ANTITRUST ISSUES IN THE NEW VIDEO MEDIA†

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The development of new media technologies,[1] particularly cable television,[2] has produced a dramatic increase in the number of local video outlets over the last decade in most of the nation.[3] This has encouraged the FCC to eliminate most of its regulatory controls and to rely increasingly on what it views as a competitive marketplace.[4] In

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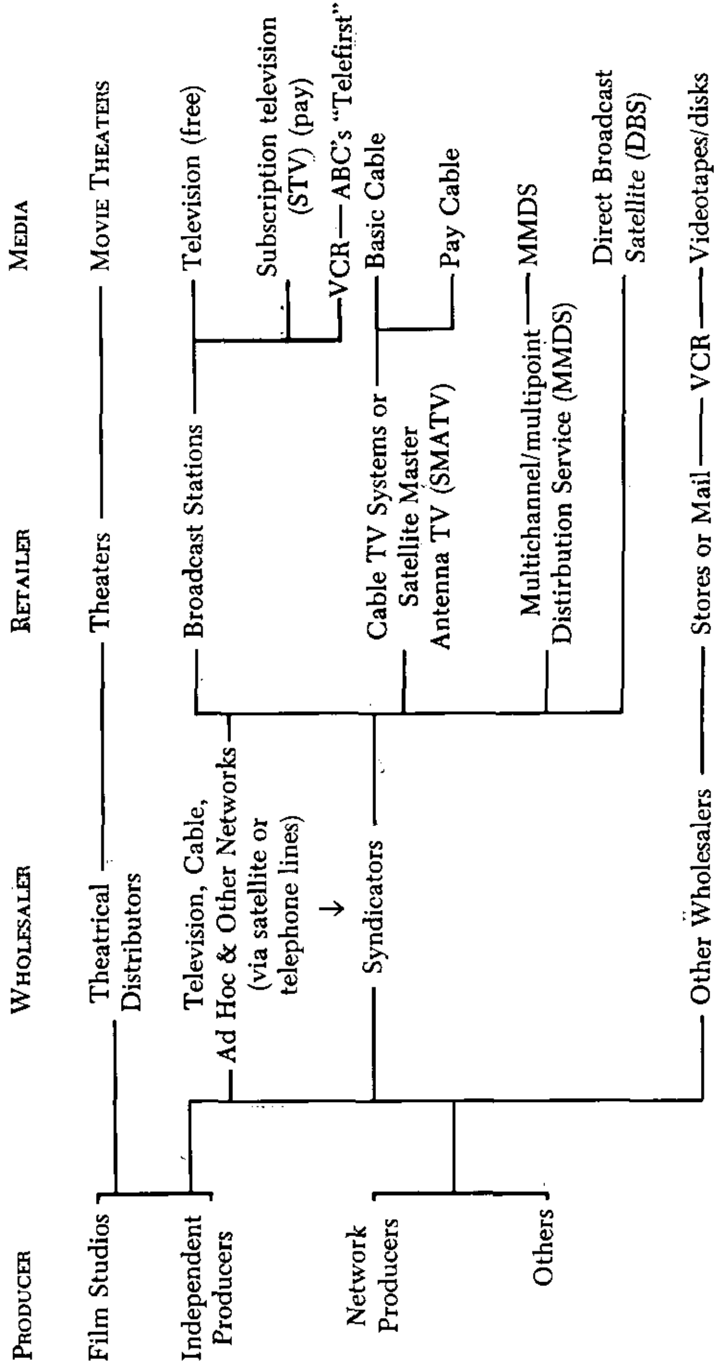
[1] For a short description of the many new technologies, *see* Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search For a Current Regulatory Philosophy*, 32 CATH. U. L. REV. 529 (1983); *1984 Field Guide to the Electronic Media*, CHANNELS OF COMMUNICATION, Nov.-Dec. 1983 [hereinafter cited as *Field Guide*]; *see also* MAJORITY STAFF OF THE SUBCOMM. ON NATIONAL TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 1ST SESS., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY (1981) [hereinafter cited as House Report].

[2] For a good overview of the cable industry *see*, T. BALDWIN & D. MCVOY, CABLE COMMUNICATIONS (1983). For a short description of the regulatory history, *see* Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981).

[3] *See, e.g.*, J. D. Levy & F. D. Setzer, Measure of Concentration in Home Video Mkts. (Dec. 23, 1982) (available at the FCC Office of Plans & Policy); National Telecommunications & Information Admin., Print and the Electronic Media: The Case For First Amendment Parity, *reprinted by* SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, 98TH CONG., 1ST SESS. (Comm. Print 1983); F.C.C. Policy on Cable Ownership (Nov. 1981) (available at FCC Office of Plans & Policy); Shooshan & Jackson, Cable Television: The Monopoly Myth and Competitive Reality (1982) (available at National Cable Television Ass'n); Stern, Krasnow & Senkowski, *supra* note 1. The FCC's original policy, favoring localism, led it to award broadcast licenses under a plan which limited much of the nation to three or fewer VHF stations, effectively limiting the number of national networks that could be formed to three. *See*, F.C.C. Network Inquiry Special Staff, Final Report: New Television Networks: Entry, Jurisdiction, Ownership and Regulation (1980). The increase in local retail outlets has led to the formation of dozens of new television networks. For a detailed list of cable network services, *see* THE CABLE TV PROGRAM DATABOOK (P. Kagan ed. May 1983); CABLEVISION, June 20, 1983, at 344–48; *Field Guide*, *supra* note 1.

[4] For a review of the deregulation of cable television, *see* Besen & Crandall, *supra* note 2. In the broadcast field, the FCC is now studying the repeal of a number of rules including the "fairness doctrine." *See* N.Y. Times, April 12, 1984, at C26, col. 1; *Notice of Proposed Rulemak-*

VIDEO DISTRIBUTION MEDIA FLOW CHART



such a deregulated environment the antitrust laws become increasingly significant in their effect on market structure.

This Article will present a short overview of how the antitrust laws apply to the anticompetitve practices that have arisen or are liable to arise as video programming is transmitted from producers to consumers. It will trace programming as it goes along the three stages of the distribution pathway: from stage one, where it is created by producers; through stage two, where it is packaged and distributed by networks, or other wholesalers; to stage three, where it is distributed locally by retailers such as cable television systems. The chart on the facing page illustrates the pathways that video programming can take.[5]

I. THE ANTITRUST LAWS

The antitrust laws are based on the premise that a competitive marketplace will maximize consumer welfare in the long run.[6] The assumption is that pressure from actual or potential competitors will

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ing, RAD. REG. (P & F) 85:115–16 (1983); the 7-7-7 ownership rules, which limit the number of AM, FM, and TV stations that a single entity can own. *See* Notice of Proposed Rulemaking in Gen. Docket No. 83-1009, F.C.C. 83-440, (Sept. 22, 1983); and the syndicated exclusivity rules. *See* Syndication and Fin. Interest Rules (Tentative Decision), 54 RAD. REG. (P & F) 457 (1983). For a detailed discussion of recent deregulatory actions *see* National Ass'n of Broadcasters, Broadcasting and Government: A Review of 1983 and A Preview of 1984 (1984). A federal cable bill is also under intense consideration. *See* S. 66, 98th Cong., 1st Sess. (1983); H.R. 4103, 98th Cong., 1st Sess. (1983).

[5] For a more detailed description of the participants, *see supra* note 1.

[6] *See* Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 1, 3 n.1 (1984). *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.") *Id.* at 610. When this premise is not satisfied and government regulation is imposed, the industry is exempt from the antitrust laws. *See, e.g.*, Federal Maritime Comm'n v. SeaTrain Lines, Inc., 411 U.S. 726 (1973); Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973). However, there is no express exemption for cable television or any of the other video media, nor are they subject to the kind of "pervasive federal regulation" that would create implied immunity. *See, e.g.*, MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983); Midland Telecasting Co. v. Medessa Television Co., 617 F.2d 1141, 1145 n. 7 (5th Cir. 1980), *cert. denied*, 449 U.S. 954 (1981). In *Midland*, the Fifth Circuit rejected the claim by a cable operator that the FCC's signal carriage rules represented such pervasive regulation that the operator was exempt from antitrust attack from a UHF broadcaster who charged the operator with attempting to monopolize the market.

lead producers to offer consumers the goods and services they desire at the lowest practical cost. Agreements between firms or actions by a single dominant firm to constrain competition are prohibited absent a pro-competitive justification.[7]

While constraints on competition are ordinarily condemned because they permit excessively high prices to be charged and excessively low outputs to be produced, there is an even graver danger when the relevant market is the market of ideas or messages. Constraints in this market are tantamount to censorship. The application of the antitrust laws to address anticompetitive action by the media is, therefore, entirely consistent with and supportive of first amendment goals.[8]

While some actions to restrain competition are illegal *per se* under the antitrust laws,[9] courts usually must analyze a firm's market power before concluding whether or not a restraint of trade is a violation of them. This is ordinarily done by measuring a firm's market share in its "relevant market,"[10] a task which requires a court to establish the relevant product and geographic markets.[11]

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[7] Section 1 of the Sherman Act declares unlawful every contract or combination between firms in restraint of trade. 15 U.S.C. § 1 (1982). Section 2 prohibits monopolization or attempts at monopolization in any part of trade or commerce. 15 U.S.C. § 2 (1982). Restraints may be justified, however, under a "rule of reason" test. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 606-07 (1972).

[8] Associated Press v. United States, 326 U.S. 1, 20 (1945). There are some, including one of the authors, who would argue that monopoly control of the television media would, nevertheless, yield better results for consumers than would a diverse group of competing sources. They claim that because a monopolist need not compete with itself, it would not devote multiple channels to serving the same type of programming to the same audience. Instead, it would be inclined to fill each of its channels with a different type of programming to attract a different audience. Government regulation could also serve this goal.

Others who support a diversity of sources answer this by noting that the monopolist provider has no incentive to provide its audience with their first choice programming type. Instead, a monopolist would be inclined to offer only the minimum level of service necessary to attract its audience. Only by opening the market to new entrants can an audience expect its specialized tastes to be catered to. For a review of this debate *see* B. Owen, J. Beebe & W. Manning, Television Economics 48–90 (1974). For a review of this debate in the context of multi-channel bundles, *see* Wildman & Owen, *Program Competition and Diversity in the New Video Industry*, in Competition Among the Television Media (E. Noam ed. forthcoming).

[9] A price fixing agreement between competitors is the classic example of such an arrangement. Jefferson Parish Hosp. v. Hyde, 52 U.S.L.W. 4385, 4387 (U.S. Mar. 27, 1984) (citing Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343-48 (1982)).

[10] While there is no inherent need to determine the relevant market, other methods for establishing whether or not market power exists are difficult to use. *See* Harris & Jorde, *supra* note 6, at 4-5.

[11] *Id.*; *See also* Comment, *Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 1979 Duke L.J. 1152; Maisel, *Submarkets in Merger and Monopolization Cases*, 72 Geo. L.J. 39 (1983).

As interpreted by the courts, the relevant market is "the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market."[12] In some contexts, each of the three stages of the industry constitute the relevant market, but in other contexts a more narrow relevant market will be the most appropriate one.[13]

Film producers are certainly a market, but narrower segments of that industry may also be markets in their own right.[14] Video wholesalers/networks are a second market, but again there will be debate over the relevancy of more narrow markets.[15] Finally, it will be necessary to explore the retailer market to see whether all the video technologies, new and old, must be included in the relevant market or whether some subset of that market may have sufficiently distinctive qualities to constitute a narrower relevant market.[16]

II. Program Suppliers

The majority of video programming supplied to consumers is provided by the major motion picture studios, the network production companies, many smaller independent production companies, and those who produce professional and amateur sporting events.[17] The market is generally highly competitive,[18] but in a number of instances program suppliers have sought to exercise market (and thus bargain-

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[12] *See* Home Placement Serv. v. The Providence Journal Co., 628 F.2d 274, 280 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1279 (1983) (citing L. A. Sullivan, Antitrust 41 (1977) and United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956))("commodities reasonably interchangeable by consumers for the same purposes"). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). The 1982 Department of Justice merger guidelines generally define a relevant market as one which is sufficiently distinct so that even if all firms in the market were to maintain a 5 percent price increase for one year, there would be little shifting to other products. *See* Department of Justice Merger Guidelines, 47 Fed. Reg. 28,493, 28,495 (1982), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶ 4500, at 6881 [hereinafter cited as Merger Guidelines].

[13] The most appropriate definition of the market depends on the question to be analyzed. *See* Harris & Jorde, *supra* note 6, at 43; Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case*, 127 U. Pa. L. Rev. 994, 1010 (1970). Thus while the term "submarket" may be misleading, courts have recognized the validity of submarkets that are relevant markets in their own right. *See* Maisel, *supra* note 11. *See also* Merger Guidelines, *supra* note 12. For a general discussion of relevant markets in the new media, *see* Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L. Sch. L. Rev. 863, 880–83 (1980).

[14] *See infra* notes 22–30 and accompanying text.

[15] *See infra* notes 64–69 and accompanying text.

[16] *See infra* notes 89–93 and accompanying text.

[17] *See* House Report, *supra* note 1, at 280–90. Programming is also produced by others, including, local retailers, *e.g.*, local news.

[18] *Id.*

ing) power in more narrow segments of the market in their dealings with wholesale video networks. In the last several years, this tendency has been most noticeable in the various proposals by studios for dealing with pay television networks. Because they do not enjoy the type of relationships here that they enjoy with broadcast networks,[19] the studios have felt compelled to develop a strategy to deal with what they characterize as the monopsony power[20] of the dominant pay TV network, Home Box Office (HBO).[21] We now turn to a history and analysis of these efforts.

A. *The Relevant Market*

When examining practices in the program supply market, courts must decide which categories of programming, if any, constitute distinct separate markets and they generally focus on buyers' and sellers' perceptions.[22] In 1948, the Supreme Court recognized that first-run motion pictures were a separate market, distinct from the more gen-

[19] When the film industry first arose, studios generally acted as their own theatrical wholesale distributors. In fact, most vertically integrated further forward into theater ownership until they were forced to divest those theaters. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). None of the studios attempted to become commercial television network wholesalers, as they initially regarded the television medium as a transient and unfriendly competitor to their theater business, rather than a complementary outlet for their film production business. *See* THE AMERICAN FILM INDUSTRY 320–25 (T. Balio ed. 1976); Stuart, *The Effects of Television on the Motion Picture Industry 1948-1960*, THE AMERICAN MOVIE INDUSTRY 291–93 (G. Kindem ed. 1982), but competition among the major networks enabled the studios to receive competitive prices for their films. In fact, the studios actually exercised market power over the networks. *See* United States v. Loew's, Inc., 371 U.S. 38 (1962).

[20] A monopsony is the reverse of a monopoly. Instead of one dominant seller and many buyers, there are many sellers and one dominant buyer. *See* F.M. SCHERER, INDUSTRIAL MARKET AND ECONOMIC PERFORMANCE 306–12 (2d ed. 1980).

[21] Home Box Office (HBO) was one of the first pay television services to sell movies to cable television operators for sale to their subscribers. It cemented its dominant position in the industry when it began distributing its service nationwide via satellite. *See* Sterling, *Cable and Pay Television*, in B. COMPAINE, WHO OWNS THE MEDIA 402–07 (1982). Pay TV was freed from burdensome FCC regulations in Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 21-22 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Between 1975 and 1980, with only one slot available for pay TV on most cable systems, HBO was able to exploit its superior marketing position to gain 69 percent of the pay TV market. United States v. Columbia Pictures, Inc., 507 F. Supp 412, 416 (1980), *aff'd*, 659 F.2d 1063 (2d Cir. 1981). While many cable operators are able to offer multiple pay TV services to subscribers today, *see* House Report, *supra* note 1, at 299, HBO still enjoys a dominant position. HBO currently has 13.5 million subscribers, nearly three times as many as its nearest competitor pay service Showtime, and has been adding new subscribers at a rate of about 2.5 million a year for the last two years. *Subscribers Up, Ratings Down*, N.Y. Times, Feb. 23, 1984, at C22, col. 1. In addition, HBO formed a separate complementary all movie service called Cinemax. *See* United States v. Columbia Pictures Indus., 507 F. Supp. 412, 416 (S.D.N.Y. 1980).

[22] *See supra* note 13. The Justice Department Merger Guidelines focus on four factors for consideration, including: buyers' and sellers' perception and customary usage. Merger Guidelines, *supra* note 12.

eral film market, in the context of theatrical exhibition.[23] The studios and audiences, and most critically the theaters, perceived them as a different product, significantly more attractive to their customers than the ordinary older films, and the Court recognized the relevance of this perception. In 1980, a district court recognized an even narrower market of blockbuster movies in the context of pay TV exhibition.[24] Again, this finding was based on the beliefs of those in the industry. Only a relatively small number of films produced annually could be used by a pay TV network to market its services and attract new customers, for example, by being featured on the cover of a monthly cable television viewer's guide.[25] This smaller group of movies was therefore treated as a narrower relevant market.

Meanwhile, in 1960, a district court refused to find that older feature films were a relevant market, distinct from other types of television programming.[26] It noted that neither broadcasters, networks, or advertisers seemed to regard them as such.[27]

There is also a question of whether sports programming or even some narrower type of sports programming, such as professional or college football, may constitute a distinct market.[28] While most sporting events may be reasonably interchangeable with each other and other video entertainment, some may be regarded by viewers as without reasonable substitute. These may include the games of a local sports team.[29]

Economists measure the perceptions of buyers by calculating their cross elasticity of demand for a product.[30] If buyers consider a subset of a market to be unique for significant purposes then they will be unwilling to substitute other products for those within the subset, even if the prices of those in the subset go up and/or those outside the subset go down. In such a case economists would say there was a low cross elasticity of demand and courts will recognize the subset as a

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[23] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[24] United States v. Columbia Pictures Indus., 507 F. Supp. 412, 430 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1063 (2d Cir. 1981).

[25] *Id.* at 417.

[26] United States v. Columbia Pictures Corp., 189 F. Supp. 153, 183–92 (S.D.N.Y. 1960).

[27] *Id.*

[28] *See, e.g.*, United States v. Int'l Boxing Club of N.Y., 358 U.S. 242 (1959) (championship prize fights are a separate market); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D.Pa. 1972) (major league professional hockey is a relevant market).

[29] In fact, such a product may even have been deemed an essential facility. *See infra* text accompanying note 66.

[30] *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956); L.A. SULLIVAN, ANTITRUST 41 (1977). The Merger Guidelines, *supra* note 12, appraise this elasticity for a 5 percent rise over one year.

relevant market. In addition to first run movies, courts may well recognize live news, live football, live basketball, and live local sports as relevant markets.

B. *Price Fixing*

One way for film producers to assure themselves equal bargaining power with a dominant video programming network, such as HBO, would be to unite and negotiate as a single unit or cartel. If the dominant cable network were forced to deal with a single production entity, then the producers' monopoly power would counteract the strength of the monopsonist.

HBO alleged that such a cartel was created when the Getty Oil company joined with four major film studios, (who together had been producing approximately one half or more of the most popular movies on pay television[31]) to form the Premiere pay TV service.[32] The Premiere group had agreed to pool their pay TV films and distribute them exclusively via Premiere.[33] By eliminating competition among themselves and controlling their own distribution network, they sought to assure themselves of higher royalty and rental fees than they would otherwise have received from the dominant firm, HBO. The group agreed to distribute their revenues according to a designated profit sharing formula.

HBO argued that the consortium decreased competition among pay TV suppliers and, therefore, insured a higher price for film product. The higher prices that networks would be forced to pay would then lead to higher prices to subscribers. Premiere replied that it was a pro-competitive venture as it represented a viable alternative to HBO. Even under a rule of reason analysis, however, the district court felt that there was a reasonable probability that the agreement constituted price fixing and an injunction was issued.

The Justice Department followed this same reasoning when it threatened to challenge a pay TV network merger that would have been co-owned by three major motion picture studios: Warner Brothers, Paramount and Universal.[34] "The Department was concerned

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[31] 507 F. Supp. at 418.

[32] *Id.* at 412.

[33] Under the agreement, the movie companies could have licensed their films to non-satellite pay-cable television and to the pay systems that did not use cable. *Id.* at 420. Also, other pay TV services would have access to films in which they invested.

[34] *See* 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1128, at 275–76 (Aug. 18, 1983) (noting Department of Justice, Press Release (Aug. 12, 1983)).

that such a combination would increase the incentives and abilities of motion picture distributors . . . to increase the prices at which they license their motion pictures to pay television."[35] Only when the deal was modified to exclude Paramount and Universal, did the Justice Department find the merger acceptable.

And the studios were not the only ones to recognize the advantages of a cartel. Sports leagues had similar interests. The National Collegiate Athletic Association (NCAA), which consists of almost all colleges and universities with athletic programs, was also attacked on antitrust grounds for its practices with television networks. In *Board of Regents of University of Oklahoma v. NCAA*,[36] a federal district court found the NCAA to be acting like a "classic cartel" when it negotiated television football contracts. The court found that the NCAA established minimum aggregate fee was "the minimum, maximum, and actual price which would be paid"[37] and therefore it constituted illegal price fixing.

C. *Refusal to Deal*

In theory and in practice, there are less restrictive alternatives to the kind of joint venture struck down in Premiere. Film producers could avoid potential exploitation by monopsony pay TV distributors by establishing their own individual pay television networks modeled on their theatrical distribution networks. Unfortunately, the cost of using a whole satellite transponder for wholesale national distribution and a whole subscriber channel for local retail distribution for only a single studio's product and then marketing the service appears to make it uneconomical.[38] Presumably, studios could share the use of the transmission facilities[39] but allocating revenues would be excessively burdensome without pay-per-view equipment which is still expensive.[40]

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[35] Department of Justice, Press Release 2 (Aug. 2, 1983).

[36] Board of Regents of Univ. of Okla. v. NCAA, 546 F.Supp. 1276 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983).

[37] *Id.* at 1305.

[38] Even in the theatrical distribution industry, "a low cost distribution system with full market penetration throughout the United States would have to distribute many more than 25 to 40 pictures [a year]." M. CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 208 (1960).

[39] *See* Regulatory Policy Concerning Resale & Share Use of Common Carrier Servs. & Facilities, 60 F.C.C.2d 261, 316–320 (1976).

[40] *See* Millonzi, *Pay per view profitability still a big question mark*, CABLEAGE, Feb. 14, 1983, at 6. *See also* Baldwin, Wirth & Zenalty, *The Economics of Per-Program Pay Cable Television*, 22 J. BROADCASTING 143 (1978) for a general description of the system.

If the joint use of a transponder and subscriber channel were all that was proposed by the companies involved in Premiere, the court probably would have recognized it as a pro-competitive entry. It would have added a new group or entity to the pay TV network industry. The Premiere joint venture, however, involved much more than merely the joint use of a transponder and channel; in addition to an apparent price fixing scheme, as discussed above, it was also seen as an effort to foreclose competition.

At the heart of the plan was a nine month exclusive license period, which the four studios granted to Premiere. During this period, most competitors of Premiere would have been denied access to half of the most attractive pay TV stock,[41] stock which the court found to be "one-half of the essential product" of the industry.[42] By refusing to deal with Premiere's competitors, the four studios would have placed HBO at a competitive disadvantage vis-à-vis Premiere and might well have caused such irreparable damage to other less established competitors like Showtime, and The Movie Channel that they might have been forced to fold.[43] The court suggested that effective competition among pay TV networks might have been significantly frustrated for the short term and possibly the long term as well.[44]

The Justice Department's recent decision not to challenge the formation of Tri-Star, a joint venture among HBO, CBS, and Columbia Pictures to form a new film studio,[45] provides some guidance on how the law will be interpreted in this area. The Department noted that although the joint venture arguably removes HBO and CBS as potential independent major motion picture studios, "this would not be anticompetitive because the firms do not possess unique capabilities to enter the market."[46]

Tri-Star does not enjoy the dominant position in the market that the Premiere studios represented. Meanwhile, its arrangement to sell its pay TV films exclusively to HBO[47] does not appear to be significantly more injurious to competition than the subsequent exclusive distribution deal between Paramount Pictures and Showtime/The

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[41] *But see supra* note 33.

[42] 507 F. Supp. at 430.

[43] *Id.* at 432.

[44] *Id.*

[45] *See* 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1131, at 376-77 (Sept. 15, 1983) (noting Department of Justice, Press Release (Sept. 14, 1983)).

[46] Department of Justice, Press Release 2 (Sept. 14, 1983).

[47] *Id.* HBO entered agreements which granted it exclusive pay TV rights to all of the films produced by its Tri-Star venture and 50 percent of Columbia Pictures' films in production in-house prior to June 30, 1986, as well as rights to obtain additional Columbia films on an

Movie Channel.[48] When a single studio refuses to deal with other pay TV networks, those networks still have access to the rest of the studios and should be able to gain competitive equality by securing exclusive rights to comparable films produced by another studio. Only when arrangements for exclusive access to a studio's entire output substantially limit the access that new competitors can get to essential programming will exclusive arrangements be subject to antitrust attack.[49] The exclusive agreements made by Columbia Pictures and Orion with HBO seem to test the limit of that boundary, as HBO may have recognized in its subsequent decision to make only non-exclusive arrangements in the future.[50]

The NCAA's control over the sale of the rights to broadcast collegiate football was also found to constitute a group refusal to deal or boycott. In fact, the plaintiff in the suit was one of the alleged members of the boycott who sought to be released from the NCAA's restrictive contract.[51] Professional sports leagues are permitted to negotiate as a single entity but are limited in the actions they can take.[52]

D. *Tying*

Another potentially anticompetitive practice that program producers may engage in involves the bundling of several of their products into packages. When a producer bundles products over which it has market power to other products it sells in competitive markets in order to coerce the purchase of the latter, the practice will be attacked

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exclusive basis in exchange for HBO's participation in financing those films; also to receive exclusive pay TV rights to approximately 30 films to be produced over several years by Orion in exchange for HBO's participation in financing those films.

[48] Showtime and The Movie Channel merged in 1983. *See infra* text accompanying note 67. Showtime/The Movie Channel, Inc. negotiated with Paramount Pictures to have exclusive rights to five year's worth of movies produced by Paramount, from 1983 to 1987. Paramount has been the number one or number two ranked studio in terms of box office revenues consistently for the past six years. *Showtime/Movie Channel and Paramount: Power Through Partnership*, *Broadcasting*, Jan. 2, 1984, at 38. This contract was not challenged by the Justice Department despite their refusal to permit Paramount to become a co-owner of the pay TV service. *See infra* notes 67–69 and accompanying text.

[49] Still, a new entrant might face other significant entry barriers. *See infra* note 67.

[50] *See HBO: No More Exclusivity*, CABLEVISION, Mar. 19, 1984, at 18; *see also supra* note 47.

[51] 546 F. Supp. 1276, 1311–13. Although the cartel arrangement might have permitted the association to maximize the total revenues that could be secured from media interests, the plaintiff did not feel that it was receiving the full market value of its product. It apparently sought to eliminate the cross subsidy imposed by the NCAA distribution rules. Although there may be good reasons to sympathize with the goals of the NCAA arrangement, as the dissenting opinion noted, only Congress can grant the association an antitrust exemption to pursue them.

[52] *See* Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983).

as illegal tying.[53] The problem is not that the producer will be able to secure additional profits from buyers from such tying, but that its actions may unreasonably harm its competitors in the non-monopoly market, thus diminishing the diversity of offerings and quite possibly producing a less competitive market in the long run.[54]

The key issue is whether a producer has market power in some product market. In 1962, the Supreme Court held that the existence of a copyright on a movie was *prima facie* evidence of sufficient market power.[55] It prohibited movie studios from tying the sale of their most popular films to the sale of their less desirable grade B films. Yet it is unlikely that market power will be found as a matter of law unless the particular products are popular as well as distinct, for in the absence of demand for the monopoly product, there is no market over which to exercise monopoly power. Recently, a television production company charged that NBC had such market power and was exercising it by tying the sale of the syndication rights to its most popular shows to the purchase of its less desirable shows.[56] This same charge has been made against syndicators of popular TV shows.[57]

The increasingly competitive status of the program production market will decrease the likelihood that any studio will enjoy sufficient monopoly power to violate the antitrust laws. The only area where such tying may continue to be viable is sports programming. There the courts may hesitate to permit an entity that controls a unique event, such as the Super Bowl or World Series, or even a local sports team's coverage in a local market, to tie the sale of that monopoly product to the sale of other programs which may be available in a competitive market.[58]

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[53] The rule was first enunciated in International Salt Co. v. United States, 332 U.S. 392, 396 (1947), and has been endorsed by the Supreme Court many times, most recently in Jefferson Parish Hosp. v. Hyde, 52 U.S.L.W. 4385 (U.S. Mar. 27, 1984). "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.* at 4388.

[54] *See* sources cited in Jefferson Parish Hosp. v. Hyde, 52 U.S.L.W. 4385, 4388 nn.21-22 (U.S. Mar. 27, 1984).

[55] United States v. Loew's, Inc., 371 U.S. 38, 45-48 (1962).

[56] *See* Aurora Enters. v. National Broadcasting Co., 688 F.2d 689 (9th Cir. 1982).

[57] Such practices were debated at the National Association of Television Program Executives (NAPTE) meeting in February 1984. *Reported on* CBS's *60 Minutes*, Mar. 18, 1984, 7 p.m. *See also* BROADCASTING, February 20, 1984, at 7.

[58] *Cf.*, Coniglio v. Highwood Servs. 495 F.2d 1286, 1291 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974) (Buffalo Bills have a monopoly over the presentation of professional football games in the relevant market.).

III. Wholesaler Networks

Thus far, we have focused on potential anticompetitive practices by producers of programming, particularly when faced with a monopsonist wholesaler. We now turn to the wholesale level itself to discuss the kinds of problems and analyses that might apply there. Distribution arrangements are normally handled by wholesale distributors or networks since it is difficult for each individual program producer to negotiate individually with each potential video retailer. Video networks may package together enough programming to fill the broadcast day, every day, as do ABC, CBS, and NBC, or merely a segment each week, as does National Jewish Television.[59]

A. *The Relevant Market*

Before the development of cable and the other new video technologies, the limited number of television stations in much of the country led to the development of only three national networks.[60] With the rapid increase in retail outlets, a result of the increasing average channel capacity of cable systems[61] and the number of satellite transponders appropriate for cable distribution,[62] there has been a rapid expansion in the number of satellite networks.[63]

Clearly all networks, including pay and commercial, compete against each other to some degree, but some clusters of networks certainly constitute relevant markets in their own right.[64] Pay TV networks believe that the programming that they offer is sufficiently different from ordinary network fare that consumers will pay for it and feature movie driven pay TV services may well be a relevant market.[65] All-news and all-music networks may also be sufficiently distinct from more general networks to constitute a separate market

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[59] National Jewish Television only broadcasts on Sundays from 1–4 pm. *See Field Guide*, *supra* note 1, at 23.

[60] *See supra* note 3.

[61] *See Systems & Subscribers: Channel Capacity*, CABLE TELEVISION DEVELOPMENT (NCTA), Dec. 1983, at 3.

[62] *See After 10 Years of Satellites, The Sky's No Limit*, BROADCASTING, April 9, 1984, at 43.

[63] *See supra* note 3.

[64] *See, e.g.*, United States v. Columbia Broadcasting Sys., 459 F. Supp. 832 (C.D. Cal. 1978)(each network's prime time entertainment programs constitute a relevant submarket for antitrust purposes); *see also* United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978).

[65] *See* White, *Antitrust and Video Markets: The Merger of Showtime and The Movie Channel As A Case Study*, in COMPETITION AMONG THE TELEVISION MEDIA (E. Noam ed. forthcoming).

but radio networks of this type would appear to compete in this market also. Live sports networks, particularly in the home team's market, may also represent a relevant market. One cable operator in Long Island, New York, has even charged that New York Islander hockey games are an essential facility for providing cable service on Long Island.[66]

While the number of actual competitors in each of these markets may be very small, the Justice Department characterized the network service market as one conducive to new entry when it approved the merger of Showtime and The Movie Channel, the second and third largest pay TV services in the nation.[67] The Justice Department based its judgments on "the absence of exclusive licensing as a significant method of motion picture distribution, [thus permitting] other firms to start new pay television services if existing pay television services engage in anticompetitive conduct."[68] The Department concluded that in the present environment it was unlikely that the agreements "would have an anticompetitive effect due to the number of theatrically successful films expected to be available for licensing by HBO's competitors and the ability of other pay television programmers to invest in film production in order to obtain exclusive pay television rights."[69]

B. *Refusals to Deal*

The Supreme Court has "long recognized [the] right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will

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[66] *See* Nishimura v. Dolan, Civil Action No. 83-0085 (E.D.N.Y. 1983), where a cable operator brought suit against the network that carried the New York Islander games when it refused to deal, claiming that monopoly control over an essential facility was being used to distort the cable retail market, where both the plaintiff and defendant were competing for subscribers.

Nevertheless, the essential facilities doctrine has generally been enforced only where the facility is owned jointly by competitors, *e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal Railroad Assocs., 224 U.S. 383 (1912), or by virtue of a governmentally granted monopoly license, *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978).

[67] *See supra* note 35. The market appears to be contestable, i.e., one for which potential competition is significant. *See* W. BAUMOL, J. PANZAR & R. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982). Nevertheless, the nature of the relations between network wholesalers and their affiliate retailers in the significantly vertically integrated cable industry appears to create substantial barriers to entry, not unlike these in the theatrical distribution market where large mergers would presumably be challenged under the Merger Guidelines, *supra* note 12.

[68] *See supra* note 35.

[69] Department of Justice, Press Release 3 (Aug. 12, 1983). *But see supra* note 67.

deal."[70] There are, however, two qualifications on the right of refusal. In *United States v. Colgate*[71] the Supreme Court stated that the right of refusal does not include the right to refuse to deal when there is a "purpose to create or maintain a monopoly."[72] In addition, the courts have held that "a business or group of businesses which control a scarce facility have an obligation to give competitors reasonable access to it."[73] This "essential facilities doctrine" will be discussed in more detail below.[74]

There are three areas where wholesalers could conceivably refuse to deal.

1. Transponder Owners

First, the owners of transponders on the most desirable satellites could refuse to lease any to a particular network.[75] If the owner of the transponders is also affiliated with a competitor of the network then the network could charge the owner with using its market power with intent to monopolize. As the supply of transponders increases, however, it is unlikely that this problem will remain significant.[76]

2. Networks-Producers

Networks may also refuse to deal with independent producers, their potential suppliers. The FCC's present syndication and financial

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[70] Reeves, Inc. v. Stake, 447 U.S. 429, 438–39 (1980) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). The Second Circuit has held that "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right." *Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920, 927–28* (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *see also* Byars v. Bluff City News Co., 609 F.2d 843, 855–56 (6th Cir. 1979).

[71] 250 U.S. 300 (1919).

[72] *Id.* at 307. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); Eastman Kodak Co. of N.Y. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927). This principle was expressed most recently in Home Placement Serv. v. The Providence Journal Co., 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983). In that case, the plaintiff newspaper refused to carry an advertisement from a rental agency which provided a service to potential renters because the agency was in competition with the newspaper's own classified ads. The court held that the newspaper "was using its dominance in the newspaper advertising market to foreclose competition in the housing vacancy information market." *Id.* at 279. The court held that this violated section 2 of the Sherman Act.

[73] Byars v. Bluff City News Co., 609 F.2d 843, 856 (6th Cir. 1979).

[74] *See generally* Associated Press v. United States, 326 U.S. 1 (1945) discussed *supra* note 66 and other cases cited *infra* notes 101–03.

[75] To receive programming from a satellite, a cable operator must point an earth dish at the satellite. Most cable operators install only one or possibly two dishes, and can only receive the programs transmitted via one or two satellites. However, the decreasing cost of earth dishes, and the development of dishes which can receive signals from two satellites simultaneously appears to be eliminating this problem. *See* T. BALDWIN & D. MCVOY, *supra* note 2, at 16–18.

[76] *See supra* note 62.

interest rules limit the power of the networks in their dealings with independent program producers.[77] The networks are also subject to consent decrees which limit the amount of programming that they may produce.[78] There were fears that the networks could use their dominant position in the distribution market to distort competition among program suppliers. This problem diminishes as the networks lose their dominant position and independent producers have viable alternative channels of distribution.[79]

3. Networks-Retailers

Another situation that has arisen involves the refusal by some networks to deal with retailers, i.e., local entities that deliver the product to the ultimate consumer.[80] SMATV operators have claimed that vertically integrated cable multiple systems operators (MSO's) sought to deny them access to popular pay networks in the hope that such denials would put SMATV operators out of business.[81] Prior to modifying their practices, cable networks defended their activities as legitimate business decisions justified because it is much less profitable to deal with small SMATV systems than with cable systems. Still this did not explain why they did not offer to deal with SMATV systems at the higher prices that might be warranted. More likely, the networks were reluctant to disturb their cable clients (who, in this integrated world, include themselves) as these cable operators seek to limit SMATV cream-skimming and other forms of competition in urban markets. Cable owners would like to take over the SMATV industry's market themselves.

In 1980, Warner Amex Cable charged ABC and the NCAA with similar anticompetitive motives when the pair sought to frustrate Warner's ability to secure the rights to live regular season Ohio State athletic events.[82]

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[77] *See* 47 C.F.R. 73.658(j) (1983); Report & Order, 23 F.C.C.2d 382 (1970).

[78] *See* United States v. ABC, 1981-1 Trade Cas. (CCH) ¶ 64,150 (C.D. Cal. 1980); United States v. CBS, 1980-1 Trade Cas. (CCH) ¶ 63,594 (C.D. Cal. 1980); United States v. NBC, 1978-1 Trade Cas. (CCH) ¶ 61,855 (C.D. Cal. 1977). *See also* Broadcasting, Mar. 12, 1984, at 50.

[79] The need to retain the syndication and financial interest rules is the issue in the current debate concerning the monopoly power of the three major networks. Syndication & Fin. Interest Rules, 54 Rad. Reg. (P & F) 457 (1983).

[80] When subscription television was still in its experimental stages in 1964, some movie theaters successfully pressured two major film producers to refuse to supply films for the Hartford S.T.V. experiment. RKO filed an antitrust suit, but it was quickly settled and by 1966 the two producers were supplying films. Fourth Report & Order, 15 F.C.C.2d 466, 475 (1968).

[81] *See* Paul Kagan Assoc., Inc., SMATV Antitrust Suits, Cable TV Franchising June 29, 1982 (No. 166) at 5.

[82] Warner Amex Cable Communications, Inc. v. American Broadcasting Cos., 499 F. Supp. 537 (S.D. Ohio 1980) (preliminary injunction denied when the court failed to find that irreparable injury would occur).

However, absent proof of monopoly intent, it is very unlikely that any retailers could win a suit by proving that any of the satellite networks should be considered an essential facility to them. In fact, when the cable networks refused to serve SMATV, STV networks offered to supply their nearly comparable services.[83] The essential facilities doctrine may be applicable, however, in a case concerning a sports network that carries the New York Islander hockey games.[84]

C. *Tying*

A number of affiliated networks have attempted to encourage cable television operators to carry their multiple services by offering operators a special package deal. Turner Broadcasting offers both WTBS and CNN at a lower price to those who carry both services and HBO offers special deals to those who purchase both HBO and Cinemax.[85] Presumably, Showtime/The Movie Channel will do the same. Some might charge these services with illegal tying. The superstations competing with WTBS may argue that Turner Broadcasting is using its monopoly power as a distributor of the only all-news television network to favor its super station. These practices would only be illegal, however, if it could be shown that Turner had market power as the owner of CNN and that the bundle was priced at an unjustifiable discount. Under present circumstances it is doubtful that either of these could be proved.

IV. Local Distribution Retailers

Once program distribution networks have secured their material, they seek to gain access to as many television sets as they can. The major problem to be discussed below is the limited space on most of the older cable systems.[86] They can not carry all available satellite networks: there is a bottleneck. Some networks desiring access must be excluded from the system, although this should be less true as systems are built or upgraded to carry a larger number of channels.

Now cable operators may have sound business reasons for refusing to deal with particular networks based on the price the networks

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[83] The STV networks offered were ONTV and SelecTV.

[84] *See supra* note 66.

[85] *See* S. Besen & L. Johnson, An Economic Analysis of Mandatory Leased Channel Access For Cable Television 35 (1982).

[86] *See supra* note 61.

are willing to pay. Claims of first amendment rights may also be raised.[87] However, if their refusal to grant access stems from anti-competitive motives, they may be attacked under the antitrust laws as refusals to deal.[88]

A. *The Relevant Market*

Here again, the determination of the relevant market for retail video distribution is vital for assessing whether anticompetitive behavior is present and there is great debate on this issue. Cable operators claim that it should include all video distribution media, including movie theaters, videocassettes, other pay TV media, and broadcast television, if not all entertainment and news media.[89] They argue that even those systems not in use at present may be considered for the pressure they exert as potential competitors. Yet even accepting such a broad market definition for some purposes, there is the question of whether there are any more narrow relevant markets.[90]

It is possible that media that are capable of delivering pay TV will constitute a distinct submarket. Clearly they are to pay TV networks seeking retail distribution. Those retailers who can deliver pay-per-view[91] may constitute an even narrower relevant market. They might be the relevant market to those offering pay TV sporting events.[92] Media which can do these things and also reach the majority of a market may also constitute a market, one made up solely of the cable operator. This is likely if the cable's economic efficiencies and its large capacity enable it to dominate and displace other media.[93]

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[87] *See, e.g.*, G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLE SPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION (1983); Goldberg, Ross & Spector, *Cable Television, Government Regulation and the First Amendment*, 3 COMM/ENT L.J. 577 (1981). *But see* Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium From the Message*, 11 FORD. URB. L.J. 163, 216-23 (1983).

[88] *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[89] *See, e.g.*, SHOOSHAN & JACKSON, *supra* note 1; Stern, Krasnow & Senkowski, *supra* note 1

[90] *See supra* note 13. In Satellite Television & Assoc. Resources, Inc. v. Continental Cablevision, 714 F.2d 351 (1982), the court did not find a narrower market, but this appeared to result from the inability of the plaintiff to muster any economic evidence on the issue for the plaintiff has the burden of proving the relevant market. *Id.* at 356.

[91] For a review of pay-per-view, *see supra* note 40.

[92] Relevant markets based on particular distribution technologies such as addressability, however, may be only temporary. The cost of adopting other technologies is often low and the only obstacle may be regulation.

[93] *See, e.g.*, I. POOL, TECHNOLOGIES OF FREEDOM 173 (1983); ("Whatever alternative means of communication exist, nothing else can offer the equivalent of the multiservice broadband cable running past every house, enjoying the privilege of a municipal franchise to string its wires and

B. *Refusal to Deal*

A party that is refused access to a cable system or other medium may proceed on either of the two theories mentioned earlier.[94] First, it may charge the medium owner with an intent to monopolize the market. Second, it may charge that the defendant has abused its power over an essential facility. Thus, a successful plaintiff must prove intent or the essential nature of a facility.

1. Monopoly Intent

When a cable operator affiliated with a cable network refuses to grant non-discriminatory access to its network's competitor, it may be attempting to monopolize the particular program market of the two services. This was the argument made by Turner Broadcasting Service (TBS) when it brought a lawsuit against Group W Cable charging Group W with denying access to Turner's Cable News Network in favor of a Group W/ABC joint venture called Satellite News Channel (SNC).[95] The lawsuit was ultimately settled when SNC was purchased by TBS. A similar issue was present in the Premiere case. Premiere sought to demonstrate that the common parentage of Home Box Office, the country's largest pay service, and American Television and Communications Corporation (ATC), the largest cable system in the country, (both owned by Time, Inc.) meant that the dominant pay system had gained initial access because of a discriminatory advantage.

In another case, two broadcast licensees operated a cable system as a joint venture and then refused to carry the signal of a competing UHF station. That UHF station brought suit to prevent them from using their market power to eliminate it from the programming mar-

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dig the streets. One can imagine a railroad owner in the nineteenth century denying being a monopolist because anyone refused access to a train could use a horse and buggy."); Pearce, *Cable and the Competition: The Future Isn't What It Used To Be*, VIEW, Sept. 1982, at 55 ("Five leading Wall Street analysts agree that cable will remain the dominant force in non-[traditional] broadcast entertainment."); Browne, Bortz & Coddington, *The Impact of Competitive Distribution Technologies on Cable Television*, REPORT BY NATIONAL CABLE TELEVISION ASSOCIATION, (Mar. 1982) ("It is our judgment that cable television will remain the dominant technology for distributing video programming even if multichannel STV, MDS and DBS develop as planned.")

[94] *See supra* notes 70–74 and accompanying text.

[95] Cable News Network v. Satellite News Channels, Civil Action No. 83-430 (N.D. Ga., filed Mar. 3, 1983). The lawsuit was subsequently dropped as part of the agreement by Group W to sell SNC to Turner Broadcast System. For a discussion of the issue in the context of Westinghouse's acquisition of Teleprompter, *see* Teleprompter, 87 F.C.C.2d 531, 554–63 (1981).

ket.[96] While a failure to gain access to a small number of markets may not be terribly harmful in most industries, the cost structure of cable networks makes them particularly sensitive to such market foreclosures.[97] Generally, the more subscribers they can reach, the greater will be their profits especially when they have paid a license fee unrelated to the number of subscribers served.[98] Once they are broadcasting nationwide, the cost of providing their satellite-delivered material to an additional subscriber is virtually zero. Access to cable systems is particularly important to regional sports networks with smaller potential audiences. They desire access to all large population centers in their region. Similarly, advertising supported networks feel it is crucial to gain access to the homes of advertising executives in the New York metropolitan area.

Finally, all new networks seek quick access to large markets to decrease the uncertainty concerning their viability. If those affiliated with MSO's are permitted to take advantage of their affiliates' market position to guarantee a substantial initial market share for their cable services, they will have a significant advantage over any competitor not affiliated with an operator. This advantage could be compounded quite easily if, for example, MSO *X* were to grant access to the affiliated services of MSO *Y* under the implicit understanding that MSO *Y* will return the favor of granting access to affiliated networks of MSO *X*. Such favoritism among MSO's could create substantial

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[96] Midland Telecasting Co. v. Midessa Television Co., 617 F.2d 1141 (5th Cir. 1980), *cert. denied*, 449 U.S. 954 (1981) (the FCC regulation of access for cable broadcasting did not operate to create an antitrust immunity for defendants). This same contention was made by a Florida alarm company. *See* Electronic Sentry v. Selkirk Communications, 82-6685-CIV-SAC (S.D. Fla., filed Oct. 27, 1982). It charged a cable operator with refusing to lease access to it, while operating (and cross-subsidizing) its own security system. A similar suit is being brought by 26 alarm companies who claim that AT&T has refused them access in favor of AT&T's own systems. AAA Alarm Co. v. American Tel. & Tel. Co., Civil Action No. 82-2907 (D.D.C. filed Oct. 12, 1982).

[97] One media commentator charges that the failure of three cable networks: CBS Cable, The Entertainment Channel, and Satellite News Channel, may have been due in part to the cable industry's animosity to their parent companies: CBS, NBC, and ABC, respectively. The networks fought hard against the cable industry for many years. *See* Brown, *When Cable Clobbered the Networks*, CHANNELS OF COMMUNICATION, Jan.–Feb. 1984, at 23; *see also* Hall, *Cable's Power Blocks*, CHANNELS OF COMMUNICATION Jan.–Feb. 1984, at 44.

[98] Their product is what economists call a public good. *See* Samuelson, *Aspects of Public Expenditure Theories*, 40 REV. ECON. & STAT. 332 (1958); *see also* Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. L. & ECON. 71 (1964). Even when producers charge licensing fees related to the number of subscribers they reach, as long as the price received from subscribers and/or advertisers on a per subscriber basis exceeds the marginal cost of the licensing fee, program distribution networks will increase profits in approximate proportion to the number of subscribers they reach.

barriers to entry and permit those affiliates to enjoy substantial market power.[99]

Even if there is no direct affiliation between operator and network a network refused access could point to an indirect link. Since the subscriber fee for pay services is ordinarily split between program supplier and system operator, program services can be regarded as joint ventures between the wholesale program distributor and the local media retailer. Similarly, the arrangements between advertiser supported cable networks and cable systems often mirror the network affiliate relationship that exists for commercial television[100] and may be strong enough in terms of shared revenue to establish the link.

In these circumstances, competition among networks which leads to decreased prices to consumers and potentially decreased revenues to the operator would not be in the operator's own short term interest. It could therefore be shown that an operator treats competitors to the programming services that it decides to carry as competing against itself. In these circumstances the operator would no longer be able to claim that he has no purpose to restrain competition when refusing to grant access.

2. Essential Facility

The second theory that a program supplier can proceed upon if it is denied access to a system is the essential facilities doctrine. The Supreme Court has decided two cases relevant to this situation: *United States v. Terminal Railroad Associates*[101] and *Otter Tail Power*

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[99] When a cable operator is vertically integrated into program production there exists a danger that it may favor its own affiliated services over those of its competitors. *See* Cabinet Comm. on Cable Communications, Report to the President, chap. 2, at 12, 20; J. Ordover & R. Willig, Notes on Non-Price Anti-Competitive Practices by Dominant Firms, presented at the Ninth Annual Telecommunications Policy Research Conference, Annapolis, Md., Apr. 1981; *see also In re* Teleprompter, 87 F.C.C.2d 531, 554–63 (1981) (Fogarty, Comm'r, dissent at 578). *See also Cox To Drop HBO, Cinemax, TMC for Spotlight in 26 Ops*, MULTICHANNEL NEWS, August 23, 1982, at 1. Such reciprocal favoritism was at the heart of the matter in the divestiture of the studios/distributors from their movie theaters. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[100] *See* S. BESEN & L. JOHNSON, *supra* note 85, at 24-40.

[101] 224 U.S. 383 (1912). In *Terminal Railroad* an association of 14 railroad companies controlled access to the sole terminal facilities crossing the Mississippi River in St. Louis and denied competing railroads access to the terminal. The Supreme Court required the association to make their facilities available to non-member companies on reasonable, non-discriminatory terms.

Co. v. United States.[102] In both cases, a single entity exercised control over an essential facility to hinder competition.[103]

The relevancy of these cases to cable or other retailers of programming depends on the essentiality of the facility. When applying the essential facilities doctrine in *Hecht v. Pro-Football, Inc.*[104] the District of Columbia Circuit Court found that for a facility to be essential, it must be "economically infeasible" to duplicate and the denial of its use must inflict "a severe handicap on potential market entrants."[105] Data showing that cable systems will provide the most economical means for the dissemination of video programming and that multiple system competition (i.e., "overbuilding") is not feasible would presumably satisfy this standard.[106] If the essentiality of the facility can be proved, then monopoly intent need not be proved, for "[l]ack of bad purpose is irrelevant where the defendant already possesses monopoly power and, without justification, uses it to exclude competition."[107]

Still, the FTC was unable to utilize this doctrine to require the publisher of the "essential" guide for airlines to provide equal treatment to all airlines competing in the marketplace.[108] The Second Circuit reversed the FTC's action, reasoning that upholding it "would give the FTC too much power to substitute its own business judgment for that of the monopolist. . . . Thus, if the only supermarket in town decides to stock Birdseye vegetables but not Green Giant vegetables, the FTC would be able to require it to stock Green Giant vegetables if it were to find Green Giant competitively disadvantaged."[109] The Second Circuit's decision may be applicable to the cable industry.[110]

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[102] 410 U.S. 366 (1973). In *Otter Tail*, an electric utility refused to "wheel" (i.e., transmit) electric power over its unique transmission facilities when a municipality desired to purchase its electricity from a competing power supplier. The Court found Otter Tail guilty of monopolizing the local market for retail distribution of electric power and enjoined it from further refusals.

[103] For a detailed discussion of *Otter Tail* and the antitrust issues discussed in this section *see* Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720, 1724 (1974).

[104] 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

[105] *Id.* at 992.

[106] *See supra* note 93; *see also* Fin. and Economic Analysis of the Cable Television Permit Policy of the City and County of Denver (Jan. 20, 1984) (Touche Ross & Co.) discussing the impracticality of multiple cable system competition.

[107] *See* Home Placement Serv. v. Providence Home Journal Co., 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983). *See also* Byars v. Bluff City News, 609 F. 2d 843 (6th Cir. 1979).

[108] *See* Official Airlines Guides, Inc. v. F.T.C., 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

[109] *Id.* at 927-28.

[110] The decision in Official Airlines Guides was applied in Saxe, Bacon & Bolan, P.C. v Martindale-Hubbell, 710 F.2d 87, 90 (2d Cir. 1983); *see also* Glen Eden Hosp. v. Blue Cross &

One could look at the cable operator the way one looks at a shopping mall entrepreneur who wants to obtain an anchor tenant, usually a major department store, and some of the associated single purpose stores that make shopping worthwhile to the consumer. Both may be willing to make special deals to line up star tenants—in cable's case usually the pay cable television network—and be justified in doing so. It is doubtful, however, whether courts would allow such anchor tenants to use their market power to foreclose competition by securing a guarantee of exclusivity in their agreement with the operator.[111]

Yet while the law may prohibit such exclusivity arrangements it would not require an operator to deal on identical terms with all networks irrespective of their marketing efforts or quality of programming. It might be reasonable, however, to require an operator to charge networks a uniform percentage of revenues rate,[112] although, there are reasons why the essential facilities doctrine may not mandate such access. Even assuming that the media firm is truly an essential facility in the relevant market, the firm is still free to refuse to deal if it has legitimate business reasons.[113]

3. Strict Separation/Divestiture Proposals

In anticipation of cable's local monopoly status, there have been proposals to limit the operator's power to distort the programming market. Some have suggested that a strict separation of hardware and software would be the appropriate solution.[114] They compare the cable industry to the movie industry before the film distributors were forced to divest themselves of their theaters.[115] No less than former Assistant Attorney General William Baxter has stated that the local monopoly power of cable operators resembles the local monopoly power of local telephone companies and that a divestiture to separate

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Blue Shield of Mich., 55 F. Supp. 337, 346 (E.D. Mich 1983); Lotter v. Collagen Corp., 450 N.E.2d 1338, 1341 (Ill. App. Ct. 1983). *But see In re* General Motors Corp., 99 F.T.C. 464 (1982) where the FTC continued to assert the wider jurisdiction that the courts have denied it.

[111] *See* Channel 100, Toledo, Inc. v. Comcast Cablevision Corp., Civil Action No. 80-40071 (E.D. Mich. 1980) (injunction issued to prohibit plaintiff lessee from being evicted).

[112] *See*, Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 HARV. J. ON LEGIS. 541 (1983).

[113] *See, e.g.*, Homefinders of Am., Inc. v. Providence Journal Co., 621 F.2d 441, 443 (1st Cir. 1980) ("[m]isleading advertising that offends its readers and could turn them away from its classified columns altogether," is a legitimate reason for refusing access.); *see also* Walker v. Providence Journal Co., 493 F.2d 82 (1st Cir. 1974).

[114] *See, e.g.*, ACLU v. F.C.C., 523 F.2d 1344 (9th Cir. 1975).

[115] *See supra* note 23.

the monopoly services and the competitively available programming services might be appropriate.[116]

Yet divestiture may be too drastic and has been repeatedly rejected as impractical. Despite the fact that most MSO's voluntarily choose to foresake ownership of software networks,[117] the industry claims that it would not be economical to build a cable system if strict separation was mandated.[118] More significantly, economists have noted that a separations policy could prevent beneficial synergies and experimentation.[119]

A more appropriate solution to the monopoly bottleneck problem would permit the dynamic benefits of vertical integration, but also require that non-affiliated software producers have some right of access to the cable system. Such proposals would require the operator to set aside some portion of its channels for commercial access at some publicly announced rate.[120] While both the industry and most economists would oppose the imposition of rate regulation;[121] the existence of some right of access would diminish the opportunities for a system operator to act in an anticompetitive manner. Proposals for such a "partial" separations policy seem to be becoming more respectable and one was included by Congressman Timothy Wirth in his house cable bill.[122]

C. *Tying*

There is one almost universal practice in the industry which may come under increased attack. This is the operator's practice of tying

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[116] *See* Grillo, *A New Monopoly*, CABLEVISION, June 28, 1982 at 79 (remarks of former Assistant Attorney General William Baxter). Should operators appear to have excessive market power over program producers/suppliers, they could conceivably be prohibited from entering the video publishing field, as was AT&T. *See, e.g.*, United States v. American Tel. & Tel. Co. 552 F. Supp. 131, 186 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 103 S.Ct. 1240 (1983).

[117] *See* United States v. Columbia Pictures Indus. 507 F. Supp. 412, 423 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1063 (2d Cir. 1981).

[118] *See, e.g.*, I. POOL, *supra* note 93, at 169–70.

[119] *See* Kahn, *The Passing of the Public Utilities Concept*, in TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 24–25 (E. Noam ed. 1983).

[120] *See, e.g.*, Petition of Henry Geller and Ira Barron to Issue Notice of Proposed Rulemaking (Oct. 9, 1981) (available from the FCC). For a discussion of cable television as a common carrier, *see* Nadel, *supra* note 112.

[121] *See, e.g.*,Kahn, *supra* note 119; Nadel, *supra* note 112; Noam, *Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 FED COMM. L.J. 20, 218–20 (1982). For an industry sponsored examination of the cost of cable rate regulation *see* Pricing Flexibility and Consumer Satisfaction: Rate Deregulation Works (NCTA Feb. 1984). Nevertheless the ACLU supports the regulation of access rates.

[122] *See* H.R. 4103, 98th Cong., 1st Sess., § 613 (Dec. 20, 1983 reprint). Such a section was not part of the cable bill passed by the Senate. *See* S. 66, 98th Cong., 1st sess. (1983).

channels into tiers.[123] A subscriber who desires to receive one channel is normally required to purchase a whole bundle and pay for the whole tier as well as any other prerequisite tiers such as the basic service. A subscriber in Chicago recently filed suit against a cable operator charging it with illegal tying.[124]

By requiring the purchase of an entire bundle, the operator often forces the subscriber to buy programs, such as news or sports services, independent programming or distant signals, that he might prefer to buy elsewhere or not at all. Operators may justify this by claiming that metering costs may prevent precise segregation of cable channels[125] or that marketing efforts are facilitated. More likely they can claim exemption from suit because they are merely fulfilling the terms of their franchise contract.[126]

As the price of converters (and therefore metering) decreases, cable operators may voluntarily untie their bundles; if they do not, they may be subject to antitrust attack. Already the cable operator Adams Russell plans to offer each of its eight proposed pay TV services with or without basic cable tiers in its Braintree, Massachusetts franchise. The city's request for proposals (RFP) specifically requested the unbundling of premium services.[127] As noted earlier, bundling is only permitted when it is deemed economically essential, as when an industry is in its infancy, and even then the courts have ruled that it must be terminated when it is no longer necessary.[128]

D. *Price Fixing*

Because of the market power that a cable operator normally enjoys, it is able to aid program producers in an effort to fix prices. If program suppliers were to fix consumer prices among themselves, they would be guilty of *per se* price fixing. They would be required to compete on price and quality in the market. The cable operator,

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[123] For a discussion of tying, *see supra* note 53.

[124] Solomon & Kaplan v. Cablevision of Chicago, No. 83C 4170 (N.D. Ill. filed June 6, 1983).

[125] *See* S. BESEN & L. JOHNSON, *supra* note 85, at 30–31, 78–79 (1982). Thus, they would fall under the economic necessity defense of the tying rule. *See* United States v. Jerrold Elecs., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[126] They could therefore try to assert a state action exemption. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

[127] CABLE TV FRANCHISING (Paul Kagan Assoc.) Oct. 1, 1982, at 4; *see also* Rosenfeld, *Let the Seller Beware: TVC*, July 15, 1982, at 72 (advocating an unbundled approach as an excellent marketing device).

[128] United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

however, is able to preempt such price competition among the program networks it offers to subscribers. It can prevent price wars. Certainly its ability to raise prices is limited by other media and its monopoly profits may even be completely dissipated by its franchise fee and other responsibilities, but the antitrust laws may still be used to try to prevent any abusive price fixing. Operators who are now subject to rate regulation presumably enjoy an implied immunity from such suits concerning basic channels.[129] For those operators who are deregulated or for services like pay TV, and other satellite cable networks where the FCC has preempted rate regulation no such immunity exits.

V. Conclusion

In this article, we have looked at the various levels in the distribution path to examine potential anticompetitive practices and to indicate the kind of antitrust analysis that might be brought to bear to develop responses to such practices. For the last several decades, FCC policy, including the impact of the licensing process, has had a major effect on television. But, we are moving from a regulated television industry to one that is more the product of competition: competition among media and competition among producers of programming and information. It is too soon to know what kind of television will be characteristic of the new regime. What is known is that the antitrust laws will play a greater part—in the absence of regulation—in establishing the rules that make it possible for new entrants to come on the scene, to establish the relationship between motion picture producers and the audience, to determine whether there will be a significant increase in the number of wholesalers, or networks, providing sports, entertainment and information to the consumer. The antitrust laws will insure that the industry remains sufficiently flexible and receptive to useful experimentation with new patterns and shapes of programming.

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[129] *See* United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975).