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Panel II: The Economic and Regulatory Issues of Convergence

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Panelists: William Baer**
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MR. PATTERSON: Good afternoon, and welcome to the second panel. This panel will talk about the antitrust and regulatory implications of media convergence and concentration. Antitrust law and communications regulation, and perhaps more specialized bodies of law, are, of course, the way that the First Amendment principles that we discussed in the first panel are vindicated, because the First Amendment does not itself give the government any power to regulate private parties. On the contrary, the First Amendment puts limits on what all statutory bodies of law can do.[1] So we have a tension here. The First Amendment may place limits on what antitrust and

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1. *See, e.g.*, Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 741 (1996) ("[T]he First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems.").

regulation can do in its attempt to vindicate First Amendment principles. Today we have a panel that comprises both government representatives, and industry representatives—so, hopefully, we will get a little bit of that tension explored on the panel.

We have four panelists. The first speaker is William Baer, who is director of the FTC's Bureau of Competition. The Bureau of Competition is the FTC's antitrust arm. He will speak about how the FTC approaches mergers in the information industries.

Then we will hear from Lawrence Grossman, the former president of NBC News and PBS. Mr. Grossman writes extensively on media issues, and has written a book entitled *The Electronic Republic: Reshaping Democracy in the Information Age*.[2] He will examine the social-policy implications of media mergers from the perspective of a media insider.

The third speaker will be Jeffrey Lanning, who is special counsel in the office of the General Counsel for the FCC. Mr. Lanning advises the General Counsel on telecommunications matters, particularly those involving mergers, interconnection, local competition, international issues and the Internet. And he will focus his discussion on technological and structural change in the industry and will try to answer the main question: "Do the old rules still work?"

Finally, we will hear from Robert Joffe, a partner at Cravath, Swaine & Moore. He is been deeply involved in communications industry mergers and acquisitions, and in litigation in the industry. As outside counsel at Time Warner, Mr. Joffe will perhaps provide a perspective on the Time Warner-Turner merger that might be in contrast with the FTC view. So perhaps we can generate a little discussion on that basis. Mr. Baer.

MR. BAER: Thank you, Mark. It is a pleasure to be here and a pleasure to be on the panel. We will see whether Bob Joffe and I can generate some sparks. We ended up settling that merger, and the question is whether we have settled all our old scores or not. We will see.

I wanted to talk a little about the trend we are seeing with respect

2. LAWRENCE GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE (Viking Press 1995).

to mergers involving the media, both electronic and print, and talk a little bit about the role of antitrust. If you take as your starting point the Communications Act rewrite,[3] large portions of which the Supreme Court has just affirmed,[4] it has been extraordinary what is been going on involving the media. You have Disney-Capital Cities; Time Warner-Turner; US West-Continental Cable; a string of radio mergers.[5] The telecommunications industry has been actively involved, for example Worldcom-MCI; Bell-Atlantic-NYNEX; Southwestern Bell-Pac Tel; and more recently, AT&T-TCI.[6]

3. Telecommunications Act of 1996, P. L. No. 104-104, 110 Stat. 56 1996) (codified in scattered sections of 15 & 47 U.S.C.). The Telecommunications Act of 1996 has been characterized as the culmination of many years of intensive lobbying, debate, and struggle among the various stakeholders of the telecommunications industry, and stands as a remarkable and historic legislative achievement. *See* Patricia E. Koch, *A Review of Telecommunications Act Handbook: A Complete Reference for Business by Leon T. Knauer, et al.*, 5 COMMLAW CONSPECTUS 55, 55 (1997). The Telecommunications Act "is historically significant because it is the first comprehensive rewrite of America's communications laws in the six decades since the adoption of the Communications Act of 1934." *Id.* The Telecommunications Act represents a fundamental redirection of American communications policy from "provid[ing] for the regulation of wire and radio communications services in order to make communications services available with 'adequate facilities' and at 'reasonable charges,'" to the promotion of competition, "reducing regulation," and securing "lower prices" and "higher quality" for existing communications services, while encouraging "rapid deployment of new telecommunications technologies." *Id.*

4. *See* AT&T Corp. v. Iowa Utilities Bd., __ U.S. __, 119 S.Ct. 721 (1999). The Supreme Court held that the FCC has rulemaking authority to carry out provisions of Communications Act of 1934, which include local competition provisions added by Telecommunications Act of 1996; claim that FCC's general authority to hear complaints arising under the Communications Act also gave the FCC authority to review interconnection agreements approved by state commissions was not ripe; FCC's application of "network element" definition to "primary unbundling rule was reasonable"; FCC did not adequately consider "necessary and impair" standards of Telecommunications Act when FCC gave blanket access to network elements in primary unbundling rule; FCC's refusal to impose facilities-ownership requirement on carriers seeking to lease network elements in incumbent local exchange carriers' ("LEC") networks was proper; rule forbidding incumbent LECs from separating network elements before leasing them to competitors was rational; and "pick and choose" rule was reasonable interpretation of Telecommunications Act. *Id.* at 726-738.

5. *See* Bryan Gruley, *Pitofsky Will Test Marketplace of Ideas Theory in FTC's Review of Time Warner-Turner Deal*, WALL. ST. J., Oct. 9, 1995, at A14.

6. *See* James Weiss & Martin Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 196 (1998)(detailing the string of recent and pending media and telecommunications mergers and their values).

I guess somebody mentioned in the earlier afternoon panel that USA Networks and Lycos agreed today to combine Lycos' Internet portal with the Internet and e-commerce activity of the USA Networks.[7] So there is a lot going on. And that does not count strategic alliances, such as the discussed AT&T-Time Warner alliance that would have AT&T and Time Warner together planning to offer local telephone service to Time Warner cable subscribers.

Well, what is the reaction among the antitrust enforcers down in Washington? Well, one is sort of a sensory overload. We are kind of exhausted by just reading the Hart-Scott-Rodino filings[8] that come in. I actually had somebody run a quick count. One out of eight filings we get, and there were 4,800 last fiscal year, involved the communications industry.[9] That is a dramatic increase—there is clearly a lot going on.

Well, what I wanted to talk about in the minutes I have is, first of all: How much should this convergence consolidation, merger mania, concern us, as antitrust enforcers and as consumers? And what types of things specifically ought to concern us? And then: How much should, how much does, antitrust account for First Amendment concerns when we do analyze transactions that involve communications and the communications industry?

First, I think most of the merger mania we are seeing is predictable, understandable, non-threatening and, however hectic it might be, not something that antitrust or consumers ought particularly to be concerned about. We are moving from a regulated environment to a more competitive environment. We are moving at a pace of technological change which is driving firms to reposition themselves. Fol-

7. *See* Eben Shapiro & Jon G. Auerbach, *USA Networks to Merge Unit with Lycos*, WALL ST. J., Feb. 9, 1999, at A3.

8. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1384 (codified as amended at 15 U.S.C § 18a (1994)) There is a requirement for notification to both the Antitrust Division of the Department of Justice and the FTC of stock and asset acquisitions that give the acquirer an interest of more than fifteen million dollars in the acquired company's stock or assets, if the acquirer and acquirer exceed some size thresholds. *See* 15 U.S.C. § 18a (1994).

9. In 1997 there were more than 3,700 Hart-Scott-Rodino filings which represents a twenty percent increase over the previous year and a 142 percent increase over 1991. *See* Robert W. Doyle Jr. & David H. Evans, *Your Competitors are Merging—What to Do? Here's How to Grab Agencies' Interest*, LEGAL TIMES, Nov. 2, 1998, at S41.

lowing the 1984 AT&T consent decree,[10] we saw the benefits of new competition for long-distance telephone service, and we are seeing some of that playing out now in other sectors. Antitrust's role in this is mostly that of cheerleader—feeling good about the fact that we have a more competitive environment, which promises to offer consumers more services, output-enhancing conduct, at competitive prices.

Now, what is that we ought to be concerned about? Well, antitrust basically is concerned about those kinds of mergers and acquisitions which potentially injure competition; potentially put someone, or just a few, in control of products, enabling them to decrease output, decrease services, and increase price. What we look for, particularly in a deregulating environment, is the potential for bottlenecks to be created, where you have one or two firms with control over key inputs.

These issues came up in terms of the Bell operating companies, and providing local access to competitors for telephone service. You can see it in radio mergers, where, if you just have a couple of firms who own all of the radio stations in a marketplace, many perhaps have control over advertising rates. You can see it in situations where one or just a couple of firms are involved in providing video through cable into homes, and are integrated into programming and potentially have control over what programming is made available and when.

10. *See* Maryland v. United States, 460 U.S. 1001 (1983), *aff'g* United States v. AT&T, 552 F.Supp 131 (1982). The consolidated cases before the Supreme Court raised questions concerning the settlement of a civil antitrust suit brought by the United States against AT&T. The United States District Court, District of Columbia held that the proposed antitrust consent decree would be approved. *See AT&T*, 552 F. Supp. at 230-232. The antitrust consent decree ordered divestiture by telecommunications corporation of local operating companies, removing all but a seven-year ban on "electronic publishing" from line-of-business restrictions imposed under a previous decree; imposed business restrictions on divested local operating companies; and generally required equal access to interconnection facilities. *Id.* The district court also mandated division of assets between the corporation and that the divested companies were in the "public interest." *See id.* However, the district court concluded that the decree had to be modified to permit judicial scrutiny and enforcement beyond entry of judgment stage, and the "complaint" and "response" procedure would be established to enable third parties to contest any future alleged absence of compliance. *Id.* The Supreme Court affirmed. *See Maryland*, 460 U.S. at 1001.

You can see it on a very micro level: with the Communications Act rewrite[11] and deregulation, there are a few pockets in this country which are local communities, where we have what is called a cable overbuild situation.[12] That simply means there has not been a cable monopoly. For some reason or another, two cable systems, and sometimes three, serve local communities of five thousand, ten thousand, thirty thousand, or fifty thousand people. We and the FCC have studied the phenomenon over the years and found that where there is a cable overbuild, where you actually have two cable firms potentially bidding to deliver video to your home via the cable.[13] Prices are dramatically lower than they are in monopoly markets, even regulated markets. Thirty or forty percent lower. Competition tends to work.

Well, in light of the Communications Act rewrite,[14] and the potential for video to be more broadly delivered other ways, many of

11. *See supra* note 3 and accompanying text.

12. Overbuilding in the cable industry is a situation in which one cable company establishes service in an area already served by another. *See* Comrad M. Shumadine et al., *Antitrust and the Media* 539 PLI/PAT 7, 352 (1998). The effect of overbuilding varies depending on the viewpoint of those operators attempting to enter into the market or an incumbent operator. *See id.* Those desiring to enter a market argue that overbuilds not only protect consumers but are consistent with the industry's general First Amendment arguments. *See id.* at 352-53. Incumbent operators desire to avoid direct competition for a limited subscriber base. *See id.* at 353. Some state legislators have addressed the problem of overbuilding with a compromise such as Florida, Minnesota, Tennessee, and Illinois. *See id.* These states have passed laws preventing a second operator from entering a market and overbuilding in the most desirable localities. *See id.* Overbuilding is becoming more prevalent in the cable industry and overbuilds will become even more common as cable rates rise. *See id.*

13. *See* Richard E. Wiley, *Competition, Consolidation, Convergence and Challenge: Developments in Communications Law*, 538 PLI/PAT 1123, 1166 (1998). Local Exchange Carriers may use their wireline networks to provide traditional cable services, subject to compliance with all cable laws and regulations, including those imposed by local governments through independent franchise agreements. *See id.* at 1165. Absent a waiver from the FCC or qualification under a narrow set of statutory exceptions, Local Exchange carriers may not acquire more than a ten percent financial or management interest in an incumbent cable system located within the Local Exchange Carrier's local telephone service area. *See id.* at 1166. Ameritech, the only "Baby Bell" that has decisively entered the video market via this option, has done so through an aggressive program of overbuilds. *See id.* Ameritech has received local approval to operate cable systems in dozens of communities throughout the United States, principally in Illinois, Michigan, and Ohio. *See id.*

14. *See supra* note 3 and accompanying text.

the firms that are now in that competitive cable environment in local communities have sought to merge with one another, and they have asked us to approve it. Well, we have gone and taken a look. And although convergence is occurring—DBS is increasingly an alternative to cable—over the long run it may be possible for the telephone company, with its copper wire into your home, to upgrade that wire and provide video services.

Right now competition really has not matured to the point where, in fact, there are real price-sensitive substitutes for the cable firms. So we have disallowed those, or refused to allow those mergers, up until now. Over time, as DBS, the telephone companies and the Internet provide meaningful and price-competitive alternatives for consumers, those sorts of mergers can and should be allowed. So what enforcement has to take into account is the pace of change, the nature of the change, and the degree of competition that exists today, and that may exist in the future.

Another example, on a broader scale, was the Department of Justice's challenge last year to Primestar's effort to buy the DBS assets of News Corp and MCI.[15] The concern in that case was that Primestar would gain control over the last orbital slot available for independent DBS firms to develop.[16] So you had a strategic acquisition. It is one of the kind that would create a potential bottleneck, giving Primestar--which is a consortium of cable companies--more control than the Department of Justice thought appropriate over a key technology that is necessary for there to be independent competition to develop.[17]

In Time Warner-Turner matter—which the Commission re-

15. *See* Roger Fillion, *Echostar Bid Tops Direct TV's $600 Million Offer Made for Primestar's Assets*, DENVER POST, Feb. 27, 1999, at C1. In November 1998, Primestar's agreement to buy $1.1 billion worth of strategic satellite assets held by News Corp. and MCI WorldCom Inc. fell apart. *See id.* In December 1998, EchoStar bought the News Corp. and MCI satellite assets in a deal worth approximately $1.2 billion. *See id.* EchoStar Communications Corp. offered to buy highly coveted satellite assets from Primestar Inc. for $600 million, exceeding the $500 million bid by the number one satellite-television provider, DirecTv Inc. *See id.* EchoStar is targeting space on a high-powered satellite slot that would allow it to send programs across the continental United States. *See id.*

16. *See id.*

17. *See id.*

viewed with Bob Joffe's help a couple years ago—we had some limited concerns.[18] We saw the potential synergies and benefits, that the companies identified to us, of combining the Turner programming with the Time Warner programming and cable distribution—but we had specific areas where there were real concerns over the integrated firm's ability to control how competition would evolve. Competition at the programming level, where an integrated Time Warner might want to favor its own programming—and, therefore, deny consumers the benefits of competing programming content through video—or situations where Time Warner, as a cable provider, might want to limit the availability of programming to a DBS firm that would seek to serve territory in competition with Time Warner.

And the relief we structured in that case was designed to prevent that kind of discrimination—prevent the use of the bottlenecks in a way that would enable Time Warner to advantage itself at the expense of competition—and, ultimately, at the expense of consumers.[19]

Now, I also raise the question of whether there ought to be special rules that antitrust enforcers apply to the media because it concerns the First Amendment. I think there are probably three views. One is that antitrust ought to be more cautious, because we are getting in the realm of content, freedom of speech, and First Amendment protection. Therefore, we ought to do less than we normally would. Second is a more aggressive view: that antitrust, because of diversity concerns, ought to intervene more aggressively, to make sure that we have a multiplicity of voices.

Then there is the view, which is the one I subscribe to which is that we do our job as antitrust enforcers most effectively when we apply the same basic standards that we do in other industries, to ensure that consumers have a diversity of options—whether it be voices, or products or services, at competitive prices. And I would say the courts, over the years, have basically subscribed to that view.

There is a case involving AT&T dating back to 1982.[20] A Mary-

18. *See* Gruley, *supra* note 5, at A14.

19. *See Time Warner Signs FTC Order to Allow Acquisition of Turner*, WALL ST. J., Aug. 15, 1996, at B8.

20. *See* United States v. AT&T, 552 F.Supp. 131 (D.D. Cir. 1982); *see supra* note

land court stated that the values underlying the First Amendment coincide quite squarely with the policy of the antitrust laws.[21] In 1945, the Supreme Court wrote that the First Amendment, far from providing an argument against application of the Sherman Act, provides powerful reasons to the contrary.[22] The First Amendment rests on the assumption that the widest possible dissemination of information, from diverse and antagonistic sources, is essential to the welfare of the public. That a free press is a condition of a free society.[23] Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations—mergers that give market power—a refuge if they impose restraints upon that constitutionally guaranteed freedom.

So I think First Amendment considerations do not, ought not cause us to be more cautious. The flip side is whether they cause us to be more aggressive. I think that gets us very close to getting into content issues and being the arbiter of who ought to see what, and under what circumstances. That basically focusing our antitrust enforcement in the communications area, as we do in other areas: Will a bottleneck be created? Will market power be generated from a merger or acquisition? Will we allow there to be less choice, higher prices? By doing that, we do our job. We make sure that competition prevails, and that the consumer benefits from the presence of that competition.

MR. PATTERSON: Next, we have Lawrence Grossman.

MR. GROSSMAN: As we talk about antitrust, and as a law-school dropout, I sort of throw up my hands and give up on that issue. I feel sorry for Bill and his colleagues at the FCC and the FTC. It is a hopeless situation. I love the way the broadcasters, and the phone companies, and the media and the newspapers all wrap themselves around the First Amendment, in every possible effort to make sure that they have a monopoly, and that the government does not in-

10 and accompanying text.

21. *See AT&T*, 552 F. Supp. at 184.

22. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) ("[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.").

23. *See id.*

terfere with it.

There is a wonderful statement by Judge Learned Hand in the AP[24] case in which he said, I am paraphrasing, he did it much more eloquently—it cannot possibly be that, because of the First Amendment, we, the government, has no right to stop major companies from interfering in the First Amendment.[25] And, yet, this is what happens all the time.

We are dealing with an industry of such tremendous change, with the huge conglomerations such as AT&T buying the second-largest cable company, and making partnerships with Time Warner, and making joint ventures with every other cable company around. And the FCC, holding a hearing, on loosening the restrictions on television ownership, so that major broadcasters—who now make fifty and sixty percent cash-flow margins with their stations—can own two or more television stations in a single market. And perhaps even, they argue, should own the one newspaper in a market, as well as a television station and a radio station.

I do not know how these guys are going to contend with this, and I do not see it stopping. I think we just have to look at other ways of developing, the kinds of things that are necessary to improve the quality of our civilization. I am under no illusions about these huge conglomerates controlling, operating, and owning the major sources of information. And it is happening in the Internet already. It is wonderful to see the parallel between the Internet and radio. The Internet is an explosive, wonderfully uncontrolled medium, but radio used to be that way too before the government stepped in and allocated channels, in order to stop interference.

In the 1930s, certain members of congress wanted to allow nonprofit universities and religious institutions, and public-service institutions, to own major commercial licenses for radio. The broadcasters responded: That is not necessary. There are so many radio stations, going seven days a week, twenty-four hours a day. We will never be able to fill them with our own stuff, commercial stuff. So

24. *See* United States v. Associated Press, 52 F.Supp 362 (S.D.N.Y. 1943).

25. *Id.* at 374. "[T]he mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, so long as he remains unfettered in his own selection of what to publish." *Id.*

there will be plenty of room for nonprofit, costly public-service, education, information and so on.[26]

And the same thing is happening today with the Internet. It is inconceivable, but very soon the Internet will be dominated, as it has already begun to be dominated by a gigantic electronic shopping mall; without the capacity to promote and to market, and with only a few access vehicles—like America Online, or AT&T-TCI—that will channel all the traffic.

We are seeing this really tremendously changing industry move so fast, it is so hard to keep up with, it is so hard to regulate, or so hard even to deregulate, or to consider what is proper. All of us hate the government being involved in any of this. So I believe that we need to start developing some very new, public policies and structures for telecommunications.

And my inclination, at this point, having worked both sides—the commercial level and in the public level—is to say: "Let the commercial guys go do whatever they please." At some point we are going to have to spread the goods a little bit, and not let anybody dominate all of the entry points. I mean, there are many more channels and far fewer gatekeepers. Going back to my historical analogies again, radio used to be a locally owned business, by and large, that served local communities. Today there is a huge increase in the number of radio stations, and because the bars have been let down, radio is virtually an oligopoly.

There are three or at the most, four companies that control almost all of the commercial radio stations,[27] and radio is doing virtually *nothing* to serve local interests anymore. The only major journalism in radio is on public radio, not commercial radio. The only national network in radio is the public radio network, not commercial radio. The only original productions, programming, performances, arts and culture in radio are produced by public radio not commercial radio.

26. *See* Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 555-567 (1997) (discussing the role that the struggle between commercial and non-commercial interests played in shaping the Communications Act of 1934).

27. A detailed list of which media companies own what entities is available at Aaron Moore, *Who Owns What,* (visited April 5, 1999) <http://www.cjr.owners>.

And I think that shows a lesson to us.

The same is happening in television and will happen to the Internet because there are huge amounts of money to be made. Now, for the first time, these new media are being driven entirely in one direction, by the marketplace. If they are run by companies, that is exactly the direction they should be drawn in because the job of companies is to make money, to earn profits, to increase value for their shareholders and for their management. They have no particular interest in the public interest.

The fact is: what makes money in the marketplace amongst others is entertainment. We are awash in entertainment, no matter how many channels we have. There is an excess of sameness with entertainment and business and commerce. So we are developing--as we see today with the USA Networks buying an Internet portal, business and commerce to a fare-thee-well.

There are major elements however, that are not being fulfilled. Even radio and television, by the way, when they began, had an underpinning of a public-interest law. That is pretty much by the boards these days. We are seeing plenty of giving the people what they want and very little of giving the people what they need, because it is being driven by the marketplace. You can make money from giving the people what they want, but it costs money to give people what they need.

What we need for a quality civilization, is, number one, education and not just education front-loaded for children, but education for lifelong learning; job retraining, as our society is increasingly growing older, and more mature with senior citizens, with much time on their hands as they retire from work. That costs money, it does not usually make money.

We see a tremendous decline in civic information and civic participation, as we get into an economy and a politics of referenda and ballot initiatives. Secretaries of State are tearing their hair out trying to get information out to people. The latest poll I saw, in terms of coverage of state politics, the most recent California election, was something like three percent that was done on television.[28] And

28. *See generally* Steve Weinstein, *Where's TV When You Need It? Not at the Sen-*

nothing, virtually, on radio anymore. You have to buy your way in if you want to expose yourself to the people. So we have got to figure out some route, some way, of getting civic and citizenship information out to the public.

The third non-marketplace-driven effort is arts and culture, particularly original arts and high culture in society. It does not make money. In the old days, NBC did a dozen operas a year. When was the last time you saw an opera on television? Only on public television, and they are very rare, because they are very expensive. The fourth area is in public health and health information.

So it seems to me you have to contrive a system--and we have the opportunity to do so--that provides the kinds of services that our civilization needs but the marketplace will not provide. And the way you deal with that is to build on what we already have. We have public broadcasting, an afterthought—weak, terribly under-funded. It is being required, forced by Congress and the FCC, to convert to digital which is a very expensive undertaking.[29] There is going to be a lot of electronic real estate available to use for public-interest purposes, but we have a history that shows that even if the real estate is available, if there is no money to fill it up, it goes to waste.

The public access channels on cable are virtually entirely unused. The last I saw, eighteen percent of public access, education and government channels were being used. And when they are used, they are

ate Races, L.A. TIMES, May 29, 1992, at A1 (discussing problem of low television coverage of political races).

29. *See* Kyle Pope, *Hype Definition: Waiting for HDTV, Don't Go Dumping Your Old Set Just Yet; Promise of Digital Television is Fading as Broadcasters Complain About Costs*, WALL ST. J., Sept. 12, 1997, at A1. An alliance of United States companies devised a standard for HDTV that was adopted by the FCC in December 1996. *See id.* In the spring of 1997, the FCC began to distribute the valuable digital "real estate," on a promise from broadcasters that all of the nation's consumers would be receiving digital television, which includes high definition, in just nine years. *Id.* By 2006, all of the nation's television stations must be broadcasting a digital signal or risk losing their FCC license. *See id.* Local television stations have to install new transmitters, new digital production facilities and new towers at a cost of between $8 million and $10 million each, which represents approximately $16 billion nationwide. *See id.* The networks as well face the additional costs of new digital production equipment, transmitters, even cameras and new sets. *See id.* At NBC alone, the cost of conversion has already exceeded $50 million while Fox Broadcasting estimates that it will have to pay $100 million to fully convert its twenty-two owned-and-operated stations. *See id.*

virtually unwatchable. Public radio and television are woefully under-financed, and there are too many stations. Everyone likes to build stations and nobody likes to pay for programs. And the government is cutting back on that.

But we also have great institutions and traditions in this country that are enormous suppliers of the information and education that our society needs—the library systems, the research universities, community colleges, museums, as well as our public broadcasting system. It seems to me it is time that we began to bring them together. Because, unlike television, these institutions have as much of a stake in the digital age as companies do. They have to reach out to the home, but beyond their walls. We cannot afford to let them be bypassed in the telecommunications age, the digital age.

We have the peculiar and wonderful opportunity, because the conversion to digital television not only means high-definition, crystal-clear pictures and good sound, but it also means access, through the television screen, to data. You do not have to just get stock quotes and sports statistics—you can actually begin to get real information about ballot initiatives and training. It means interactivity, so you can be connected with the World Wide Web, and receive e-mail, and take courses and get feedback.

When digital comes in, everyone is either going to have to get converters, or buy new television sets. So you want to make that stuff available to as wide an audience as possible. It seems to me the strategy now is to begin to pull together the public broadcasting community; the education community; the arts and performances and culture community; the information community such as the libraries, the Library of Congress, the local libraries; the museums, and begin to develop strategies for them to use this public-interest real estate. The goal is to develop information superhighways and public access to it in a meaningful way, and figure out ways to pay for it. One way to pay for it, if you are going to use the public airwaves, and exploit them, then you, as a commercial enterprise, ought to pay a fee for that.

We have no history of that in this country, and it is not likely, politically, to be done. Now that we are going to auction off, the analog channels, there are pockets of opportunity—if we really believe in that sort of thing—for the libraries and the universities, and the community colleges, and the museums, and the public-broadcasting interests, to come together and really go after some major funding, so that we can fulfill the promise of the telecommunications age, even as our commercial side is exploiting them for increasing profits.

So, in the most simpleminded kind of way, I give up on the question of antitrust. We are going to have huge centralized control of these media. We have a history now of the more channels, the more access we have, the fewer gatekeepers. Cable is the best example there is. There is one gatekeeper with access to all these channels. Unless they have a piece of it, of a network, you are not going to get on. Now unless, the networks have a piece of your program, your program is not going to get on a network.

So we have got to develop an alternative strategy and the alternative strategy is really the obligation of the public interest institutions to take a leaf from the book of the commercial institutions. The name of the game is networking and convergence, come together, act as a heavy-duty political powerhouse. Insist on—along with the support of the American public—getting the civic information and the educational capacity, and the public-health capacity, and the arts and culture capacity, to be used, at least on the public interest side, to improve the quality of our society and fulfill the needs of a decent civilization. Thank you.

MR. PATTERSON: Next, we have Jeffrey Lanning.

MR. LANNING: The first thing I am going to tell you is that the things I say today are solely attributable to me personally, and may not be attributed to the Federal Communications Commission. Therefore, to the extent I make mistakes, or do not make sense, it is my fault, and does not reflect badly on my agency.

MR. PATTERSON:The same holds true for all of the good things he says.

MR. LANNINIG: The first comment that I want to make is about what "convergence" really means. Convergence has become one of those buzzwords that is used in many different situations, and often means a lot of different things. As a result, it may end up having no real meaning, unless we explicitly think about it and give it one.

When I speak about convergence, I am thinking about the

Internet, as well as the idea that cable networks will be used to transmit telephony, and telephony networks may be used to transmit video programming.[30] In fact, at this time the main source of convergence is from the variety of networks that are being used to connect to the Internet.[31] The Internet, in turn, is being used to transmit many different services, including telephony and some video.

The fundamental principle at work in this convergence is that new technologies—principally the use of digital transmission and the deployment of increased bandwidth—are making it possible for communications networks to deliver services that they could not provide before.[32] One of the most important examples is the ability of residential consumers to buy books, airline tickets, do their banking, and invest online, at any time of the day or night.[33] Some of these services used to be available only to businesses, and others have never before been available.

The most media-oriented development attributed to convergence is that publishing material online can be dramatically cheaper and easier than publishing books, magazines, or newspa-

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30. *See* Thomas Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 4 (1996). The very essence of modern telecommunications is technological convergence. Telecommunications is the electronic transmission of information in audio, video, or simple data form. *See id.* In 1934, telecommunication by wire was a natural monopoly, subject to common carrier regulation, characterized by speaker and listener privacy and virtually devoid of censorship while telecommunication through the air was broadcasting. *See id.* at 6. Today there is technological convergence with satellites, microwave, television, computers, fiber optics, and the World Wide Web. The growth of these technologies have "shattered" the previous "illusions of tightly compartmentalized technologies." *Id.*

31. *See id.* at 4-6.

32. *See* Norman Redlich & David R. Lurie, *First Amendment Issues Presented by the "Information Superhighway"*, 25 SETON HALL L. REV. 1446, 1446 (1995). Traditional electronic and written media is being replaced by "broadband" digital networks carrying an array of electronic information services which will provide users with a broad range of new means of receiving news and other information, of communicating, of conducting business transactions and of being entertained. *See id.* Digital technology facilitates the transmission of an unlimited range of information that traditional forms of communications were incapable of producing. *See id.* at 1447.

33. *See* George Anders, *Click and Buy: Why and Where—Internet Commerce is Succeeding*, WALL ST. J., Dec. 7, 1998, at R9.

pers.[34] Consequently, it is becoming easier for most people to distribute their ideas to large numbers of people, and to do so without having to rely on professional publishers.[35] This development is caused by the same underlying factors that are causing convergence—digitization of voice and video services, and the deployment of higher bandwidth transmission services to residential consumers.[36]

We are seeing the pace of convergence accelerate because a lot of legal barriers to providing services have been removed, particularly by the Telecommunications Act of 1996.[37] These barriers might not have been removed but for the threat that convergence would happen anyway. However, the removal of explicit legal barriers to entry has made it possible for cable companies to offer telephony, and for telephone companies to offer video programming, and for other companies, even power companies, to begin offering both video programming and telephony.[38]

Not all legal barriers have been removed, and I will take a moment to put in my two cents about cable overbuilding.[39] Some of the biggest legal barriers to cable competition are still in place. There are still build-out requirements, so that if a competitor would like to serve a few buildings in Manhattan, and the system crosses a public right of way, that competitor will have to agree to serve all of the franchise area, which is either upper or lower Manhattan,

34. *See* Laura Fording, *Cyberscope: Virtual Vanity*, NEWSBYTES, Apr. 8, 1999, at 1. With online publishing, books are prepared, then stored in print-ready digital form and printed in single copies as ordered. *See id.* In the absence of large print runs, the costs to both author and publisher are reduced significantly compared to traditional vanity-press publication. *See id.*

35. See Tony Jackson, *Media Futures: The Greatest Story in the Book World–Jonathan Newcomb tells Tony Jackson that Digital Technology will Transform the Industry*, LONDON FINANCIAL TIMES, July 31, 1995, at 9.

36. *See* Jamie Nafziger, *Time to Pay Up: Internet Service Providers' Universal Service Obligations Under the Telecommunications Act of 1996*, 16 J. MARSHALL COMPUTER & INFO L. 37, 69 (1997).

37. Telecommunications Act of 1996, P. L. No. 104-104, 110 Stat. 56 1996) (codified in scattered sections of 15 & 47 U.S.C.). *See also supra* note 3 and accompanying text.

38. *See* Krattenmaker, *supra* note 30, at 5.

39. *See* Shumadine, *supra* note 13, at 352.

and to do so within a relatively short time.[40] Moreover, the competitor will have to provide the same programming to all of its customers—it cannot compete by tailoring its programming to individual neighborhoods.

The key point about convergence, however, is that it is mostly happening at the service level. In other words, although there is increasing use of terrestrial wireless and satellite delivery, most of the developments are about using the existing wires owned by phone, cable, or power companies, to carry more services.[41] To date, we have not seen a large deployment of alternative distribution facilities in residential neighborhoods. This is not a criticism. The fact that the pipes we have can carry competing services is a really big improvement—but it is a recognition that we are not yet looking at an explosion in the sources of communications services available to residential customers. Personally, I think the service providers have to be in place first, then they will create the demand for the alternative facilities.

With respect to regulation by the Federal Communications Commission, the fact that convergence, to date, has mostly been a service-level phenomenon is rather important. The FCC's responsibility is primarily over the facilities and spectrum being used by communications providers.[42] The FCC is much less concerned with the content that is provided. Yes, we do have some issues with content, such as political advertising and children's programming.[43] Even so, broadcast regulation is much more about the use

40. Generally, cable is regulated at the local level, typically through franchise agreements between cable operators and local governments. *See* MICHAEL D. SCOTT ET AL., SCOTT ON MULTIMEDIA LAW § 24.02[B] (2d ed. 1997). Build-out requirements are encompassed within such local regulations, whereby a cable operator under a franchise agreement is required to build-out its priority service area before it could expand to another service area. *See* Kathleen A. Marron & Agnes E.C. Brandon, *Consumer Complaints: An Overview of Antitrust, Predatory Pricing, Competitive Access, Mergers, Overbuilds, Unfair Competition and Other Consumer Trade Issues*, 535 PLI/PAT 491, 556-57 (1998).

41. *See* M.A. Nelson, *Bell Atlantic's Wayne Budd talks 'Convergence', Competition*, MASS HIGH TECH., July 27, 1998, at 6.

42. *See* Jason E. Freidrich, *Thinkable Mergers, The FCC's Evolving Public Interest Standard*, 6 COMMLAW CONSPECTUS 261, 263 (1998); Krattenmaker, *supra* note 30, at 5-6.

43. *See* 47 C.F.R. § 73.1212(a)(ii) (1999) (regulating political advertising); 47

of the spectrum than the content, and content is largely outside the FCC's jurisdiction in the telecom arena. In fact, it is the Federal Trade Commission ("FTC"), not the FCC, that deals with the obscenity regulation in the telecommunications area, including the rules regulating the delivery of pornography over telephone lines.[44]

A principal effect of convergence, or at least of the increases in bandwidth and digitization that are making convergence possible through the Internet, is that smaller organizations, small businesses and individual families, can take advantage of services that were previously available only to large organizations.[45] This is dramatically demonstrated by the growth of on-line services such as travel agents, brokers and banks.[46] In the media environment, the reduction in transaction and production costs produced by the Internet is making it possible for far more things to be published, and by far more people. In fact, everybody can be their own publisher on the World Wide Web and have their material seen all over the world.[47]

Another major effect of convergence is legal uncertainty. In a way, this is the point of convergence: do the old rules still work, or do we need new rules for a world with converging communications technologies? This issue was one of the principal sources of debate in our review of the merger of AT&T and the cable giant TCI.[48] Cable systems have generally considered themselves broadcast-type companies, and many of the rules that apply to cable service are analogous to the rules that apply to television broadcasters. Now they are beginning to provide Internet access services and offer some content of their own. Whereas they argue that these services are just like their cable services, other providers of Internet access services contend that they are really more like

C.F.R. § 75.3526(e)(11)(iii) (1999) (regulating children's television).

44. *See* Krattenmaker, *supra* note 30, at 203.

45. *See* Gruley, *supra* note 5, at A14.

46. *See* Anders *supra* note 33, at R9.

47. *See* Greg Alwang, *American Online 4.0 (Internet/Web/Online Service Information) (Evaluation)*, P.C. MAG., Apr. 20, 1999, *available in* WESLAW, MAGSPLUS File (discussing subscriber options, including creating their own web page).

48. *See* John Simons, *Faced with 'Convergence' FCC Takes Closer Look at Internet Access Via Cable*, WALL ST. J., Sept. 8, 1998, at B8. "As the Internet, cable, and telephone services begin to merge into a single medium, the FCC has had difficulty fitting them into its decade-old, narrow regulatory slots." *Id.*

telephone services, which are covered by different rules.[49]

I think that one of the things that is often overlooked in many discussions of convergence is that some of the principal economic distinctions between different communications networks are *not* changing or converging. We still have a fundamental distinction between broadcast-type networks and switched networks.[50]

Broadcast-type networks include cable systems, radio stations, and television stations (and probably newspapers too). In these networks, there is one speaker—the network operator—and many listeners. In other words, these are networks of communications from "one to many," and generally the communication only goes in one direction, from the "one" to the "many." The network operator is deemed a speaker for First Amendment purposes, but it also has responsibility for its speech—it can be held liable for distributing indecent speech for example.[51]

In broadcast-type networks, the network operator is actually choosing the content that is being communicated. Capacity is limited. There is only so much time and so much spectrum available, even in a cable system—so there simply is not room for all of the programming that is available to be distributed. Moreover, many listeners, if not all of them, actually prefer that there be a measure of exclusion—the service is more valuable with exclusion because it is easier for customers to find the programming they want. The big policy questions, then, are whose programming gets excluded, and what limits, if any, should be placed on the operator's right to choose.

A fundamentally different network, at least economically, is a

49. *See* Krattenmaker, *supra* note 30, at 6.

50. *See* Jonathan D. Blake, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 FED. COMM. L.J. 397, 403 (1994) (describing broadcast type networks). Switched networks are traditional land-line telephone services. *See* Celnet Communications, Inc. v. FCC, 149 F.3d 429, 433 (6th Cir. '998). *See also* Daniel L. Brenner, *Telephone Company Entry Into Video Services*, 67 NOTRE DAME L. REV. 97, 144-145 (1991).

51. *See generally* Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1187 (1993) (describing the First Amendment status of cable operators); *see also* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998).

network like a telephone network. In the interest of full disclosure, let me say that I actually spend most of my time working with telephone issues. These networks involve individual users, or groups of users, engaging in two-way communication with other individual users or groups of users. I generally call them switched or "one to one" type networks, but there must be a better term.[52] The basic point, however, is that the user wants to both send and receive communication, and wants to engage in communication with specific people as opposed to a general audience of many people.

In one-to-one networks, capacity is actually fairly unlimited over the long run. The choice of communication is made by the user, *not* the network operator. Telephone companies are not speakers for First Amendment purposes, and they have very little responsibility for the content that is available over the telephone network.[53] Instead of capacity, the limiting principle is reach. The network that can be used to reach the most people is the most valuable. This phenomenon is known as network economics, and it is likely to lead to "natural monopolies" without a requirement that providers interconnect with each other. In other words, the very kind of exclusion that is essential to a broadcast-type network is very undesirable for a switched network.

I do not see any reason why the fundamental distinction between broadcast and switched networks will diminish or go away as a result of convergence. The fact that the same physical network is being used to provide both kinds of services will not change the economics. Therefore, I do not think that we need one unifying set of rules that apply to all networks. Instead, I believe that things will work out fairly well if, but only if, broadcast services are covered by rules that adequate address the economics of limited capacity and switched services are covered by rules that address network effects.

Now, for a few thoughts about the large number of recent communications mergers—from my perspective, one big reason is

52. *See* Brenner, *supra* note 50, at 145.

53. *See* Redlich & Lurie, *supra* note 32, at 1449 (explaining that telephone companies do not have "speaker" status for First Amendment purposes).

that the Telecommunications Act of 1996 removed a lot of legal barriers to mergers.[54] This reason is particularly evident in the case of broadcast television and radio mergers. The restrictions that existed in the FCC's ownership rules with substantial support from Congress, prevented the realization of substantial economies of scale.[55] For example, it is probably just as easy to sell advertising for eight stations as for one, and it probably does not cost much more to do so. Moreover, customers buying advertising time are probably interested in buying packages that include stations reaching different demographic groups. I do think we have to be careful here, and that the new ownership rules may permit mergers that are truly harmful—cases where one or two owners have all of the listeners. With proper enforcement of competitive conditions, however, these mergers will be beneficial for society, at least from an economic perspective.

I think realization of economies of scale is also one factor behind consolidation in the cable industry. There is another factor, uncertainty, which I suspect is also the primary reason for mergers between telephone companies, or, at least, the ones between local telephone companies. Nobody is really sure what telecom services are going to emerge as the most important, and the same is true to an even greater degree with Internet access services. In fact, it is not even clear what sort of transmission media will be used by the preferred providers.

In times of uncertainty, size can offer a form of security for corporations. It gives them more time to respond to change before losses begin to seriously affect share prices. It can also provide increased diversity across services and geographic areas which can both reduce risk of loss from competition or changing tastes and increase the possibilities for repositioning. In this time of uncertainty, I do not think anybody really knows where the real profit centers will be located. It may be like the current telephone industry, where the profits are closely tied to the distribution network

54. *See* Krattenmaker, *supra* note 30, at 13.

55. *See id.* at 7. Krattenmaker notes, for example, that television systems cannot operate local cable systems; telephone companies cannot offer cable television; and cable television companies cannot offer telephony, although both run wires for electronic communications into the same houses. *See id.*

and value-added distribution services. Or, it may be in the content business, like in broadcast networks, which is why there is so much interest in "portals,"[56] which function as vehicles for filtering and selecting content to make it more convenient for users.

Finally, I am going to take a couple of minutes to address an issue that has received a lot of attention and air time in Washington: why is the FCC reviewing mergers when we already have an FTC and Department of Justice ("DOJ") approving mergers from an antitrust perspective?[57] First, although several members of Congress like to act as if it were not true, as of now, federal law clearly requires the FCC to determine that transfers of licenses and telecommunications lines serve the public interest.[58] The courts have clearly found that effect of competition is one of the factors that we must consider in this public interest analysis.[59] Accordingly, we have to make an affirmative determination about the competitive effect of a merger that requires the transfer of communications licenses or telecommunications lines.

When the FCC makes its public interest determination, it can and does take into account the antitrust agencies' conclusions regarding competitive effects.[60] Unfortunately, they generally do not issue written decisions or make formal findings unless they challenge mergers. Consequently, we have a harder time explaining to a judge any reliance on the non-action of the DOJ or the FTC. It could be they thought the merger was good but did not have the resources to do anything about it, which we understand to be the case more often than one might expect.

There is another big difference between the findings of the antitrust agencies and those we are required to make. They have the

56. *See* Andrea Petersen, *What is a Portal and Why are There so Many of Them? Once Gateways to the Web, The Keep Expanding*, WALL ST. J., Dec. 10, 1998, at B8 (examining the confusion surrounding the "definition" of a portal).

57. *See* Weiss & Stern, *supra* note 6, at 197(discussing the overlap between the FCC, the FTC and the DOJ and the resulting conflicts).

58. *See* Friedrich, *supra* note 42 (citing *In re Application of NYNEX and Bell Atlantic For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion Order, 12 F.C.C.R. 1985, ¶ 2 (1997)).

59. *See id.*

60. *See* Weiss & Stern, *supra* note 6, at 204 (examining three examples of telecommunications mergers reviewed by the FCC and the DOJ).

burden of proof that a merger is bad, whereas we must affirmatively determine that a merger is good.[61] There is a large middle ground there—mergers that are not so bad that it can be proven to the satisfaction of a court, but are also too bad for us to prove that they are good on appeal, although we do get a lot of deference from courts.

The FCC's analysis of competitive effects is necessarily drawn from the same economic principles used by DOJ and FTC. Our statutory mandates our different. The Department of Justice and the FTC are to stop mergers that harm competition, whereas we are charged with promoting competition. A merger could seriously interfere with promoting competition without harming existing competition as I will discuss in a minute. The focus is also different. The antitrust agencies have developed a methodology that applies to all industries "one size fits all," that is based on the notion that most markets tend to work the same way. Later in the process, they get to the factors that are unique in a particular market. Conversely, we have developed a method of analysis that draws on our unique expertise in communications markets; that begins with the economic factors that are special in these markets, these are often reflected in our rules and the policies we are attempting to fulfill. Then, we go through the standard competitive analysis using the general tools.

Generally, we reach the same conclusions,[62] but approaching the problem from each end provides a nice check. Our society usually looks for redundancy when something is important, I do not think many people would complain that airports maintain duplicative air traffic control systems. I also think that communications markets are important right now—they are the foundation for the information economy and this is a critical transition period as we attempt to *create* competition where it did not exist before.

One reason that there is much more awareness of the FCC's review of mergers is that the mergers between local telephone companies have presented a particular problem.[63] The DOJ has

61. *See id.* at 199.
62. *See id.* at 196-197.
63. *See id.*

said that these mergers are unlikely to violate the antitrust laws because of the way courts view potential competition.[64] Since local telephone companies are not currently competing with each other and they are not in the process of entering each others markets, case law indicates that it will be very hard to show that mergers between local telephone companies violate the antitrust laws. In essence, they do not *reduce* competition since there is not any competition to begin with. In theory, all local telephone companies could merge into one big, national local telephone company and DOJ would be powerless to stop them.

Now, from the FCC perspective, the local telephone companies have not been competing with each other in large part because it was against the law, and Congress clearly contemplated that they would compete with each other in the future—this is one of the assumptions underlying the 1996 Act.[65] As a result, we see mergers between LECs ("Local Exchange Carriers") as potentially very threatening. For example, the FCC found that Bell Atlantic would have competed with NYNEX in New York City but for their merger. They offset this harm with other public benefits that should result in more competition, but we found harm where DOJ could not.[66]

In fact, just as mergers between local telephone companies might interfere with an assumption of the 1996 Act, some merger might really interfere with the operation of this or other communications laws, even if they do not reduce competition in the eyes of the antitrust laws. The FCC implements and enforces a number of very fundamental rules that are necessary for competitive markets to exist in the first place. In fact, spectrum allocation and management is just like the assignment and enforcement of property rights: without this very fundamental level of regulation nobody could reliably use the spectrum to provide services. Other very important rules that facilitate competitive markets include number assignments, standard setting, and interconnection requirements.

It is true that a merger that interferes with the basic regulation

64. *See id.* at 199.
65. *See id.* at 198 (citing 15 U.S.C. §§ 18, 21(a)(1994)).
66. *See id.* at 203

needed for competitive markets will probably be seen by an antitrust agency as harmful to competition. It is not at all clear, however, that they can easily address the problem through the antitrust laws. Moreover, the FCC is probably better positioned to assess the likelihood that a merger could interfere with the operation of communications laws. One example where we took the lead was when SBC, the local telephone company composed of former Bell System companies in Texas and other southwestern states, was rumored to be discussing a merger with AT&T. Such a merger would have flatly violated Section 271 of the 1996 Act,[67] which is the provision that replaced the Modified Final Judgment that produced the divestiture of AT&T. As a result, it would have completely undermined the entire framework established by Congress, and the FCC made clear that it would not be inclined to approve such a merger before it even happened.[68]

I am going to skip my last two points, which are some ways in which the FCC's merger review process differs from industry to industry depending on the different underlying rules, and will just wrap up.

MR. PATTERSON: Thank you. Our final speaker, Mr. Joffe.

MR. JOFFE: Thank you, I am happy to be here. I find myself in the odd position of almost agreeing with Bill Baer, which is beginning to worry me a little—but I will see if I can overcome it. Bill and I could probably go around the country carrying on an Alpert and Leary kind of debate, but neither of us would want to be Alpert or Leary, so we would have to figure out someone else to be.

I guess I am here today to say that I do think the antitrust laws are a better guide to making sure we get the right result than either regulation, on the one hand, or some platonic, benevolent dictatorship which decides what is in the public interest, and I think the last twenty-five years in the media business has shown that to be the case. As you remember, in the 1960s we had three networks and some local broadcast stations, and we had a vast wasteland. Then, in

67. *See* Section 271 of the 1996 Act, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 89 (codified at 47 U.S.C. § 271). For further discussion *see* Weiss & Stern, *supra* note 6, at 209-10.

68. *See* Weiss & Stern, *supra* note 6, at 210.

the 1970s, we had the growth of cable, supposedly a gatekeeper, and it provided lots of alternatives.[69] It started as a means of delivering TV to the homes in places where reception was bad. But then, in order to sell cable, the cable operators began to vertically integrate and develop their own programming. A lot of it was "narrowcasting,"—aimed at narrow audiences rather than the broadcasting aimed at wide groups—to which broadcast television was appealing.[70]

Local towns began regulating the rates of basic television. So you had this odd situation where basic rates were regulated and pay-television rates were not regulated and, consequently, moved up. Through the late 1970s you had very little in the way of new cable channels, a twelve or fourteen channel cable system was typical.[71] In the early 1980s, when the federal government stopped local rate regulation, the number of channels just exploded. You went from systems with twelve channels to systems with eighty and one hundred channels.[72] You went from people getting one pay service, like HBO or Showtime, to people who—now that the cable systems had enough capacity to carry or receive four, five and six pay services. Of course, we have seen multiplexing since then.

So rates were deregulated. Sure, rates went up, but there was an explosion in the amount of choice that people had, and I do not think anyone today would suggest that television is a vast wasteland. One might not like all the programming, or think there should be other programming, but it is a far cry from when you had only three things at which you could look.

The number of channels have increased, and now there are actually alternatives to cable including DBS, Direct TV, and Echo Star. Small dishes are very attractive. You no longer have to have something in your front yard which looks like a shield between your house

69. *See generally* Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L. J. 1, 22-32 (1991) (discussing the rise of cable television stations and the conflicts between state and federal regulation).

70. *See id.*

71. *See id.* at 172 n.54 (discussing cable penetration prior to FCC regulation).

72. "As soon as the FCC allowed, the structure of the cable industry changed as group owners bought out and combined the early pioneering cable systems and prepared for an assault on the then-restricted top 100 markets." *Id.*

and the road. There is MMDS, the telephone companies have gone into that.[73] Through the Internet you now get video streaming, which provides other alternatives. Sure, this is not perfect competition, but it really is working pretty well with the aid of the antitrust laws and antitrust enforcement—although one can argue about its application in any particular case.

Let me turn for a second to the First Amendment. I did catch the tail end of the last panel, and I said this personally to Andy Schwartzman, so I will now say it behind his back. In the last several years I forgot how much I disagreed with Andy until I heard him again.

The First Amendment, and I do not have to tell this to a bunch of law students, says Congress shall make no law.[74] The First Amendment is a limitation on government power—and it is been applied through the Fourteenth Amendment to the states. But the First Amendment does not apply to private actors, and it has no clause in it like the Fourteenth Amendment, which allows Congress to enforce it. It is a self-executing amendment that prohibits certain governmental action.

Now, there are other things beside the First Amendment that can be taken into account. For example, the public interest, which is certainly one of the standards the FCC has to apply, and other values in our society. But we should not kid ourselves that putting impositions on the media is a way of somehow vindicating the First Amendment. It is not vindicating the First Amendment at all. It may be doing something else, but that is not what it is doing.

Let me talk about a couple of things that Bill mentioned, because I do have to debate with him. Cable overbuilds, for instance. Now, I happen to have a small cable overbuild before the FTC. It is so small

73. Multichannel Multipoint Distribution Service ("MMDS") provides users with high speed wireless Internet access, but is not yet widely available. *See* Jonathan Blackwood et. al. *Hot or Hype: Are the Latest Technologies all They're Cracked up to be? Get the Straight Answers from the Experts*, WINDOWS MAG., Mar. 1, 1999 <http://www.winmag.com/library/1999/0301/fea0050c.htm> at 1 (visited Apr. 5, 1999).

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

it has not bubbled its way up to Bill yet, I do not think. But let me give you a reason why some of the perceived ideas about cable overbuilds are not necessarily the case, and the numbers I am going to give you are just sort of illustrative—they are not the actual numbers.

I will show you how regulation sort of messes things up. It used to be the case that you could have, occasionally, two cable systems that were overbuilt with each other.[75] This may have happened because two cable operators expanded into each other's territory before they realized what they were doing, and their wires ran down the same streets. After they stopped, they each got half as many customers as they had before, although their costs of wiring the street were the same. They did tend to lower the prices in the overbuild area, because that was the only way they could try and get more customers and justify the expense of the cable down the street.[76]

Then some people who thought they knew what was in the public interest issued regulations and passed laws which essentially required that a cable operator price the same everywhere in the franchise. Did that cause the prices in the non-overbuild areas to go down? No. What it did was cause the prices in the overbuild areas to go up to match the prices in the non-overbuild areas.

So the case we have at the FTC at the moment involves a buyer with a modern cable system and let us, for the sake of discussion, say fifty cable channels, basic channels, which it is selling at twenty-five dollars. The company it is trying to buy is an antiquated system, with about twenty channels, which it sells at the same price. The two systems are only slightly overbuild, a few thousand subscribers, they have many thousand subscribers outside the overbuild area, and the basic prices are the same in the overbuild area and outside the overbuild area.

The seller's prices, pay prices, are the same inside the overbuild area and outside. The buyer's pay prices, both inside and outside the overbuild area, are lower than the seller's prices, but slightly lower in the overbuild area than outside the overbuild area. So if the deal were to go through, what would happen is, there are some subscrib-

75. *See* Shumadine, *supra* note 13, at 351-352.

76. *See id.* (generally discussing the phenomenon that where there is an overbuild situation, there will be more price competition).

ers who, in the overbuild area, currently with the buyer and the pay services—to whom, presumably, the price might well go up, to the price outside the overbuild area, a few dollars.

But, and this is the important but, with respect to the seller, the seller's basic prices, which are the same inside and outside the area—that system will be upgraded. Subscribers now, instead of getting the smaller number of channels for the same price will get the larger number of channels. And the pay prices, which are higher than the buyer's prices—inside and outside the overbuild—will go down.

So this is a situation where, I believe, eliminating the overbuild will actually end up in lower prices and better service for many more people than the few people whose prices might go up. And the question that Bill will eventually have to face, and if we cannot get it resolved, someone else will have to resolve is whether the antitrust laws allow that. I would say that of course they do. That whatever competition may be being eliminated in one place is more than being made up for somewhere else, and the FTC ought to exercise its discretion and allow that.

Let me talk for a moment about Primestar, which is another interesting example. Cable created midpower DBS.[77] These were six-foot dishes, and, later, three-foot dishes, in the midpower range. The Justice Department actually opposed, before the FCC, the cable operators going into DBS, because it said they did not want cable in this new technology.[78] Even though there was no one else at the time who wanted to go into it, even though there was no limit on the number of people.

Anyway, the FCC allowed a group of cable operators representing, let us say, forty to fifty percent of the cable subscribers to go into midpower DBS. In the meantime, Direct TV and EchoStar acquired high-power DBS, which goes to a smaller dish, has more channels, is

77. *See* Scott Blake Harris, *New DBS Rules: From the Sublime to the Political*, SATELLITE COMM., Apr. 30, 1998, *available in* 1998 WESTLAW 9362701 (discussing the elimination of the distinction between DBS and FSS regulation and outlines the FCC's proposal for new rules regarding DBS regulation).

78. *See id.*

much more competitive with cable.[79] A third spot opened up, the spot that Murdoch owned,[80] and the question was whether Primestar, owned by these cable operators, could acquire it.

The Justice Department blocked the acquisition because it argued that that scarce resource would be better off in the hands of one or the other of the high-power DBS operators—which would better enable them to compete against cable—than it would be to allow a third player into the DBS market.[81] Therefore, you had a strange situation where the Justice Department was protecting the two DBS operators against a third competitor, supposedly in order to allow those competitors to better compete against cable.

One of the problems with the argument was that, there was no evidence that Primestar would not compete against cable. The Justice Department argued that Primestar, in the past, had tended to sell its dishes mainly in non-cable areas.[82] Well, that was because the dishes that Primestar was selling were these larger, ungainly dishes—which obviously do not compete with cable as well as a small dish.

The other issue, of course, is that most of the country is not covered by those cable operators, and so Primestar would have no incentive not to compete against cable operators in the, let us say, sixty-percent of the country covered by other cable systems, or in the portions of the country which are not covered by cable at all.[83] So, supposedly, in an effort to enhance competition, I think what really happened was a decision which was anti-competitive. So that while I am a proponent of the application of the antitrust laws, in preference to regulation or platonic republics, sometimes even the antitrust enforcers, I believe, get it wrong. But, you know, that happens.

79. *See* John R. Wilke, *Antitrust Suit Filed to Block Primestar Purchase*, WALL ST. J., May 13, 1998, at A3; Paul Farhi & Mike Mills, *Murdoch Satellite TV Deal Folds Under U.S. Pressure*, WASH. POST, Oct. 15, 1998, at C1.

80. *See id.*

81. *See* David Lieberman & Jane O'Donnell, *Justice Lawyers Oppose Murdoch-Primestar Deal*, USA TODAY, Apr. 2, 1998, at B1; Genevieve Wilkinson, *Computers and Technology Regulators Telling Primestar DBS and Cable Don't Mix*, INVESTORS BUS. DAILY, July 6, 1998, at A10.

82. *See id.*

83. *See U.S. Sues to Halt Murdoch and Primestar Deal*, NEW ORLEANS TIMES-PICAYUNE, May 13, 1998, at C1.

One last point. Again, my adversary is not in the room. Andy in his last few words, discussed the problems that he saw with cable operators preventing Internet providers from doing video streaming over cable lines. Now, video streaming would be a way in which you might go onto the Internet, and you might essentially get the equivalent of a television programming service over your Internet service.

Now, current cable systems are not capable of providing enough capacity for Internet service providers to put their video streaming over it. So what a cable operator has to do—when he decides whether or not he or she wants to upgrade his system and spend, in the case of AT&T and TCI, billions of dollars converting coaxial cable to fiber-optic material[84]—is to say: Am I prepared to invest all that if I am going to be forced to allow an Internet provider to come in on my line and compete against me, by providing the same programming that I have to pay for? When I do a contract with CNN, or ESPN, I have to pay for that programming. Should I spend the billions of dollars, and then be forced by the FCC, or some local town, to essentially open up? AT&T, of course, said it would not.

The FCC recently decided that it would *not* force AT&T to do that as a condition of allowing the merger I to go through. But I would just submit that even the notion that that would be a good thing to do really is sort of counterintuitive. Why would anyone invest that money, if you were then essentially going to take it away from them, by forcing it to open it up to their competitors? So what might in the momentary glance seem like it is in the public interest, on analysis, in many cases, turns out that it is not.

I guess I would just close by saying I do not want to be Dr. Pangloss[85]—there are always improvements that can be made. This is not the best of best of all possible worlds, but I do think things are working pretty well.

MR. PATTERSON: Thank you, all. Before we turn things over to the audience, I have a couple questions that might start some discussion. But I would like to see—before that, even—if the panelists

84. *See* Reinhardt Krause, *Computers & Technology: AT&T Finds Way "Home" Through TCI Acquisition*, INVESTOR'S BUS. DAILY, June 25, 1998, at A8.

85. The eternal optimist in Voltaire's *Candide*

have questions or comments they would like to address to each other. No?

To what extent should the antitrust laws and the FCC's regulatory power be directed towards diversity of programming? You know, it is perfectly possible for them, and for the antitrust in its consumer-welfare standard, and for the FCC in its public-interest standard—to focus on this. Often the merger considerations are: Is this going to raise prices to advertisers? And I am not sure that advertisers are a good proxy for consumers. And should we be looking more directly at programming diversity? And, is fifty channels going to be better than twenty.

I guess, also, one problem this might raise is: are we looking at what consumers want, rather than what consumers need, as Mr. Grossman said?

MR. GROSSMAN: Let me try a response on that. I hate regulation as well, but it seems to me broadcasters want it both ways. They say: Why is it not enough to just abide by the antitrust laws and forget about regulation? And I think that is a fine idea, if the broadcasters were willing to pay for the free publicly-owned frequencies that are worth hundreds of millions—in fact billions—of dollars that they are being given.

If they auctioned off the frequencies, and the money went for a public dividend, in other words, went to the government then they should be allowed to do whatever they please. But they are getting these things free of charge, and the FCC allocates them—and, therefore, has to have some criteria. Traditionally, it is always been this public-interest criteria one of which is diversity of programming promises. It never works, because, eventually, broadcasters end up doing whatever they want, anyway.

I have a problem with this business of let us just compete and deal the antitrust department, unless you are also willing to do what everybody else does, which is to pay for the incredibly valuable distribution mechanism that you are using.

Now, in direct answer to the question about should there be concern about diversity of programming, the FCC cannot get into program content. But you can have one sort of fundamental notion, that the more diverse the ownership of the media, the more likely you are to have at least some diverse programming. And that is been kind of the underlying basis of the diversity standard.

Of course, diversity of ownership does not guarantee diversity of content. Television has an excess of sameness now—despite that underlying doctrine. But one thing is sure: if you have fewer gatekeepers, you are guaranteed to have less diversity of content. If the underlying principle of the First Amendment is: The more diversity of content, the more diversity of sources of information, the more antagonistic sources that you have, the healthier our democracy. Then you want to try to get as much diversity of ownership as you possibly can.

That always comes into conflict with the other very simple-minded basic rule, which is that every company hates to have competition. And so every company is dying either by purchase or by driving the other guy out of business to have a monopoly. Which, of course, is what the cable industry has at this point.

MR. PATTERSON: Well, I think it is true that both the antitrust agencies and the FCC have focused on diversity of ownership. But it is not obvious to me that it is true that less diversity of ownership always means less diversity of programming. Since the remedies are generally structural we should be trying to keep concentration low; trying to prevent bottlenecks. Maybe we should look more substantively at what the results are of particular enforcement actions, to see if we, in fact, do get more programming diversity *regardless* of whether we get diversity of ownership.

MR. JOFFE: Well, in the Turner merger we had an example that came close to this issue. The FTC was concerned that Time Warner's cable system would favor CNN, to the exclusion of other news sources. So we entered into a consent decree that required us to put another all-news channel on half of our cable systems in a certain amount of time.[86] We argued that that was unnecessary, because Time Warner cable only accounted for, let us say, fifteen percent of the cable subscribers in the country—and that Fox News and MSNBC could survive without access to our systems. Even if, at

86. *See* John R. Wilke, *Acquisition Can Mean Long-Lived Antitrust Scrutiny*, ARIZONA REP., Mar. 9, 1997, at D1; *see also* Business Wire Reports, *Fox News Channel Detante Reached*, FORT WORTH STAR TELEGRAPH, July 24, 1997, at 2.

worst, we did block them, which we said we had no intent to do, they could prosper without us. But it was easier to meet Mr. Baer's demands than litigate about this for a year, so we entered into a consent decree.

MR. GROSSMAN: I do not mean to take up a lot of time here, but I had some personal involvement or professional involvement with that. The fact of the matter is that without that consent decree there would still be probably only one cable news channel. Before the consent decree—when, for better or worse I was running NBC News—we tried to either start a new news channel that would be cable, many years ago, or buy CNN. Ted Turner, who is one of the great people in the world, sold interest to Time Warner, TCI, and Cox, and thereby assured that there would be no competition to CNN.

So it was not the people who decided what kind of cable news channel that they preferred, it was by virtue of the fact that the gatekeepers controlled what went on, and they were not about to let a competing news channel diminish the value of the news channel in which they now owned an interest. The fact is, when GE bought the bankrupt Financial News channel, and converted it into CNBC, one of the conditions of them getting accepted on the major cable MSO's, and the major multiple systems, was that they would *not* provide a news service.[87] And it was only because of the consent decree that these other news services were allowed to flourish.

MR. LANNING: Actually, I wanted to make two quick observations. The first—although I guess I was being called regulation, or the FCC is being called regulation, I think that there ought to be a distinction drawn between sort of output regulation--by that I mean, prices shall be "X," or, services shall be Y—and underlying sort of fundamental structural regulation, which I do not think anybody at this table is opposed to. I mean, property rights, for example, are regulation, as are the criminal law.

And unless you want to live in Bosnia, or Somalia or something, I think you like that kind of regulation. There are some libertarians, some in Montana, for example, who are not fond of that kind of

87. *See* Patrick McGeehan, *The Peacock Spreads Into Cable; NBC's Cable News Channel Takes to the Air This Month*, N.J. RECORD, Apr. 9, 1989, at B1.

regulation—but regulation is not necessarily an evil thing. Actually, the FCC is fairly active at trying to get out of the output-regulation business. We are not very fond of price regulation and we would prefer structural regulation, that allows competitive markets to exist.

The second point is, I hear this debate going on back and forth about the cable news situation. It is related to what goes on in telephone networks, and related to what may go on in the cable-Internet world. But if you imagine these integrated companies—and integration often provides a lot of benefits. One of the best examples is the development of cable programming that happened in the early 1980s. A lot of risk was taken, because there was sort of a guarantee of carriage. There is also a flip side to that, though, and sort of what Mr. Grossman was getting at. If I am a network company, if I am just running the cable network, I want to provide the programming that my consumers want. And if I am a phone company, I do not really want to be limited to just one seller. If I was just Bell Atlantic's network company, I do not really want just Bell Atlantic selling my service. I would like to have Time Warner, and AT&T, and anybody else who wants to sell my service sell it.

Conversely, if I was just in the business of selling telephone service to users—suppose I was American Express or somebody—I would not want to be limited to just one phone network. I do not want to sell just Bell Atlantic. I would actually like to find out if Time Warner would develop a competing capacity, and if I can find the best sort of platform for each particular application. When you have integration, you have an inherent tension in the companies between each sort of not wanting the other to do what is naturally their want. And that is sort of what is offset by the potential efficiencies of integration, which makes it a really difficult problem.

MR. JOFFE: Could I respond to Mr. Grossman's point? Just two quick points. And this is just an example of how I think there are two sides to every question. CNBC essentially forced itself on the cable operators, in return for carrying their broadcast stations, once the must-carry retransmission law[88] came through, and essentially

88. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 614, 615, 106 Stat. 1460, 1471-81 (codified at 47 U.S.C. §§ 534, 535 (1994)); *see also* Robinson, *supra* note 51, at 933.

required the cable operators to take CNBC if they wanted to take NBC. In return for that, the cable operators said: Fine, we will take you—but we want to know what it is we are paying for. We do not want you to be able to switch the programming on us willy-nilly.

So in their programming contracts there was a description of the kind of programming, which was different from the news programming they already carried. And, obviously, they wanted to keep that kind of programming, as opposed to allowing CNBC to switch to something else, which might already be carried and/or less desirable.

Just one word in defense of Ted Turner. Ted Turner got involved, probably to his regret, with the cable operators when he ended up in perilous financial condition after investing hundreds of millions of dollars in buying the MGM library in the mid-1980's.[89] At the verge of going bankrupt, and going under, he went around the country pleading for financial assistance—and none of the broadcast networks were willing to help bail him out. The ones who did bail him out were the cable operators, who obviously had an interest in seeing CNN survive, and help them distinguish themselves from broadcast television, and compete against broadcast television. As a result of the ownership rights they got as part of that bailout, they created all sorts of difficulties for Mr. Turner, which eventually resulted in a merger.[90] Because there was always disagreement among Time Warner, TCI and Ted about what should happen, that is what led to Ted's decision, essentially, to sell out and merge with Time Warner.

MR. GROSSMAN: You are absolutely right—it depends on your perspective. NBC offered to buy out Ted and solve his financial problems.[91] But John Malone and Time Warner came in and said, when Turner was trying to raise his rates to the cable companies: We will buy you, as long as you guarantee to keep the rate low. Now, I am not saying that that would have been a good idea, by the way, for the public interest, but it probably would not have been any

89. *See* Melissa Turner, *Cable T.V.'s Close Ties to Turner Stir Unease: Critics Say Industry Controlled by Too Few*, ATLANTA J. & ATLANTA CONST., Dec. 17, 1989, at 1.

90. *See Time Warner Signs FTC Order to Allow Acquisition of Turner*, *supra* note 19, at B8.

91. *See* Keith Herndon, *TBS Asks Cable Companies for Financial Help: Turner Offers Stock for Cash to Ease Debts*, ATLANTA J. & ATLANTA CONST., Jan. 10, 1987, at A01.

worse than having the cable companies own the network.

MR. PATTERSON: Let me see if I can solicit some views on technological convergence. The convergence idea is that pretty soon we are going to be able to get the same services over our phone lines as we get over our cable lines—may be as we get over our electrical-utility lines. Now there is this controversy about whether cable should be required to provide equal access—whether TCI should have to give access to all, say, Internet providers. One of the arguments for requiring the same policy across these various sorts of wires that enter the house or the business is that you do not want to put one of the industries at a disadvantage relative to the other.

Now, on the other side of it, it seems to me, is the fact that we do not know which way is going to work best. We do not know whether equal access is the best thing to apply, or whether we would be better off letting cable operate a little more freely. So might it not be better to try, rather than treating all the industries the same, treat them explicitly differently.

You know, we have a tradition of state federalism in the United States, perhaps we ought to try technological federalism, as well. Maybe force equal access on phone companies, but do not force it on the cable companies, and see which way it works out best—since we do not know.

MR. JOFFE: I completely agree. Treating people who are in different positions the same is unequal, which is not similar treatment. One area where I particularly agree with Mr. Grossman is, there is a big difference, for instance, between cable and broadcasters. Broadcasters are using the public's airwaves—and, hence, there are obviously certain requirements that you can put on a broadcaster, which you would not put on a cable operator who has invested his hard-earned money—or borrowed money—to run the wires under the street. Essentially cable operators have paid for their means of distribution, which the broadcaster has not. So you cannot treat the broadcaster and the cable operator the same. They are in different positions.

So I think the only rule here that really makes sense is: You have to think very carefully about what you are doing, but you cannot treat everyone exactly the same.

MR. GROSSMAN: I agree with that—but I go back to where I began, which is I feel sorry for the FTC and the FCC, and the Justice Department, trying to sort this out. I mean, if you do require the telephone companies, to provide universal service, you know that if the telephone service comes through the cable lines, that the cable guys have skimmed off the cream. That only seventy percent, not one hundred percent, of the population that has access to cable, which actually subscribes to cable, that maybe can afford to subscribe to cable.[92]

So now you are giving a particular advantage to the AT&T-TCI group, because they do not have to worry about the poor people or the slums. They only deal with people who can afford to pay a lot of money for telephony, and that ends up screwing the telephone companies. How do you deal with it? I do not have the foggiest idea.

AOL has the same problem. If you have to first subscribe to cable and take AT&T's Internet access service, and pay extra to get AOL, then you are really putting AOL at a tremendous competitive disadvantage if things start going through cable. And these are very troublesome and difficult, and not one-sided arguments. Of course, what you want to do, if you are a cable operator, or the cable operator combined with the telephone operator, is make sure that you *do* screw AOL, you know? That everybody is forced to take the Internet through the AT&T, Time Warner, whatever portals.

MR. BAER: I just want to endorse Mr. Grossman's suggestions, that you really ought to feel sorry for the federal enforcers. You listen to people who are as articulate and effective advocates as Bob Joffe endorsing the principle of antitrust enforcement, but who always finds a reason why it ought not to be applied in the specific case involving his specific client.

92. *See* Federal Communication Commission, *Fifth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, (visited Apr. 13, 1999) <http://www.fcc.gov/Bureaus/Cable/Reports/fcc98335.pdf>. A total of 76.6 million households subscribed to multichannel video programming services as of June 1998, up 4.1 percent over the 73.6 million households subscribing to MVPDs in June 1997. This subscriber growth accompanied a 2.3 percentage point increase in multichannel video programming distributors' penetration of television households to 78.2 percentage in June 1998. During this period, the number of cable subscribers continued to grow, reaching 65.4 million as of June 1998 up about 2 percentage over the 64.2 million cable subscribers in June 1997. *Id.* at 5.

But the fact of the matter is that we are in a very messy situation right now, moving from a mostly regulated environment to a mostly deregulated environment. We have unequal situations. We have scarcity with respect to the broadcast spectrum and elsewhere, which creates some allocation issues. We do not have that with respect to other things. We have competing ways of getting information into the home, or getting the home access to information, that are not quite comparable. They are competing with each other on one sense, but they are different.

And so it is a complicated, difficult environment we are sorting out. Part of the approach—that I tried to take in my opening remarks—is simple to say: It is clear to me, having been at this job for four years, that antitrust is not the answer to everything. That it is the issues, the public-policy choices, that need to be made are broader than antitrust. Antitrust, and a belief in competition as the most effective allocator of resources, does not mean we get, an ideal allocation of resources.

Larry Grossman's point, that one result, often, of imperfect competition is dumbing everything down—lowest-common-denominator program. We are denied some quality. What we need to do with the Congress of the United States is figure out how we are going to ensure that the imperfections in a competitive marketplace, which probably are preferable to a regulated marketplace, how we deal with those in a way that makes sure we protect values that go beyond the values that are enshrined in the antitrust laws.

MR. PATTERSON: Any questions from the audience?

QUESTION: Yes, I have got one. Let me just preface it by saying in a lot of areas where I work, and where my firm works, we deal with issues where antitrust is one part of an issue, and there is an intellectual-property element on the other side. Because intellectual property, of course, does create something that is not exactly a monopoly, that, in some ways, seems like a monopoly. Particularly after some recent decisions, there seems to be a trend where certain aspects of intellectual property are going to become increasingly important in the domain in which this convergence is taking place. So with that rather elaborate justification for myself, I simply ask whether you see intellectual-property laws and conduct as being a wild card in all of this that you are discussion, or whether, in fact, this will remain through a different domain in your world.

MR. BAER: Well, let me start. I do not think they are going to be in a different domain. I mean, one has to look at the intersection of competition principles and intellectual property. In just about every case we do, you see some of that going on. In the Microsoft case being tried down in Washington—we have got a case involving Intel that involves, you know, how far one can go in enforcing one's patent rights, or extracting patent rights from others. So there is a necessary intersection. But having a policy which says antitrust, you know, is opposed to accumulations of market power, but recognizes that the Constitution, and various laws Congress has enacted, have created exceptions to that, and given people prosecutor rights in order to preserve incentives to innovate. There are ways to reconcile the rights that intellectual property laws convey, while still managing to use the antitrust laws to avoid people unfairly extending the rights they have into areas where they ought to be competing on merit.

MR. PATTERSON: I think one area in which it is a wild card, though, is that as, in the new industries creates new sorts of problems, then so we have creations of new kinds of intellectual property. Like the effort to pass a database-protection law last year, and Europe's passage of such a law. And so as the industries change, new forms of intellectual protections, that are not copyright, patent or trademark are going to come into play, and it is going to be hard to predict how that is going to play out.

Any other questions? I had like to thank the panelists very much, and thank you all for coming.