduce the total number of firms operating at any single level in the market, it does pose the danger that the merged entity will internalize all business.[88] Consequently, other firms at either market level may suddenly find themselves without customers or suppliers.[89]

Just as a vertical merger may impede a firm's current competitors from operating in a market, it may also frustrate potential new competitors from entering that market.[90] In some circumstances, firms already in the market may view the "acquiring firm"[91] as a

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expansion is socially preferable to growth by acquisition." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963). As a result, courts are less likely to find a violation of antitrust policy in the former situations. *See* Stephen G. Breyer, Symposium: *Anticipating Antitrust's Centennial: Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1037 (1987) (discussing courts' hesitation to find violations of antitrust law for internal expansion in the airline industry).

84. *Brown Shoe*, 370 U.S. at 324 (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949)).

85. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949), *quoted in Brown Shoe*, 370 U.S. at 324.

86. *Brown Shoe*, 370 U.S. at 324.

87. *Id.*

88. *See, e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 149 (1948) (motion pictures); United States v. AT&T, 524 F. Supp. 1336, 1348-57 (D.D.C. 1981) (telephone).

89. That vertical integration may result in foreclosure to competitors of customers and suppliers is not, however, without heavy criticism. Some commentators argue that internal transfers in a vertically-merged entity are still subject to market forces. *See, e.g.*, Paul L. Joskow, *The Role of Transaction Cost Economics in Antitrust and Public Utility Regulatory Policies*, 7 J.L. ECON. & ORG. 53, 58-59 (1991). Such commentators maintain that the vertically-integrated firm will still buy or sell from outside the firm, where external transfers ultimately result in a product that costs less or is higher in quality. *Id.* at 58-59.

90. *See* Alberta Gas Chemicals v. E. I. du Pont de Nemours, 826 F.2d 1235, 1253-54 (3d Cir. 1987) (discussing "perceived potential competition" and "actual potential competition"), *cert. denied*, 486 U.S. 1059 (1988).

91. In the context of a vertical merger, an "acquiring firm" is a potential entrant to

potential entrant,[92] and may have maintained competitive prices in order to deter the acquiring firm's entry into that market.[93] With the elimination of the acquiring firm's threat of entry, however, other firms may have the opportunity to increase prices to excessive levels[94]—especially where potential entrants are few and where the acquiring firm had unique advantages over other potential entrants.[95] Thus, a vertical merger between a firm already in a market and a potential entrant to that market may remove "perceived potential competition,"[96] resulting in anticompetitive behavior.[97]

Similarly, a vertical merger may still provoke anticompetitive conduct—even if the market does not perceive the acquiring firm as a potential entrant—where the acquiring firm is, in fact, "actual potential competition."[98] While losing an actual potential entrant will not change immediate pricing decisions by market firms, the loss eliminates a future competitor's entry into the market in a "more procompetitive manner."[99] Consequently, the merger results in a lost opportunity for improving market performance that would

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a market, whereas an "acquired firm" is one which is already in that market. 1984 DOJ Merger Guidelines, *supra* note 79, § 4.11. As noted in the DOJ's 1984 Guidelines, the terms "acquired" and "acquiring" refer "to the relationship of the firms to the market of interest, not the way the particular transaction is formally structured." *Id.* § 4.11 n.26.

92. A "potential entrant" to a market is a company which has the skills, technology, and resources necessary to scale the entry barriers to a particular industry. SULLIVAN, *supra* note 39, § 205, at 633.

93. 1984 DOJ Merger Guidelines, *supra* note 79, § 4.111; SULLIVAN, *supra* note 39, § 205, at 633; *see, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 655, 658-59 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174-77 (1964).

94. 1984 DOJ Merger Guidelines, *supra* note 79, § 4.111; *see* SULLIVAN, *supra* note 39, § 205, at 633 (stating that the existence of potential entrants reduces the power of firms already in the market, by inhibiting excessive price increases); *see, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-33 (1973); FTC v. Procter & Gamble Co., 386 U.S. 568, 578, 580-81 (1967).

95. 1984 DOJ Merger Guidelines, *supra* note 79, § 4.111; *see* SULLIVAN, *supra* note 39, § 205, at 634.

96. 1984 DOJ Merger Guidelines, *supra* note 79, §§ 4.11-.112.

97. *Id.*

98. *Id.*

99. *Id.* § 4.12. For example, the acquiring firm could have entered through the development of an improved product or through a "toehold acquisition," which is the purchase of a present, small competitor. *Id.*

have resulted from adding a significant competitor.[100]

c. Conglomerate Mergers

Finally, of the three categories of mergers, conglomerate mergers are the least likely to pose antitrust problems. This is because a conglomerate acquisition, by definition, is typically between firms that operate in independent markets.[101] As such, the transaction will usually not have any direct effect on competition.[102] This is not to say, however, that conglomerate mergers cannot at least impair competition. In contrast, a conglomerate merger may retain characteristics of either a horizontal or vertical transaction and, as a result, pose corresponding threats.[103] In addition, some critics generally fear that large-scale conglomerate mergers result in an oversaturation of assets into too few hands.[104] These critics argue that such concentration of economic forces and decision-making units narrows individuals' economic choices and upsets democratic political processes.[105]

B. *Principles of Antitrust Merger Law and Economics*

Generally, the word "merger" in the antitrust analysis describes "a permanent union of previously separate enterprises."[106] For the most part, it is irrelevant as a matter of law whether either or both corporations survive.[107] Moreover, while antitrust statutes[108] often limit their analyses to "mergers," the word is merely a generic label

100. *Id.*

101. *See* Bauer, *supra* note 67, at 351 (defining a conglomerate merger as one between companies "that were neither previously in a direct competitive relationship nor in a buyer-supplier relationship").

102. *Id.* at 351-52.

103. *Id.* (explaining that conglomerate mergers may be less likely to threaten competition, but that they still pose the same anticompetition concerns as horizontal and vertical mergers). For example, just like vertical mergers, conglomerate mergers may deter perceived potential competition and actual potential competition. 1984 DOJ Guidelines, *supra* note 79, §§ 4.11-.112.

104. AREEDA & KAPLOW, *supra* note 30, ¶ 530, at 881.

105. *Id.*; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

106. AREEDA & KAPLOW, *supra* note 30, ¶ 500, at 793.

107. *Id.*

108. *See infra* notes 113-20 (discussing the three primary antitrust statutes—the Clayton Act, the Sherman Act, and the Federal Trade Commission Act).

for nearly all forms of union.[109] Likewise, antitrust statutes apply equally to "all legal forms by which an amalgamation of assets may be consummated."[110] In addition, while the applicability of such statutes to transactions effected by acquiring assets, rather than by exchanging stock,[111] was once an issue, this distinction is no longer significant.[112]

1. Introduction to Federal Antitrust Law

The basic statutory antitrust prohibition for anticompetitive mergers and acquisitions is Section 7 of the Clayton Act ("Section 7"),[113] which, together with its subsequent amendments,[114] isolates

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109. AREEDA & KAPLOW, *supra* note 30, ¶ 500, at 793; *see also Brown Shoe*, 370 U.S. at 317 n.31 (explaining that legislative history explicitly states that Section 7 of the Clayton Act applies to all mergers—horizontal, vertical, and conglomerate); *infra* notes 113-29 and accompanying text (discussing the principles of Section 7 of the Clayton Act).

110. AREEDA & TURNER, *supra* note 81, ¶ 900, at 1.

111. The traditional stock transaction consists of the purchase of all the outstanding debt and voting securities of a publicly-traded target firm by an acquiring company. REED & LAJAOUX, *supra* note 66, at 287. Such deals can take many forms, including stock redemptions, tender offers, pure stock acquisitions, and reverse mergers. Patrick S. Dunleavy, *Leveraged Buyout, Management Buyout, and Going Private Corporate Control Transactions: Insider Trading or Efficient Market Economics?*, 14 FORDHAM URB. L.J. 685, 685 n.4 (1986) (citations omitted). In contrast, in an asset transaction, the target transfers all of the assets used in the business that is the subject of the sale. REED & LAJAOUX, *supra* note 66, at 287. Such assets include real estate, equipment, and inventory, as well as "intangibles," including contract rights, leases, patents, trademarks and so on. *Id.* at 283-84. These may be all or only part of the assets owned by the selling company. *Id.* at 284. Stock transactions, however, are more commonly used than asset transactions if the target company is publicly held. Dunleavy, *supra*, at 722.

112. *Philadelphia Nat'l Bank*, 374 U.S. at 337-38; H.R. REP. NO. 1191, *supra* note 85, at 4 ("Congress, in granting the [FTC] power to prevent purchases of stock, did not also give it the power to move against acquisitions of assets."). Congress eventually extended Section 7 of the Clayton Act to reach asset acquisitions by passing the Celler-Kefauver Act. *See* Act of Dec. 29, 1950, 64 Stat. 1125, 1125-26 (codified as amended at 15 U.S.C. § 18 (1994)).

113. Clayton Act of 1914, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (codified as amended at 15 U.S.C. § 18 (1994)). In addition to Section 7 of the Clayton Act, there are two other principal statutes that comprise federal antitrust law. The first statute is the Sherman Act of 1890. Sherman Anti-Trust Act of 1890, ch. 647, § 1 , 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)). Section 1 of the Sherman Act forbids contracts, combinations, and conspiracies that are in restraint of trade. 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize. 15 U.S.C. § 2. The other principal antitrust statute is the Federal Trade Commission Act of 1914, which, as amended, prohibits "unfair methods

and precludes transactions whose probable anticompetitive consequences exceed their likely benefits.[115] Section 7 states, in relevant part, "[n]o person . . . shall acquire . . . any part of the stock . . . or 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 to tend to create a monopoly."[116] While Section 7 is typically enforced by either the FTC or the Antitrust Division of the DOJ,[117] a private

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of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45 (1994).

In addition to the Sherman, Federal Trade Commission, and Clayton Acts, rules promulgated by agencies in certain regulated industries, such as banking and railroads, may restrict antitrust mergers and acquisitions. *See* BRUNNER ET AL., *supra* note 68, at ix n.3. For example, the Bank Holding Company Act of 1956 provides for review of mergers of bank holding companies by the Federal Reserve Board. 12 U.S.C. § 1842(a) (1994); *see also* BRUNNER ET AL., *supra* note 68, at 115. Similarly, the Interstate Commerce Act authorizes the Interstate Commerce Commission to regulate mergers of railroad, motor, and water carriers. 49 U.S.C. §§ 11343(a), (d)(1)-(2) (1994); *see also* BRUNNER ET AL., *supra* note 68, at 119.

Within the media industry, both newspapers and telecommunications companies are subject to some merger regulation by administrative agencies. *See* BRUNNER ET AL., *supra* note 68, at 120-21, 123-24 (discussing briefly the standards and procedures of merger enforcement in the newspaper and telecommunications industries). For example, the Newspaper Preservation Act authorizes a limited antitrust merger exemption, where a newspaper is in financial trouble. 15 U.S.C. §§ 1801-04 (1994); *see also* BRUNNER ET AL., *supra* note 68, at 120. Also, mergers among telecommunications companies may require approval by the FTC. *Id.* at 123. Nevertheless, merger enforcement by administrative agencies other than the DOJ or the FTC is outside the scope of this Note. Instead, this Note focuses only on developing an antitrust model for multimedia mergers and acquisitions that complies with Section 7 of the Clayton Act.

114. Section 7 of the Clayton Act was last amended in 1984. 15 U.S.C. § 18 (1984).

115. Interface Group v. Massachusetts Port. Auth., 816 F.2d 9, 10 (1st Cir. 1987); 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1500, at 362-63 (1986); *see* C. Paul Rogers, *The Limited Case for an Efficiency Defense in Horizontal Mergers*, 58 TUL. L. REV. 503, 509 (1983) ("[T]he lessening of competition should not be considered 'substantial' unless the potential anticompetitive aspects significantly outweigh, on balance, the procompetitive potentialities of the merger."). Part I.A.2, *supra*, explores the possible anticompetitive effects of mergers. Similarly, part I.A.1, *supra*, discusses the likely benefits that follow from mergers.

116. 15 U.S.C. § 18.

117. The DOJ and the FTC have concurrent authority to enforce Section 7 of the Clayton Act. *See* 15 U.S.C. § 25 (1994) (granting administrative authority to the DOJ to enforce the Clayton Act); *id.* § 21(a) (granting administrative authority to the FTC to enforce the Clayton Act); *see also* IRVING SCHER, ANTITRUST ADVISOR § 8.01, at 8-3 (1995) ("The Department of Justice . . . shares with the Federal Trade Committee (FTC)

party who claims actual or prospective damage as a result of a merger may also bring an enforcement action.[118] More importantly, private plaintiffs may still attack a merger, even if the government has approved or settled the disputed transaction.[119] Should a court or enforcement agency find a violation of Section 7, that court or agency may order an injunction against the merger or an order compelling divestiture of the property or other interests.[120]

Some commentators find Section 7 most striking for its "ambiguous language" and "enigmatic generality":[121] "any *line of commerce*;" "*substantially* to lessen competition;" "*tend* to create a monopoly."[122] These commentators add that a reader will not find clarification of such phrases elsewhere in the statutory language.[123] Moreover, as noted in Chief Justice Warren's majority opinion in *Brown Shoe v. United States*,[124] "[a] review of the legislative history of [Section 7 and its amendments] provides no unmistakably

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the authority to enforce [Section 7] of the Clayton Act."). In addition, in recent years, state attorney generals have begun to review proposed mergers that may affect consumers within their states. *See* REED & LAJAOUX, *supra* note 66, at 65.

118. *See, e.g.*, Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1363 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1564 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986).

119. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973); Cableamerica Corp. v. FTC, 795 F. Supp. 1082, 1086 (N.D. Ala. 1992). The law is, however, unsettled as to whether and under what circumstances private parties may bring such antitrust challenges. REED & LAJAOUX, *supra* note 66, at 65.

120. 15 U.S.C. § 21 (authorizing the FTC to order the divestment of assets and stock acquired in violation of Section 7); REED & LAJAOUX, *supra* note 66, at 58.

121. *See* BRUNNER ET AL., *supra* note 68, at 3 ("The language of Section 7 is terse and ambiguous."); *see also* 1 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 106, at 14 (1978) ("Neither the language nor the legislative history of the federal antitrust laws is very illuminating about what specifically is allowed or prohibited . . . .").

122. 15 U.S.C. § 18 (emphases added); *see* Bon-Ton Stores, Inc. v. May Dept. Stores Co., 881 F. Supp. 860, 867 (W.D.N.Y. 1994) (noting that Congress did not define precisely what it meant by some of its terms in Section 7).

123. BRUNNER ET AL., *supra* note 68, at 3 ("There is little enlightenment as to these generalities elsewhere in the statutory language . . . .").

124. 370 U.S. 294 (1962). *Brown Shoe* was the first Supreme Court decision to interpret the amended Section 7. *Id.* at 311. Although *Brown Shoe* was decided in 1962, it is still frequently cited as one of the controlling Supreme Court decisions for antitrust law. *See, e.g.*, *Bon-Ton Stores*, 881 F. Supp. at 867.

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."[125] Therefore, with no definitive standards to apply, courts and enforcement agencies have broad power in determining the scope of Section 7.[126]

This is not to say, however, that there is no guidance available for evaluating mergers. The Supreme Court, in *Brown Shoe*, constructed a framework for antitrust analysis, using the congressional fears of "a rising tide of economic concentration" that prompted the Clayton Act and its subsequent amendments.[127] As originally stated in the legislative history surrounding the original Clayton Act and its subsequent amendments,[128] it was this dynamic force of economic concentration that Congress sought to halt "at its outset and before it gathered momentum."[129]

2. Framework for Section 7 Analysis—Economic Principles as Guidance

While the *Brown Shoe* Court uncovered many of the congressional goals behind the Clayton Act, the Court could neither identify nor devise any definitive quantitative or qualitative test to gauge the anticompetitive effects of a given merger.[130] Nevertheless, while the lack of a "bright line" test complicates a merger's evaluation, Section 7's ambiguity does not preclude an antitrust analysis.[131] As the Court noted in *Brown Shoe*, Congress intended that

125. *Brown Shoe*, 370 U.S. at 315.

126. *See Bon-Ton Stores*, 881 F. Supp. at 866 ("A review of the relevant statutes reveals that Congress intended to vest the courts with broad power to prohibit and enjoin mergers and acquisitions . . . .").

127. *Brown Shoe*, 370 U.S. at 315-16 ("Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.").

128. H.R. REP. NO. 1191, *supra* note 85, at 8 (stating that Section 7 is intended to permit intervention in incipient monopolies); S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950) ("The intent here . . . is to cope with monopolistic tendencies in their incipiency . . . ."); S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914) (enunciating reasons for enactment of the Clayton Act).

129. *See Brown Shoe*, 370 U.S. at 318.

130. *Id.* at 321-22.

131. *See* Lissa Lamkin Bromme, *The Influence of Enhanced Thrift Institution Powers*

economic principles guide the statute's application to specific mergers:[132] whether a merger lessens competition or creates a monopoly cannot be determined without a detailed consideration of economic and market realities.[133] Consequently, a court or enforcement agency must view a merger functionally—in the context of the merger's particular industry.[134]

In addition to evaluating a merger comparatively, a court or agency must concentrate on the relevant economic and business facts of each individual case.[135] Such "facts," however, need not be unequivocal—Congress was concerned with probabilities, not certainties.[136] As the Court in *Brown Shoe* reasoned, other statutes proscribed "clear-cut menaces to competition."[137]

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on Commercial Bank Market Expansion, 67 N.C. L. REV. 795, 821 (1989) (explaining that while there are "no definite quantitative or qualitative tests . . . to determine whether [a merger] may 'substantially' lessen competition, . . . other relevant factors . . . help to gauge a merger's probable effect on competition") (citations omitted).

132. *Brown Shoe*, 370 U.S. at 322 n.38.

133. Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 466-67 (1992) (Sherman Act) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."); General Indus. Corp. v. Harz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987); *Bon-Ton Stores*, 881 F. Supp. at 869.

134. *Brown Shoe*, 370 U.S. at 321-22. Such industries, according to the Court, should be evaluated with a number of factors in mind, including: (1) how fragmented or concentrated the industry is, and (2) whether the 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.* at 322.

135. *See id.* at 321 n.36 (discussing some of the transaction-specific factors that Congress considered relevant in determining whether a particular merger is anticompetitive); United States v. Archer Daniels Midland Co., 781 F. Supp. 1400, 1402 (S.D. Iowa 1991) (explaining that an antitrust merger analysis requires consideration of "other factors" pertinent to the transaction); *see also Bon-Ton Stores*, 881 F. Supp. at 877 (examining the business facts of the particular merger).

136. *Brown Shoe*, 370 U.S. at 323. The Senate was explicit on this point:

> The use of these words ['may be'] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [sic] effect . . . . The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.

S. REP. NO. 1775, *supra* note 128, at 6, *quoted in Brown Shoe*, 370 U.S. at 323 n.39 (alterations in original).

137. *Brown Shoe*, 370 U.S. at 323; *see supra* note 113 (describing the Sherman Act

C. *Practical Steps for Antitrust Merger Analysis*

In following the *Brown Shoe* court's guidance for Section 7 jurisprudence, courts have developed a three-step test for the antitrust merger analysis: (1) define the relevant market; (2) estimate the merging firms' strength in the relevant market; and (3) examine industry- and transaction-specific factors.[138]

1. Define the Relevant Market

The first step in any antitrust analysis is defining the relevant market in which the merging firms operate.[139] According to Section 7's language, this first step requires a determination of the combined entity's "line of commerce," or product market,[140] and the "section of the country," or geographic market, in which it operates.[141] In constructing the "outer boundaries of a product market,"[142] a court or enforcement agency will first focus on how reasonably interchangeable a product is with its substitutes.[143]

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and the Federal Trade Commission Act—two other statutes that deal with "clear-cut menaces to competition").

138. *See Archer Daniels Midland*, 781 F. Supp. at 1402 (describing a four-step analysis, where step one, defining the relevant market, is broken down into two components: the relevant product market and the relevant geographic market); *see also infra* notes 139-74 and accompanying text (defining "product markets" and "geographic markets").

139. The requirement for a relevant market definition stems from Section 7's proscription of anticompetitive mergers "in any line of commerce . . . in any section of the country." 15 U.S.C. § 18. As a result, the determination of the relevant market is a necessary predicate for finding a Section 7 violation. United States v. E. I. du Pont de Nemours, 353 U.S. 586, 593 (1957).

140. Products are grouped into a market to create "a line of commerce," because of the competition that exists among them. United States v. Aluminum Co. of Am., 377 U.S. 271, 275 (1964); *see also* United States v. Continental Can Co., 378 U.S. 441, 457 (1964) (holding that a line of commerce is a market for a product).

141. Spectrum Sports, Inc. v. McQuillian, 113 S. Ct. 884, 892 (1993); United States v. Marine Bancorporation, 418 U.S. 602, 618-19 (1974); *Bon-Ton Stores*, 881 F. Supp. at 867.

142. *Brown Shoe*, 370 U.S. at 325.

143. *See* 1992 Merger Guidelines, *supra* note 64, § 1.11 n.9. As an aid in determining the product market, the DOJ and the FTC have created the "five-percent" test. *Id.* § 1.11; *see Bon-Ton Stores*, 881 F. Supp. at 872. Under the five-percent test, the DOJ and the FTC seek to identify a group of products upon which a hypothetical monopolist could profitably impose at least a "small but significant and nontransitory" price increase. 1992 Merger Guidelines, *supra* note 64, § 1.11; *Bon-Ton Stores*, 881 F. Supp. at 872. In making this determination, the DOJ and the FTC, in most contexts, will use a price increase of five percent lasting for the foreseeable future. 1992 Merger Guidelines, *supra*

Keeping price, use, and qualities in mind, the more that products are reasonably interchangeable, the more likely it is that they should be in the same product market.[144] Such interchangeability is also measured from both the demand and supply sides.[145] From the demand, or consumers', side, the test is "cross elasticity of demand":[146] how easily consumers can substitute one product for another.[147] In contrast, the test from the supply, or producers', side is "cross elasticity of supply":[148] how easily producers, who do not currently make the relevant product, may alter their production in order to produce it.[149] Therefore, even if consumers do not consider two products substitutes, those two products may still constitute a single product market for antitrust purposes, if producers can easily substitute production of one for the other.[150]

Determining the relevant product market also requires considering whether certain products are usually bought or sold as a

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note 64, § 1.11; *Bon-Ton Stores*, 881 F. Supp. at 872. The smallest group of products that satisfies this test is then considered to be the product market. 1992 Merger Guidelines, *supra* note 64, § 1.11; *Bon-Ton Stores*, 881 F. Supp. at 872.

144. *Brown Shoe*, 370 U.S. at 325; *see also* United States v. E. I. du Pont de Nemours, 351 U.S. 377, 395, 404 (1956). According to the *Brown Shoe* Court, "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." 370 U.S. at 326.

145. *See Brown Shoe*, 370 U.S. at 325 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *id.* at 325 n.42 ("The cross-elasticity of production facilities may also be an important factor in defining a product market . . . .").

146. *Id.* at 325; Hayden Publ. Co. v. Cox Broadcasting Corp., 730 F.2d 64, 70 n.9 (2d Cir. 1984); Adams & Brock, *supra* note 17, at 312 ; WILLIAM G. SHEPHERD, PUBLIC POLICIES TOWARD BUSINESS 163-64 (7th ed. 1985); *see* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 960 n.39 (1981).

147. *Hayden Publ. Co.*, 730 F.2d at 70 n.8, 71; Adams & Brock, *supra* note 17, at 312; SHEPHERD, *supra* note 146, at 163-64.

148. *Id.*; Landes & Posner, *supra* note 146, at 948-49; *see Brown Shoe*, 370 U.S. at 325 n.42 (calling this variable "cross-elasticity of production facilities").

149. Harry Boadwee, *Product Market Definition for Video Programming*, 86 COLUM. L. REV. 1210, 1217 (1986).

150. For example, in the eyes of most consumers, a wooden table leg is not a reasonable substitute for a baseball bat. *See id.* at 1217 n.38. Nevertheless, the two would be included in the same antitrust product market, if manufacturers could substitute production of the former, for the latter, with relative ease. *See id.*

group.[151] In such cases, the "cluster market" doctrine requires that the products, although not substitutes for one another, be grouped together into a single product market.[152] For example, in *United States v. Philadelphia National Bank*,[153] a leading case concerning the cluster market doctrine, the Supreme Court ruled that commercial banking services, including checking accounts, commercial loans, and savings accounts, constitute a single cluster market.[154] As such, the services should be evaluated separately from the markets for the services of savings banks, commercial loan companies, and other financial institutions.[155] Thus, while various commercial banking services are not substitutes for each other, the fact that they are usually purchased in a group justifies treating them as a single product market.[156]

Finally, drawing the relevant "line of commerce" also requires examining the market's competitive performance and supplier conduct.[157] This approach focuses on the supplier's ability to price discriminate, which is the capacity to manipulate a product's price.[158] Price discrimination is typically accomplished by either charging different prices for the same product at different times,[159]

151. United States v. Household Fin. Corp., 602 F.2d 1255, 1258 (7th Cir. 1979); United States v. AT&T, 524 F. Supp. 1336, 1375-76 (D.D.C. 1981).

152. United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359-61 (1970); Note, *Rationalizing Antitrust Cluster Markets*, 95 YALE L.J. 109, 117 n.41 (1985). When a consumer consistently purchases goods from one supplier, even though those goods are not substitutes, the practice is known as "one-stop shopping." *See In re* Grand Union Co., 102 F.T.C. 812, 998-99, 1044 (1983). According to one commentator, cable and satellite television offer "one-stop shopping," while broadcast television does not. Boadwee, *supra* note 149, at 1226. As a result, cable and satellite television would be subject to "cluster market" principles, while broadcast television would not. *Id.*

153. 374 U.S. 321 (1963).

154. *Id.* at 356; *see also Phillipsburg Nat'l Bank*, 399 U.S. at 359-61.

155. *See Philadelphia Nat'l Bank*, 374 U.S. at 356 ("Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions . . . .").

156. *Id.* at 359-61.

157. SULLIVAN, *supra* note 39, §§ 25-30, at 80-90, § 32, at 92-93.

158. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 14.1, at 516 (1st ed. 1994).

159. This phenomena, which is known as "temporal price discrimination," was a common practice used by the motion picture industry in the 1930s and 1940s. *See* Boadwee, *supra* note 149, at 1221; *see, e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 144-45, 170-71 (1948). In *Paramount Pictures*, the Supreme Court examined

or by "bundling"[160] the products and selling them as a group for a price lower than the sum of the individual products' prices.[161] Generally, where a producer can sell the same product to consumers at different prices, either through temporal price discrimination or through bundling, the product market definition must be narrowed to include only that product.[162] This is because persistent price discrimination indicates a lack of effective competition in the market.[163] As a result, antitrust law narrows the product market to protect "diehard consumers"[164] from discretionary exercises of mar-

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the motion picture industry's custom of running the same film in a series of "runs," separated by "clearance" times. *See id.* at 144-45 & n.6 (defining "clearances" and "runs"). Each run, in turn, was coupled with a corresponding drop in the movie ticket price. *Id.* at 170-71 (finding that certain contract provisions required first-run theaters to charge the highest price, the second-run theaters the next highest, and so on). Such practices serve to maximize the amount of consumer surplus that a supplier can capture, by coercing the consumers who value the product more to pay a higher price. *See* Boadwee, *supra* note 149, at 1221-22. The practice of exhibiting films in runs still exists today. *See, e.g.*, *Syufy*, 903 F.2d at 665.

160. "Bundling" is defined as a consolidated packaging of services. *See* Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COM. L.J. 215, 230 (1991).

161. *See* Boadwee, *supra* note 149, at 1222 (citations omitted). Commodity bundling may be subdivided into "pure" bundling, where the individual products cannot be purchased separately, and "mixed" bundling, where the individual products can be purchased separately from the bundle. *Id.*

162. *Id.* at 1222 n.87. Nevertheless, at least one commentator has argued that the Supreme Court has never "articulated" this analysis. SULLIVAN, *supra* note 39, § 17, at 62.

163. 2 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 534a2, at 179 (1995).

164. A "diehard consumer" is one who has a decided preference for a particular product, even though others find the product substitutable. Boadwee, *supra* note 149, at 1223 (citations omitted). Some lines of commerce are especially susceptible to diehard consumers. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 106-07 (1984) (finding that the pricing structure for NCAA college football is unresponsive to consumer demand); International Boxing Club v. United States, 358 U.S. 242, 250 (1959) (finding that spectators are willing to pay "substantially more" for tickets to championship boxing fights than for nontitle fights); Columbia Broadcasting Sys. v. FTC, 414 F.2d 974, 979 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

In describing one type of diehard consumer, the *Columbia Broadcasting* court explained that:

> A [typical phonograph record] club member is one who prefers to sit at home and select records rather than make many trips to the store; wants guidance in

ket power.[165] Ultimately, the consequence of including products that are not subject to price discrimination in the same market as those that are is that the investigating court or agency will perceive the price discriminator as having less market power than it actually has, resulting in a skewed antitrust analysis.[166]

Once a court or enforcement agency has determined the product market, it must delineate the relevant geographic market.[167] In general, the concerns behind geographic markets parallel those of product markets: both definitions ultimately turn on product substitutability, the clustering doctrine, and market behavior.[168] Regarding the geographic market, the "area of effective competition"[169] is either the area in which consumers reasonably turn to obtain substitute products or the area defined by actual sales patterns and con-

> repertoire selection; seeks economic values and is willing to accept the disadvantages of club membership such as long waiting periods for delivery, limited selection and a contractual commitment as to the number of purchases.

Id.

165. Boadwee, *supra* note 149, at 1228.

166. *See* Walker Process Equip., Inc., v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965) (holding that "[w]ithout a definition of [the product] market there is no way to measure [the] . . . ability [of the challenged acquisition] to lessen or destroy competition"); *Bon-Ton Stores*, 881 F. Supp. at 867 (noting that many antitrust cases hinge on the definition of the relevant product market); *see also id.* at 869 (finding that an overbroad definition of the relevant product market results in an antitrust merger analysis that fails to acknowledge anticompetitive behavior).

167. *See Marine Bancorporation*, 418 U.S. at 618 ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act . . . ."); *Bon-Ton Stores*, 881 F. Supp. at 867 ("A necessary first step in the evaluation of an antitrust claim is a determination of the relevant product market and geographic market."); *Archer Daniels Midland*, 781 F. Supp. at 1402 (explaining that a determination of the relevant geographic market is the second step of a Clayton Act analysis).

168. *See* Warren G. Lavey, *Inconsistencies in Applications of Economics at the Federal Communications Commission*, 45 FED. COM. L.J. 437, 470 (1993); Roger D. Blair & Jeffrey L. Harrison, *Public Policy: Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U. L. REV. 331, 360 (1992) (discussing product market substitutability and market behavior as factors for determining the relevant geographic market); Werner, *supra* note 160, at 234.

169. *Philadelphia Nat'l Bank*, 374 U.S. at 359. In *Philadelphia National Bank*, the Supreme Court found that "in banking, as in most service industries, convenience of location is essential to effective competition." *Id.* at 358.

sumer convenience and preference.[170] The geographic area may be as small as a city and its environs,[171] or as large as the entire nation,[172] depending on the nature of the product in question.[173] Finally, where a merger has both horizontal and non-horizontal elements, there may be more than one geographic market for each aspect of the transaction.[174]

2. Estimate the Merging Firms' Strength in the Relevant Market

Once a court or enforcement agency has defined the relevant market, the second step is to estimate the degree of power that the unified firm would possess in that market.[175] Determining market power requires a series of ministeps: (1) identifying the competitor firms;[176] (2) computing market shares;[177] and, (3) calculating market

170. *Id.* at 358-59. Alternatively, the relevant geographic market has been defined as the region "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Id.* at 357.

171. *See, e.g., Marine Bancorp.*, 418 U.S. at 619. In *Marine Bancorporation*, the Court held that where a large, nationally charted bank acquired a medium-sized state bank, the relevant geographic market was the metropolitan area in which the acquired bank conducted business. *Id.* at 606-07, 619.

172. *Brown Shoe*, 370 U.S. at 337; *Philadelphia Nat'l Bank*, 374 U.S. at 361-62.

173. 1984 DOJ Merger Guidelines, *supra* note 79, § 2.31.

174. *See, e.g., Brown Shoe*, 370 U.S. at 328, 339. In *Brown Shoe*, the Court created separate geographic markets for the horizontal and vertical aspects of the deal. *See id.* at 328, 339. With regard to the horizontal aspect of the merger, the Court recognized that while the transaction was between two shoe retailers, the merging companies sold shoes in mutually exclusive geographic markets: one in cities with populations over 10,000, and the other in very small communities. *See id.* at 339. As a result, the Court concluded that the relevant geographic market, for purposes of the horizontal analysis, was cities of 10,000 or more, and the corresponding environs in which both companies retailed through their own outlets. *Id.* In contrast, the vertical aspect of the *Brown Shoe* merger united the nation's fourth largest shoe manufacturer with a retailer owning and operating the nation's largest independent chain of family shoe stores. *Id.* at 300, 303. Consequently, the Court held that the appropriate geographic market, for purposes of analyzing the vertical element of the merger, was the entire nation. *Id.* at 328.

175. *Archer Daniels Midland*, 781 F. Supp. at 1402; *see* SULLIVAN, *supra* note 39, § 22, at 74 (stating that after defining the relevant market, the next step is to determine the merging firms' position relative to those with which it competes).

176. *See* 1992 Merger Guidelines, *supra* note 64, § 1.3.

177. *See id.* § 1.4.

concentration.[178] The first two ministeps are relatively easy. First, an in-depth analysis of the relevant product and geographic markets usually establishes all competitors.[179] According to the 1992 Merger Guidelines, competitors include firms that currently produce or sell the market's products in the market's geographic area.[180] In addition, competitors may include other firms, depending on their likely supply responses to a "small but significant and nontransitory" price increase by the unified firm.[181] Such potential competitors,[182] however, will only be considered if they would likely enter the market within one year, and without the expenditure of significant sunk costs.[183]

The second ministep, computing market shares, is equally straight-forward. Market shares for all market participants are based on the total sales or capacity currently devoted to the relevant market, together with what would be devoted to the relevant market in response to a "small but significant and nontransitory" price increase.[184] In addition, the market shares can be expressed either in dollar or physical terms, through measurement of sales, shipments, or production.[185]

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178. *See id.* § 1.5.

179. Laura L. Stephens, *Nonprofit Hospital Mergers and Section 7 of the Clayton Act: Closing an Antitrust Loophole*, 75 B.U. L. REV. 477, 495 (1995).

180. 1992 Merger Guidelines, *supra* note 64, § 1.0.

181. *Id.*; *see supra* note 146 and accompanying text (discussing "cross elasticity of demand" and reasonable demand substitutes).

182. Potential competitors, in this context, are known as "uncommitted entrants." 1992 Merger Guidelines, *supra* note 64, § 1.32.

183. *Id.* "Sunk costs" are defined as "[c]osts which have been incurred and cannot be reversed." BREALEY & MEYERS, *supra* note 39, at G10.

184. 1992 Merger Guidelines, *supra* note 64, § 1.41.

185. *Id.*; United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (expressing market share in dollar terms of sales); United States v. International Boxing Club of N.Y., Inc., 348 U.S. 236, 240 (1955) (expressing market share in terms of number of championship boxing matches held in the United States between June 1949 and March 1952); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (expressing market share in terms of physical production). Courts are entitled to rely on any of several indicia of market share for media firms, as well. *See Syufy*, 903 F.2d at 666 n.10 (holding that market share indicia for an exhibitor of films may include "its percentage of first-run films, its percentage of first-run playdates and its percentage of gross box office receipts").

In contrast to the first two ministeps for estimating the merging firms' strength in the relevant market, the third—calculating market concentration—is often an abstract and inexact process.[186] Generally, market concentration is "a function of the number of firms in a market and their respective market shares."[187] Nonetheless, there is no structural test or methodology for carrying out this general rule that is consistently reliable.[188] In fact, in many of the earlier antitrust decisions, courts determined market concentration and the corresponding market power of the merging firms on an *ad hoc* basis.[189] For example, in *United States v. Aluminum Company of America*,[190] the court held that the defendant, the Aluminum Company of America ("Alcoa"), possessed monopoly power, based simply on the company's massive 90 percent share of the relevant market.[191] Similarly, in *United States v. Grinnell*[192] and *Amplex of Maryland, Inc. v. Outboard Marine Corporation*,[193] 87 percent of a national market,[194] and 60 percent of a relevant market,[195] respec-

186. *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486, 494-504 (1973) (holding that while the Government's statistical showing might have been sufficient to support a finding of "undue concentration" in the absence of other considerations, the district court was justified in finding that other pertinent factors affected the coal industry and that the appellees' business mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition in question). Media is one industry in which concentration is particularly abstract and difficult to measure. *See, e.g.*, Robert Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 NW. U. L. REV. 159, 161 (1971).

187. 1992 Merger Guidelines, *supra* note 64, § 1.5.

188. *See* SULLIVAN, *supra* note 39, § 22, at 76 ("It would be a boon if there were a self-executing, two dimensional structural test for monopoly power—if the need were simply to define the market and compute defendant's share to see if it exceeds a critical threshold.").

189. *See, e.g.*, *Aluminum Co. of Am.*, 148 F.2d at 424.

190. 148 F.2d 416 (2d Cir. 1945).

191. *Id.* at 429; *see also* SULLIVAN, *supra* note 39, § 22, at 76. One commentator argues that *Alcoa*'s 30-60-90 rule for determining market concentration is too rigid, because it produces "false positive" risk (the risk of setting the critical percentage too low) and "false negative" risk (the risk of establishing a critical percentage that is too high). SULLIVAN, *supra* note 39, § 22, at 76.

192. 384 U.S. 563 (1966).

193. 380 F.2d 112 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

194. *Grinnell*, 384 U.S. at 570-71, 576.

195. *Amplex*, 380 F.2d at 115.

tively, were held to constitute monopolies. In contrast, the Supreme Court in *United States v. United States Steel Corporation*[196] and *United States v. International Harvester Company*[197] held that there was no monopoly power where the defendant firms controlled 50 percent[198] and 64 percent[199] of their respective markets.[200]

In an attempt to move away from such *ad hoc* decisions and to allow corporations to better anticipate when an agency might challenge a particular merger,[201] the trend for determining market concentration has been toward applying the Herfindahl-Hirschman Index ("HHI"),[202] which is calculated by summing the squares of the individual market shares of all the market participants.[203] Because the HHI calculation squares the market shares, it gives proportionately greater weight to larger firms, in accord with their relative importance in the market.[204] As a result, a lack of information about a market's smaller firms is generally not critical, because such firms do not affect the HHI calculation significantly.[205]

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196. 251 U.S. 417 (1920)

197. 274 U.S. 693 (1927)

198. *United States Steel Corp.*, 251 U.S. at 445; *see also id.* at 451 ("the law does not make mere size an offence [sic]").

199. *Int'l Harvester Co.*, 274 U.S. at 709; *see also id.* at 708 ("The law . . . does not make the mere size of a corporation . . . an offense.").

200. *See* SULLIVAN, *supra* note 39, § 22, at 75 (discussing *United States Steel Corporation* and *International Harvester Company*).

201. 1992 Merger Guidelines, *supra* note 64, § 0.

202. *See, e.g., id.* § 1.5; FTC v. PPG Industries, 798 F.2d 1500, 1503 (D.C. Cir. 1986); *Archer Daniels Midland*, 781 F. Supp. at 1421.

203. 1992 Merger Guidelines, *supra* note 64, § 1.5. The 1992 Merger Guidelines offer an example of the HHI: a market consisting of four firms, with market shares of 30 percent, 30 percent, 20 percent and 20 percent, has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). *Id.* § 1.5 n.17. The HHI ranges from 10000 (in the case of a pure monopoly) to a number approaching zero (in the case of a market with many firms, all of which have infinitesimal market shares). *Id.*

204. *Id.* § 1.5.

205. *Id.* § 1.5 n.17. Courts have, at times, downplayed the reliability of the HHI. *See* United States v. Baker Hughes, 908 F.2d 981, 992 (D.C. Cir. 1990) ("The Herfindal-Hirschman Index cannot guarantee litigation victories."); *see also* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975) (holding that while data on market shares may be sufficient, standing alone, to make a prima facie showing of anticompetitiveness, the parties to the merger can still rebut by "show[ing] that the market-share statistics gave an inaccurate account of the . . . probable effects on competition").

Both the FTC and the DOJ have adopted the HHI as a useful framework for antitrust analysis.[206] According to those agencies, a post-merger market that has an HHI of below 1000 is generally regarded as "unconcentrated."[207] Ordinarily, neither agency challenges mergers in such markets, because the transactions are unlikely to pose adverse competitive threats.[208] In contrast, a post-merger HHI between 1000 and 1800 is a "moderately concentrated" market.[209] Still, mergers in such markets usually go unchallenged where the mergers increase the HHI less than 100 points.[210] The FTC and the DOJ will, however, further analyze transactions in "moderately concentrated" markets where the HHI increases more than 100 points.[211] According to the enforcement agencies, this is because mergers in such markets pose "significant competitive concerns."[212]

Finally, the FTC and the DOJ broadly categorize those markets that have an HHI above 1800 as "highly concentrated."[213] Yet, neither enforcement agency is likely to investigate mergers in highly concentrated markets where the HHI increases less than 50 points.[214] If, however, this HHI increases more than 50 points, a merger will raise "significant competitive concerns."[215] Moreover, where the transaction increases the HHI 100 points or more, the FTC and the DOJ each presumes that the merger will likely create or enhance market power or facilitate its exercise.[216]

3. Examine industry- and transaction-specific factors

After defining the relevant market and estimating the merging firms' market power, the final step of the antitrust inquiry is to introduce factors that are specific to the structure of the merger's

206. 1992 Merger Guidelines, *supra* note 64, § 1.5; *Bon-Ton Stores*, 881 F. Supp. at 875 (describing the 1992 Merger Guidelines' reference to the HHI).
207. 1992 Merger Guidelines, *supra* note 64, § 1.5.
208. *Id.* § 1.51.
209. *Id.* § 1.5.
210. *Id.* § 1.51.
211. *Id.*
212. *Id.*
213. *Id.* § 1.5.
214. *Id.* § 1.51.
215. *Id.*
216. *Id.*

particular industry and the merger transaction itself.[217] The factors that are usually examined include difficulty of entry into the market[218] and efficiencies that result from the merger.[219] Regarding entry analysis, the 1992 Merger Guidelines state that a merger is not likely to create or enhance market power or to facilitate its exercise if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above pre-merger levels.[220] Entry is considered "easy" where it would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.[221] In such situations, the merger

217. *See General Dynamics Corp.*, 415 U.S. at 494-504 (holding that while the Government's statistical showing might have been sufficient to support a finding of "undue concentration" in the absence of other considerations, the district court was justified in finding that other pertinent factors affecting the coal industry and appellees' business mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition); FTC v. National Tea Co., 603 F.2d 694, 700 (8th Cir. 1979); *Archer Daniels Midland*, 781 F. Supp. at 1402; *see generally Brown Shoe*, 370 U.S. at 311-23 (finding that Congress intended that a variety of economic and other factors be considered in determining whether the merger was consistent with maintaining competition in the industry in which the merging companies operated). In *Philadelphia National Bank*, the Supreme Court found that:

> [I]ntense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Philadelphia Nat'l Bank, 374 U.S. at 363.

218. 1992 Merger Guidelines, *supra* note 64, § 3.0; *see, e.g.*, *Syufy*, 903 F.2d at 664; Oahu Gas Serv., Inc., v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir.) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (citations omitted), *cert. denied*, 488 U.S. 870 (1988); *Bon-Ton Stores*, 881 F. Supp. at 876.

219. 1992 Merger Guidelines, *supra* note 64, § 4; *see Syufy*, 903 F.2d at 669 ("Fostering an environment where businesses fight it out using the weapon of efficiency . . . is what the antitrust laws are meant to champion . . . .").

220. 1992 Merger Guidelines, *supra* note 64, § 3.0; *see also Syufy Enters.*, 903 F.2d at 664 (quoting 1984 DOJ Merger Guidelines, *supra* note 79, § 3.3).

221. 1992 Merger Guidelines, *supra* note 64, § 3.0.

raises no significant antitrust implications and ordinarily requires no further analysis.[222]

Similarly, both the FTC and the DOJ might permit an otherwise anticompetitive merger where the transaction may be reasonably necessary to achieve significant net efficiencies.[223] Such efficiencies may include economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms.[224] The FTC or the DOJ may also consider, although to a lesser degree, claimed efficiencies resulting from reduction in general selling, and administrative and overhead expenses.[225]

In addition to entry and efficiency analyses, many commentators argue that antitrust enforcement should consider the social and political implications of the proposed transaction.[226] This argument, which is one of the most controversial issues affecting antitrust jurisprudence,[227] gained significant prominence with Congress' passing of the Celler-Kefauver Amendment[228] to Section 7 in

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222. *Id.*; *see also* Colorado Interstate Gas v. Natural Gas Pipeline, 885 F.2d 683, 695-96 n.21 (10th Cir.), *cert. denied*, 498 U.S. 972 (1989); *Syufy*, 903 F.2d at 664 (quoting 1984 DOJ Merger Guidelines, *supra* note 79, § 3.3).

223. 1992 Merger Guidelines, *supra* note 64, § 4.

224. *Id.*

225. *Id.*

226. *See, e.g.*, Pitofsky, *supra* note 105, at 1051; Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is There any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273 (1985).

227. Symposium, *Recent Developments in the Telecommunications and Cable TV Industries*, 6 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 427, 430 (1996) (comments of Robert D. Joffe, Partner, Cravath, Swaine & Moore); Kirk Victor, *Merger Man*, NAT. J., Jan. 20, 1996, at 118 (profiling Robert Pitofsky, currently one of the biggest supporters of incorporating social and political concerns into the antitrust analysis); *Statement on Competition Policy and Mergers in the Telecommunications Industry: Hearings Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 4 (1993) (statement of Robert Pitofsky, Professor, Georgetown University Law Center) ("It has become common for antitrust economists, academics and lawyers to argue that the antitrust laws should be interpreted exclusively to serve economic goals–I believe that is wrong.").

228. Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1994)).

1950.[229] While such concerns subsequently guided many antitrust decisions during the Warren Court era,[230] they have remained relatively dormant since the 1970s.[231] Nonetheless, the recent trend toward consolidation in the media industry,[232] and the alleged corresponding threat to the marketplace of ideas,[233] has prompted many antitrust experts in academia, industry, and government to reopen for debate the role of social and political concerns in the antitrust analysis.[234]

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229. According to the *Brown Shoe* Court:

> The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy . . . . Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

Brown Shoe, 370 U.S. at 315-16; *see also supra* notes 113-37 and accompanying text (discussing history of the legislation and its amendments).

230. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Aluminum Co. of Am., 377 U.S. 271, *reh'g denied*, 377 U.S. 1010 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Allis Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969).

231. *See* Symposium, *supra* note 227, at 446 (comments of Creighton O'M. Condon, Esq., Partner, Cravath, Swaine & Moore, New York, NY); *see also* Cann, *supra* note 226, at 276 (arguing that *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), was the pivotal decision in removing social and political concerns from the antitrust analysis).

232. For example, Walt Disney acquired Capital Cities/ABC, Westinghouse purchased CBS, and Time Warner has announced a merger with Turner Broadcasting. Pearl, *supra* note 18, at A10. Other notable media mergers in the recent past include those between Time and Warner, and between Viacom, Paramount and Blockbuster. Dennis Leibowitz, *Media Mergers: The Underlying Economic Dynamics*, N.Y. L.J., Dec. 1, 1995, at 5. In addition, the past few years have seen a number of multi-billion dollar media and telecommunications joint ventures, including MCI and News Corp., Microsoft and NBC, Nynex Corp. and Viacom, US West and Time Warner, and Sprint and TCI. Farhi, *supra* note 26, at H1 ("When it comes to the media business, it's a small, small world and getting smaller all the time.").

233. *See supra* notes 18-26 and accompanying text (explaining that many commentators argue that large-scale media mergers threaten the diversity of voices in the media).

234. *Compare* Pearl, *supra* note 18, at A10 (comments of Steve Sunshine, former Deputy Assistant Attorney General for mergers in the Antitrust Division of the DOJ, arguing against including social and political concerns in the antitrust analysis) ("It may be

At the center of this controversy are contrasting concerns in the legislative history surrounding the Celler-Kefauver Amendment and the actual language of Section 7 regarding the role of non-economic factors in the antitrust analysis.[235] While the legislative history of the Celler-Kefauver Amendment emphasizes the social and political effects that would result from an unbridled accumulation of economic and political power within our country,[236] the actual statutory language of Section 7 does not refer to any such considerations.[237] This distinction has led to two conflicting approaches to merger enforcement policy:[238] the Chicago School Approach and the Multivalued Approach.[239]

a. The Chicago School Approach

The first approach, known as the Chicago School, advocates a

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that having a few large companies in the media business is bad social policy when under standard antitrust principles it's not.") *and* Victor, *supra* note 227, at 118 (former FTC Chairman, James C. Miller III, commenting that "[the FTC] ought to examine [the Time Warner-TBS merger] and make a decision based strictly within the four squares of the antitrust law and whether this merger would restrict competition . . . .") *with id.* (former FCC general counsel, Henry Geller, arguing that "[media] does require special and heightened [antitrust] scrutiny–for economic reasons but also for reasons dealing with the quality of life in a democracy").

235. Symposium, *supra* note 227 at 432 (comments of Joffe); Cann, *supra* note 226, at 273-74; *Panel Discussion: Merger Enforcement and Practice*, 50 ANTITRUST L.J. 233, 239 (1982) (comments of Robert D. Joffe, Member, New York Bar); Lawrence Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 4 (1980); *see* Pitofsky, *supra* note 105, at 1051 (arguing that the issue that separates differing schools for antitrust policy is whether non-economic considerations have any role in the antitrust analysis, and if so, how they should be defined and measured).

236. *See* discussion *supra* part I.B.1 (explaining that Congress feared an accelerated concentration of corporate power not only on economic grounds, but also because of the threat to other values a trend toward concentration was thought to pose).

237. *See* Cann, *supra* note 226, at 274 (noting that Section 7, on its face, "only prohibits those mergers where the effect may be substantially to lessen competition, or to tend to create a monopoly"); *see also* 15 U.S.C. § 18.

238. Cann, *supra* note 226, at 275; *Panel Discussion: Merger Enforcement and Practice*, *supra* note 235, at 239 (comments of Joffe) (arguing that divergence in the congressional record and the language of Section 7 led to the differing approaches to antitrust enforcement).

239. Symposium, *supra* note 227, at 432 (comments of Joffe) (explaining the differences between Chicago School and Multivalued approaches).

purely economic approach to the antitrust analysis by disregarding the guidance in the congressional record and, instead, focusing solely on the actual statutory language of Section 7.[240]

According to the Chicago School, "the major goals of antitrust relate to economic efficiency—to avoid the allocative inefficiencies of monopoly power, encourage efficiency and progressiveness in the use of resources, and perhaps, on fairness grounds, to maintain price close to cost in order to minimize unnecessary and undesirable accumulations of private wealth."[241]

Thus, proponents of the Chicago School emphasize the potential benefits that accompany merger activity, rather than stressing the potential non-economic dangers of such transactions.[242] These proponents argue that merger policy should seek to encourage efficiencies resulting from economies of scale, technological and product-related synergy, superior management, coordinated research and development, lower transportation and transaction costs, and the reduction of excess capacity.[243]

Ultimately, advocates of the Chicago School argue that the free market should be permitted to regulate itself, and that the primary—if not exclusive—evil that antitrust jurisprudence is to protect against is the creation or exercise of market power.[244] Consequent-

240. *Id.*; Cann, *supra* note 226, at 28; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925 (1979); Pitofsky, *supra* note 105, at 1051; *cf.* Adams & Brock, *supra* note 17, at 258 (describing the "revisionist" vision, a form of the Chicago School, as viewing most government intervention as counterproductive, and placing its faith in the operation of natural economic laws to protect the consuming public). The Chicago School approach was, in fact, officially used at one time by the DOJ. *See* U.S. Dep't. Justice, Merger Guidelines § V (B) n.54 (1982). Two of the leading Supreme Court decisions adopting the Chicago School rationale are *United States v. General Dynamics*, 415 U.S. 486 (1974), and *United States v. Marine Bancorporation*, 418 U.S. 602 (1974).

241. Pitofsky, *supra* note 105, at 1051.

242. Cann, *supra* note 226, at 284; Symposium, *supra* note 227 at 432 (comments of Joffe); *Panel Discussion: Merger Enforcement and Practice*, *supra* note 235, at 238-39 (comments of Robert H. Bork, Judge, U.S. Court of Appeals for the District of Columbia Circuit).

243. Cann, *supra* note 226, at 284; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582, 1599-1601 (1983).

244. Adams & Brock, *supra* note 17, at 282; Cann, *supra* note 226, at 284; Sympo-

ly, followers of the Chicago School argue that mergers should be analyzed purely in terms of their economic impact, irrespective of non-economic considerations.[245]

b. The Multivalued Approach

In contrast to the Chicago School approach, the Multivalued Approach recognizes that in passing Section 7, and more particularly the 1950 Celler-Kefauver Amendment, Congress squarely articulated its desire to preserve a variety of social and political values and to encourage an "economic way of life"[246] that was compatible with those values.[247] Based on the legislative history, many proponents of the Multivalued Approach argue "that a merger policy that fails to reflect social and political considerations would contravene the congressional mandate."[248]

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sium, *supra* note 227, at 432 (comments of Joffe); Pitofsky, *supra* note 105, at 1051; *see* John S. McGee, *Why Not "Deregulation" for Antitrust?*, *in* INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM: LEGAL, ECONOMIC, SOCIAL AND POLITICAL PERSPECTIVES 53, 61 (1st ed. 1979) (arguing that if consumers are willing to purchase the goods offered to them in the market, they are getting what they want, and their welfare is being maximized).

245. Adams & Brock, *supra* note 17, at 282; Cann, *supra* note 226, at 284; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 20 (1976); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986); Robert H. Bork, *Legislative Interest and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 47 (1966).

246. *Brown Shoe*, 370 U.S. at 333 (explaining that Congress was concerned not only with the anticompetitive economic effects of mergers, but also with the adverse social ramifications that mergers may cause).

247. Cann, *supra* note 226, at 277. According to Judge Hand, evidence of Congressional intent to expand the antitrust analysis beyond mere economics dates as far back as 1890, with the passing of the Sherman Act. *See Aluminum Co. of Am.*, 148 F.2d at 427-29.

248. *See* Cann, *supra* note 226, at 280. According to Robert Pitofsky, "[i]t is bad history, bad policy, and bad law to exclude political values in interpreting the antitrust law." Pitofsky, *supra* note 105, at 1051. Pitofsky reasons that:

> [T]he trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts. Such considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by the few, can and should be feasibly incorporated into the antitrust equation. Although economic concerns would remain paramount, to ignore these non-economic factors would

As a general rule, the Multivalued Approach expands the definition of "competition" beyond mere "prices, costs, and product innovations,"[249] to include a strong "socio-political" connotation.[250] Many proponents of the Multivalued Approach justify this broadened definition by arguing that Congress wished to avoid not only economic, but also social losses from mergers.[251] These proponents maintain, for example, that Congress sought to protect small businesses,[252] prevent the loss of communities' local economic independence to large, absentee corporations,[253] and preserve the social and civic ties that bind communities together.[254]

Some proponents of the Multivalued Approach also argue that Congress considered the danger to political institutions that accelerated economic concentration threatened.[255] In addition, these proponents suggest that a firm's political influence grows as a function of its size, creating political economies of scale and reducing the number and diversity of political decision-makers.[256] Therefore, Multivalued Approach advocates insist that political and social concerns are an integral part of the antitrust analysis.[257]

> be to ignore the bases of antitrust legislation and the political consensus by which antitrust has been supported.

Id. at 1075. Mr. Pitofsky's article provides several examples of legislative and judicial history that support his argument.

249. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 248 (1960).

250. *Id.*

251. *Statement on Possible Legislation Relating to Mergers by Large Corporations: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 2 (1983) (statement of Joseph Brodley, Professor, Boston University School of Law).

252. 95 CONG. REC. 11,506 (1949); 96 CONG. REC. 16,503, 16,507 (1950).

253. 96 CONG. REC. at 16,444, 16,450, 16,452.

254. 95 CONG. REC. at 11,495 (comments of Rep. Bryson).

255. *Id.* at 11,486.

256. *See* Michael Pertschuk & Kenneth M. Davidson, *What's Wrong with Conglomerate Mergers?*, 48 FORDHAM L. REV. 1, 6, 10 (1979); Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 591-92 (1973).

257. *See* Cann, *supra* note 226, at 280; Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources for Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1232 (1977); Pitofsky, *supra* note 105, at 1051; Bok, *supra* note 249, at 236.

II. HISTORICAL APPLICATION OF SECTION 7 TO MEDIA MERGERS AND ACQUISITIONS

It has been said that media and entertainment are industries "in which antitrust concepts such as product market and cross-elasticity of demand are exceptionally difficult to apply."[258] Much of this difficulty is attributable to the ambiguity that is associated with identifying competition between a particular media product "and the other forms of entertainment and enlightenment available in the community."[259] Moreover, as technology accelerates and additional channels for information multiply,[260] previous leading media anti-

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258. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 204 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

259. *Id.* at 204 (plaintiff challenged FCC's authority to promulgate rules for development of nationwide over-the-air subscription television); *see also id.* (discussing an FCC report, 15 F.C.C.2d 466 (1968), which suggests various product market definitions for the media industry).

260. In addition to "older media," such as print, motion pictures, radio, and broadcast television, recent developments in "new media" include satellite master antenna television systems (SMATVs), multi-channel, multi-point distribution systems (MMDS), direct broadcast satellites (DBS), and home satellite dishes (HSDs). *See* Werner, *supra* note 160, at 224 n.32.

Other recent developments in new media and telecommunications include: (1) real-time document/application sharing, which permits people in separate locations to share graphics, text, and annotations while simultaneously speaking over the same standard analog telephone line; and (2) the videoserver, which is the technology behind video-on-demand and the "Cinema of the Future"—specially equipped theaters and venues that will have the high-capacity and high-performance storage needed to deliver high-definition, digitized versions of first-run films and live sports over a fiber-optic network. Patrick Flanagan, *The 10 Hottest Technologies in Telecom: A Market Research Perspective*, TELECOMMUNICATIONS, May, 1995.

Finally, the media industry has experienced a recent surge in computerized information services. Telecommunications Act of 1996, Pub. L. No. 104-104, § 230(a)(1), 110 Stat. 56, 141 (1996) (to be codified at 47 U.S.C. § 230(a)(1)) (finding that "the rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources"); *id.*, 110 Stat. at 59-60 (to be codified at 47 U.S.C. § 153(a)(41)) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service"); *id.*, trust cases no longer reflect market realities accurately.[261] Consequently, antitrust analysis of the media industry has historically been a particularly challenging area for both the courts and enforcement agencies.[262]

This part examines the historical application of Section 7 to media mergers and acquisitions. In particular, it focuses on a consumer's ability to substitute media and how courts have defined the product market for four media sub-categories: newspapers, motion pictures, television, and radio.

A. *Newspaper Industry*

Since the 1940s, there have been numerous federal cases involving the application of antitrust law in actions by or against the publishers of newspapers or other periodicals.[263] Of these cases,

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110 Stat. at 142 (to be codified at § 230(e)(1)) (defining "Internet" as "the international computer network of both federal and non-federal interoperable packet switched data networks"); *id.*, 110 Stat. at 142 (to be codified at 47 U.S.C. § 230(e)(2)) (defining "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions"); *id.*, 110 Stat. at 142 (to be codified at 47 U.S.C. § 230(e)(3)) (defining "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service").

261. *Cf.* United States v. Loew's Inc., 882 F.2d 29, 33 (2d Cir. 1989) (explaining that the development of technology rendered obsolete the Supreme Court's 1948 decision in *United States v. Paramount Pictures*, 334 U.S. 131 (1948)); *see also* Pearl, *supra* note 18, at A10 (arguing that while antitrust law does allow antitrust regulators to take into account where markets are heading, it is difficult to discern where the media industry is heading, given all the rapid changes in communications).

262. *See* Boadwee, *supra* note 149, at 1210. For example, over the past twenty years, the FCC has purported that all information and entertainment media are reasonable substitutes, which consumers consider interchangeable. *Id.* (citations omitted). Under the FCC's definition, all information and entertainment media would constitute a single product market. *Id.*

Similarly, in his dissent in United States v. E. I. du Pont de Nemours, also known as the "Cellophane" case, Chief Justice Warren argued that the majority's definition of a relevant product market, in that particular case, would enable a monopolist of motion picture exhibition to "avoid Sherman Act consequences by showing that motion pictures compete in substantial measure with legitimate theatre, television, radio, sporting events, and other forms of entertainment." 351 U.S. 377, 423 (1956) (Warren, C.J., dissenting).

263. *See, e.g.*, Citizen Publ. Co. v. United States, 394 U.S. 131 (1969); Albrecht v.

however, only a few have involved the question of whether an acquisition by one newspaper of a competing newspaper violated Section 7.[264] Nonetheless, courts ruling in both Clayton Act and Sherman Act cases[265] have held nearly uniformly against including other forms of media, such as radio and television, in the relevant product market definition for the newspaper antitrust analysis.[266]

Herald Co., 390 U.S. 145 (1968); ADVO v. Philadelphia Newspapers, Inc., 51 F.3d 1191 (3d Cir. 1995); High Technology Careers v. San Jose Mercury News, 996 F.2d 987 (9th Cir. 1993); Morgan v. Ponder, 892 F.2d 1355 (8th Cir. 1989); *see also* D. E. Evins, Annotation, *Federal Antitrust Act as Applied to Publishers of Newspapers or Other Periodicals—Federal Cases*, 19 L. Ed.2d 1530, 1533 (1968) (explaining that since 1945, there have been many newspaper antitrust cases).

264. *See, e.g.*, Citizen Publ. Co. v. United States, 394 U.S. 131 (1969); Sun Newspapers, Inc. v. Omaha World-Herald Co., 713 F.2d 428 (8th Cir. 1983); C.A. Page Publ. Co. v. Telford Work, 290 F.2d 334 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); *see also* Evins, *supra* note 263, at 1533-34. For example, of the eight Supreme Court cases that involve newspapers and other periodicals, six focus on Sherman Act violations. *See, e.g.*, United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971) (Clayton and Sherman Acts) (printing of comic supplements); Citizens Publ. Co. v. United States, 394 U.S. 131 (1969) (Clayton and Sherman Acts); Albrecht v. Herald Co., 390 U.S. 145 (1968) (Sherman Act); Times-Picayune Publ. Co. v. United States, 345 U.S. 594 (1953) (Sherman Act); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (Sherman Act) (newspaper and radio station); Associated Press v. United States, 326 U.S. 1 (1945) (Sherman Act); Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268 (1934) (Sherman Act); Blumenstock Bros. Advertising Agency v. Curtis Publ. Co., 252 U.S. 436 (1920) (Sherman Act).

265. United States v. Archer Daniels Midland Co., 781 F. Supp. 1400, 1402 (S.D. Iowa 1991) ("The legal standards for an antitrust evaluation of an acquisition or merger are substantially the same under both the Clayton and Sherman Acts."); *see also* Brown Shoe v. United States, 370 U.S. 294, 325 (1962) (applying Sherman Act product market to Clayton Act claims).

266. *See, e.g.*, Paschall v. Kansas City Star Co., 695 F.2d 322, 326 n.4 (8th Cir. 1982) (affirming district court's conclusion that media, such as suburban newspapers, shoppers' guides, handbills, news magazines, television, and radio, are sufficiently different in purpose, content, technique, and audience appeal from metropolitan newspapers sold at wholesale to constitute a separate product market), *different results reached on reh'g*, 727 F.2d 692 (8th Cir.), *cert. denied*, 469 U.S. 872 (1984); Morning Pioneer, Inc. v. Bismark Tribune Co., 493 F.2d 383, 386 (8th Cir.) (finding that electronic media, such as television and radio, do compete with daily newspapers in the news and advertising fields, but that such media are not wholly competitive with respect to some types of news and advertising), *cert. denied*, 419 U.S. 836 (1974); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 441 F. Supp. 628, 635-36 (W.D.N.Y. 1977) (rejecting the argument that the relevant product market, daily metropolitan newspapers, should be broadened to include radio and television), *rev'd on other grounds*, 601 F.2d 48 (2d Cir.

As authority for excluding other media from the relevant market, many courts,[267] including one from 1995,[268] have looked to *United*

1979); United States v. Citizen Publ. Co., 280 F. Supp. 978, 986-87, 993 (D. Ariz. 1968) (holding that relevant product market was the daily newspaper business, where: (1) daily newspapers were the only media in the relevant geographic market that provided, on a daily basis, such things as local society news, schedules of current local events, reports of births and deaths, movie schedules, and box scores of local baseball games; (2) daily newspapers, weekly newspapers, radio, television, and magazines all supplied news and advertising content to the public; (3) only daily newspapers, radio, and television provided extensive coverage of local, state, national, and international news on a daily basis; (4) radio and television neither attempted to nor generally succeeded in reporting news with the same depth of coverage as daily newspapers; (5) "a newspaper may be picked up and read at the convenience of the reader, whereas the news broadcast by radio or television stations [could] only be heard if the set [was] on at the particular time that the station [was] broadcasting it"; (6) "newspapers constitute[d] a permanent record of news and information; broadcast news [was], by its very nature, transitory"; (7) of the media in *Citizen Publishing*, newspapers were primarily news-oriented, whereas radio and television were primarily entertainment-oriented; and (8) newspapers could not duplicate television and radio's "on-the-spot" coverage of news and sporting events), *aff'd*, 394 U.S. 131 (1969); *see also Times-Picayune*, 345 U.S. at 600, 611, 613 (discussing competition for advertising among newspapers and other communications media, such as radio, television, and magazines); *infra* note 268 (discussing the differences between local, metropolitan, and regional newspapers).

267. *See, e.g., Morning Pioneer*, 493 F.2d at 386; *Buffalo Courier-Express*, 441 F. Supp. at 636; Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1366 (N.D. Cal. 1974), *aff'd in part and rev'd in part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Bowen v. New York News, Inc., 366 F. Supp. 651, 675 n.56 (S.D.N.Y. 1973), *aff'd in part and rev'd in part*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); McKeon Constr. v. McClatchy Newspapers, 1970 Trade Cas. (CCH) ¶ 73,212, at 88,816 (D. Cal. Nov. 24, 1969); *see also* Keith Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 320-22 (1968).

268. *See* Community Publishers v. Donrey Corp., 892 F. Supp. 1146, 1157 (W.D. Ark. 1995) (decided on June 30, 1995). In *Community Publishers*, the government and private plaintiffs successfully challenged the purchase of a local daily newspaper, the *Northwest Arkansas Times* ("the *Times*"), by NAT, L.C. ("NAT"), which had significant shareholders in common with co-defendant Donrey Media Group ("Donrey"), owner of the *Morning News of Northwest Arkansas* ("*Morning News*"), a competing local daily newspaper. *Id.* at 1148. In finding the product market for readership to be local daily newspapers, the *Community Publishers* court explained why other mass media should be excluded from the relevant market definition:

> The local daily newspaper provides a unique package of information to its readers. Foremost, it provides national, state and local news. Many of the stories, such as those on high school sports and city council meetings, are of purely local interest. Readers also value other features of a local nature, including calendars of local events and meetings, movie and TV listings, classified

States v. Times Mirror Company,[269] a district court decision that was decided in 1967.[270]

In *Times Mirror*, the government challenged the $15 million[271] acquisition by the publisher of the largest daily newspaper in Southern California (the *Los Angeles Times*) of the largest independent[272] daily newspaper publisher in Southern California (The Sun Company).[273] The acquiring company, Times Mirror, was a highly diversified holding company with large interests in newspaper publishing, book publishing, and commercial printing.[274] Between 1960 and 1964, the earnings after taxes of the Times Mirror Com-

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> advertisements, other local advertising, legal notices, and obituaries. The format of the newspaper allows its message to be timely and detailed. Moreover, a newspaper is portable and allows readers access to information at their own convenience.
>
> The peculiar characteristics and uses of other media outlets are completely different. National and state newspapers have a similar format to local papers, but they contain no local news or advertising, which is a critical factor in the acceptance and success of a local daily . . . . On the other hand, weekly papers offer purely local news, and as weeklies, they offer virtually no time sensitivity. Radio and television news are also poor substitutes for local papers. Television and radio are primarily dedicated to entertainment, and to the extent that they offer news and information, they lack breadth and depth of coverage. Also, they are not portable and convenient like newspapers.

Id. at 1155.

269. 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968).

270. Prior to *Times Mirror*, there were at least two antitrust cases that considered the interchangeability of newspapers with television and radio in certain circumstances. *See Times-Picayne Publ. Co.*, 345 U.S. at 600 (Sections 1 and 2 of the Sherman Act) (suggesting that competition exists, in certain circumstances, between newspapers, magazines, radio, and television for advertising linage); News, Inc. v. Lindsay Newspapers, Inc., 1962 Trade Cas. (CCH) ¶ 70,398, at 76,621 (S.D. Fla. June 7, 1962) (Sherman and Clayton Acts) (finding competition among weekly newspapers, visitors' guides, radio, and television). Nevertheless, both of these cases focus on the substitutability of media for the advertising market. *Times-Picayne Publ. Co.*, 345 U.S. at 600; *News, Inc.*, 1962 Trade Cas. (CCH) at 76,620. This Note, in contrast, only considers media substitutability in the eyes of the consumer.

271. *Times Mirror*, 274 F. Supp. at 611.

272. A newspaper is independently owned when its owners do not publish another newspaper at another locality. *Id.* at 621.

273. *Id.* at 609. The *Los Angeles Times*, which was owned by Times Mirror, had the largest circulation of daily newspapers in California for the twenty years prior to the acquisition, and the largest Sunday circulation for the prior fifteen years. *Id.*

274. *Id.*

pany had more than doubled, its total assets had increased from $81 million to $165 million, and its revenues had risen from $113 million to $197 million.[275] The company's principal enterprise, the *Los Angeles Times*,[276] was "a newspaper with special focus on the interpretation of news and issues and specialization in financial news, entertainment, art, sports and special interest subjects."[277] In terms of circulation, the *Los Angeles Times* was the largest daily newspaper published in California for the prior 19 years and the largest Sunday paper in California for the prior 16 years.[278] In addition, it led all others nationwide in total annual daily and Sunday advertising lineage[279] for the prior 12 years, and in total annual editorial and feature matter lineage for the prior 16 years.[280]

In contrast, the acquired company, the Sun Company, with its three newspapers, the morning *Sun*, the evening *Telegram*, and the *Sunday Sun-Telegram*, dominated the daily newspaper business in California's San Bernardino County.[281] Both the morning *Sun* and the *Sunday Sun-Telegram* carried a substantial amount of state, national, and international news, complete stock reports of the New York and American Stock Exchanges, national sports news, nationally known columnists, comics and other syndicated features, and Los Angeles television and radio logs.[282]

In analyzing the government's claim that the combined Times Mirror and Sun Company violated Section 7, the court's first step was to develop the relevant market definition.[283] Regarding the

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275. *Id.* A large part of the growth of the Times Mirror Company had been attributable to a number of acquisitions. *Id.*

276. *Id.*

277. *Id.* at 610.

278. *Id.* at 609-10.

279. "Advertising lineage" is defined as "(1) the number of printed lines, especially agate lines, covered by a magazine article, newspaper advertisement, etc., or (2) the amount charged, paid, or received per printed line, as of a magazine article or short story." RANDOM HOUSE DICTIONARY OF THE ENG. LANGUAGE 1116 (2d ed. 1987).

280. *Times Mirror*, 274 F. Supp. at 609.

281. *Id.* at 610. San Bernardino County adjoins Los Angeles County to the east. *Id.*

282. *Id.*

283. *See id.* at 614 ("a finding of the appropriate 'product market' is a necessary predicate to a determination of whether a merger has the requisite anticompetitive ef-

product market, the court held that the daily newspaper business was a distinct line of commerce,[284] based on a number of peculiar characteristics and uses that made it distinguishable from all other products.[285] According to the court, the daily newspaper had achieved industry and public recognition and utilized unique meth-

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fects") (citing *Brown Shoe*, 370 U.S. at 324).

284. The *Times Mirror* court also classified daily newspapers into three categories: (1) community or local; (2) metropolitan; and (3) regional. *Times Mirror*, 274 F. Supp. at 614. The court described a local paper as one which serves its own community, by emphasizing local news, local issues, and advertising. *Id.* ("Although each community daily likes to think of itself as a primary newspaper, basically it will have a skeleton of national and international news from press associations which vary little from paper to paper."); *see also id.* (defining a "primary paper" as "one which gives to its reader all the news and information he [or she] needs to be an informed person"). Such newspapers are also "newspapers of record for their communities, reporting births, deaths, marriages, social events and the like." *Id.* In contrast, the *Times Mirror* court defined a metropolitan paper as one which serves "a metropolitan complex which is an area of population concentration that has in it a number of communities." *Id.* (explaining that the *New York Times*, the *Washington Post* and the *Los Angeles Times* are examples of metropolitan papers). Metropolitan papers emphasize the development in detail of "national, international, regional and state news and, thus, seek out the news that is of interest to the greatest number of readers rather than attempt to do a systematic job of covering the news of all the small communities within the metropolitan complex." *Id. But see id.* (noting a trend that had recently begun to develop in the newspaper industry, in which metropolitan papers established zone editions, featuring local news, social events, and advertising of the communities within the particular zone, in order to increase circulation and advertising in the smaller communities). Finally, the *Times Mirror* court explained that a regional newspaper is one which "serves a vast region in a systematic way. Such a paper is usually found in areas that are to some degree still rural in character. It carries local news of its major community and, extensively and systematically, local news of the smaller communities in the region." *Id.* (explaining that examples of regional newspapers included the *Sacramento Bee*, which served Northern and Central California; the *Salt Lake Tribune*, which served all of Utah and part of Idaho, Wyoming and Nevada; and the *Des Moines Morning Register*, which covered all of Iowa and part of Nebraska and South Dakota, bypassing larger communities like Iowa City and Cedar Rapids). Despite the above analysis, however, the *Times Mirror* court ultimately held that while the *Los Angeles Times* and the *Sun* were *complementary* products, rather than *competing* products (the *Sun* was somewhat more locally-oriented toward the relevant geographic market of San Bernardino County than the *Los Angeles Times* was), this distinction was not significant enough in the instant case to warrant placing the two papers in separate product markets. *See id.* at 615-17. Specifically, the court held that it made "little difference when one newspaper acquires another what the merger is called, whether it be horizontal or product-extension. The issue is whether the effect is to substantially lessen competition in any section of the country." *Id.* at 616.

285. *Id.* at 617.

ods of production, distribution, and pricing—all practical indicia for determining a product market.[286] In particular, the court emphasized the fact that the daily newspaper provided a cluster of services in one unique package,[287] and that the business had its own trade associations,[288] societies,[289] and journals.[290] In determining the product market, the *Times Mirror* court also recognized that while daily newspapers compete with other media, such as radio and television, for both news and advertising, "all competitors of any service provided by a daily newspaper should not be lumped into the same line of commerce with it."[291] The court reasoned that while substitutes may exist for every product, "a relevant market cannot meaningfully encompass that infinite range."[292] In the final analysis, the *Times Mirror* court regarded the daily newspaper business as a commercial reality which was "universally recognized as a line of commerce."[293]

Just as the court considered practical indicia and market realities in determining the product market, it also incorporated such characteristics in defining San Bernardino County as the relevant geographic market.[294] First, the court stressed that the county encompassed virtually the entire area of circulation and home deliv-

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286. *Id.*

287. *Id.* These services included "a daily written record of current events and reference information including vital statistics, public announcements, legal notices, box scores, stock market reports, weather reports, theater listings and radio and television logs." *Id.*

288. *Id.* One example of a daily newspaper trade association is the American Newspaper Publishers Association. *Id.*

289. *Id.* The American Society of Newspaper Editors is one such society. *Id.*

290. *Id.* *Editor and Publisher* is one such trade journal. *Id.* The Journal reports statistics and records relating only to the daily newspaper business. *Id.*

291. *Id.* at 618.

292. *Id.* (quoting United States v. Continental Can Co., 378 U.S. 441, 449 (1964)).

293. *Id.* at 617.

294. *See id.* (utilizing industry characteristics in developing the product market); *id.* at 619-20 (utilizing similar characteristics in delineating the geographic market). In determining the relevant geographic market, courts often factor in the area of a certain periodical's circulation. *See, e.g., Citizens Publ. Co.*, 394 U.S. at 135 (holding that Pima County, Arizona, had the proper geographic market for a merger of the only two local newspapers in Tucson); *Morning Pioneer*, 493 F.2d at 385 (holding that the relevant geographic market for two local newspapers was the southwestern North Dakota area).

ery overlap between the *Los Angeles Times* and the *Sun*.[295] Second, the court stated that the newspaper industry recognized San Bernardino County as a single newspaper market.[296] Third, the court noted that both the Sun Company and Times Mirror had recognized San Bernardino County as a daily newspaper market for years, and had regularly reported for advertisers' use such things as circulation, number of households, population, and retail sales on a San Bernardino basis.[297] Finally, and most importantly, the court found that Times Mirror, itself, in evaluating the acquisition of the Sun, had used the daily newspaper business in San Bernardino County as the relevant market area.[298] As a result, the court held that San Bernardino County constituted the relevant geographic market for the acquisition in question.[299]

The second step of the court's Section 7 analysis was to scrutinize the trend toward concentration in the daily newspaper industry.[300] In its inquiry, the court examined the trend not only in the relevant market of San Bernardino County, but also in the larger area of Southern California, where the *Los Angeles Times* circu-

295. *Times Mirror*, 274 F. Supp. at 619. Specifically, in 1964, the year of the acquisition, the *Los Angeles Times* had a weekday circulation of 16,650 and a Sunday circulation of 31,993 within San Bernardino County. *Id.* This amounted to 11 percent of the total weekday circulation for both morning and evening newspapers in the county, 24 percent of total morning circulation, and 20 percent of the total Sunday circulation. *Id.* In contrast, the *Sun* had its entire circulation, except for a very few copies, within the limits of San Bernardino County. *Id.*

296. *Id.* In making this determination, the court looked to organizations such as the Audit Bureau of Circulations, the American Newspapers Market, Inc., and Standard Rate & Data Service. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* The defendant in this case contended that the county of San Bernardino was not commercially realistic because county lines define political and administrative limits, not the boundaries of a newspaper market. *Id.* Also, the Times Mirror Company argued that the largest part of its circulation was in the western part of San Bernardino County, while the largest part of the circulation of the *Sun* was in the eastern part. *Id.* In response to these arguments, the *Times Mirror* court held that while counties generally are only political and administrative boundaries, the entire county still constituted the relevant geographic market in this case, because of commercial indicia and Times Mirror's own pre-acquisition analyses. *Id.*

300. *Id.* at 620.

lates.[301] Ultimately, the *Times Mirror* court found that there had been a steady decline of independent ownership of newspapers in Southern California,[302] and that at the time of the acquisition there was already a heavy concentration of daily newspaper ownership in Los Angeles County and the four counties immediately surrounding it.[303]

In its third and final step, the *Times Mirror* court analyzed the industry trend toward concentration, in conjunction with other industry- and transaction-specific factors, to determine the likely anticompetitive effects of a combined Times Mirror-Sun Company.[304] Specifically, the court found that the acquisition would enhance existing barriers to entry and increase the difficulties of smaller firms already in the market, because the Southern California daily newspaper market was already significantly difficult to enter.[305] Consequently, the court ruled that the acquisition and ownership of stock of the Sun Company by the defendant, the Times Mirror Company, violated Section 7, and directed the defendant to divest itself of the Sun Company's stock, accordingly.[306]

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301. *Id.* at 621. As authority for examining the trend toward concentration beyond the relevant market, the *Times Mirror* court looked to *United States v. Philadelphia National Bank*. *Id.* (citing 374 U.S. 321, 325-26 (1963)). In *Philadelphia National Bank*, the Supreme Court determined that the relevant geographic market was the metropolitan area consisting of Philadelphia and its three contiguous counties. *Philadelphia Nat'l Bank*, 374 U.S. at 325-26, *cited in Times Mirror*, 274 F. Supp. at 621. Yet in discussing the trend toward concentration in the commercial banking business (the relevant product market), the *Philadelphia National Bank* court extensively discussed the trend throughout the United States, an area far outside the relevant geographic market. *Philadelphia Nat'l Bank*, 374 U.S. at 325-26, *cited in Times Mirror*, 274 F. Supp. at 621.

302. *Times Mirror*, 274 F. Supp. at 621. As of January 1, 1952, six of the seven daily newspapers in San Bernardino County were independently owned. *Id.* On December 31, 1966, only three of the eight dailies published there remained independent. *Id.*

303. *Id.* For example, the top four American newspaper publishers accounted for 73 percent of all weekday daily circulation, while the top ten publishers accounted for 89 percent of the total. *Id.* The *Los Angeles Times*, alone, accounted for 80 percent of all morning daily circulation in the five-county area. *Id.*

304. *Id.* at 622.

305. *Id.* As evidence, the court pointed to the then recent failure of the *New York Times*, one of the most powerful publishers in the country, to successfully establish a West Coast edition. *Id.*

306. *Id.* at 624.

B. *Motion Picture Industry*

In addition to mergers and acquisitions among newspaper companies, courts have also considered the substitutability of media in deciding antitrust cases concerning the motion picture industry.[307] Due to changes in technology and judicial oversight,[308] competition with and within the motion picture industry[309] has broadened dramatically since leading decisions, such as *United States v. Paramount Pictures*,[310] were handed down decades ago.[311] Consequently, motion picture antitrust cases today stand in stark contrast to the leading cases of years past.[312]

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307. *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 666-67 n.9 (9th Cir. 1990) (movie exhibition market) (suggesting that moviegoers view first-run theatrical exhibition substitutable with exhibition on home video, cable television and pay-per-view television); United States v. Loew's Inc., 882 F.2d 29, 31, 33 (2d Cir. 1989) (movie exhibition market) (explaining that movie theatres, network television, syndicated television, cable television, and videocassettes exhibit competing forms of movies); United States v. Tracinda Inv. Corp., 477 F. Supp. 1093, 1108 (C.D. Cal. 1979) (movie production market) (explaining that consumers see motion pictures substitutable with other forms of entertainment); *see infra* notes 346-49 and accompanying text (explaining that the movie industry is divided into three markets: production, distribution, and exhibition).

308. One aspect of judicial oversight of the motion picture industry that has changed in the past few years is the recent approval by the Second Circuit Court of Appeals of vertical integration of the movie industry. *See, e.g.*, United States v. Loew's Inc., 882 F.2d 29 (2d Cir. 1989); *see also infra* notes 351-62 and accompanying text (discussing the *Paramount Pictures* and *Loew's Inc.* decisions).

309. As opposed to 40 years ago, the motion picture industry today faces stiffer competition from ancillary markets, including: network television, syndicated, cable, and pay-per-view television, and home video. United States v. Syufy Enters., 712 F. Supp. 1386, 1396 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990); *Loew's Inc.*, 882 F.2d at 33 (using the term "aftermarkets" instead of "ancillary markets"). "Ancillary markets" are defined as "the distribution of motion pictures to home video, cable television, and pay-per-view television." *Syufy*, 712 F. Supp. at 1389 n.3.

310. 334 U.S. 131 (1948); *see infra* notes 351-62 and accompanying text (discussing the *Paramount Pictures* case in detail).

311. *See, e.g.*, *Syufy*, 712 F. Supp. at 1397 ("The advent of vast and rapid technological changes in the industry resulting in substantial nontheatrical exhibition requires the Court to reassess the validity of [the *Paramount Pictures* Court's decision to limit] the product market to first-run exhibits.").

312. *Compare id.* at 1389 (defining the product market for the motion picture industry broadly) *and Loew's Inc.*, 882 F.2d at 33 (recognizing that first-run films compete with motion picture aftermarkets) *with Paramount Pictures*, 334 U.S. at 170-71 (defining the product market narrowly) *and* Houser v. Fox Theatres Management Corp., 845 F.2d 1225, 1229-30 (3d Cir. 1988) (defining the product market narrowly) *and* Admiral Theatre

Of the recent antitrust cases that recognize the depth of competition that the movie industry faces, the district court's decision in *United States v. Syufy Enterprises*[313] is one particularly instructive Section 7 analysis. In *Syufy*, the defendant, Syufy Enterprises ("Syufy"),[314] was a regional motion picture theatre circuit[315] that, in 1985, operated a total of 33 indoor theatres with approximately 130 screens and 23 drive-in theatres with approximately 108 screens in California, Nevada, and several other western states.[316] The government alleged that Syufy's acquisition of a competing exhibitor, Red Rock Theatre, and plans to construct a 12 screen theatre, substantially lessened competition in one particular market—Las Vegas, Nevada.[317] The market for first-run exhibition of motion pictures in Las Vegas evolved as follows:[318]

FIGURE 1

NUMBER OF SCREENS

	Dec. 1980	*Jan. 1981*	*Jan. 1983*
Plitt Theatres:	3	3	0
Mann Theatres:	3	3	0
Red Rock Theatre:	11	11	11
Syufy Enterprises:	0	6	12
Roberts Company:	0	0	5

Corp. v. Douglas Theatre Co., 437 F. Supp. 1268, 1299 (D. Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978) (defining the product market narrowly).

313. 712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990). The government, in *Syufy*, also claimed that the defendant violated the Sherman Act. *Id.* at 1387. Nevertheless, this Note focuses on violations of Section 7 of the Clayton Act and, consequently, will not explore Sherman Act allegations.

314. Actually, there were two defendants in the case, Raymond Syufy and Syufy Enterprises. *Id.* Raymond Syufy was the general partner of Syufy Enterprises, a limited partnership which had its principal place of business in San Francisco, California. *Id.*

315. There are essentially two types of movie theatres: "circuits" and "independents." *See* Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 488 (5th Cir. 1982) (private Sherman Act action brought by movie theatre owner against competing theatre chains and national film distributors alleging conspiracy to deprive owner of opportunity to license first-run films). Circuits are chains of theatres under common ownership, while independent theatres are individuals unaffiliated with any circuit. *Id.*

316. *Syufy*, 712 F. Supp. at 1387.

317. *Id.* at 1395, 1404.

318. *Id.* at 1389-92.

	SYUFY		ROBERTS/UA	
	Number of Screens	*Market Share*	*Number of Screens*	*Market Share*
1984:	23	60%	5	40%
1985:	23	91%	11	9%
1986:	23	85%	28	15%
1987 (1st half):	23	79%	28	21%
1987 (2nd half):	23	57%	31	24%
1988 (1st half):	22	39%	31	25%
1989 (proposed):	34	—	31	—

In determining whether the above trend toward consolidation rose to the level of a Section 7 violation, the *Syufy* court first analyzed the relevant market.[319] Because both parties stipulated that the City of Las Vegas was the appropriate geographic market,[320] the court focused on the scope of the relevant product market.[321] The government contended that the product market should include only first-run exhibitions of motion pictures,[322] and that a line of cases, originating with the *Paramount Pictures* case, routinely accepted such a narrow definition.[323] Notwithstanding such authority, the court held that the rapid development of technology warranted an expansion of the product market beyond first-run exhibits to include sub-run exhibits, as well as exhibition in the ancillary markets[324] of home video, cable television, and pay-per-view television.[325]

319. *See id.* at 1389, 1396-1400.

320. *Id.* at 1396-97.

321. *Id.* at 1397.

322. *Id.*

323. *Id.* at 1396 (citing *Fox Theatres*, 845 F.2d at 1229-30); *Admiral Theatre Corp.*, 437 F. Supp. at 1299; *see also infra* notes 351-62 and accompanying text (discussing the *Paramount Pictures* decision in detail).

324. *See supra* note 309 (defining "ancillary markets").

325. *Syufy*, 712 F. Supp. at 1396. At least one commentator has argued that movies

In finding that consumers consider home video, cable television, sub-run exhibition and, to a lesser degree, pay-per-view television viable substitutes to first-run theatrical exhibition, the *Syufy* court emphasized four main points.[326] First, the defendant had introduced evidence that 50 percent of VCR owners attend movie theatres less often and that 67 percent of VCR owners prefer watching a movie at home instead of at a theatre.[327] Second, the defendant had established that persons who subscribe to pay cable television also go to the movies less.[328] Third, the court found that consumers viewed the above ancillary markets—VCR and cable television—as substitutes to first-run motion picture exhibition.[329] Finally, the expert testimony at trial proved that home video and cable television alternatives act as a restraint to theatre exhibitors' ability to charge excessive prices at the box office.[330] As a result, the court found that if the defendant were to raise its admission prices, many consumers simply would not go to one of its theatres to see a movie.[331] Instead, such consumers would likely rent a movie on videocassette or watch a movie on cable television.[332] Thus, the court held that the product market for the movie industry, insofar as consumers are concerned, should be defined broadly to include all ancillary markets.[333]

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appearing on different media compete, because they are of the same "program type." *See* Boadwee, *supra* note 149, at 1224. *But see id.* (rejecting an approach for defining product markets for video programming that is based exclusively on program types). A "program" is a coherent sequence of video or audio information, communicated over a medium that primarily transmits such information. *Id.* at 1211 (citing Cable Communications Policy Act of 1984, § 602(16), 47 U.S.C. § 522(16) (1994)). A "program type" is "a group of programs set apart by similarities in format, length, or content, such that viewers consider them reasonably substitutable." *Id.*

326. *See Syufy*, 712 F. Supp. at 1399.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* The district court in *Syufy* also defined the product market from the perspective of distributors, and determined that it should also include all ancillary markets. *Id.* On appeal, however, the Ninth Circuit agreed with the government that such a definition does not accurately reflect the defendant's power over film distributors. 903 F.2d at

Having defined the relevant market, the *Syufy* court next set out to estimate the defendant's strength in that market. As Figure 1 demonstrates,[334] Syufy had a significant, albeit steadily declining, market share throughout the 1980s. Notwithstanding such percentages, the court held that Syufy's acquisitions and internal expansions did not pose a significant likelihood of lessening competition in Las Vegas.[335] Specifically, the court found that this case was a prime example of one in which there were no barriers to entry and, consequently, no monopoly power.[336] As evidence, the court looked to the Roberts Company, the only other significant competitor to Syufy, which had expanded the number of theatres it operated in Las Vegas between November 1985 and December 1986 from five to twenty-eight screens.[337]

Supporting the court's determination was an economic expert who had testified "convincingly" at trial that Roberts' great and rapid expansion was proof that no entry barriers existed in Las Vegas.[338] Moreover, the fact that Syufy was planning to build twelve more screens upon the conclusion of the trial was evidence that the market could handle additional theatres.[339] Finally, projecting population growth and applying the industry standard that there should be one screen for every ten thousand persons, the court found that Las Vegas would be underscreened in the near future if no additional screens were added.[340] As a result, the *Syufy* court held that additional competitors could enter the Las Vegas market with no barriers.[341] More importantly, the court found that the defendant's acquisitions and internal expansions did not violate

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665 n.9. Nonetheless, the Ninth Circuit affirmed the product market definition with respect to consumers, and held that the district court's erroneous definition of the relevant upstream product market did not warrant reversal, because the court had made alternative findings using the government's narrower market definition, limited solely to first-run exhibition, that were supported by substantial evidence. *Id.*

334. *See supra* text accompanying note 318 (Figure 1).

335. *Syufy*, 712 F. Supp. at 1402-03.

336. *Id.* at 1401.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

Section 7.[342]

Decisions such as *Syufy* are likely to stimulate mergers and acquisitions within the motion picture industry, because diminished antitrust merger concerns are likely to follow from broadened relevant product market definitions.[343] Nonetheless, this is not the only path by which rapidly developing technology will lead to consolidation within the movie industry.[344] In contrast, the advent of technology, and the corresponding rise in motion picture aftermarkets, has also lead to a lessening of judicial oversight of vertical integration within the motion picture industry.[345]

In broad terms, the movie industry encompasses three markets:[346] (1) production;[347] (2) distribution;[348] and (3) exhibition.[349]

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342. *Id.* at 1403.

343. As a general rule, "a broadly defined product market will include a greater number of competitors than a narrowly defined market" and, consequently, less market power. Katherine B. Kravitz, *Nonprofit Hospital Mergers and Federal Antitrust Law: The Quest For Compatibility*, 15 DEL. J. CORP. L. 539, 551 (1990); *see also* David L. Kasserman & John W. Mayo, *Competition and Asymmetric Regulation in Long-Distance Telecommunications: An Assessment of the Evidence*, 4 COMMLAW CONSPECTUS 1, 4 (1996); Andrew C. Hruska, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 YALE L.J. 305, 331 (1992).

344. *See, e.g.*, David Einstein & Jeff Pelline, *Disney's Stunning Deal to Buy ABC*, S.F. CHRON., Aug. 1, 1995, at A1 ("Acquisitions and alliances [of entertainment companies] are being driven by new technologies that blur the boundaries between media and entertainment."); *Viacom Acquiring Larger Paramount*, NEWSDAY, Sept. 13, 1993, at 8 ("The [consolidation trend in the media and entertainment industries] has been fueled by the promise of technology that could soon make channels and an array of services available through TV sets.").

345. *See, e.g.*, Dottie Enrico, *Big Media Marriage Blessed By Boards*, ENT. LITIG. REG., Oct. 9, 1989 (discussing *Loew's Inc.*); *see generally Loew's Inc.*, 882 F.2d at 31, 33.

346. *Syufy*, 712 F. Supp. at 1387; *see Southway Theatres*, 672 F.2d at 488 (finding a tripartite system of film production and marketing in the United States: production, distribution, and exhibition); *Tracinda Inv. Corp.*, 477 F. Supp. at 1104 (finding that "motion picture production, motion picture distribution, and motion picture exhibition are each separate and distinct lines of commerce within the commercial realities of the motion picture industries"); *cf.* Boadwee, *supra* note 149, at 1215 (explaining that video programming has four markets: the advertising market, the program acquisition market, the program distribution market, and the program exhibition market). This Note does not consider the advertising market, because movies usually do not contain commercials.

347. *Syufy*, 712 F. Supp. at 1387. Production companies operate at the originating level and "are responsible for the financing and creation—at least economically—of

At one time, courts disapproved greatly of vertical integration of these three markets.[350] For example, in the 1948 *Paramount Pictures* decision, the Supreme Court found that the major motion picture studios had unreasonably restrained competition in violation of the Sherman Act[351] by entering into certain anticompetitive agreements with exhibitors by vertically integrating the production, distribution, and exhibition of motion pictures.[352]

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motion pictures." *Southway Theatres*, 672 F.2d at 487-88.

348. *Syufy*, 712 F. Supp. at 1387. Distributors market motion pictures to theatre owners, who are known as exhibitors. *Southway Theatres*, 672 F.2d at 488. Motion picture distributors market their films by licensing the right to exhibit them for a specified period of time. *Id.*; *see Syufy*, 903 F.2d at 662 n.1 (explaining that "film distributors . . . sell exhibition licenses"). The exhibitor rents a print of the film along with a copyright license of limited duration. *Southway Theatres*, 672 F.2d at 488. Licensing agreements generally provide for payment to the distributor of a percentage of the gross box office profits earned by each exhibitor, and often also include a guaranteed minimum to be paid, regardless of the success of the film. *Id.*; *see Syufy*, 903 F.2d at 662 n.1. Under this system, the distributors retain a direct interest in the profitability of each picture, and they carefully control the availability and distribution patterns of films so as to maximize returns. *Southway Theatres*, 672 F.2d at 488.

The process of motion picture distribution does not stop, however, after films are licensed to exhibitors for public theatrical exhibition. *Syufy*, 712 F. Supp. at 1388. Thereafter, they are available in videocassette form for resale or rental for private, "home video" use. *Id.* They are also licensed for exhibition on pay-per-view, cable, and broadcast television. *Id.*

In *United States v. Columbia Pictures Corporation*, an antitrust case involving films sold for television exhibition, the term "distribution" was defined as:

> Offering to grant and sublicensing, the right to televise any filmed, videotaped or live programming to (1) any person operating any television station or group of television stations, for televising over such station or group, (2) any sponsor sponsoring any telecast over any television station or (3) any advertising agency, for exercise on behalf of any client sponsoring telecast over any television station.

189 F. Supp. 153, 156 (S.D.N.Y. 1960).

349. *Syufy*, 712 F. Supp. at 1387. "Exhibitor" is a technical term in the motion picture industry that refers to the company that actually projects a motion picture for viewing by the public in a cinema. Boadwee, *supra* note 149, at 1215 n.26.

350. *Southway Theatres*, 672 F.2d at 488; *see, e.g.*, *Paramount Pictures*, 334 U.S. 131, 141 (1948).

351. The antitrust evaluation of an acquisition or merger is substantially the same under both the Clayton and Sherman Acts. *See Archer Daniels Midland*, 781 F. Supp. at 1402.

352. *Paramount Pictures*, 334 U.S. at 141; *Loew's Inc.*, 882 F.2d at 30 (discussing the *Paramount Pictures* decision). The Court explicitly stated, however, that vertical

In the subsequent case history to *Paramount Pictures*, the motion picture studios were required to divest themselves of all motion picture theatres they then owned.[353] Furthermore, in order to terminate producers' anticompetitive practice of distributing films exclusively to circuits of theatres, the studios were prohibited from "licensing any feature for exhibition . . . in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."[354] Finally, on remand from the *Paramount Pictures* Court, the motion picture studios were also prohibited from acquiring theatres in the exhibition business in the future, except upon application to the U.S. Attorney General and upon a showing to the court "that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures."[355]

Despite the gradual evolution of the movie industry,[356] the *Paramount Pictures* decision and its subsequent history were regarded

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integration of producing, distributing and exhibiting motion pictures is not illegal per se. *Paramount Pictures*, 334 U.S. at 173-74 ("the legality of vertical integration under the Sherman Act turns on: (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent").

353. United States v. Loew's Inc., 1950-51 Trade Cas. (CCH) ¶ 62,765, 64,273-74 (S.D.N.Y. 1951); *see also Paramount Pictures*, 334 U.S. at 174-75 (remanding to the district court the issue of whether divestiture is proper). The subsequent case history to the *Paramount Pictures* decision proceeded under the name, *Loew's Inc.* Search of LEXIS, Auto-cite service (May 20, 1996).

354. *Loew's Inc.*, 1950-51 Trade Cas. (CCH), at 64,272. Today, motion picture distributors frequently license films by competitive bidding. *Southway Theatres*, 672 F.2d at 488. Under the competitive bidding system, exhibitors in a marketing area defined by the distributor are asked to submit bids stating the percentages and guarantees each exhibitor will pay for the film being offered. *Id.* The distributor selects the most lucrative combination of bids. *Id.* If it is unsatisfied with some or all of the bids it has received, it may enter into negotiations with individual exhibitors in the hopes of receiving a more profitable agreement. *Id.*

355. *Loew's Inc.*, 1950-51 Trade Cas. (CCH), at 64,272; *see Loew's Inc.*, 882 F.2d at 30; *see also Paramount Pictures*, 334 U.S. at 150-51 (affirming decision of lower courts to enjoin future acquisitions).

356. *See Southway Theatres*, 672 F.2d at 498 (finding that the structure of the motion picture industry has evolved since *Paramount Pictures*, with respect to a movie distributor's ability to boycott an exhibitor).

as the leading motion picture antitrust decision for many decades.[357] Some 40 years later, however, in *United States v. Loew's Inc.*,[358] the Second Circuit Court of Appeals, finding that the growth of the motion picture aftermarkets of videocassettes, network, and syndicated and cable television had dramatically changed the nature and business realities of the motion picture industry,[359] lifted the *Paramount Pictures* consent judgment[360] and granted the movie producer-distributor defendant permission to own and operate motion picture theatres, subject to certain restrictions.[361] With the restrictions on vertical integration eliminated by the Second Circuit, it is likely that motion picture production studios will look to acquire or merge with distribution and exhibition firms.[362]

C. *Television and Radio Industries*

The debate over the substitutability of various media is not limited to antitrust decisions concerning the newspaper and motion picture industries. In contrast, the concept of interchangeability also often arises in defining a relevant product market for antitrust cases in the television and radio industries as well.[363] For example,

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357. *Id.* at 496.

358. 882 F.2d 29 (2d Cir. 1989).

359. *Loew's Inc.*, 882 F.2d at 33. According to the *Loew's Inc.* court, "[t]here is now at least one screen in most homes in the United States, many millions in addition to the 22,000 screens owned by motion picture exhibitors." *Id.*

360. The consent judgment was issued on remand from the *Paramount Pictures* Court by the United States District Court for the Southern District of New York. *See Loew's Inc.*, 1950-51 Trade Cas. (CCH), at 64,265.

361. *Loew's Inc.*, 882 F.2d at 29. The restrictions included a prohibition of a return to the sort of licensing arrangements that the consent judgment addressed and prohibited. *Id.* at 34. Moreover, the defendant's competitors remained free to seek redress under the antitrust laws if the defendant began to engage in anticompetitive activities. *Id.*

362. One example is Sony Corporation's vertical integration of movie production, distribution, and exhibition since the 1989 *Loew's Inc.* decision. *See, e.g.*, *Sony Theatres Deal Gives New Meaning to Movie Magic*, CHI. TRIBUNE, May 25, 1995, at N2; Alan Citron, *Sony to Acquire Culver Studios for Columbia*, L.A. TIMES, May 31, 1991, at D1; *Sony Wants to Buy Orion Pictures*, REUTERS, Feb. 8, 1991, *available in* LEXIS, Nexis Library, ARCNWS File; *Sony Finishes Columbia Buyout*, L.A. TIMES, Nov. 7, 1989, at P3; *Sony Buys Guber-Peters*, N.Y. TIMES, Sept. 29, 1989, at D3.

363. *See, e.g.*, Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987) (Sherman and Clayton Acts) (defining product market as all "passive visual entertainment"); Satellite Television & Associated Resources, Inc. v. Continental

at least as far back as 1975, the DOJ has argued that, in certain circumstances, newspapers, television stations, and radio stations are all competitors and, therefore, should be included in the same product market.[364] Also, in *Satellite Television v. Continental*

Cablevision of Va., Inc., 714 F.2d 351, 355 (4th Cir. 1983) (discussing competition among all entertainment media), *cert. denied*, 465 U.S. 1027 (1984) (Sherman Act decision); New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802, 808 (S.D.N.Y. 1986) (Sherman Act) (holding that plaintiff's definition of the relevant product market as that for "pay cable television movie and non-sports entertainment services" was specific and sufficient to withstand a motion to dismiss); *see also In re* Amendment of Sections 73.34, 73.240, and 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046, 1057 (1975) (explaining the DOJ's position that the public principally relies on newspapers and television stations for its news). *But see* United States v. Columbia Pictures Corp., 189 F. Supp. 153, 191 (S.D.N.Y. 1960) (Sherman and Clayton Acts) (holding that feature films exhibited on television do not compete with radio and movies shown in motion picture theatres, where the "consumers" involved in the case are television stations).

One commentator, pointing to studies which demonstrate that transmission medium influences consumer choice, has argued that a product market definition for video programming should focus on the content of the program, as well as "on the media themselves." Boadwee, *supra* note 149, at 1211; *see also id.* at 1225 n.106; Note, *Defining the Relevant Product Market of the New Video Technologies*, 4 CARDOZO ARTS & ENT. L.J. 75, 102 (1985) (arguing that video programming product markets should be defined by program types). The significance of the effect that the transmission medium has, however, may depend largely on program type. For example, one commentator points to a study that shows that consumers consider media substitutable only for certain program types: cinemas and broadcast television were considered substitutable for motion pictures, but not for news. Boadwee, *supra* note 149, at 1225 n.106 (citations omitted). Still, this study suggests that there is some substitutability between news on the radio and through other media. *Id.* at 1213 n.15 (citations omitted).

The Court of Appeals for the District of Columbia, in *National Ass'n of Theatre Owners v. FCC*, also took note of various experts' product market definitions for video programming: (1) "all entertainment available in a given area"; (2) "all television programming available in the area"; (3) "all programs or performances of a given type, such as motion pictures or sporting events, which could be seen in live performances and other media"; (4) "subcategories within program types, such as films less than two years old or athletic events featuring home town teams"; (5) "and unique individual programs." 420 F.2d 194, 204 (D.C. Cir. 1969) (citing *In re* Amendment of Part 73 of the Comm'n's Rules and Regulations to Provide for Subscription Television Service, 15 F.C.C.2d 466, 474-78, 494-509 (1968)).

364. *See In re* Multiple Ownership, 50 F.C.C.2d at 1056 n.11. According to the DOJ, newspapers, television stations, and radio stations are all engaged in the same business of attracting audiences and selling them to advertisers. *Id.* While the DOJ does acknowledge that the three are not interchangeable for all advertisers, it asserts that the

Cablevision,[365] the Fourth Circuit Court of Appeals held that "cinema, broadcast television, video disks and cassettes, and *other types of leisure and entertainment-related businesses* for customers who live in single-family dwellings and apartment houses" were reasonably interchangeable and constituted a single product market.[366] Similarly, according to the Eleventh Circuit's decision in *Cable Holdings of Georgia v. Home Video, Inc.*,[367] consumers perceive cable television, satellite television, video cassette recordings, and free broadcast television to be reasonable substitutes.[368]

In *Cable Holdings*, the three corporate parties, Cable Holdings, Home Video, and Wometco, were engaged in the cable television

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three are far more alike than they are different. *Id.* Also, at least one commentator has suggested that there is some substitutability between news on the radio and on other media. Boadwee, *supra* note 149, at 1213 n.15 (citations omitted). In New York City, for example, consumers may obtain local news, social calendars and sports information from: (1) local newspapers, including the *New York Post* and *New York Newsday*; (2) news radio stations, including WINS Radio, 1010 AM; and (3) New York 1, a 24 hour all news cable channel that focuses on events within and concerning New York City.

365. 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984).

366. *Id.* at 355 (emphasis added). There has been considerable debate as to whether "pay-TV" actually competes with, or merely supplements "free TV." *See, e.g.*, *National Ass'n of Theatre Owners*, 420 F.2d at 197 n.7 (discussing the pricing structure of the television industry and competition between nationwide over-the-air subscription television and broadcast television) (citing Subscription Television Service, 15 F.C.C.2d at 548); Boadwee, *supra* note 149, at 1225 n.109 (citations omitted). As noted in *National Association of Theatre Owners*, "[t]he public's access to the broadcast media has never been wholly free; at a minimum, it has been necessary to procure and maintain the necessary apparatus for receiving broadcasts . . . ." 420 F.2d at 206. Also, "free TV is not really free. The advertising costs which support free TV are eventually passed on to the public, and a profit is made by the licensee or others from the use of the public's channels." *Id.* at 197 n.7 (quoting Subscription Television Service, 15 F.C.C.2d at 548). Finally, advertiser-supported television is free "only in the sense that viewers cannot pay directly for programs," because viewers still pay indirectly through higher prices on advertised goods. Boadwee, *supra* note 149, at 1215 n.27 (citations omitted).

Nevertheless, some economists contend that free television is indeed "free" because, "as more and more units of a particular commodity are sold, the purchase price goes down and the advertising price goes down and the advertising costs are borne not by the public, but by the results of mass production." *National Ass'n of Theatre Owners*, 420 F.2d at 197 n.7 (citations omitted).

367. 825 F.2d 1559 (11th Cir. 1987).

368. *See id.* at 1563 (affirming the district court's definition of the relevant product market).

business[369] in Cobb County, Georgia.[370] The antitrust allegations in the suit arose out of an attempt by the plaintiff, Cable Holdings, to expand its cable business into an area of the county known as the "western territory."[371] In addition to a number of Sherman Act accusations,[372] the plaintiff charged that the merger between Home Video and Wometco violated Section 7.[373]

Regarding the relevant market definition, the *Cable Holdings* court held that all "passive visual entertainment" was reasonably interchangeable by consumers and constituted a single product market.[374] In addition, the court found that the two merged companies did not control a significant portion of the relevant product market and, consequently, no anticompetitive effects arose from the merger.[375] The Eleventh Circuit thus held that the district court had properly dismissed Cable Holdings' Section 7 claim, on the grounds that Cable Holdings had failed to prove that the merger would monopolize a significant portion of the relevant product market.[376]

Regarding the definition of the relevant geographic market in an antitrust merger analysis of the television or radio industry, some courts have examined the range of broadcasting signals,[377]

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369. The cable television industry involves the distribution of over-the-air broadcast signals, pay services (such as HBO, Cinemax, and Disney) and locally-originated television through a network of cable. *Id.* at 1560. This cable network connects the "head end" of the system (an antenna or earth station which receives signals communicated via satellite) to a system of coaxial cable with further connection to each individual subscriber. *Id.* The coaxial cable is generally strung along utility poles. *Id.*

370. *Id.*

371. *Id.*

372. Cable Holdings accused Wometco and Home Video of taking various actions to prevent it from competing for subscribers in the western territory, in violation of the Sherman Act. *Id.* at 1561. Specifically, the allegedly anticompetitive actions included: (1) instituting a sham lawsuit in state court for the purpose of deterring Cable Holdings' expansion into the western territory; (2) opposing Cable Holdings' application for a franchise in the western territory; (3) seeking a revocation of the plaintiff's franchise for the western territory; and (4) erecting strand in the western territory, thus inhibiting Cable Holdings from stringing its own strand. *Id.* Strand is defined as "wire hung on utility poles that is used to support the coaxial cable which carries a cable television signal." *Id.* at 1560.

373. *Id.* at 1561.

374. *Id.* at 1563 (affirming district court's definition of the relevant market).

375. *Id.*

376. *Id.*

377. *See, e.g.*, Ralph C. Wilson Indus. v. American Broadcasting Cos., 598 F. Supp.

while other courts have looked to different criteria,[378] to determine the area of effective competition. For example, in *Ralph C. Wilson v. American Broadcasting Companies*,[379] the court ruled that the entire San Francisco-Oakland-San Jose Bay area constituted a complete geographic market,[380] where the plaintiff and defendants operated several television stations.[381] In arriving at this decision, the court weighed several factors, including: (1) that the Federal Communications Commission ("FCC") regarded the area as one market; (2) that the two recognized national ratings services, A.C. Nielson Company and Arbitron Company, considered the region to be a single market; (3) that there was a large overlap in the signal coverage of both the plaintiff's and defendants' television signals; and (4) that the plaintiff's and defendants' television stations shared a substantial overlap of viewers.[382]

D. *Inconsistencies Among Previous Media Antitrust Decisions*

By placing the antitrust analyses of the newspaper, motion picture, and television and radio industries side-by-side, a signifi-

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694 (N.D. Cal. 1984), *aff'd*, 1986-1 Trade Cas. (CCH) ¶ 67,185 (9th Cir. 1986) (antitrust case); Satellite Television & Assoc. Resources v. Continental Cablevision, 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); Midwest Radio Co. v. Forum Publishing Co., 942 F.2d 1294, 1296-97 (8th Cir. 1991) (holding that the geographic market for mass media advertising was the Fargo, North Dakota—Moorhead, Minnesota metropolitan area, where the parties were a local daily newspaper, a network-affiliated television station, and FM and AM radio stations); Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs., 746 F. Supp. 320, 323-24, 327 (S.D.N.Y. 1990) (holding that there was a national geographic market, where the plaintiff was engaged in the national business of licensing performing rights in the copyrighted musical compositions of its affiliated composers and publishers, and the defendant was a national cable television service provider, which acquired, produced, and marketed various video programming, including music performances).

378. *See, e.g.*, Northeastern Educ. Television of Ohio, Inc. v. Educational Television Assoc. of Metro. Cleveland, 758 F. Supp. 1568, 1579 (N.D. Ohio 1990) (holding that the relevant geographic market was "a 'world market' of available public television programming," where the parties were public television stations and distributors of public television programming).

379. 598 F. Supp. 694 (N.D. Cal. 1984), *aff'd*, 1986-1 Trade Cas. (CCH) ¶ 67,185 (9th Cir. 1986) (antitrust case).

380. *Id.* at 703.

381. *Id.* at 698.

382. *Id.* at 703 (citations omitted).

cant inconsistency arises: courts approach the product market definition differently across media industry sub-categories. As explained above, a court must focus on the reasonable interchangeability of a product with its substitutes in constructing the outer boundaries of a product market definition.[383] Where consumers perceive products as interchangeable, those products should be included in the same product market.[384]

Regarding the media industry, courts are gradually adopting two approaches for recognizing competition among differing media products: a compartmentalized approach and a broad-market approach. Under the compartmentalized approach, courts find consumers' perception of media product substitutability as limited.[385] By finding that a particular media product has few substitutes, these courts contract the outer boundaries of the product market, resulting in a particularly narrow relevant market definition.[386] One sub-category of the media industry for which courts have adopted this compartmentalized approach is the newspaper industry—as explained above, newspaper antitrust decisions rarely recognize competition among newspapers, radio, and television in consumer news and information markets.[387]

In contrast to the compartmentalized approach, the broad-market approach expands the outer boundaries of the product market definition to include media product competition across industry sub-categories. For example, in motion picture antitrust decisions, courts have gradually been accepting the notion that competition exists among first-run films, sub-run films, and video

383. *See supra* notes 142-43 and accompanying text (discussing the law of product substitutability).

384. *See supra* note 144 and accompanying text (discussing the law of product substitutability and interchangeability).

385. *See, e.g.*, discussion *supra* part II.A (discussing the antitrust analysis of the newspaper industry).

386. *See supra* notes 291-92 and accompanying text (discussing the *Times Mirror* court's decision to exclude radio and television from the product market definition).

387. *See supra* notes 265-66 and accompanying text (explaining that courts generally do not include other forms of media in the relevant product market definition for the newspaper antitrust analysis).

aftermarkets.[388] Similarly, in television antitrust decisions, courts have also held that cable television, satellite television, video cassette recordings, and broadcast television—dubbed collectively as "passive visual entertainment"[389]—do, in some circumstances, compete for viewers.[390]

This section does not advocate either compartmentalized or broad-market analyses for media antitrust decisions. Moreover, this section does not argue that certain courts erroneously followed one approach over the other, given the relevant economic and business facts at the time each individual case was decided. Nonetheless, it is important to note that the evolution of a compartmentalized versus broad-market approach distinction has lead to an inconsistent recognition of competition in the media industry.

III. RISING COMPETITION AND CONSOLIDATION REQUIRES COURTS TO ADOPT A NEW ANTITRUST MODEL FOR MULTIMEDIA MERGERS AND ACQUISITIONS

A. *The Telecommunications Act of 1996 is a New Stimulus for Multimedia Competition and Consolidation*

As discussed above in Part II, the development of video aftermarkets, computerized information services, and other technology has dramatically transformed competition within the media industry.[391] Also contributing to the rise of media competition and consolidation, however, is the Telecommunications Act of 1996[392] (the "Telecom Act" or the "Act").[393] The Telecom Act amends the

388. *See supra* notes 324-25 and accompanying text (discussing competition among motion picture exhibitors and other forms of media).

389. Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987).

390. *See supra* note 374 and accompanying text (explaining that all passive visual entertainment compete).

391. *See supra* notes 309, 345, 359 (discussing the development of video aftermarkets); *supra* note 260 (discussing computerized information services).

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

393. President Clinton signed the Telecom Act into law on February 8, 1996. *See* Amy Boardman, *Law Firms at the Ready; A Hot Practice Area Just Got Hotter*, LEGAL

Communications Act of 1934[394] and deregulates much of the telecommunications and media industries.[395] By eliminating regulatory barriers that block competition among local phone companies, long-distance carriers, and cable television companies,[396] the Telecom Act is intended to provide for fair competition between local and long-distance telephone companies[397] and to promote the continued

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TIMES, Feb. 12, 1996, at 1. The Telecom Act substantially deregulates the communications industry and will allow for new competition for local phone service, as well as the introduction of new technology. *See* Susan Farmer, *Telecom Bill Prompts Competition*, COLUMBIAN, Feb. 21, 1996, at D5. According to Senator Ernest F. Hollings (D-SC), ranking minority member of the Commerce, Science, and Transportation Committee, the legislation will promote competition by unleashing the ingenuity of the telecommunications industry. *President Signs Measure to Reform Telecom Sector*, ANTITRUST & TRADE REG. REP. (BNA), Feb. 15, 1996, at 187.

394. Ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-610 (1994)).

395. Joint Explanatory Statement of the Committee of Conference to the Telecommunications Act of 1996 [hereinafter "Statement Accompanying the Telecom Act"] (stating that the Telecom Act is designed to provide deregulatory national policy framework for telecommunications and information technologies and services); Boardman, *supra* note 393, at 1 ("the telecommunications act is the biggest rewrite of the communications code in 60 years"); Dominic Bencivenga, *Communications Law; For Lawyers, Future Holds Regulation, Litigation*, N.Y. L.J., Feb. 8, 1996, at 5 ("The federal Telecommunications Acts of 1996 is expected to revolutionize the telecommunications industry . . . ."); *id.* (reporting that the Telecom Act "represents the most sweeping reform of the Communications Act of 1934 to date"); *see also infra* notes 399-413 and accompanying text (discussing some of the deregulation that would follow from the Telecom Act).

396. *See* Kirk Victor, *Media Monsters*, NAT. J., Mar. 2, 1996, at 480 (stating that the new Telecom Act "will promote head-to-head competition between the local telephone, long-distance and cable television industries"); Sallie Hofmeister & Leslie Helm, *U.S. West to Buy Cable Firm for $10.8 Billion; Mergers: Continental Deal is First Major Consolidation of Phone Carrier, Cable Operator*, L.A. TIMES, Feb. 28, 1996, at A1 (maintaining that the Telecom Act "opens the cable and the long-distance telephone and local telephone businesses to fierce new competition"); Bencivenga, *supra* note 395, at 5 (stating that the Telecom Act allows local telephone companies to provide long-distance service and long-distance companies to provide local service, and permits telephone/cable cross ownership, giving cable companies the opportunity to provide telephone services and telephone companies to deliver video programming).

397. Statement Accompanying Telecom Act, *supra* note 395; *see Deal Struck on Telecom Act, Clearing Way for Final Passage*, DAILY REPORT FOR EXECUTIVES (BNA), at A-245 (Dec. 21, 1995) [hereinafter *Deal Struck on Telecom Act*] (citing Vice President Al Gore); *Cable TV, Telephone Reform Stalls; House GOP Seeks More Deregulation of Media Companies*, BALTIMORE SUN, Dec. 22, 1995, at C1 [hereinafter *Cable TV, Telephone Reform*] (citing Vice President Al Gore); Chris Woodyard, *Telecommunications Bill Offers Sweeping Overhaul*, HOUSTON CHRON., Dec. 21, 1995, at A1 (citing Vice President

development of interactive media.[398]

Regarding television, the Telecom Act repeals or modifies many television ownership limitations.[399] First, the Act eliminates cable cross-ownership restrictions,[400] thereby permitting a single person or entity to own or control both a network of broadcast television stations and a cable television system.[401] Second, the Act increases the percent of national viewers that television stations can reach from the former limit of 25 percent to 35 percent.[402] Third, it eliminates FCC restrictions on the number of television stations that a person or entity "may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide."[403] Fourth, the Act directs the FCC to reevaluate its multiple ownership rules, which restrict ownership of more than one television station in a local market.[404] Fifth, the Act orders the FCC to exempt the top 50 markets from its "One-to-a-Market" rule,[405] which bans cross-ownership of radio and television stations in the same market.[406] Final-

Al Gore).

398. Telecommunications Act, 110 Stat. at 141 (to be codified at 47 U.S.C. §§ 230(a)(5), 230(b)(1)) (finding that "increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services[,]" and that "[i]t is the policy of the United States . . . to promote the continued development of . . . interactive media").

399. *See generally id.* 110 Stat. at 112-14 (to be codified at 47 U.S.C. § 202).

400. *See generally* 47 C.F.R. 76.501 (1995).

401. Telecommunications Act, 110 Stat. at 114 (to be codified at 47 U.S.C. § 202(f)(1)).

402. *Id.*, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(c)(1)(B)).

403. *Id.*, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(c)(1)(A)).

404. *Id.*, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(c)(2)). Specifically, the Act directs the FCC to conduct a rulemaking proceeding to determine whether the Commission should retain, modify or eliminate the multiple ownership rules. *Id.* Nonetheless, "[i]t is the intention of [the managers on the part of the Houses and the Senate at the conference on the disagreeing vetoes of the two House (the "conferees")] that, if the [FCC] revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling circumstances." Statement Accompanying Telecom Act, *supra* note 395, § 202.

405. *See* Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(d)).

406. Statement Accompanying Telecom Act, *supra* note 395, § 202. According to Roy Stewart, Chief of the FCC Mass Media Bureau, the Bureau will soon be considering a ban on newspaper-broadcast cross-ownership. *"Don't Stumble Around"; FCC's Stewart*

ly, the Act directs the FCC to revise its rules concerning "dual networks,"[407] thus permitting a television station, either broadcast or cable, to affiliate with a person or entity that maintains two or more networks, unless such 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 two emerging networks (WBTN and UPN).[408]

Concerning radio ownership, the Telecom Act eliminates all FCC provisions limiting the number of AM or FM broadcast stations that one entity may own or control nationally.[409] In addition, one entity may now own up to five stations or 50 percent of all stations, whichever is less, in small markets with 0-14 stations.[410] In markets with 15-29 stations, one company may own six stations;[411] in markets of 30-44 stations, one company may own seven stations;[412] and in markets with more than 45 stations, one company

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Sets Out Priorities for Mass Media Bureau, COMMUNICATIONS DAILY, Mar. 5, 1996, at 3.

407. Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(e)).

408. Statement Accompanying the Telecom Act, *supra* note 395, § 202 ("The conferees do not intend these limitations to apply if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such networks.") The Telecom Act does not, however, prohibit a merger between the two emerging networks: WBTN and UPN. Jay L. Birnbaum, Partner, Skadden, Arps, Slate, Meagher & Flom, Address at the *Fordham Finance, Securities and Tax Law Forum* Inaugural Symposium (Mar. 12, 1996).

409. Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(a)). Prior to passage of the new Telecom Act, one company could only own 20 AM and 20 FM radio stations nationally. 47 C.F.R. § 73.3555(e)(1)(i) (1995).

410. Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(b)(1)(D)). Prior to the Telecom Act, in markets with 14 or fewer commercial radio stations, "[one] party [could] own up to 3 commercial radio stations, no more than 2 of which [were] in the same service (AM or FM), provided that the owned stations, if other than a single AM and FM station combination, represent[ed] less than 50 percent of the stations in the market." 47 C.F.R. § 73.3555(a)(1)(i).

411. Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(b)(1)(C)). Prior to the new Telecom Act, "[i]n radio markets with 15 or more commercial radio stations, a party [could] own up to two AM and two FM commercial stations, provided, however, that evidence that grant of any application [would have] result[ed] in a combined audience share exceeding 25 percent [would have been] considered *prima facie* inconsistent with the public interest." 47 C.F.R. § 73.3555(a)(1)(ii).

412. Telecommunications Act, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(b)(1)(B)).

may own eight stations.[413]

According to many commentators, the new Telecom Act paves the way for "wave after wave"[414] of multimedia[415] mergers and acquisitions.[416] Once firms can own more stations, cable television and entertainment companies will probably see even more consolidation within their respective industries.[417] In addition, where Congress permits cable television and local and long-distance telephone companies to compete directly,[418] mergers and alliances between telecommunications and cable enterprises will likely follow.[419]

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413. *Id.*, 110 Stat. at 113 (to be codified at 47 U.S.C. § 202(b)(1)(A)).

414. *Analyst Predicts "Wave After Wave" of Telecom Mergers* (CNN television broadcast, Feb. 28, 1996) [hereinafter "CNN Broadcast"].

415. "Multimedia" is defined as "Telephones + Wireless + Cable." Mark Landler, *U.S. West's Continental Ambitions*, N.Y. TIMES, Feb. 28, 1996, at D1.

416. *Id.*; *Telcos in Merger Craze*, TELECOMMUNICATIONS ALERT, Feb. 29, 1996, *available in* LEXIS, Nexis Library, CURNWS File (reporting that about one-third of telecom companies interviewed are more likely to pursue mergers and acquisitions in 1996 than in 1995); Diane Mermigas, *Telecom Act Opens Floodgates on TV Station Sales, Mergers*, ELECTRONIC MEDIA, Feb. 26, 1996, at 32 ("TV station sales and mergers will soon mirror the flood of radio deals spurred by the passage of the new telecommunications law . . . ."); Leibowitz, *supra*, note 232, at 5. Mergers and acquisitions in the media industry are expected to follow from the lessening of ownership restrictions, such as those discussed above for the television and radio industries. *See* Mermigas, *supra*, at 32. While the Telecom Act certainly provides incentives for media mergers and acquisitions, it explicitly states that it does not "modify, impair, or supersede the applicability of any of the antitrust laws." Telecommunications Act, 110 Stat. at 131 (to be codified at 47 U.S.C. § 401(b)).

417. *See* Gene Marcial, *It's Radio Days in the Buyout Game*, BUS. WK., Mar. 4, 1996, at 94 (stating that Wall Street expects a "rash of mergers and acquisitions" in the radio industry as a result of the Telecom Act); Kevin McKenzie, *Owner of WMC Stations Ponders Options*, COMMERCIAL APPEAL, Jan. 16, 1996, at B5 (discussing a particular corporate owner of television and radio stations in the Memphis area that now considers a sale of its company more likely, as a result of the anticipated lessening of media ownership regulation).

418. Statement Accompanying Telecom Act, *supra* note 395.

419. *See* Woodyard, *supra* note 397, at A1 (stating that mergers and alliances of telecommunications companies are sure to follow passage of the Telecom Act); *Cable TV, Telephone Reform*, *supra* note 397, at C1. For example, a mere 19 days after President Clinton signed the Telecom Act into law, U.S. West, which provides local phone service in 14 Western states, announced a $10.8 billion merger with Continental Cablevision, the nation's third-largest cable-TV operator. *See* Catherine Arnst & Peter Burrows, *U.S. West's Gauntlet Won't Just Lie There*, BUS. WK., Mar. 11, 1996, at 32. Prior to the Telecom Act, Congress prohibited telephone companies from providing cable services in their service areas. 47 U.S.C. § 533(b) (1994) (formerly called the 1984 Cable Act).

Finally, the Telecom Act provides multimedia companies with the opportunity to offer consumers a bundle of communications services, including local and long-distance telephone services, wireless communication, and cable television.[420] Ultimately, then, the Telecom Act is likely to result in an evolutionary blurring of the line between telecommunications and entertainment,[421] producing major multimedia conglomerates,[422] and rendering traditional no-

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Originally, such bans on cross-ownership were developed to protect the cable industry from the once dominant telephone companies. *See* Application of Tel. Cos. for § 214 Certifications for Channel Facilities Furnished to Affiliated Community Antenna Television Sys., 21 F.C.C.2d 307, 323-26 (1970), *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971). In 1992, however, the FCC recommended that Congress lift such cross-ownership restrictions, given how well-established the cable industry had become. *In re* Telephone Co.-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781, 5847-51 (1992).

420. *See generally* Telecommunications Act, 110 Stat. at 121-27 (to be codified at 47 U.S.C. § 302) (authorizing cable and television cross-ownership); Arnst & Burrows, *supra* note 419, at 32; Daniel Bergstein, *Mega-Mergers on Information Superhighway*, N.Y. L.J., Dec. 11, 1995, at 7. Studies have indicated that a market for convergent cable and telephone products exist. *Id.* One study in particular found that 66 percent of homes favor some bundling of basic cable and telephony. *Id.* According to Ivan Seidenberg, CEO of Nynex, however, customers do not want one-stop shopping. *See* Andrew Kupfer, *An Exciting Story About Nynex—Really*, FORTUNE, Mar. 18, 1996, at 54 ("Nobody wants to be owned by a single provider. Anybody who believes he can win all of a customer's business has got to be crazy.").

421. *See* Arnst & Burrows, *supra* note 419, at 32 (describing "the converging world of telecom and video"). According to one commentator:

> [A] slew of [communications industry] mega-mergers and alliances have resulted in a convergence of discrete elements of the industry which traditionally were separated. It seems as if, on any given day, telephone companies become cable operators, cable companies become telephone companies, both enterprises forge ahead into personal communications services (PCS), and even movie studios get in on the act by becoming broadcast conglomerates.

Bergstein, *supra* note 420, at 7; *see also id.* ("The recent flurry of mega-media transactions has made one thing clear: Convergence will continue.").

422. According to one commentator, the U.S. media industry is starting to resemble the Japanese *keiretsu* system, in which a chain of companies, such as a bank, a manufacturer, and a parts supplier, work together and own shares of one another's stock. Farhi, *supra* note 26, at H1. In fact, there are already several examples of enormous joint ventures, cross alliances, and partial share holdings among the media giants: Nynex Corp., a regional phone company, owns a $1 billion share of Viacom, the parent of MTV; U.S. West, another regional Bell company, has a $2.5 billion position in Time Warner; MCI Communications Corp. has invested $2 billion in Tele-Communications Inc. ("TCI"),

tions of "telephone companies," "cable companies" and "movie companies" obsolete.[423]

B. *A New Antitrust Model is Needed for Multimedia Mergers and Acquisitions Because Current Standards Fail to Address the Media Industry's Changing Competitive Landscape*

Competition in the media industry has undergone dramatic and far-reaching change since decisions such as *Paramount Pictures* and *Times Mirror* were handed down in 1948 and 1967, respectively.[424] Specifically, the rise of technology and the corresponding changes in legislation that has followed has created competition where, in fact, competition never previously existed.[425] Furthermore, past media antitrust decisions are inconsistent across industry sub-categories, and are inadequate for analyzing multimedia mergers and acquisitions.[426]

With so much new technology and legislation stimulating the simultaneous rising forces of media competition and consolidation, applying existing antitrust law to the multimedia industry moves beyond the realm of "exceptionally difficult"[427] to the level of nearly impossible. Therefore, as explained in the following three subsections, the evolving competitive landscape of the media industry requires a new model for the multimedia antitrust analysis.

1. The Rise of Technology Has Spurred Changes in Media Product Substitutability

From the demand side, consumers increasingly are viewing formerly discrete channels of media as interchangeable or substitut-

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and two other cable giants in a wireless phone venture. *Id.*

423. Bergstein, *supra* note 420, at 7.

424. *See supra* notes 351-62 and accompanying text (discussing *Paramount Pictures*); *supra* notes 269-306 and accompanying text (discussing *Times Mirror*).

425. *See* discussion *infra* part III.B.1 (discussing technology's effect on competition in the media industry); discussion *infra* part III.B.2 (discussing the Telecom Act's effect on competition in the media industry).

426. *See* discussion *infra* part III.B.3 (explaining that media antitrust decisions are inconsistent across industry sub-categories).

427. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 204 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (discussing the difficulty of applying antitrust law to the entertainment industry).

able products.[428] For example, as noted by courts in such decisions as *Syufy*, *Loew's Inc.*, and *United States v. Tracinda Investment Corporation*,[429] the advent of vast and rapid technological changes in the motion picture industry has resulted in substantial ancillary markets for movies.[430] Consequently, consumers today can respond to a price increase by a first-run movie exhibitor by choosing, instead, to watch a movie on broadcast, cable, or pay-per-view television, or by renting a film on videocassette.[431]

As this example demonstrates, recent technological innovation has lead to a rise in media product substitutability. Nonetheless, courts fail to consistently recognize that competition exists among different media exhibiting similar content.[432] Therefore, a new antitrust model is needed for the media industry that reflects technological innovation, and the corresponding change in market realities.

2. Legislative Changes Have Altered the Manner in which Media Companies Compete

Just as competition in the media industry has evolved from the demand side, it has also shifted from the supply side.[433] As ex-

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428. *See supra* notes 145-47 and accompanying text (explaining that product substitutability must be considered from the demand side of a market).

429. 477 F. Supp. 1093 (C.D. Cal. 1979).

430. *See supra* notes 313-42 and accompanying text (discussing *Syufy*); *supra* notes 345, 353-61 and accompanying text (discussing *Loew's Inc.*); *supra* notes 307, 346 (discussing *Tracinda*).

431. *See supra* notes 331-32 and accompanying text (explaining that consumers may respond to a price increase in first-run films, by renting a video cassette or watching one on cable television).

432. *See* discussion *infra* part III.B.3 (explaining that media antitrust decisions are inconsistent industry sub-categories). In a hypothetical newspaper antitrust case in New York City, for example, a court would likely refuse to include such newspapers as the *New York Times*, the *New York Daily News*, and the *New York Post* in the same "news and information" product market as New York 1—a twenty-four hour news cable television station that reports events affecting and occurring in the city. This is because newspaper antitrust decisions generally do not include radio and television news broadcasting as substitutes for newspapers, even though the rise of technology has created competition among these media. *See infra* notes 265-66 and accompanying text (explaining that courts generally do not include other forms of media in the relevant product market definition for the newspaper antitrust analysis).

433. *See supra* notes 148-66 and accompanying text (explaining that the antitrust

plained above, the recent Telecom Act has opened up new competition within the media industry.[434] For example, media companies today can sell consumers a package of diverse products that those companies formerly were prohibited from offering.[435] Also, under the Act, certain multimedia companies are permitted not only to compete directly, but also to merge with and acquire each other.[436]

Finally, with the restrictions on television and radio station ownership significantly lessened,[437] media companies are encouraged to consolidate[438] in order to achieve higher market shares and economies of scale.[439] Consequently, the antitrust analysis of multimedia mergers and acquisitions must adequately consider recent changes in competition from the supply side of the industry.

3. Past Media Decisions Are Inconsistent Across Media Sub-Categories

Finally, courts need a new model for the antitrust analysis of multimedia mergers and acquisitions because past decisions are inconsistent across media sub-categories. As explained above in Part II.D, courts deciding media antitrust cases in the past have alternated between a compartmentalized and broad-market approach for determining media product substitutability. For example, newspaper antitrust decisions rarely recognize competition among newspapers, radio, and television in consumer news and information markets.[440]

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analysis must consider competition from the supply side of a market).

434. *See* discussion *supra* part III.A (discussing the Telecom Act).

435. *See supra* note 420 and accompanying text (explaining that the Telecom Act permits media companies to offer consumers packages of services). As explained below in part III.C.1, courts should apply the "cluster market" doctrine in this situation.

436. *See supra* notes 414-19 and accompanying text (explaining that the Telecom Act creates direct competition among multimedia companies, and paves the way for a wave of multimedia consolidation).

437. *See supra* notes 399-413 and accompanying text (discussing the lessening of restrictions on television and radio station ownership).

438. *See supra* note 417 and accompanying text (explaining that mergers and acquisitions of television and radio stations are likely to result from the Telecom Act).

439. *See supra* notes 44-52 and accompanying text (explaining economies of scale).

440. *See supra* notes 265-66 and accompanying text (explaining that courts generally do not include other forms of media in the relevant product market definition for the newspaper antitrust analysis).

In contrast, motion picture antitrust decisions have gradually started accepting the argument that competition exists among first-run films, sub-run films, video aftermarkets, and cable television.[441] Similarly, television antitrust decisions have also held that cable television, satellite television, video cassette recordings, and free broadcast television—dubbed collectively "passive visual entertainment"[442]—do, in some circumstances, compete for viewers.[443]

The approaches taken in newspaper, motion picture, and television decisions may have reflected market realities at one time. Nonetheless, these "older media" decisions cannot guide future courts because the past decisions recognize competition on an inconsistent basis. Where companies are suddenly permitted to own amalgamations of publishing, television, radio, motion picture, and computerized interactive media concerns,[444] courts must adopt a new antitrust model that consistently recognizes competition across media sub-categories.

C. *Developing an Antitrust Model for Multimedia Mergers and Acquisitions That Recognizes Competition Where Competition Exists*

As explained above in Part III.B, current antitrust standards cannot guide future courts in analyzing multimedia consolidations, where those standards do not reflect changing market realities and competition accurately. What is needed, therefore, is a new antitrust model for multimedia mergers and acquisitions that, in the words of Chief Justice Warren in *Brown Shoe*, "recognize[s] competition where, in fact, competition exists."[445] What follows is a framework for analysis for: (1) defining the relevant market for multimedia; (2) estimating the merging firms' strength in the rele-

441. *See supra* notes 324-25 and accompanying text (discussing competition among motion picture exhibitors and other forms of media).

442. Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987).

443. *See supra* note 374 and accompanying text (explaining that all passive visual entertainment compete).

444. *See supra* notes 414-19 and accompanying text (explaining that the Telecom Act permits new consolidations of multimedia companies).

445. *Brown Shoe*, 370 U.S. at 326.

vant market, and (3) examining industry- and transaction-specific factors.[446]

1. Defining the Relevant Market for Multimedia

As discussed above,[447] defining a relevant market is a two-part process: drawing the line of commerce, or product market, and delineating the effective area of competition, or geographic market.[448] In determining the relevant product market for the media industry, various courts and agencies have diverged significantly in the past.[449] For example, in some newspaper antitrust cases, courts have defined the product market as microscopically as "daily local newspapers."[450] Considering, however, that consumers in some geographic markets today can obtain local news, social calendars, and sports information from many other sources,[451] this definition is overly narrow. On the other hand, an "all-inclusive" definition, similar to one purported by the FCC[452]—grouping all information and entertainment media into a single market—provides an equally unsatisfactory result, given the diversity of media channels that has

446. *See supra* note 137 and accompanying text (describing the three-step process for antitrust merger analysis).

447. *See* discussion *supra* part I.C.1.

448. *See supra* notes 139-74 and accompanying text (discussing the law of relevant markets).

449. *Compare supra* notes 266, 283-93 (describing product markets for newspapers) *and supra* notes 322-33 (describing product markets for motion picture exhibition) *with supra* notes 363-69, 374 (describing product markets for television and radio industries).

450. *See, e.g.*, Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1155 (W.D. Ark. 1995); United States v. Times Mirror Co., 274 F. Supp. 606, 614 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968); *see also supra* notes 283-93 (describing one particular product market as "daily local newspapers").

451. *See supra* note 364 (suggesting some substitutability between local news in newspapers and on the radio and television).

452. The FCC purported that all media are perfect substitutes in the context of communications regulation. *See, e.g.*, *In re* Amendment of Sections 73.35, 73.240, and 73.636 of the Comm'n's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 95 F.C.C.2d 360, 387-89 & n.101 (1983) (Notice of Proposed Rulemaking); *In re* Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Comm'n's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 25-26, 54 (1984) (Report and Order); *see also* Boadwee, *supra* note 149, at 1211 n.3 (discussing the FCC's definition); *supra* note 262 (explaining that the FCC has suggested that consumers regard all media as reasonable substitutes).

resulted from the rapid advances in cable, telecommunications, and information delivery technologies in recent years.[453]

An appropriate product market definition for multimedia, then, can only follow from focusing on the special characteristics of the industry.[454] First, courts and enforcement agencies should recognize that consumers' perception of media interchangeability varies, depending on the content of that media.[455] Second, consumers' propensity to substitute media is also a function of "communication medium."[456] Third, the content on some forms of media is more heavily regulated than on others, thereby limiting competition among some media.[457] Finally, multimedia firms can now provide "one-stop shopping" benefits to consumers, as a result of the recently passed Telecom Act.[458] Viewed individually or together, such characteristics significantly affect the mode of competition in the marketplace and, in turn, must be factored into the product

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453. *See supra* notes 266, 345, 359 (discussing the development of video aftermarkets); *supra* notes 391-423 and accompanying text (discussing the effect that the Telecom Act will have on competition in the telecommunications and cable industries); *supra* note 260 (discussing recent advances in computerized information services and real-time document sharing).

454. *See supra* notes 132-35 (explaining that antitrust merger law must reflect economic and market realities).

455. *See supra* note 325 (explaining that consumers generally consider similar "program types" as reasonable substitutes).

456. This Note defines "communication medium" as the medium on which a content genre is communicated. *Cf. supra* note 363 (discussing substitutability of video programming, based on transmission medium).

457. For example, broadcast media is more highly regulated for indecent content than print media or cable television. *See* FCC v. Pacifica Found., 484 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that [receives] the most limited First Amendment protection."); *id.* at 739 ("[T]he government's interest in the well-being of its youth justifies special treatment of indecent broadcasting."); *id.* at 741-42 n.17 (explaining that governmental interference of obscene and indecent print publications is more strictly scrutinized than governmental interference of obscene and indecent broadcasts); Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985) (explaining that cable television is subject to less government interference than broadcast television).

Regarding ownership rules, however, the media industry recently became much less regulated as a result of the passing of the Telecom Act. *See* discussion *supra* part III.A.

458. *See supra* note 420 and accompanying text (explaining that the Telecom Act presents cable and telecommunications companies with the opportunity to offer bundled services).

market definition.[459]

Taking the special characteristics and market realities of the multimedia industry into account, a product market definition for multimedia merger analysis must include a definition of a product market that recognizes competition where, in fact, competition exists.[460] Such a definition must focus on the medium's content, as well as the manner in which it is communicated.[461] What follows is a three-step process for delineating a product market for the multimedia industry: (1) create "content genres";[462] (2) exclude nonsubstitutable media; and (3) incorporate "cluster markets."[463] In the first step of the process, a court or enforcement agency should group similar content genres into individual markets.[464] By limiting the outer boundaries of each product market to media that communicates the same content genre, this first step minimizes the danger that the amount of competition will be overstated. Moreover, creating content genres recognizes that different media do compete, but only to the extent that they communicate similar messages.[465]

After basing the initial product market definition on the applicable content genre, the next step is to evaluate the special character-

459. *See supra* notes 132-35 (explaining that antitrust merger law must reflect economic and market realities).

460. *See supra* note 144 (discussing the Supreme Court's decision in *Brown Shoe*).

461. *See supra* note 363 (explaining that transmission medium influences substitutability); *supra* note 432 (explaining that communication medium influences substitutability).

462. This Note defines "content genre" as "a group of texts set apart by similarities in format, length, or content, such that viewers consider them reasonably substitutable." *Cf. supra* note 325 (defining program types, which are analogous to content genres for video programming). Examples of content genres include "motion pictures," "news," or "variety shows."

463. *See supra* notes 151-56 (describing cluster markets).

464. For example, a "movies genre" would tentatively constitute a single product market, because films are displayed on broadcast television, cable television, various pay television services, videocassettes, and movie theaters.

465. *See supra* note 363 (explaining that program type influences substitutability); *supra* notes 307-12, 321-33 and accompanying text (explaining that movies exhibited on different media compete); *supra* note 364 (explaining that news appearing on radio and other media compete). *But see supra* notes 266-93 (explaining that courts are hesitant to recognize competition between newspapers and electronic media).

istics of the communication medium.[466] As it appears on a particular medium, a content genre may not be substitutable with the same content genre appearing on another medium.[467] This may result from the existence of: (1) technical or regulatory restrictions;[468] (2) diehard consumers;[469] (3) temporal price discrimination;[470] or, (4) bundling.[471] Media with such characteristics should, therefore, be placed in their own markets, in order to avoid overinclusive market definitions. For example, a preliminary "sports genre" may include sporting events on television and radio, and in live arenas, newspaper stories, and movie theaters. Nonetheless, because the last two media are not physically capable of broadcasting real-time images or sound, they are limited substitutes of the first three. Thus, in order to accurately "recognize competition where, in fact, competi-

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466. *See supra* note 363 (explaining that transmission medium influences consumer choice); *supra* note 458 (explaining that communication medium influences substitutability).

467. *See supra* note 363 (explaining that transmission medium influences consumer choice); *supra* note 458 (explaining that communication medium influences substitutability).

468. An example of a technical restraint is newspapers' inability to report live news. Similarly, an example of a regulatory restraint is broadcast television's inability to exhibit sexually explicit programs. *Cf. supra* notes 350-62 and accompanying text (explaining that judicial oversight restraints prevented vertical integration in the motion picture industry between the 1950s and the 1980s); *Syufy*, 903 F.2d at 673 ("It is well known that some of the most insurmountable barriers in the great race of competition are the result of government regulation.").

469. *See supra* notes 157-66 and accompanying text (discussing price discrimination and the effect on diehard consumers). Diehards are especially visible in the "live sports broadcasting genre." *See supra* note 164.

470. *See supra* note 159 and accompanying text (defining temporal price discrimination). Similar to motion pictures in the 1930s and 1940s, movies today are subject to temporal price discrimination because of aftermarkets: a first-run film may start in a movie theater, move to a sub-run theater, show up on videocassettes, appear on pay-per-view television, get to cable-television, and then, finally, reach broadcast television. *See supra* notes 324-25 (explaining ancillary markets for motion pictures). Over time, the price for viewing the film decreases, thus capturing more consumer surplus.

471. *See supra* note 160 and accompanying text (explaining bundling). Bundling is especially popular in the cable-television business. In purchasing "basic cable service," cable television consumers usually purchase a standard package of channels. Examples of the standard channels include MTV—a channel that exhibits primarily music videos and other music-oriented programming—and CNN Headline News—a twenty-four hour news service.

tion exists,"[472] the preliminary sports genre line of commerce should be divided into two submarkets: live sports exhibition and "anecdotal" sports reporting.[473]

The final step of the product market definition is to incorporate "cluster markets" and other supplier conduct into the analysis.[474] Under the cluster market rationale, products that consumers tend to purchase concurrently from a single producer should be grouped together, even if the products do not typically compete.[475] Consequently, the product market definition would be broadened to include such clustered goods.[476] For example, because cable and

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472. *Brown Shoe*, 370 U.S. at 326.

473. Under the model that this Note proposes, some media may communicate more than one content genre. For example, pay-per-view television and HBO—a cable television station—both exhibit movies and live sporting events. Consequently, programming on either medium could fall into either the "movies genre" or the "sports genre." In cases such as this, each medium's market share for a particular content genre must be calculated individually. While an example is helpful to illustrate this proposition, it does, unfortunately, require drawing upon yet-to-be-discussed mechanics of the model.

With that caveat in mind, assume that a court is determining market concentration of the "live sports broadcasting genre," based on total revenues. *See infra* note 492 and accompanying text (explaining that market shares can be based on any number of criteria). Assume further that only broadcasters in the relevant geographic market are HBO and pay-per-view television.

To calculate HBO's market share, the court would include total revenues from *all* HBO programming (including revenues from movies). This is because under the third step for defining the product market—incorporating "bundling" and/or "cluster markets"—the court would recognize that HBO bundles its sports and movies programming. *See infra* notes 474-80 and accompanying text (explaining that "cluster markets" must be included in the multimedia product market definition). That is, cable subscribers' only options are to purchase all or none of HBO's programming; they cannot buy individual movies or sporting events from the channel. Consequently, movies exhibited on HBO should be included in the same relevant market as sports exhibited on HBO, even though those content genres are not typically interchangeable. *See supra* notes 464-65 and accompanying text (explaining that consumers' perception of media substitutability varies, depending on content).

In contrast, to calculate pay-per-view television's market share, the court would include only those revenues derived from sporting events. This is because viewers of pay-per-view television can purchase individual programs.

474. *See supra* notes 151-56 and accompanying text (explaining cluster markets). "Other" supplier conduct would include price discrimination and bundling. *See supra* notes 157-66 (discussing price discrimination and bundling).

475. *See supra* notes 151-56 and accompanying text (explaining cluster markets).

476. *See supra* notes 151-56 and accompanying text (explaining cluster markets).

satellite television offers "one-stop shopping,"[477] but broadcast television does not, programs of all types exhibited on cable and satellite television should be combined into a single cluster market.[478] Similarly, with the passage of the Telecom Act, cable and telephone companies are permitted to offer packages of services, including local and long-distance telephone services, wireless communications, and cable television.[479] As was the case with commercial banking services in *Philadelphia National Bank*, such goods and services should be included in the same relevant market, even where those products do not typically compete.[480]

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477. *See supra* note 152 (explaining "one-stop shopping"). Cable television distributors usually offer consumers a variety of channels, such as ESPN (sports genre) and HBO (primarily movies genre), that otherwise might not be substitutes for each other. Because viewers generally purchase all channels from a single cable television distributor, antitrust law requires that all channels that such distributors offer be included in a single product market. *See supra* notes 151-56 and accompanying text (explaining that antitrust law groups products which are bought or sold concurrently into a single product market).

478. *See supra* note 152 (explaining that cable and satellite television are subject to the "one-stop shopping" rationale).

479. *See generally* Telecommunications Act, 110 Stat. at 121-27 (to be codified at 47 U.S.C. § 302); *see supra* note 405 (describing telecom and cable companies' abilities to provide packages of services).

480. *See id.* at 355, 359-61; *see supra* notes 151-56 and accompanying text (explaining that those products that do not typically compete, but are usually sold together, should be included in the same product market).

With the above explanation of "content genres" in mind, it is prudent to note that some commentators may find this notion to be controversial. *See* Letter from Robert D. Joffe, Partner, Cravath, Swaine & Moore, to Peter Nesvold (Apr. 28, 1996) [hereinafter "Joffe Letter"] (on file with author) (explaining some of the arguments that commentators might make in response to the model that this Note suggests). These commentators may argue, for example, that the suggestion of a "movies genre" begs the question about *types* of movies. *See id.* Hypothetically, one could continue to narrow the movies genre into markets for children's movies, action movies, comedies, etc. *See id.* Therefore, these commentators may conclude that the narrowing down process should not be begun at all, leaving the market very broadly defined. *See id.*

Admittedly, a movies genre could theoretically continue to be narrowed to the point where individual movies, such as *Casablanca* or *Citizen Kane*, constitute discrete product markets. Nonetheless, as explained by the Supreme Court in *United States v. Continental Can Company*, a court or enforcement agency must draw the product market line to *reasonably* reflect competition. *See* 378 U.S. 441, 449 (1964). A relevant market definition that encompasses every substitute of an infinite range for a product is overly broad. *See id.* Similarly, a product market definition that requires "products [to] be fungible to be considered in the relevant market" is too narrow. *Id.* Therefore, the *Continental Can*

Once a court or enforcement agency has determined the product market for a multimedia merger, it must delineate the relevant geographic market.[481] Nonetheless, because the law of geographic markets parallels that of product markets, multimedia substitutability, clustering, and market behavior also determine the geographic market.[482] In addition, courts might consider: (1) any overlap of broadcasting signals;[483] (2) the area of a certain periodical's circulation;[484] (3) industry and regulatory definitions of the geographic market;[485] (4) the existence of any trade associations, societies, or journals;[486] and, to a lesser degree, (5) both parties' stipulations of the appropriate geographic market.[487] While these criteria should

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court stressed that "[i]n defining the product market between these terminal extremes, we must recognize *meaningful* competition where it is found to exist." *Id.* (emphasis added).

The *Continental Can* rationale applies directly to multimedia product market definitions. Narrowing the relevant market to that for children's movies or action movies does, in fact, require the products to be "fungible," and equates to an overly narrow product market. By the same token, a product market that forgoes the narrowing process altogether, leaving the relevant market as "a very broad-ranging one for 'eyeballs,'" may be excessively broad. *But see* Joffe Letter, *supra.*

A movies genre product market definition, in contrast, finds a mid-point between these "terminal extremes." Specifically, a consumer is unlikely to perceive other content genres—such as sports or music videos—as reasonable substitutes for movies on broadcast television, cable television, or in movie theaters. *See supra* notes 455, 465 and accompanying text (explaining that the content of media influences a consumer's perception of interchangeability). Therefore, content genres are more likely to recognize meaningful competition for multimedia than the terminal extremes of all-encompassing or all-exclusive product market definitions.

481. *See supra* notes 167-74 and accompanying text (describing the law of geographic markets).

482. *See supra* notes 167-74 and accompanying text (explaining that both product and geographic market definitions turn on product substitutability, the clustering doctrine and market behavior).

483. *See supra* note 382 and accompanying text (discussing *Ralph C. Wilson v. American Broadcasting*).

484. *See supra* note 295 and accompanying text (discussing newspaper circulation as evidence of the geographic market).

485. *See supra* note 382 and accompanying text (discussing regulatory and industry standards as evidence of developing geographic market for television and radio industries); *supra* note 296 and accompanying text (stating that the newspaper industry's definition of the geographic market influenced the court's definition).

486. *See supra* notes 288-90 and accompanying text (discussing trade associations, societies, and journals as evidence of the relevant product market).

487. *See supra* notes 319-20 and accompanying test (explaining that the court moved

guide a court or enforcement agency in establishing the "area of effective competition," the geographic market ultimately should be defined to encompass any commercially significant area which can reasonably be said to confine the relevant commercial activities.[488]

2. Estimating the Unified Firm's Power in the Relevant Market

Once a court or enforcement agency has defined the relevant market, the second step of the antitrust merger analysis for the multimedia industry is to estimate the degree of power that the unified firm would possess in that market.[489] As discussed in Part I above, determining market power requires a three part analysis.[490] First, the court must identify competing multimedia firms by applying the above market definition rules to other media conglomerates that currently produce or sell the market's products in the market's geographic area.[491] Second, the court must compute market shares, based on any number of criteria: (1) total sales expressed in either dollar or physical terms; (2) the number of actual points of communication (such as the number of screens that motion picture exhibitors own in a particular market); or (3) the number of consumers served in the relevant market (e.g., readers in the case of periodicals and computerized information services, listeners in the case of radio, and viewers in the case of various video programming media).[492]

In the third part of the analysis, the court or enforcement agency must estimate the concentration of the relevant market.[493] Be-

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quickly over geographic market definition, where parties both stipulated that it was Las Vegas, Nevada).

488. *See supra* notes 167-74 and accompanying text (discussing the law of geographic markets).

489. *See supra* notes 175-216 and accompanying text (explaining that the second step of the antitrust merger analysis is estimating market power).

490. *See supra* notes 176-78 and accompanying text (explaining that estimating market power is a series of three ministeps).

491. *See supra* notes 176, 179-83 and accompanying test (describing the process of identifying competitor firms).

492. *See supra* notes 177, 184-85 and accompanying text (discussing the process of calculating market shares).

493. *See supra* notes 178, 186-216 and accompanying text (discussing the process

cause market concentration is often an abstract and inexact concept, courts, the DOJ, and the FTC favor the HHI—an objective and easy-to-understand formula.[494] Nonetheless, the test for market power is not always as simple as computing a firm's market share to see if it exceeds a critical threshold.[495] As the Supreme Court warned nearly fifty years ago, "[t]he relative effect of percentage command of a market varies with the setting in which that factor is placed."[496]

An overly rigid test, then, could potentially obscure the reality that "market power" varies significantly with the structural and political factors of some markets.[497] Indeed, mergers and acquisitions that result in a post-transaction HHI of less than 1000 could escape antitrust scrutiny, and yet still pose anticompetitive and antidemocratic threats.[498] Moreover, such threats are especially prevalent in the media industry, where even minimal economic control may equate to significant influence over public sources of information.[499] When two firms that inform the population merge, the decrease in the number of competitors may threaten the free flow of information, quite apart from any economic repercussions.[500] Therefore, while the HHI may provide an objective and somewhat useful standard, the antitrust investigator should not overemphasize the importance of the formula in deciding whether to proceed with a full antitrust analysis of multimedia mergers and

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of estimating market concentration).

494. *See supra* notes 201-16 and accompanying text (defining the HHI).

495. *See supra* note 191 (explaining that an overly rigid test has the potential for both "false positive" and "false negative" risk). For similar reasons, relying on certain HHI thresholds to determine when a market has become concentrated is also too rigid. *See supra* notes 207-16 and accompanying text (describing the various HHI thresholds on which the DOJ and the FTC rely).

496. United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948).

497. *Id.*

498. *See supra* notes 207-08 and accompanying text (explaining that mergers in markets with an HHI of under 1000 are rarely challenged by the DOJ or the FTC).

499. *See supra* note 186 (explaining that media is an industry in which market concentration is particularly abstract).

500. *See* Pearl, *supra* note 18, at A10; *supra* note 186 (discussing market concentration and the media industry).

acquisitions.[501] Nonetheless, until a more flexible methodology is developed for measuring market concentration in the multimedia industry, courts should continue to use the HHI in the multimedia antitrust analysis.[502]

3. Examining Multimedia Industry- and Transaction-Specific Factors

As discussed in Part I above, examining industry- and transaction-specific factors is the third and final step in determining whether a merger or acquisition violates Section 7 of the Clayton Act.[503] From an economic standpoint, one may argue that the barriers to entry to some areas of the media industry are extremely low.[504] After all, "freedom of speech" is, by definition, free. Furthermore, one commentator has suggested that new technology, such as the Internet's "World Wide Web,"[505] ensures that all viewpoints, no matter how controversial, may reach the public.[506] Under such rationale, entry into the multimedia market is so easy as to eliminate anticompetitive concerns of multimedia mergers and acquisitions.[507]

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501. *See supra* note 205 (explaining that some courts downplay the reliability of the HHI).

502. This Note does not suggest that threats to the marketplace of ideas be quantified for HHI calculations. Nonetheless, these threats should, at a minimum, supplement HHI calculations. Therefore, courts could adopt a rule whereby the HHI establishes a rebuttable presumption as to market concentration, but that evidence of reasonable structural and political factors is admissible.

503. *See supra* notes 217-57 (discussing the final step of the antitrust merger analysis: examining industry- and transaction-specific factors).

504. Nonetheless, there still may be legal and regulatory barriers. *See* Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 418 (1989); Boadwee, *supra* note 149, at 1225 n.108.

505. The "World Wide Web" ("WWW") "links servers across the Internet." Symposium, *First Amendment and the Media: Regulating Interactive Communications on the Information Superhighway: The Changing Landscape of First Amendment Jurisprudence in Light of the Technological Advances in Media*, 5 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 235, 240 n.13 (1995). Specifically, the WWW "utilizes electronic links to connect documents, images, sounds, and video—or specific parts of such media—to each other." Georgia K. Harper, *The University Pursuit of the Promise of the New Media*, 13 CARDOZO ARTS & ENT. L.J. 447, 449 (1993). The electronic links "are called hypertext links, hyperlinks, or simply links." *Id.*

506. Symposium, *supra* note 227, at 439-40 (comments of Joffe).

507. *See supra* notes 220-22 and accompanying text (explaining that mergers in

Nonetheless, free speech comes at a price. While the U.S. Constitution protects an individual's right to speak, it does not guarantee that a mass audience will receive the message.[508] Moreover, certain controversial viewpoints on a "Web sight in Zaire"[509] simply may not compete with those same viewpoints when they appear on an established and, presumably, objective 24 hour cable television news channel. Consequently, the public may not perceive the World Wide Web as a legitimate substitute for news, commentaries, and editorials on television or radio. Therefore, the multimedia industry should be examined with the same traditional efficiency and market entry analyses as any other industry.

With this in mind, a court might consider a number of industry-specific factors in determining whether a particular multimedia merger is anticompetitive. For example, the content on certain media, such as broadcast television, are more highly regulated than other media.[510] In addition, some media are limited physically in the number of distribution channels on which they may be offered. An example includes the radio industry, which can only broadcast on a finite number of frequencies. Consequently, broadcast television and radio have higher barriers to entry than other types of media.

While proponents of the Chicago School Approach for evaluating multimedia mergers would conclude the antitrust analysis with entry and efficiency analyses,[511] supporters of the Multivalued Approach would examine the social and political ramifications of the proposed transaction.[512] At the most extreme and controversial level, some proponents of the Multivalued Approach would even extend those socio-political implications to include First Amend-

industries with low barriers to entry are less likely to be deemed anticompetitive).

508. *See* U.S. CONST. amend. I (establishing the freedom of speech).

509. Symposium, *supra* note 227, at 440 (comments of Joffe).

510. *See supra* note 457 and accompanying text (explaining that the content on some forms of media is more heavily regulated than on others, thereby limiting competition among some media).

511. *See supra* notes 240-45 and accompanying text (discussing the Chicago School approach).

512. *See supra* notes 246-57 and accompanying text (discussing the Multivalued approach).

ment concerns:[513] "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[514]

Without advocating either approach in general, the antitrust model that this Note proposes addresses the considerations of both the Multivalued Approach and the purely-economic Chicago School Approach. As explained above, the First Amendment concerns that multimedia mergers and acquisitions limit the number of channels for communication are intertwined inseparably with traditional Chicago School notions of "competition" and "substitutability." Consequently, this Note protects the social and political ramifications of multimedia mergers and acquisitions by developing an antitrust model that "recognize[s] competition where, in fact, competition exists."[515]

To illustrate how the proposed model addresses both the Chicago School and the Multivalued Approaches, assume a merger between a 24 hour cable television news channel, such as New York 1 in New York City,[516] and a regional newspaper, such as the *New York Post*.[517] Assume further that both New York 1 and the *New York Post* report some national news, but focus primarily on events that occur in, and affect, New York City.[518] Under the historical antitrust analysis of the media industry, a court would probably not include New York 1 and the *New York Post* in the same product market, because courts in the past generally have not regarded television stations and newspapers as substitutes.[519] While this historical approach to an antitrust analysis of the merger would fulfill the Chicago School Approach because it would be purely

513. Symposium, *supra* note 227, at 433 (comments of Joffe).

514. Associated Press v. United States, 326 U.S. 1, 20 (1945).

515. *Brown Shoe*, 370 U.S. at 326.

516. *See supra* notes 364, 432 (discussing the cable television channel New York 1).

517. *See supra* notes 364, 432 (discussing the *New York Post*).

518. These events might include local politics, news, sporting events, social calendars, etc.

519. *See supra* notes 265-66 and accompanying text (explaining that courts generally do not include other forms of media in the relevant product market definition for the newspaper antitrust analysis); *supra* notes 364, 432 (discussing a potential product market which would include New York 1 and the *New York Post*).

economic, the analysis would not satisfy the Multivalued Approach because the analysis would not consider any socio-political ramifications that could potentially follow from the merger.

Nonetheless, under the proposed model, a court would probably place New York 1 and the *New York Post* in the same "news and information" content genre.[520] Specifically, a court would likely find that both media compete, because they communicate nearly identical content at comparable prices to the consumer.[521] Consequently, a court would probably include both New York 1 and the *New York Post* in the same relevant market definition.

In contrast to the historical analysis of this hypothetical merger, the analysis under the proposed model would address both the Chicago School and the Multivalued Approaches. First, the proposed model would comport with the Chicago School because it applies an economically-based antitrust analysis to the New York 1–*New York Post* merger. Intangible First Amendment and other socio-political concerns would not enter into the analysis; the model would focus solely on competition between the two media. Second, the proposed model would also satisfy the Multivalued Approach. This is because it would recognize that a hypothetical merger between New York 1 and the *New York Post* would eliminate an editorial voice over New York City's "marketplace of ideas."[522] Therefore, the model that this Note proposes protects the socio-political concerns of the Multivalued Approach, by developing a Chicago School, economically-based analysis that focuses on

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520. To a lesser extent, both New York 1 and the *New York Post* may also compete from the supply side. That is, both media presumably compete for researchers, reporters, and writers, all of whom know and understand New York City history, politics, and sports.

521. The *New York Post* can be purchased in New York City for $0.50 per daily copy, whereas New York 1 is included in Time Warner's basic cable television service, which, as a package, costs a consumer approximately $0.90 per day. *See, e.g.*, Billing Statement from Time Warner Cable to Elizabeth A. Bloomer (Feb. 17, 1996) (on file with author). Note, however, that because New York 1 is sold in a package of Time Warner's basic cable television service, the product market may have to be broadened under the proposed model to include all "clustered" channels. *See supra* notes 474-80 and accompanying text (discussing the "cluster market" doctrine as it applies to the proposed model).

522. *See supra* notes 20-21 and accompanying text (discussing some commentators' concerns that mergers between media companies restrict the marketplace of ideas).

competition across sub-categories of the multimedia industry.

CONCLUSION

Courts and enforcement agencies need a new antitrust model for analyzing mergers and acquisitions in the rapidly advancing multimedia industry. This Note develops a model that protects the social and political concerns surrounding multimedia mergers and acquisitions, by focusing on traditional economic concepts of competition and product substitutability. By approaching antitrust law in such a manner, this model addresses the both Multivalued Approach and the Chicago School Approach for determining the anticompetitive effects of consolidation within the multimedia industry.