

MULTINATIONAL ECONOMIC NETWORK EFFECTS  
AND THE NEED FOR AN INTERNATIONAL  
ANTITRUST RESPONSE FROM THE WORLD TRADE  
ORGANIZATION:

A CASE STUDY IN BROADCAST-MEDIA AND NEWS  
CORPORATION

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1. INTRODUCTION

[T]he economic landscape with which we deal is increasingly a global one and . . . business conduct and transactions to which antitrust law is applied are increasingly transnational. But we enforce the laws within a framework that in many ways was designed for a period when that was not the case. The same is true of antitrust agencies in most parts of the world.<sup>1</sup>

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<sup>1</sup> Charles Stark, *Antitrust in the International Business Environment*, 27 N.Y.U. J. INT'L L. & POL. 659, 665 (1995). Mr. Stark was, at the time of this writing, the Chief of the Foreign Commerce Section, Antitrust Division, United States Department of Justice. *See id.* at 659. Further, his assessment is particularly accurate with respect to mergers in high technology, intellectual property intensive sectors, where the relevant product and geographic markets often become international via the mergers themselves. In the mid 1990s, "headlines [had] been filled with stories of . . . mergers . . . in the U.S. media and entertainment industry, global integration of the telecommunications market, and consolidation or growing concentration in biotechnology and the computer software and hardware industries." Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283, 1284 (1998). In this environment, nation-based competition regulators often fall into an internationalization assumption trap. Oftentimes, regulators conclude that, as market concentrations must now be viewed on a world scale, a merger establishing home-based market power concentrations is now of less concern. Even the antitrust leadership seems susceptible to this assumption. As Robert Pitofsky, current Chairman of the Federal Trade Commission, noted "[m]ergers go through now that would have been challenged just 10

The network effect is defined as the “increasing return in value to the owners and participants in a network as the number of members or components in it increases . . . .”<sup>2</sup> The network effect, however, is becoming increasingly international—all the while flying low on the antiquated nation-based antitrust radar.<sup>3</sup> While often viewed as a bounty for the consumer, rapidly changing technology and the network effect are often used as excuses for monopolistic behavior. The traditional model of nation-based antitrust regulation is not sufficiently sensitive to the monopolistic implications of international network effects.<sup>4</sup> Without a truly

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years ago because competition now comes from all corners of the world.” *Id.* at 1283 (citing Leslie Wayne, *Wave of Mergers is Recasting Face of Business in U.S.*, N.Y. TIMES, Jan. 19, 1998, at A1). While it is true that competition now comes from all corners of the world, it is difficult to realistically assume that a nation-based antitrust regulator can validly assess the true anti-competitive implications of a particularly “international” merger. The nation-based antitrust position, as this article contests, is rooted in bias—regardless of what internal safeguards are established. Through this biased regulatory lens, home-based mergers that perpetuate anti-competitive effects elsewhere in the world marketplace are likely to be given the benefit of the doubt. Two wonderfully explicit examples of this exact quandary are the British Airways/American Airlines case and the Boeing/McDonnell Douglas merger case. See G. Porter Elliott, *Learning to Fly: The European Commission Enters Unfamiliar Skies in Review of the British Airways-American Airlines Alliance*, 64 J. AIR L. & COM. 157 (1998) (describing how the European Union (“EU”) asserted questionable jurisdiction over the transaction and in turn, regulated in a manner that pitted European and British government officials and antitrust regulators against their U.S. counterparts); Amy Ann Karpel, Comment, *The European Commission’s Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998) (describing how U.S. and EU antitrust regulators took drastically different approaches to viewing the transaction and the concomitant potential anti-competitive effects).

<sup>2</sup> Kevin J. Arquit et al., *Antitrust, Intellectual Property, Standards and Interoperability*, in INTELLECTUAL PROPERTY ANTITRUST 1998, at 157, 162 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 524, 1998).

<sup>3</sup> The literature frequently recognizes this nation-based antiquation. “Anti-competitive conduct within the borders of a foreign country no longer solely affects the economy of that country; but its repercussions can often be felt worldwide.” James F. Rill, *A Framework for Cooperation: The Status of International Antitrust Enforcement*, 18 WHITTIER L. REV. 321, 321 (1997).

<sup>4</sup> The internationalization of the network effect is naturally forcing competition regulators to attempt antitrust regulation on an international scale. The Microsoft Corporation case is a textbook example of such an attempt. See generally Allison J. Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of “Extraterritoriality,”* 17 U. PA. J. INT’L

cooperative international vision of antitrust regulation, international anti-competitive conduct will go unchecked and unregulated. This article proposes a solution—embodied within the structure of the World Trade Organization (“WTO”)—to this network-based international antitrust problem.

Antitrust law has historically operated based upon national principles and focus. Business transactions, however, are increasingly international in scope. The accelerated growth of information technology is producing economies of scale which have further driven the network effect. These factors combine to establish an international business environment that must be understood through the perspective of international antitrust law. The WTO, an established trade regulator on the international scale, is the ideal body to establish this regulatory scheme.

International network effects can occur in many different industries. The rapid pace of technological innovation often blurs once separate product markets into cohesive wholes.<sup>5</sup> Company

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ECON. L. 909 (1996) (tracing the interactions of U.S. and EU competition regulators in the handling of the first Microsoft case and arguing for a revival of cooperation between the United States and EU in antitrust regulation). Himelfarb’s analysis, by juxtaposing the Microsoft case, which substantively turned on network effects issues, with the need for continued international cooperation, underscores the growing internationalization of the network effect. For a bibliographic synopsis of the entirety of the antitrust issues surrounding Microsoft Corporation, see *infra* note 200.

<sup>5</sup> Particularly at the merger level, the internationalization of antitrust issues is impossible to ignore; mergers with international effect occur practically everyday. The mergers of SmithKline Beecham P.L.C. and Glaxo Wellcome P.L.C. in the pharmaceutical industry and the proposed merger of British Petroleum (which recently merged with Amoco) and Atlantic Richfield Corporation in the petroleum industry demonstrate the breadth of market and industry coverage of internationalization. See Agis Salpukas, *It’s Official: BP is Planning to Buy ARCO*, N.Y. TIMES, Apr. 2, 1999, at C5; Andrew Ross Sorkin & Melody Petersen, *Glaxo and SmithKline Agree to Form Largest Drugmaker*, N.Y. TIMES, Jan. 17, 2000, at A1.

Concomitant with the effects of technological innovation is a convergence of geographic markets. Those at U.S. antitrust enforcement agencies recognize the difficulties that rapidly changing technology presents to market definition and antitrust regulation:

An increasing number of cases involve issues on the cutting edge of some new technologies: innovation markets, standard setting, network effects, market access, and new forms of competition. The challenge here is multifaceted. High tech markets pose some new and novel issues for antitrust enforcers. Unlike traditional markets, these are often markets with “winner take all” characteristics. Thus, the key competition occurs at the stage of product development and in-

A offers one distinct product in a distinct geographic market. Company B offers a somewhat related product in a somewhat overlapping geographic market. Company A buys company B, merges their formerly separate products into one, and subsequently offers its new "single product" to both originally separate markets. The product market changes to that of the new "single product"; the geographic market expands to that of the original product markets combined and generally becomes international. Antitrust regulators view the two products as being in different product and geographic markets. The newly merged entity produces the "new product" in an entirely new product market without competition. The newly merged entity gains from "first mover" effects and creates a "network" via the pervasive use of its products throughout the expanding relevant market. The new entity gains monopoly leverage, buying other entities and "merging-in" other products as it expands its network. The network effect settles in. At first, positive externalities ensue. However, negative externalities develop given the lack of effective international antitrust oversight.

The evolution of the broadcast-media conglomerate News Corporation illustrates this development of network effects. Flying low on the antitrust radar, News Corporation continues to purchase entities in transactions that do not trigger close national antitrust scrutiny with respect to those entities' relevant product and geographic markets. News Corporation combines these entities into a larger, more cohesive whole, then offers new products that draw on the expanded network efficiencies. These products occupy new markets in which News Corporation essentially creates and controls the product as the dominant or even exclusive player. News Corporation thus offers a unique product via its

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novation. Protecting competition at this stage involves some difficult trade offs, especially since the agency does not want to suppress incentives to innovate. The goal as antitrust enforcers is not to favor one competitor or group of competitors over another. Rather, the objective is to ensure that the race is run fairly, that the course is level, and that the rules are fair.

Anthony E. DiResta, *Enforcement by the Federal Trade Commission in the Bureau of Competition*, in 40TH ANNUAL ANTITRUST LAW INSTITUTE 1999, at 85, 1093 (PLI Corporate Law Course Handbook Series No. 1117, 1999). DiResta's discussion "substantially reflect[s] the comments by Mr. William J. Baer, Director of the Bureau of Competition, before the Bar Association of the City of New York on November 17, 1997." *Id.* at 1085.

constructed network. The News Corporation network, given its control over key copyrighted content, makes the development of a competing network extremely unlikely.

As quickly as News Corporation exploited inefficiencies in the *distribution* of broadcast-media, it now appears poised to do the same in the content market, establishing strategic distribution partnerships in emerging delivery technologies. News Corporation is hedging its dominant position. News Corporation strengthens its content market position partially via a strategy of sports media purchases, ownership, and control. News Corporation realizes that while the network provider may be the front-end “product” that a consumer purchases, it is the content provided by that network for which the consumer really pays. Particularly in a rapidly evolving and broadcast-media *delivery* marketplace, the entity that controls the content ultimately controls the dial.

The perplexing scenario of News Corporation raises serious public policy questions and problems. The News Corporation scenario triggers the problem of trying to conceptualize the true antitrust concerns raised by international business transactions.<sup>6</sup>

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<sup>6</sup> This Article employs economic analysis throughout its exposition in an attempt to achieve an international conceptualization in both antitrust and political economy determinations. Such analysis gives a better understanding of why nation-based antitrust regulation in the context of international anti-competitive effect is ill-fated. This analysis exposes not only the true industrial economics of a firm like News Corporation, but also sheds light on the regulatory motivations of an individual nation. While antitrust scholarship regularly embraces the realm of economics, such use of economic theory and analysis is not the norm in international law scholarship—particularly that which deals with international cooperation, an area of law upon which this paper directly comments. See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 4 (1999). Dunoff and Trachtman identify why this may be the case:

While there may be many explanations for why international legal scholars have not participated in the law and economics (“L&E”) revolution, we believe that many international lawyers would identify at least one of the following three concerns: (1) L&E’s seemingly inaccessible methodologies; (2) L&E’s supposedly conservative political prejudices; and (3) L&E’s positivism and its presumed denigration of international law.

*Id.* at 6. Another author addresses, albeit from a somewhat different angle from the one directly taken by this paper, the need to integrate legal analysis, international relations theory, and economic analysis in studying the environment of international cooperation. See William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State*

When one nation or jurisdiction makes an antitrust determination that is either contrary to others or is not in the best interests of other affected nations, entities like News Corporation escape serious antitrust analysis. Current national antitrust policies either do not take into consideration or are ill-equipped to handle these extraterritorial concerns.

Part 2 of this article sets out the economic landscape of globalization in the broadcast-media market. This section delineates the expansion of broadcast-media, from traditional television tower transmission to direct broadcast satellite ("DBS") and digital services. This section sets out the industrial organization economics of different forms of broadcast-media, which have afforded News Corporation the ability to exploit inefficiencies in the marketplace. Part 3 of this article takes a closer look at News Corporation—its history, corporate structure, operations, business strategy, and the international antitrust issues raised by that strategy. Part 4 presents a brief summary of the current international antitrust problem, underscoring not only the difficulties that current nation-based antitrust laws pose to consumers, but also highlighting a lack of predictability that may deter international commerce. This part then examines the various solutions proposed by the current literature and applies them to the News Corporation dilemma. Part 5 proposes, using the News Corporation dilemma as a catalyst and the World Trade Organization as a foundation, a new path toward international antitrust regulation. This vision is one that focuses on respect for national sovereignty combined with a recognition of the international nature of relevant product and geographic markets. This proposal achieves this goal by proposing that the WTO become the center for enforcement of international competition law.

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*Practice*, 17 U. PA. J. INT'L ECON. L. 995, 999 (1996). Aceves argues "transaction costs affect all contractual arrangements, including the development and operation of international institutions." *Id.* at 1003. This argument thus lends an interesting level of critique to current approaches to international antitrust regulation and the "international antitrust regulatory institution" proposed by this Article. As this angle of discussion is more appropriately addressed on its own terms, this paper employs Aceves's concept of "transaction costs" as an additional tool of economic analysis in a subtext of footnote dialogue. See *infra* note 259.

## 2. THE GLOBALIZATION OF BROADCAST-MEDIA

When cable television emerged in the late 1940s as a pragmatic solution to providing clear reception to those in rural areas,<sup>7</sup> few would have guessed that this simple and local solution would be the ancestor to a global television market. The lineage of entities like News Corporation, however, draws directly from the advent of cable services. The birth of cable began the expansion of geographic broadcast markets, altering the broadcast product from single-station broadcast availability to a broader concept—a product “delivery package” constituting multiple stations. Cable opened the door to consumer choice, which in turn forever altered consumer demand and expectations. The expansion of this demand to a global level was inevitable, only requiring entities like News Corporation as catalysts. While News Corporation actively furthers and pursues the globalization of broadcast-media markets, it succeeds in large part due to the underlying consumer demand.

### 2.1. *Cable Spawns Increased Consumer Choice*

Early in its existence, cable was exploited by providers for its expanded carry capacity. Not only did they provide the primary stations that would be available in the delivery area, cable providers very quickly began to deliver more distant stations previously unavailable in the delivery area.<sup>8</sup> By 1958, broadcast stations in the United States began to feel uncomfortable with the presence of cable and, in turn, sought regulatory protection—eventually gaining that protection via the Federal Communication Commission’s (“FCC”) must-carry regulations of 1962.<sup>9</sup> The competitive environment surrounding the origination of must-carry regulations was arguably one of speculative harm, not necessarily specifically documented harm.<sup>10</sup> The must-carry regulations still exist today in their current incarnation as part of the Cable Act of 1992.<sup>11</sup>

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<sup>7</sup> See John E. Lopatka & Michael G. Vita, *The Must-Carry Decisions: Bad Law, Bad Economics*, 6 SUP. CT. ECON. REV. 61, 65 (1998).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 66.

<sup>10</sup> See *id.*

<sup>11</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.

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(1994)). Lopatka and Vita describe the politically charged atmosphere that precipitated Congress's 'must-carry' regulations:

Congress saw more and more American households subscribing to cable television service, and it was alarmed. Once cable is installed, viewers have little reason to maintain the apparatus necessary to receive over-the-air signals as well. For broadcast stations, therefore, carriage on a cable system is economically significant, for it means access to an ever-increasing portion of the viewing public, and audience access is critical to the sale of their advertising time. But cable operators, who generally have local monopolies in the provision of cable service, refused to carry some local stations and relegated others to disadvantageous channel positions. Some of the stations affected failed, others suffered, and Congress reasoned that most, if not all, were in jeopardy. The looming specter, as perceived by Congress, was the erosion of "free TV" and the loss of the local news and public affairs programming it provides. So Congress acted to save free TV by imposing 'must-carry' obligations on cable operators. Subject to certain qualifications, Congress required cable operators to carry the signals of local broadcast stations. Because these stations would then be able to reach households connected to cable, they would thrive as businesses and consequently remain available to unconnected viewers, however shrinking the number of those viewers might be.

Now, this sketch of the must-carry rules provokes a number of questions. Why would cable operators refuse to carry local broadcast stations, given that subscribers tend to want that programming, and operators want subscribers? Is the explanation nefarious, or does it have to do with the natural effects of technological progress? How many stations have been or will likely be denied carriage, and what kind of programming do they provide? Will these excluded stations in fact perish? Would they have failed anyway? Will stations carried on cable displace other programs? If they will, how should the interests of subscribers who would prefer the dropped shows be taken into account?

Lopatka & Vita, *supra* note 7, at 61-62.

Lopatka and Vita's sketch resonates with the quandary now facing regulators in the broadcast-media market. Similar to cable's redefinition of the primary broadcast-media product from single-station to a package of stations, News Corporation is altering the face of the broadcast-media product. As News Corporation expands its distribution network (explained in more detail later in this article), the primary broadcast-media product moves from a package of services offered, to the distribution system that offers an open-end of broadcast possibilities. The more widespread the distribution network, the more demand for a particular distribution "product." For instance, a broadcast system that offers the viewer expanded choice from a myriad of sports and entertainment products is more valuable (in terms of consumer welfare) than a broadcast service that has limited, pre-set packaged selection. In essence, a consumer, in selecting a broadcast service on the basis of choices available, is more apt to select the broadcast service that has more "connections"—more likely the broadcast service with a wider distribution network. In reality, the consumer is picking a distribution network, not an end product. The distribution net-



Regardless of the perceived restraint of the must-carry regulations, cable growth has continued and, in the process, structurally altered the dynamic of the broadcast-media market.<sup>12</sup> Individual broadcast stations were forced to improve their product, facing increased competition from the multiple broadcast services that cable services offered. Cable emerged as a conduit, and with or without must-carry regulations, cable provided those broadcast products that consumers most desired.

In the United States, the cable industry historically has been, and for the most part remains, the dominant local (non-global) player in the broadcast-media industry, particularly in the market for *pay-TV* services.<sup>13</sup> In other parts of the world, direct broadcast satellite is currently the leading delivery system for pay-TV broadcast-media.<sup>14</sup> In contrast to DBS's market share, cable penetration in the U.S. broadcast-media market is extreme, claiming close to an overall 70% market share.<sup>15</sup> In the Telecommunica-

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work is now the relevant product. The arena of competition changes, forcing cable operators (who before did not necessarily have to compete) to be competitive on the basis of not only price, but also selection. Just as cable operators engulfed single-stations into the new expanse of packaged broadcast product, the current emergence of massive broadcast distribution networks is engulfing the traditional cable operator. Where once before there existed a myriad of local cable operators, now there is rising a new type of provider—TCI, Time Warner, News Corporation—whether cable, digital, or satellite-based, that competes using its integrated distribution muscle. Economies of scope and scale shifted once before, with the emergence of cable, and they appear to be shifting again. The questions that Lopatka and Vita pose, particularly the one pondering the evolutionary “exclusionary” effects of technological progress, are hauntingly relevant to the current competitive environment of broadcast-media. Such questions naturally raise the issue of innovation market theory, and, in the case of News Corporation, the potential for an essential facility. Both of these issues are addressed in more detail later in this article.

<sup>12</sup> “Rather than a supplement to broadcast television, cable became an independent vehicle for providing alternative video services.” *Id.* at 66.

<sup>13</sup> See *Reports Forecast Cable TV and DBS Markets through 2003*, MICROWAVE J., Dec. 1, 1999, at 56; *c.f. Cable Transponder Revenue Could Drop Because of Oversupply*, SATELLITE WK., Oct. 4, 1999.

<sup>14</sup> KEY NOTE LTD., INTERNATIONAL CHAMBER OF COMMERCE, KEY NOTE REPORT CABLE AND SATELLITE TV (1996), available in LEXIS, Europe Library, Company & Financial File, at \*25 [hereinafter 1996 KEY NOTE REPORT] (noting that BskyB has a dominant hold on “subscriptions from viewers” in the United Kingdom).

<sup>15</sup> See Erin Arvedlund, ABC News, *Little Dish Seeks Big Market Slice* (visited Feb. 7, 2000) <<http://www.abcnews.go.com/sections/business/DailyNews/directtv990211.html>> (noting percent broadcast market shares: satellite TV 8.9%; broadcast TV only 21.1%; and cable TV 68.0%).

tions Act of 1996,<sup>16</sup> Congress, in conjunction with the FCC, seriously attempted to remedy the underlying inefficiencies.<sup>17</sup> It is apparent, however, that only minor progress has been achieved in stimulating more competition.<sup>18</sup> Different regulatory maneuvers have been employed in this fight. One promising method noted in the literature is the concept of overbuilding—allowing new cable companies to build a new cable network in an already “built-

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<sup>16</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>17</sup> Prior to the 1996 Act, the FCC delivered a report to Congress summarizing the dismal state of competition in the U.S. broadcast-media markets. See Norman M. Sinel et al., *Recent Developments in Cable Law*, in INTELLECTUAL PROPERTY ANTITRUST 1998, at 523, 598-99 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 523, 1998) (citing In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 F.C.C.R. 2060 (1995)). Sinel noted:

The [FCC] concluded that cable television systems continue to dominate the distribution of multichannel video programming in most markets. Although some progress has begun toward a competitive market place for the distribution of video programming, the Commission found that cable television systems today enjoy market power in *local* markets.

*Id.* at 599 (emphasis added). Notable is the fact that Sinel mentioned Congress' finding that cable enjoyed market power in local markets. While it is certainly a jump, it is still a logical jump to conclude that either cable may not have held such power in larger more global markets or in fact did not participate in a more global market. Interestingly, Sinel further noted the FCC recognition of continued competition from arguably more “global” competitors; “the Commission found that, since 1990, competing distribution technologies [had] made substantial strides to compete with cable. The Commission noted that in [1995], DBS, MMDS, and SMATV systems [had] attracted many subscribers away from traditional cable systems.” *Id.* at 599-600.

<sup>18</sup> See *id.* at 599-605 (presenting a brief overview of the sequence of FCC broadcast-media market reports that followed the 1996 Act and documented the progress of competition). In 1998, the FCC concluded:

[T]he local markets for video programming delivery remained “highly concentrated and . . . characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems.” . . . The Commission reported . . . that regional clustering of cable operations continued, and that the percentage of vertically integrated national programming services continued to decline (and stood at 40 percent).

*Id.* at 603.

up” licensed area.<sup>19</sup> This method of inducing competition has been somewhat successful.<sup>20</sup>

In early years, U.S. cable providers primarily confined themselves to particularly small localities. By the late 1980s, however, cable providers began to realize the economies of scale<sup>21</sup> brought on by larger cable networks. The economics of cable market entry are simple—high entry barriers.<sup>22</sup> Spurred by favorable economic conditions, where cable providers could no longer purchase access licenses, larger cable companies began to buy out local cable companies. Cable giants Tele-Communications Incorporated (“TCI”) (recently purchased by AT&T), Comcast, Adelphia, MediaOne,<sup>23</sup> and Time Warner Cable were all built in this manner. Today, “local” cable companies no longer exist.

Concentration is expected as an industry naturally moves towards the efficient level of production.<sup>24</sup> What was not expected in the case of cable was the reason for this consolidation—the cable industry’s “race with telephone companies to offer high-speed access to the Internet.”<sup>25</sup> In fact, the potential for cable broadcast-media to become competitive on a globalized scale rests solely on the shoulders of this technological marriage—cable and the Internet. The proposed merger between America On-Line

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<sup>19</sup> See *id.* at 606. Such new cable companies could very well necessitate some sort of initiative by the local government itself. See *id.*

<sup>20</sup> See *id.* at 606-23. Some courts have held that overbuilding in an already licensed territory violates a cable company’s franchise license rights and/or equal protection rights. See *id.* However,

[t]he 1992 [Cable] Act dealt with some of these overbuilding issues. The law prohibits a franchising authority from granting exclusive franchises and unreasonably refusing to award an additional competitive franchise. [The 1992 Act] also clarified the right of a municipality to operate a cable television system and provided that a municipality need not have a franchise to provide such a service.

*Id.* at 623.

<sup>21</sup> “If average cost falls as output increases, [a] firm is said to have economies of scale . . . .” DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 59 (2d ed. 1994).

<sup>22</sup> See 12 F.C.C.R. 16802 (May 8, 1997), available in 1997 WL 236317.

<sup>23</sup> A spin-off of U.S. West and recently subject to a bidding war between Comcast and AT&T. See Geraldine Fabrikant, *AT&T Makes Competing Bid for MediaOne*, N.Y. TIMES, Apr. 23, 1999, at C1.

<sup>24</sup> See generally CARLTON & PERLOFF, *supra* note 21, at 36-37 (discussing how mergers can improve efficiency in an industry).

<sup>25</sup> Fabrikant, *supra* note 23.

("AOL") and Time Warner,<sup>26</sup> while primarily a U.S. market synergy, stands poised to take this globalized step. With Time Warner's extensive ownership of high demand content product, globalization may not be far off for the merged entity. Broadcast-media itself is moving ever closer to a complete integration with cyberspace, an integration that will once again alter product and geographic market structures. This integration will merely be a by-product of a battle *for the Internet itself*; a battle which increasingly forces cable companies to view the competitive marketplace in the context of telephone companies, not DBS.<sup>27</sup> This battle inherently changes the cost functions of cable companies, allowing them to offer a wider selection of services, bringing in greater capital influx. These changes are not only enabling cable companies to compete on a globalized scale; the changes are making it more *efficient* for these companies to compete on a globalized scale. DBS companies, while already positioned globally, are currently ill-positioned to take advantage of these economies of scope due to the current technological limitation of satellite service.<sup>28</sup>

## 2.2. *Emergence of Direct Broadcast Satellite Service*

The globalized product market implications of DBS service have long been acknowledged. In 1969, the United Nations Committee on Peaceful Uses of Outer Space ("COPOUS") stated that DBS was a "means to 'unprecedented progress in communications and understanding between peoples and cultures.'"<sup>29</sup> DBS globalization, however, has followed a much less noble path. The space-based transmission of DBS dramatically altered the potential geographic and product markets for broadcast services. Tradi-

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<sup>26</sup> *Time Warner and AOL to Combine in \$350 Billion Deal*, COMM. DAILY, Jan. 11, 2000.

<sup>27</sup> Fabrikant notes, "As the only two industries that have communication cables passing almost every house and business in the country, cable and telephone companies are positioning themselves to grab a share of the other's business." Fabrikant, *supra* note 23.

<sup>28</sup> "When it is cheaper to produce two products together (joint production) rather than separately, there is an economy of scope." CARLTON & PERLOFF, *supra* note 21, at 70.

<sup>29</sup> Gerald A. Flaherty, *Direct Broadcast Satellites and the Free Flow of Information, A Canadian Perspective on Legal Implications of Direct Broadcast Satellites (DBS) for North America 1* (Berlin Conference on the Law of the World Work Paper 1985) (quoting the United Nations Committee on Peaceful Uses of Outer Space, at 4, U.N. Doc. A/AC 105/66 (1969)).

tional transmission was always hampered by the limitations presented by transmitter capacity. Cable overcame these limitations, yet was structurally stalled in expansion due to legislative and national boundaries. Cable was also somewhat limited on an average costing basis—it was prohibitively expensive on a per customer basis to provide cable to those in remote areas or those residing on highly inaccessible terrain.<sup>30</sup> Once a cable network is in place, adding additional customers within that network follows on an economy of scale. For cable network expansion into an undeveloped territory, however, a provider must physically outlay more cable. This expansion requires not only time and money, but also government approval.

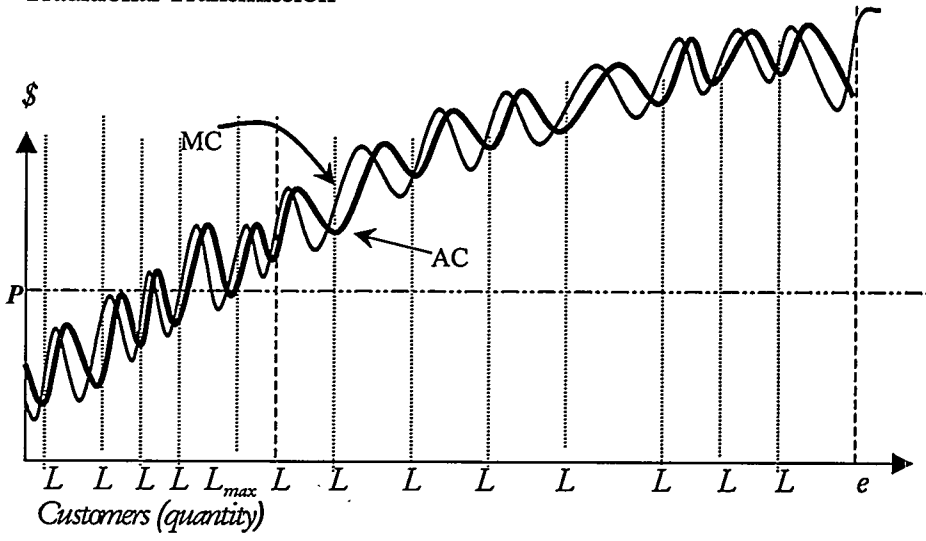
DBS overcame all of these limitations. Putting legal-structural limitations aside, if a consumer was theoretically able to purchase the necessary reception equipment, a DBS service was only limited by the broadcast window of the access satellite. Once a DBS service goes “on-line,” the marginal cost of adding new customers more or less decreases with the addition of new customers. The average cost curves of these three mediums, assuming perfect competition is as follows:<sup>31</sup>

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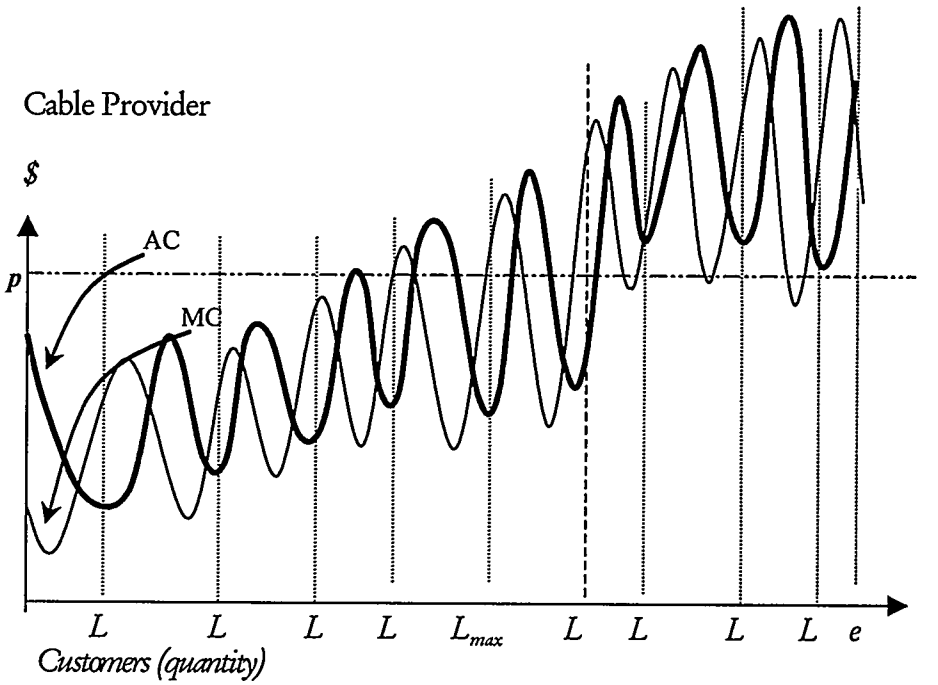
<sup>30</sup> As the International Chamber of Commerce notes, many areas in the United Kingdom won't ever be cabled because of their relative isolation (and the corresponding questionable economics of cable construction). 1996 KEY NOTE REPORT, *supra* note 14, at \*7.

<sup>31</sup> These cost curves are meant simply to be illustrative, based on a theoretical understanding of the broadcast-media marketplace. These graphs are not intended to be precise representations based on actual or contrived mathematical marketplace data.

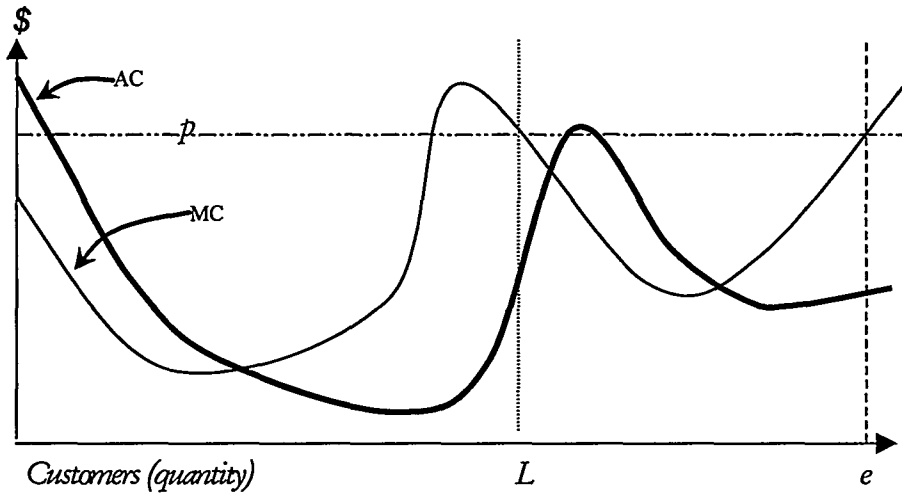
Traditional Transmission



Cable Provider



## Direct Broadcast Satellite Service



In each production function graph, point “L” represents the maximum quantity (number of customers) allowable at the structural limitation point of the type of broadcast delivery, and point “e” represents the universal point of global quantity (customer) coverage. “Lmax” represents the maximum potential quantity (customers) under the natural equilibrium price within that particular market structure. Price (“p”), average cost (“AC”), and marginal cost (“MC”) are detailed in each industry graph.

### 2.2.1. Traditional Transmission

In the context of traditional transmission, each point “L” represents the physical limitations of television tower transmission and the legal barriers to further expansion. Each “L” varies with transmitter power and coverage area. After these points, the price to reach globalization effectively equals the cost of the transmitters it takes to reach point “e.” Particularly due to the low equilibrium price,<sup>32</sup> the costs to reach globalization become prohibitive at an early stage.

<sup>32</sup> This low equilibrium price is dictated by the relatively low cost of obtaining transmission, i.e., purchasing a television set. This cost is a one-time cost and money that only indirectly channels back to the television provider via advertising revenue. Thus, in a somewhat backward way, the price commanded by pure traditional television providers, for the purposes of the model

### 2.2.2. *Cable Provider*

Cable providers face a somewhat different, yet, in the end, reasonably similar predicament. Initial cost outlays focus on building an initial network of cable in the licensed area. Costs thus rise as additional customers are "added onto" the network. Once a particular licensed service area network is "built out," however, the cost of adding additional customers mainly entails advertising and hook-up. These costs are reduced on an average basis with the addition of more customers based in the networked territory.

Once full capacity is reached in a particular area, further expansion can only occur via a new territory license and subsequent build-out of such area. The pattern repeats itself, with each point "L" varying upon the size of the network addition. To maintain current market share in the original jurisdiction, the cable provider must meet standard overhead costs (fixed costs), such as advertising, maintenance, labor, etc., which still figure into the overall efficient scale cost equation. As such, the overall cost curve has an upward trend, with the addition of new territories and markets.

While a cable competitor can purchase pre-existing cable groups in each major area of the country, the purchase cost is prohibitive in a similar way to that of new network construction and build-out costs. In that expansion context, purchase cost acts much like the cost of setting up a network, as the valuation of the purchase price is likely to account for the construction cost of the network and associated goodwill. Upon purchase, maintenance costs are similar to that of building the network outright. In sum, globalization is prohibitively difficult and, above all else, economically inefficient.

### 2.2.3. *Direct Broadcast Service*

The production function graph for DBS services demonstrates how the underlying industrial organization of a DBS service al-

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at hand, is rather low. In reality, the price used in the graph is more a reflection on the generally lower revenue streams generated by traditional television transmission providers. Lower revenue streams effectively limit these providers from expanding on a more global scale. Simply put, it costs too much—specifically in the context of how much revenue a pure traditional transmission provider can realistically raise.



lows for globalization capacity. Initial cost outlays in starting a DBS service are quite high. The number of broadcast windows are limited,<sup>33</sup> and licensing costs are high. Potential DBS service providers must, of course, gain satellite access. Satellite access, whether gained via an existing satellite or a new dedicated satellite, is also a large start-up cost. Once the satellite network is in place, however, cost outlays increase slightly, mainly due to increased overhead as the customer base increases. In fact, a DBS service does not incur any additional hook-up costs in adding customers, and marginal cost decreases with the addition of new customers because ground costs (accounting, advertising, management, etc.) do not rise in equal proportion to the addition of customers.

The initial network of DBS service provides an extremely large broadcast window that can supply broadcast services to more customers within a wide geographic market. Once a DBS service reaches full service capacity in the initial network, it too must build-out via new licenses and satellite service. To reach globalization, however, additions are minimal compared to the extensive network building costs associated with traditional transmission and cable. The largest cost, obtaining initial satellite service to the new network area, may only need to be incurred two or three times before global build-out occurs. The revenue streams from the higher price structure of the DBS product allows the DBS competitor to more closely realize true globalization. Also, next to the initial cost outlays, the fixed costs of maintaining a DBS system are comparatively low because of low maintenance costs and extensive service personnel are not required. Thus, a DBS cost structure allows a firm to 'produce' at a global level.

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<sup>33</sup> Unlike other uses of spectrum, which are available primarily on a first-come, first-served basis, DBS spectrum is allocated on a per country basis. Via the International Telecommunications Union ("ITU"), a finite number of DBS slots have been allocated to each ITU member nation. As such, the United States only has four DBS slots. In addition to the issue of limited slots, DBS service also triggers the sensitive issue of content control, particularly in countries that sit under the DBS coverage area but object to that DBS content. See Secretary-General, ITU Pekka Tarjanne, *The Global Development of DBS and Advanced TV Systems*, Presentation at CNN/World Economic Development Congress, (Sept. 20, 1992), at <<http://www.itu.int/itudoc/osg/ptspeech/chron/1992/cnn.txt>>.

#### 2.2.4. *Comparison Discussion*

DBS cost structures<sup>34</sup> have allowed competitors, like News Corporation, to expand their market share. News Corporation has focused its broadcasting *delivery* efforts primarily via the construction of a DBS “network.” The cable entities that News Corporation owns focus solely upon front-end *product creation* (news, sports, etc.) that merely feed into this network.

While cable services are catching up in terms of competitiveness, their increasing competitiveness is due only to their emulation of what satellite services provide and the growing importance of broad-band delivery pipelines. Modern cable service providers are altering the economics of providing cable, but they still lack total globalization—for now. Generally speaking, the broadcast market is currently split into two categories: terrestrial, land-based broadcasts to aeriels connected to televisions; and non-terrestrial, cable and satellite services.<sup>35</sup> While the two categories are generally considered separately for classification purposes, they may be considered as one merged market for broadcast-media product analysis, in which cable operators currently offer an inferior product. DBS—at least for now—simply offers a more profitable cost structure in a pure broadcast market. As the next two subsections illustrate, however, that market structure is changing in the climate of internet convergence.

#### 2.3. *Merger of Cable and Satellite Television Product Markets—Case Study: the United Kingdom and BSkyB—A Prelude to International Antitrust Concern*

In many ways, the changing broadcast-media market structures are beneficial to News Corporation. The merger of the ca-

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<sup>34</sup> DBS delivery presents benefits outside the assumption of a perfect market. The primary entry barrier into the DBS service market is the limited number of “sky slots” which are available. Governments, as per ITU allocation, can only offer a limited number of slots. See *supra* note 33. News Corporation did try to take advantage of this limitation, attempting to purchase the remaining U.S. sky slot. Competition concerns arose, and News Corporation sold the slot to EchoStar, one of the large players in the U.S. DBS market. See Seth Schiesel, *Local Signals May Be Costly for Satellite Providers*, N.Y. TIMES, at C1 (noting that the United States has a limited number of DBS orbital slots and that NewsCorp sold its slot to EchoStar—the last slot available); see also Daisy Whitney, *No. 5 EchoStar's Orbit is High in the Telecom Industry*, DENVER POST, at D8 (explaining circumstances of sale to EchoStar).

<sup>35</sup> See 1996 KEY NOTE REPORT, *supra* note 14, at \*25.

ble and satellite television product markets has been prominent in News Corporation's rise in power, specifically those in the United Kingdom. The apparent merger of these markets, while inevitable, was accelerated by News Corporation's U.K. DBS service, British Sky Broadcasting ("BSkyB").<sup>36</sup>

There is some indication that the U.K. terrestrial and non-terrestrial television markets are merging. As noted by the International Chamber of Commerce ("ICC"), "[t]he commercial [television] sector in the [United Kingdom] is facing challenges . . . from both non-terrestrial commercial operators and commercial digital channels."<sup>37</sup> The ICC also noted that, "BSkyB has the largest revenues of any single commercial television company in the U.K. market."<sup>38</sup> BSkyB considers the relevant broadcast market to be all commercial broadcasters.<sup>39</sup> In light of the 1995 U.K. governmental proposal that no individual entity could own more than 10% of the entire broadcast-media market (including commercial radio and newspapers), it appears that the U.K. government itself recognizes this media market convergence.<sup>40</sup> Even under this governmental constraint, the question of what constitutes a single entity for antitrust purposes still arises, particularly in the context of News Corporation. There is a significant and increasing concentration in the U.K. broadcast market across terrestrial and non-terrestrial boundaries.<sup>41</sup> More impor-

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<sup>36</sup> The power of BSkyB, and of News Corporation for that matter, rests on its distributional muscle, as alluded to earlier. A more in-depth analysis of this distribution network product will follow in the next section. For purposes here, however, the understanding that BSkyB has an extensive vertically-integrated distribution network with News Corporation will suffice. This article delineates a historical and detailed structural analysis of BSkyB. See *infra* Section 3.1.2.

<sup>37</sup> KEY NOTE LTD., INTERNATIONAL CHAMBER OF COMMERCE, KEY NOTE REPORT CABLE AND SATELLITE TV (1997), available in LEXIS, Europe Library, Company & Financial File, at \*abstract [hereinafter 1997 KEY NOTE REPORT].

<sup>38</sup> 1996 KEY NOTE REPORT, *supra* note 14, at \*25.

<sup>39</sup> See *BSkyB Says Cable, Satellite TV Viewing Share Hits 14.98%*, EXTEL EXAMINER, Apr. 26, 1999.

<sup>40</sup> See 1997 KEY NOTE REPORT, *supra* note 37, at \*17.

<sup>41</sup> See *id.* ("The loosening of the existing rules covering ownership between terrestrial TV operators, satellite and cable operators, commercial radio stations and newspaper groups has resulted in a wave of takeovers and acquisitions . . . . Another important trend encouraged by the relaxation of media ownership regulations is the sight of terrestrial companies moving into the

tant to BSkyB's market power is that the difference in the United Kingdom between cable and satellite services is blurry, particularly due to the fact that most cable providers use BSkyB offerings as central to their cable packages.<sup>42</sup>

The broadcast-media market is becoming highly elastic because consumer choice is driven by the quality and variety of programming.<sup>43</sup> Satellite television in the United Kingdom is becoming the choice over traditional cable services. As the ICC notes, "There are many areas in the [United Kingdom] that will never be cabled, due to their relative isolation and the questionable economics of cable construction in such areas."<sup>44</sup> Due to its aggressive strategy combined with its array of services, BSkyB has become the "dominant player in the subscription television market."<sup>45</sup> There is some argument that cable may overtake satellite television penetration in the subscription television market, "as the cable television operators continue to build-out their networks."<sup>46</sup> This wider penetration is partly explained because "consumers who wish to access high-quality multichannel television will often choose cable services in preference to satellite because of the much wider range of services that can be packaged with a cable connection, not the least of which is cheap telephone services."<sup>47</sup> If this trend continues, BSkyB's dominance may wane.<sup>48</sup> At a certain point, however, build-out of a cable network eventually becomes prohibitively expensive.

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non-terrestrial market, either through mergers and acquisitions, or through partnerships.").

<sup>42</sup> *See id.*

<sup>43</sup> *See id.* ("[A]s the quality of programming available through terrestrial television, funded only by advertising revenues, continues to decline, the appeal of multichannel television will continue to attract consumers to the dish option.").

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*38.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* at \*25 ("As cable construction advances and terrestrial digital broadcasting begins to offer viewers increased choice over the next few years, perhaps without the high initial outlay, BSkyB may encounter increasing consumer resistance to its product."); *see also id.* at \*38 ("For the foreseeable future, the cable industry will remain heavily dependent on BSkyB for its most attractive programming. However, it is not inconceivable that with terrestrial broadcasters increasingly turning their attention to the subscription sector, a new source of programming could emerge to rival the present BSkyB dominance.").

Most U.K. cable operators depend on BSkyB to fill their roster of channels.<sup>49</sup> The cable operators often purchase BSkyB and then resell the BSkyB product as part of a larger cable-ready package. Even if cable does gain a stronger foothold, BSkyB will still control the key element—the market for the media product itself. If viewers are driven by quality and variety of choice in media content, then BSkyB's dominance should continue due to its enormous bargaining power gained through subscriber revenues and strength of distribution network that is already in place.<sup>50</sup> Subscriber revenues are not likely to decrease even if actual direct subscriber numbers decrease because BSkyB is likely to charge cable operators on the basis of how many subscribers those operators service.

As broadcast mediums converge and substitutability increases between those mediums, BSkyB's dominance apparently fades, at least based on percentage share of a traditional delivery market. Traditional antitrust product and geographic market analysis miss BSkyB's extensively developed media distribution, marketing, and support system—the content control market.<sup>51</sup> While this structure is not the specific product that News Corporation or BSkyB offers, it is the structure upon which new products in new markets are offered. BSkyB, regardless of its form, is a driving force in influencing whether people choose satellite dish service.<sup>52</sup> Any

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<sup>49</sup> See *id.*

<sup>50</sup> See 1996 KEY NOTE REPORT, *supra* note 14, at \*25 (“The main source of [BSkyB's industry leading revenue base] is subscriptions from viewers, in comparison to the terrestrial broadcasters which are heavily dependent on advertising revenues. This gives BSkyB a dramatic advantage when negotiating for programme rights. The sums it can afford to pay for films and sporting events are considerable.”).

<sup>51</sup> In an abstract sense, this “distribution network” is the type of vertically-integrated network that usually raises interoperability concerns. See *infra* note 200.

<sup>52</sup> See 1996 KEY NOTE REPORT, *supra* note 14, at \*38.

BSkyB is actively seeking ways to make its services as attractive to consumers as possible. Plans for new services include a tie up with BT (British Telecommunications), to provide discounts on telephone bills, an Internet connection that will offer home banking, video-on-demand and other interactive services. BSkyB also holds the screening rights to some of the most attractive television available to U.K. broadcasters.

*Id.* BSkyB has just launched its own interactive broadcast service, British Interactive Broadcasting (BiB), via digital satellite TV. See *Waveguide Satellite News British Interactive Broadcasting* (visited Feb. 1, 2000) <<http://www.waveguide.co.uk/447.htm>>.

product offered via BSkyB's distribution structure has a competitive leg up, not necessarily competing on price or service quality. For example, while the advent of digital television (satellite and cable) promises to offer a vast array of new choices to consumers and a challenge to traditional satellite television and cable, BSkyB is already exploiting its strong distribution and marketing system, offering its own digital satellite/terrestrial access television service—SkyDigital.<sup>53</sup> Even if digital cable makes inroads into BSkyB's direct subscriber base, BSkyB's extensive distributional and content strength and worldwide support via News Corporation, could help it maintain a dominant position.<sup>54</sup> These strengths will allow BSkyB to parlay its former monopoly on delivery into a monopoly of control over the broadcast content itself.

#### 2.4. *Mass Electronic Media Convergence*

The broadcast-media market dynamic is again shifting. Industry cross-breeding continues, obliterating formerly well-defined lines between electronic mediums. A good example of this convergence can be seen in the recent actions of the AT&T Liberty Media Group. Liberty Media is owned and controlled by John Malone, dubbed the "King of Cable."<sup>55</sup> Liberty Media, the largest present shareholder in Time Warner Inc., which owns Time Warner Cable, recently became the second-largest shareholder in

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<sup>53</sup> See British Sky Broadcasting, *Sky Introduces Digital Television to Britain* (visited Mar. 1, 2000) <[http://www.sky.com/corporate/press/98jul\\_dec.html](http://www.sky.com/corporate/press/98jul_dec.html)> [hereinafter *Digital Television Introduction*].

<sup>54</sup> See 1996 KEY NOTE REPORT, *supra* note 14, at \*11. The ICC notes:

The main battle within the non-terrestrial TV sector is between BSkyB and the principle cable operators. With the hold on the market that BSkyB has, it is difficult to see how it can lose. As BSkyB is the only major distributor of top-quality multichannel programming packages, the cable companies are selling BSkyB television services over their networks. Effectively, this means that if BSkyB is able to increase direct-to-home (DTH) satellite penetration, it will increase subscription revenue from this source. However, as the cable operators build-out their networks, if they take market share away from BSkyB dish subscriptions, the cable companies will sell BSkyB television services to make their own service attractive to viewers.

*Id.*

<sup>55</sup> Karen Fessler, *Malone Uses Midas Touch* (visited Apr. 10, 1999) <<http://insidedenver.com/business/0408malo5.shtml>>.

News Corporation.<sup>56</sup> AT&T itself recently purchased cable giant Tele-Communications Inc. ("TCI").<sup>57</sup> The broadcast and electronic media feeding frenzy has begun. Malone noted to Karen Fessler of Bloomberg News:

We're all out scouting in the woods for the right opportunities . . . . Where Liberty is mostly to spend a substantial amount of capital is in taking large positions on companies who want to stay independent and who like a large and friendly shareholder whose injection of capital would dramatically improve its balance sheet and fend off hostile suitors.<sup>58</sup>

Fessler added that "Malone has acquired minority stakes in cable-programming and technology companies and is on the hunt for more."<sup>59</sup> Malone and others like him (e.g., Rupert Murdoch) undoubtedly exercise control over aggregating transactions like these, despite the lack of technical shareholder control.

The lines between different video entertainment mediums are blurring. As noted above, cable, satellite, and internet services are merging into a single pathway of information and telecommunication services. AOL and TimeWarner recently announced their intent to merge.<sup>60</sup> AOL has been increasingly concerned over maintaining market share as increasingly more Internet users migrate to broad-band providers. Time Warner Cable, which is one of the leading broad-band providers in the Northeast, offers unparalleled portal access for AOL. Time Warner also offers dynamic proprietary content, which AOL lacks. Recognizing the opportunity, Time Warner is now packaging itself more so as a full service broad-band provider (that offers cable service as part of a package) rather than merely a cable provider. The AOL-Time Warner merger is commonly seen as paradigm shifting transac-

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<sup>56</sup> See Al Lewis, *Liberty Media Ups its Stake* (visited Apr. 10, 1999) <<http://insidedenver.com/business/0407lib1.shtml>>.

<sup>57</sup> Fessler, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Time Warner and AOL to Combine in \$350 Billion Deal*, *supra* note 26.

tion.<sup>61</sup> AOL-Time Warner is emblematic of the convergence rapidly occurring in media industries.<sup>62</sup> News Corporation, recognizing the potential challenge AOL Time Warner presents, is now actively seeking its own Internet partners. News Corporation is currently talking with Yahoo and Microsoft, among others, about potential minority investment stakes in News Corp's satellite operations.<sup>63</sup> Speculation in the industry is that Murdoch is poised to respond.<sup>64</sup> This epic merging of technology is creating a fruitful environment for entirely new entertainment products. New entities, whose existences were previously impossible—integrated internet entertainment entities like Quokkasports (“Quokka”)—may challenge the traditional broadcast-media entities for video programming dominance.<sup>65</sup>

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<sup>61</sup> See *Few Regulatory Obstacles Seen for AOL Time Warner*, COMM. DAILY, Jan. 11, 2000; Diane Mermigas, *A New Time Warner-AOL Perspective*, ELECTRONIC MEDIA, Feb. 28, 2000, at 20.

<sup>62</sup> See *Industry Could be in for Changes Once AOL & Time Warner Complete Merger*, ELECTRONIC ADVERTISING & MARKETPLACE REP., Jan. 25, 2000; Diane Mermigas, *A Deal that Redefines Content*, ELECTRONIC MEDIA, Jan. 24, 2000, at 18.

<sup>63</sup> See *News Corporation Moves to Fight AOL for the Centre*, MEDIA INTELLIGENCE BULL., Mar. 3, 2000.

<sup>64</sup> See Diane Mermigas, *Is Fox the Next Megaplayer? AOL-Time Warner Deal Leaves Fox in a Plum Position*, ELECTRONIC MEDIA, Feb. 7, 2000, at 21.

<sup>65</sup> As this article demonstrates *inter alia*, a primary tactic used by News Corporation in constructing and furthering its broadcast-media distributional backbone is the acquisition and control of various sports-related media products throughout the world. See *infra* Sections 3.1.2.1.-2.2. Unique Internet sports entities, like Quokka, present a potential challenge to this sports-related dominance. Quokka terms its product “sports immersion.” Quokka describes its mission and product as follows:

Quokka is the Digital Sports Entertainment Company. Quokka was created with a single focus: to bring the real intensity of sports experiences to worldwide audiences. And to use emerging technologies and emerging media to make it happen. Our thinking goes something like this: everywhere you look today in sports, technology is being utilized in the service of improved performance. Motion capture, telemetry and biometrics just to name a few, are employed by athletes and trainers who are using technology as a lens—an aperture into what is really going on. By leveraging these data assets through a wide range of techniques and technologies we create data visualizations and simulations that tell this “inner story”—the real story behind a given athletic endeavor—to fans who want to look deeper into what is really happening. By combining these elements with more conventional coverage techniques, we create a next-generation sports-entertainment product.



The providing of bundled entertainment and telecommunications services benefits from both economies of scale and scope. These scale and scope economies reside at an international level. Mergers that once would draw objections based upon concentration numbers no longer may be of concern:

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*Quokka Sports Immersion is a New Form of Sports Entertainment* (visited Feb. 7, 2000) <<http://company.quokka.com/immersion.html>> [hereinafter *Quokka Sports Immersion*]. As of this writing, Quokka is a relatively new company and concept, only having “produced” six immersion products to date: the 1999 Marathon des Sables; a 1999 mountaineering expedition in China; the 1998-99 Around Alone race—an around-the-world “single-handed yacht race”; the official site of the International Olympic Committee; the official site for CART (Championship Auto-Racing Team); and the 1997-98 Whitbread Round the World Race. See *Press: Quokka Sports in the News* (visited Feb. 7, 2000) <<http://company.quokka.com/press.html>>. Regardless of its youth, Quokka is a fascinating operation that straddles the media of cyberspace and traditional sports broadcast-media. It does not take much imagination to envision a Quokka sports immersion produced sports event—an event exclusively “broadcast” by Quokka. With the growing convergence of cable, video, telecommunications, and entertainment media into a streamlined “entertainment-on-demand” conduit, the emergence of such changes in the way sports events are “viewed” is closer to reality than one may think. Quokka itself alludes to such changes in media delivery:

[I]mmersive presentation techniques are not just intensely entertaining—they create whole new business models. Advertisements, sponsorship fulfillment, and transactions converge with presentations to create obvious opportunities to entertain—but they also create opportunities for profit. Today we produce sporting events on the Internet and they have proved much more popular than we had expected. The thing that gets us excited about our jobs (and our future) is the promise of converged media—the high bandwidth screaming processor future—that from all accounts is still a couple of days off. It turns out that tomorrow is arriving a whole lot faster than we would have anticipated.

*Quokka Sports Immersion, supra.* The resulting question, relevant to this article, is simple: how will traditional broadcast-media entities react to Quokka? We may already have part of the answer. Quokka lists as investors: Accel Partners, BancBoston Robertson Stephens, the Ignite Group, Intel Corporation, MediaOne Interactive Services, Media Technology Ventures, Omega Venture Partners, Trinity Ventures, and the Wakefield Group. See *Quokka Sports Raises Additional \$16 Million in Funding* (Press Release, Feb. 20, 1999) (visited Feb. 7, 2000) <[http://company.quokka.com/press/index\\_quokka\\_sports.fhtml](http://company.quokka.com/press/index_quokka_sports.fhtml)>. The notation of MediaOne Interactive Services—an industry leader at the emerging convergence of electronic media—raises an eyebrow. One will have to wait to see News Corporation’s sports-related response. Yet, without a doubt, one can expect News Corporation to respond with distributional savvy.

As new digital and wireless technologies become available, alternative modes of content delivery emerge. Such new modes will increase competition unless obstacles are created to their introduction and expansion in the marketplace. The combination of existing facilities' networks increases the likelihood that economies of scale will be achieved and allow for the offering of enhanced telecommunications and information services.<sup>66</sup>

Yet, the consumer benefits of these economies of scale may be deceiving. As this Article will explain, inefficiencies exist in this type of a rapidly changing marketplace that depends on network *efficiencies*.

### 3. NEWS CORPORATION

The empire of Rupert Murdoch spans far and wide, setting foot on every continent except Africa and Antarctica.<sup>67</sup> Self-styled as "building an unrivaled platform"<sup>68</sup> and claiming to be the only globally vertically integrated media company, News Corporation has created a web of media-related entities. This creation has come in part through start-up, yet primarily via acquisition. Begun and based in Australia, News Corporation now brings in 72% of its operating earnings from the United States, with the United Kingdom accounting for 23%.<sup>69</sup> Australia now only accounts for 5% of News Corporation's operating earnings.<sup>70</sup> With worldwide revenues totaling \$12.8 billion,<sup>71</sup> News Corporation truly owns an "unrivaled platform" that combines unparal-

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<sup>66</sup> Ilene Knable Gotts, *The Competitive Analysis of Communications and Entertainment Mergers*, 1060 PLI/CORP 27, 29 (1998).

<sup>67</sup> See *infra* notes 92-94 and accompanying text.

<sup>68</sup> See NEWS CORPORATION, 1998 ANNUAL REPORT 1 (visited Feb. 7, 2000) <<http://www.newscorp.com/report98/business.html>> [hereinafter ANNUAL REPORT].

<sup>69</sup> See NEWS CORPORATION, *Chief Executive's Review* 1998 ANNUAL REPORT 15 (visited Feb. 7, 2000) <<http://www.newscorp.com/report98/chief1.html>> [hereinafter *Chief Executive's Review*].

<sup>70</sup> See *id.*; see also NEWS CORPORATION, *Financial Highlights*, 1998 ANNUAL REPORT 9 (visited Feb. 7, 2000) <<http://www.newscorp.com/report98/high1.html>> [hereinafter *Financial Highlights*]. The source reports the operating revenue in Australian dollars and then translates it into American dollars.

<sup>71</sup> See *id.* at 9.

leled entertainment and news media-market coverage across the globe.

### 3.1. *News Corporation's Business Structure*

Although News Corporation began as a newspaper conglomerate,<sup>72</sup> newspapers now only account for 25% of its operating income.<sup>73</sup> News Corporation divides its business activities and entities into seven main categories:<sup>74</sup> television,<sup>75</sup> filmed entertainment,<sup>76</sup> newspapers,<sup>77</sup> magazines and inserts,<sup>78</sup> book publishing,<sup>79</sup> technology,<sup>80</sup> and other.<sup>81</sup> The industry segment lines

<sup>72</sup> See generally *Chief Executive's Review*, *supra* note 69 (stating that newspaper publishing is the business in which News Corporation began its operations).

<sup>73</sup> See *Financial Highlights*, *supra* note 70, at 10.

<sup>74</sup> See NEWS CORPORATION, *The News Corporation Limited Worldwide, 1998 ANNUAL REPORT* (visited Mar. 9, 2000) <<http://www.newscorp.com/report98/world.html>>.

<sup>75</sup> News Corporation's television entities include Fox Broadcasting Company, Twentieth Century Television, Fox Television Studios, and Fox Television Stations. See NEWS CORPORATION, *Worldwide Properties* (visited Mar. 9, 2000) <<http://www.newscorp.com/public/cor/index.html>>.

<sup>76</sup> News Corporation's film entities include Fox Filmed Entertainment: Twentieth Century Fox, Fox 2000, Fox Searchlight, Fox Animation Studios, Twentieth Century Fox Home Entertainment, Twentieth Century Fox Television, Twentieth Century Fox Licensing and Merchandising, Fox Interactive, and Fox Studios Australia. See NEWS CORPORATION, *Corporate and Financials: Filmed Entertainment* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_fe.htm](http://www.newscorp.com/public/cor/cor_fe.htm)>.

<sup>77</sup> See generally NEWS CORPORATION, *Corporate: Newspapers* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_ne.htm](http://www.newscorp.com/public/cor/cor_ne.htm)> (*Australasia* Over 200 national, regional, and local newspapers including major papers such as The Australian, The Daily Telegraph, Herald Sun, The Courier-Mail, Northern Territory News, The Mercury, and The Advertiser; *United Kingdom*: The Times, The Sunday Times, The Sun, and News of the World; and the *United States*: New York Post).

<sup>78</sup> See generally NEWS CORPORATION, *Corporate and Financials: Magazines and Inserts* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_mandi.htm](http://www.newscorp.com/public/cor/cor_mandi.htm)> (*Australasia*: Pacific Islands Monthly; *Canada*: News FSI Canada; *United Kingdom*: The Times Educational Supplement, The Times Higher Educational Supplement, The Times Literary Supplement, The Times Educational Supplement (Scotland), and Nursery World; and the *United States*: News America Marketing, TV Guide, and The Weekly Standard).

<sup>79</sup> See generally NEWS CORPORATION, *Corporate: Book Publishing* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_bp.htm](http://www.newscorp.com/public/cor/cor_bp.htm)> (HarperCollins Publishers: *Australasia, United Kingdom and Europe, United States*).

that News Corporation draws are quickly blurring, as News Corporation often combines formerly separate entities. For instance, during 1998, News Corporation reorganized all of its U.S. entertainment entities into one conglomerate, Fox Entertainment Group. Fox Entertainment Group now consists of News Corporation's "development, production and worldwide distribution of feature films and television programs, television broadcasting and cable networks and sports team assets in the United States."<sup>82</sup> News Corporation recently combined its continental European "media investments" under the guise of a single entity, News Corporation Europe.<sup>83</sup> The particularly intriguing sports sector aspects of these product packages will be addressed in Section 3.1.2.1.

### 3.1.1. *Commercial Television / Cable and Satellite Television*

News Corporation's commercial television, cable, and satellite television holdings constitute 35% of its operating income, the leading industry segment within the company.<sup>84</sup> The focus of News Corporation is shifting towards television—"the fastest growing part of the Company."<sup>85</sup> News Corporation is gaining a stunning global foothold, as it points out that with its "launch of satellite platforms in Latin America and Japan, [News Corpora-

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<sup>80</sup> See generally NEWS CORPORATION, *Corporate and Financials: Technology* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_te.htm](http://www.newscorp.com/public/cor/cor_te.htm)> (Australasia: News Interactive and PDN Xiren Information Technology Co. Ltd.; United Kingdom: News Digital Systems Ltd. and Springboard Internet Services Ltd.; and the United States: News America Digital Publishing and Kesmai Corporation).

<sup>81</sup> See generally NEWS CORPORATION, *Corporate and Financials: Other Operations* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_op.htm](http://www.newscorp.com/public/cor/cor_op.htm)> (Australasia: Ansett Australia, Ansett New Zealand, Ansett Worldwide Aviation Services, Australian International, Broadsystem (Australia), Festival Records, F.S. Falkiner & Sons, Mushroom Records, National Rugby League, and Newspoll; Europe: Convoys Group, Broadsystem Ltd., PLD Telekom, Radio 538, Sky Radio; and the United States: News America New Media).

<sup>82</sup> NEWS CORPORATION, *Television, 1998 ANNUAL REPORT 19* (visited Feb. 7, 2000) <<http://www.newscorp.com/report98/tv1.htm>> [hereinafter *Television*].

<sup>83</sup> See NEWS CORPORATION, *Formation of News Corporation Europe*, Nov. 23, 1998 (visited Feb. 7, 2000) <[http://www.newscorp.com/public/news/news\\_062.htm](http://www.newscorp.com/public/news/news_062.htm)>.

<sup>84</sup> See *Financial Highlights*, *supra* note 70, at 10.

<sup>85</sup> *Television*, *supra* note 82, at 19.

tion is] close to attaining global reach approaching 75% of the world's population."<sup>86</sup>

In the United States, News Corporation is a large player in the commercial broadcast market with its group of twenty-two Fox Network stations,<sup>87</sup> which reach upwards of 40% of the U.S. market.<sup>88</sup> Fox Network stations, known collectively as Fox Television Stations ("FTS"),<sup>89</sup> are strategically situated in top U.S. television markets. FTS has stations in nine of the top ten U.S. television markets and fourteen of the top twenty U.S. television markets.<sup>90</sup> In 1998, "twenty of the twenty-two stations were either first or second in these locales in common prime time competition."<sup>91</sup> News Corporation also owns Fox Broadcasting Company—consisting of Fox Entertainment, Fox Kids Network, and Fox Sports.<sup>92</sup> FTS stations, in turn, broadcast Fox network programming.

In the United States, News Corporation is also a rapidly growing cable television player, with an emphasis on the sports-related sector. Via a joint venture (now solely owned by News Corporation), Fox/Liberty Media,<sup>93</sup> News Corporation controls Fox Sports Net (ten regional cable sports channels), Rainbow Sports (eight regional cable sports channels), Fit TV, Fox Sports

<sup>86</sup> *Chief Executive's Review*, *supra* note 69, at 17 (visited Feb. 7, 2000) <<http://www.newscorp.com/report98/chief3.html>>.

<sup>87</sup> The stations are: WNYW - New York, NY; KTTV - Los Angeles, CA; WFLD - Chicago, IL; WTXF - Philadelphia, PA; WFXT - Boston, MA; WTTG - Washington, DC; KDFW - Dallas, TX; WJBK - Detroit, MI; WAGA - Atlanta, GA; KRIV - Houston, TX; WJW - Cleveland, OH; WTVT - Tampa, FL; KSAZ - Phoenix, AZ; KDVR - Denver, CO; KTVI - St. Louis, MO; WDAF - Kansas City, MO; WITI - Milwaukee, WI; KSTU - Salt Lake City, UT; WHBQ - Memphis, TN; WGHP - Greensboro, NC; WBRC - Birmingham, AL; KTBC - Austin, TX. See NEWS CORPORATION, *Corporate and Financials: Television* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_tv.htm](http://www.newscorp.com/public/cor/cor_tv.htm)>.

<sup>88</sup> See *Chief Executive's Review*, *supra* note 69, at 15.

<sup>89</sup> See *Television*, *supra* note 82, at 20 (visited Feb. 7, 2000) <<http://www.newscorp.com/report98/tv2.html>>.

<sup>90</sup> See *id.*

<sup>91</sup> *Id.* (citing statistics "based on the May 1998 ratings sweep period with viewers in the 18-49 age group").

<sup>92</sup> See *id.*

<sup>93</sup> Though originally a joint-venture between John Malone's Liberty Media and Murdoch's News Corporation, Fox/Liberty Networks was fully under News Corporation control by mid-1999. See Geraldine Fabrikant, *Murdoch Said to be in Deal with Liberty*, N.Y. TIMES, Apr. 2, 1999, at C1.

World, and FX.<sup>94</sup> Overall, "Fox/Liberty Networks owns an interest in, or is affiliated with, twenty-seven regional sports networks."<sup>95</sup> News Corporation also owns a 33% share of The Golf Channel.<sup>96</sup> In addition to these sports-related cable entities, News Corporation owns Fox Family Worldwide (The Family Channel and MTM Entertainment), Fox News Channel, and FXM: Movies from Fox.<sup>97</sup> In a move that uniquely positions News Corporation at the convergence between television and the Internet, TV Guide (already owned by News Corporation) merged with United Video Satellite (which owns Prevue Channel) during 1997.<sup>98</sup>

Outside of the United States, News Corporation owns a diverse palette of cable and satellite television offerings. These holdings spread across Asia, Australia, Germany,<sup>99</sup> India,<sup>100</sup> Indonesia,<sup>101</sup> Japan, Latin America, and the United Kingdom.

In Asia, News Corporation owns STAR TV, a satellite television service "reaching more than 60 million homes,"<sup>102</sup> and which News Corporation believes to be "Asia's leading satellite broadcaster."<sup>103</sup> "STAR produces, either in partnership or alone, twenty-three channels in eight languages for a multitude of markets in Asia, reaching fifty-three countries with an estimated audi-

<sup>94</sup> See NEWS CORPORATION, *Corporate and Financials: Cable and Satellite Television* (visited Feb. 7, 2000) <[http://www.newscorp.com/public/cor/cor\\_cns.htm](http://www.newscorp.com/public/cor/cor_cns.htm)> [hereinafter *Cable and Satellite Television*].

<sup>95</sup> See *Television*, *supra* note 82, at 20.

<sup>96</sup> See *Cable and Satellite Television*, *supra* note 94.

<sup>97</sup> See *id.*

<sup>98</sup> See *Chief Executive's Review*, *supra* note 69, at 16. News Corporation notes that

[t]he new business merges mediums to deliver programming information and guidance across print, cable TV, and the Internet. It offers a single-source solution to advertisers, allowing for more efficient advertising strategies and broader reach. It will enjoy enhanced revenue opportunities, for example from cross-selling advertising and custom editions for cable systems.

*Id.*

<sup>99</sup> 49.9% of VOX and a majority interest of TM3. See *Cable and Satellite Television*, *supra* note 94.

<sup>100</sup> ISkyB, 50% of Asia Today Ltd., 50% of Program Asia Trading Co. Pvt. Ltd. and 50% of Siticable Network Pvt. Ltd. See *id.*

<sup>101</sup> 50% of Bahasa Programming Ltd., which owns Film Indonesia. See *id.*

<sup>102</sup> *Television*, *supra* note 82, at 22.

<sup>103</sup> *Chief Executive's Review*, *supra* note 69, at 17.

ence of 260 million people.”<sup>104</sup> In addition, News Corporation partially owns the following Asian entities: Channel [V] Music Networks, VIVA Cinema, ESPN STAR Sports (joint venture between STAR Sports and ESPN), Phoenix Satellite Television Company Ltd., and Tianjin Golden Mainland Development Company Ltd.<sup>105</sup>

In Australia, News Corporation owns 50% of FoxTEL, a joint venture with Telstra.<sup>106</sup> FoxTEL is a subscription television service with over 300,000 subscribers and is Australia’s “largest pay television provider.”<sup>107</sup> Amongst the stations offered by FoxTEL are Fox Sports, which is 100% owned by News Corporation, and Sky News Australia, which is 33.3% owned by BSkyB.<sup>108</sup> FoxTEL has enormous capacity for growth, as it “passes 2.5 million of [Australia’s] total 6.5 million homes.”<sup>109</sup> News Corporation also owns 50% of Sky Channel.<sup>110</sup>

In Japan, News Corporation owns 11.375%<sup>111</sup> of Sky PerfectTV!, a satellite television service.<sup>112</sup> Sky PerfectTV! is a new entity, the product of the merger between JSkyB and PerfectTV!; its largest owners are News Corporation and four Japanese companies—Sony Corporation, Fuji Television, Softbank Corporation, and Ito-chu.<sup>113</sup> Sky PerfectTV! has 700,000 subscribers, with its only competitor having just 100,000 subscribers.<sup>114</sup> News Corporation also owns 80% of News Broadcasting Japan, which “provides seven channels to Sky from Fox, Fox Family, Fox News and STAR TV, including STAR’s music service, Channel [V].”<sup>115</sup>

In Latin America, News Corporation operates Sky Latin America, a direct-to-home (“DTH”) digital satellite television service that serves Brazil, Mexico, and Colombia and has more

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<sup>104</sup> *Television*, *supra* note 82, at 22.

<sup>105</sup> *See Cable and Satellite Television*, *supra* note 94.

<sup>106</sup> *See id.*

<sup>107</sup> *Television*, *supra* note 82, at 22.

<sup>108</sup> *See Cable and Satellite Television*, *supra* note 94.

<sup>109</sup> *Television*, *supra* note 82, at 22.

<sup>110</sup> *See ANNUAL REPORT*, *supra* note 68.

<sup>111</sup> *See Cable and Satellite Television*, *supra* note 94.

<sup>112</sup> *See Television*, *supra* note 82, at 22.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *Id.*

than 400,000 subscribers.<sup>116</sup> News Corporation operates Sky Latin America on a joint-ownership basis with Organizações Globo, Grupo Televisa, and Tele-Communications International, Inc.<sup>117</sup> Innova, Sky Latin America's Mexican DTH service, is 30% owned by News Corporation.<sup>118</sup> NetSat, Sky Latin America's Brazilian DTH service, is 36% owned by News Corporation.<sup>119</sup> News Corporation also wholly owns the cable channel Canal Fox, "which now reaches a total of 9.6 million subscribers in Latin America, making it one of the highest rated general entertainment channels in the region."<sup>120</sup> Fox Family Worldwide owns Fox Kids Latin America, which has five million subscribers and "carries programs from other Fox networks but uses area talent, such as Latin American teenagers, as hosts."<sup>121</sup> News Corporation owns 50% of Fox Sports Americas, which "is the largest 24-hour Spanish sports network in the world" and has "7.2 million subscribers in Latin America . . . and has an additional 1.8 million viewers in the U.S."<sup>122</sup> News Corporation also owns portions of Telecine and Cinecanal.<sup>123</sup>

In the United Kingdom, News Corporation owns 40% of British Sky Broadcasting (BSkyB), "the world's leading satellite pay television operator."<sup>124</sup> BSkyB has over 6.5 million subscribers and a total of over sixteen million viewers in the United Kingdom,<sup>125</sup> with approximately 28% of all U.K. homes receiving BSkyB.<sup>126</sup> Approximately 15% of all actual television (general commercial, cable, and satellite) viewing in the United Kingdom is of BSkyB.<sup>127</sup> BSkyB offers over forty channels,<sup>128</sup> half of which

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<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See Cable and Satellite Television, supra* note 94.

<sup>124</sup> *Television, supra* note 82, at 21.

<sup>125</sup> *See id.*

<sup>126</sup> *See* British Sky Broadcasting, *Sky Online, The Home for the Future is Wired for Choice* (visited on Dec. 11, 1998) <<http://www.sky.co.uk/homes/future.htm>>.

<sup>127</sup> *See BskyB Says Cable, Satellite TV Viewing Share Hits 14.98%, supra* note 39.



are either wholly or partially owned by News Corporation.<sup>129</sup> Sports broadcasting is a central feature of BSkyB, with the service offering three all-sports channels.<sup>130</sup> BSkyB recently began the introduction of digital satellite television to the United Kingdom.<sup>131</sup> BSkyB also plans on launching an interactive services “network” soon—British Interactive Broadcasting (BiB)—of which it will own 32.5%.<sup>132</sup>

### 3.1.2. *British Sky Broadcasting*

There was a time when British Sky Broadcasting was dismissed by the U.K.’s TV establishment as an upstart with poor prospects—Rupert Murdoch’s folly. But over the past decade, BSkyB—now the most successful satcaster in the world—has transformed television in Britain, consistently setting the agenda for British multichannel TV and, in the process, forcing old-guard broadcasters to rethink how they do business.<sup>133</sup>

In a relatively short period of time, BSkyB has grown from a fledgling non-terrestrial broadcast service in a newly deregulated broadcast market to a market-altering force in the U.K. broadcast industry.<sup>134</sup> This section briefly reviews BSkyB’s rise to prominence, business strategy, and plans for the future. In 1983, Satellite Television PLC began as the first European commercial satellite service. News Corporation (then known as News International Corporation) purchased Satellite Television PLC in 1984, renaming it Sky TV. In the following six years, Sky TV expanded its services, adding channels and offering Sky TV via di-

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<sup>128</sup> See British Sky Broadcasting, *Sky—All the Best Sports, News & Entertainment* (visited on Jan. 31, 2000) <<http://www.sky.co.uk/home/GeneralIndex.html>>.

<sup>129</sup> See *Television*, *supra* note 82, at 22.

<sup>130</sup> See *Sky—All the Best Sports, News & Entertainment*, *supra* note 128.

<sup>131</sup> See *Television*, *supra* note 82, at 22.

<sup>132</sup> See *id.*

<sup>133</sup> Erich Boehm, *Stratospheric: Leading Satcaster Enters Digital Age*, VARIETY, Feb. 1, 1999, at 35 [hereinafter Boehm, *Stratospheric*].

<sup>134</sup> BSkyB is a leading “regional” example demonstrating how Rupert Murdoch has built his monopoly on an acquisition-by-acquisition and region-by-region basis.

rect-to-home dish systems ("DTH").<sup>135</sup> Sky TV also began to expand its viewer base, selling its product to cable operators who would then "resell" a repackaged Sky TV product.<sup>136</sup> By 1990, Sky TV was in one million U.K. homes.<sup>137</sup> In 1990, British Satellite Broadcasting DTH service began transmission. By then, Sky had leveraged its position as first-mover "to build brand awareness and acceptance."<sup>138</sup> As such, by 1991 Sky TV merged British Satellite Broadcasting under its wing.<sup>139</sup>

Back in 1991, BSKyB was still highly unprofitable and its ability to survive was questioned. One industry commentator stated that "[b]uying shares in BSKyB is not so much an investment, as an act of faith."<sup>140</sup> Regardless, BSKyB quickly began to blossom, first breaking even in March 1992, and by early 1996 was in five million U.K. homes.<sup>141</sup>

BSkyB based its success on a strategy that entailed "invest[ing] in developing its distribution and sales infrastructure."<sup>142</sup> In following this strategy, BSKyB spent very little money on developing its own programming. In turn, it "invested increasingly large sums in programme [sic] rights."<sup>143</sup> This strategy allowed BSKyB in 1992 to spend £200 million on the exclusive rights to live broadcast of Premier League Football matches for five years.<sup>144</sup> The agreement was renewed in 1996<sup>145</sup> with a four-year extension for £670 million.<sup>146</sup> The acquisition of these exclusive rights is often pointed to as the turning point for BSKyB; "Rupert Murdoch's early days of the four-channel Sky Television very nearly

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<sup>135</sup> See 1996 KEY NOTE REPORT, *supra* note 14, at \*8.

<sup>136</sup> See *id.*

<sup>137</sup> See British Sky Broadcasting Service, *Sky Online, Key Dates in the Development of Sky Television* (visited Dec. 11, 1998) <<http://www.sky.co.uk/skysales/keydates.htm>> [hereinafter *Key Dates*].

<sup>138</sup> 1996 KEY NOTE REPORT, *supra* note 14, at \*8.

<sup>139</sup> See *id.*

<sup>140</sup> *Id.*

<sup>141</sup> See *Key Dates, supra* note 137.

<sup>142</sup> 1996 KEY NOTE REPORT, *supra* note 14, at \*8.

<sup>143</sup> *Id.*

<sup>144</sup> See British Sky Broadcasting, *Sky Online, Examples of Programming Investments in Sky* (visited Dec. 11, 1998) <<http://www.sky.co.uk/skysales/invest.htm>> [hereinafter *Examples*].

<sup>145</sup> See *Key Dates, supra* note 137.

<sup>146</sup> See *Examples, supra* note 144.

ended in bankruptcy before being saved in 1991 by the bold acquisition of the Premier League rights.”<sup>147</sup>

By relying on a proven distribution and sales system that had comparatively very little fixed cost, BSkyB freed up significant amounts of cash flow to bid on high-profile events that attracted subscribers to BSkyB.<sup>148</sup> As the ICC noted, “Considering that in 1995 42% of [BSkyB’s] revenues were spent on programming, it is easy to see why other broadcasters struggle to compete for programme rights to sporting events, films, etc.”<sup>149</sup> This business strategy has paid off in terms of market dominance for BSkyB. The current market power of BSkyB is quite unparalleled. As the ICC further noted, the U.K. satellite television has been “dominated by the presence of BSkyB, in terms of ownership, marketing, distribution and the provision of the subscriber management services, without which, no company providing mainstream programming services can generate significant revenues.”<sup>150</sup> Some argue that with the advent of digital cable and the proliferation of cable-integrated products, BSkyB’s dominance of the U.K. broadcast-media market may wane.<sup>151</sup> Regardless, BSkyB is confronting the digital age with full competitive force, launching its own digital cable service—SkyDigital<sup>152</sup>—and its own digital interactive media-on-demand service—Bib.<sup>153</sup>

### 3.1.2.1. Sports-Related Strategic Positioning and Purchases

Voted three out of the past five years by the Sporting News as the most powerful man in sports, Rupert Murdoch is the undis-

<sup>147</sup> Richard Russell, *Heads I Win, Tails I Win*, SUNDAY TIMES, Sept. 11, 1998 (visited on Feb. 7, 2000) <<http://www.sunday-times.co.uk/news/pages/tim/98/09/11/timmdamda02006.html?2501972>>.

<sup>148</sup> See 1996 KEY NOTE REPORT, *supra* note 14, at \*8.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*9.

<sup>151</sup> See, e.g., Boehm, *Stratospheric*, *supra* note 133 (discussing the possible effects of the advent of digital cable and arguing that BSkyB’s preexisting dominance in the broadcast market coupled with its control over content sources will likely minimize the impact of new digital cable companies). See also *supra* notes 46-54 and accompanying text.

<sup>152</sup> See *Digital Television Introduction*, *supra* note 53; see also Tim Westcott, *SkyDigital Explores Bold Interactive Frontier*, VARIETY, Feb. 1, 1999, at 48. Surprisingly enough, SkyDigital appears to be expanding overall BSkyB capacity: “According to [sic] BSkyB, 30% of the 100,000 SkyDigital subscribers who signed up in its first month of operation . . . were new customers.” *Id.*

<sup>153</sup> See ANNUAL REPORT, *supra* note 68; see also Westcott, *supra* note 152.

puted king of sports media.<sup>154</sup> Murdoch gained this position in very much the same way he gained a similar position in newspapers and every other media entity he has made successful—meticulous construction of a strong distribution, marketing, and support network. In sports-media this translates to infiltration on the local level with ownership of regional sports channels, local team broadcast rights, and a unifying identifiable corporate image at the upper-most level of distribution.<sup>155</sup> The powerful combination of pay-television and sports broadcasting rights are integral to Murdoch's success.<sup>156</sup>

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<sup>154</sup> See Steve Gietschier, *The Sporting News, 100 Most Powerful People in Sports* (visited on Dec. 11, 1998) <[http://www.sportingnews.com/features/powerful/century\\_list1.htm](http://www.sportingnews.com/features/powerful/century_list1.htm)>. As one commentator noted,

[Rupert Murdoch] lusts after sports after sports programming, which he said in 1996 would be his “battering ram” into pay TV. It’s a lucrative play for Murdoch because his satellite services—including BSkyB, Sky Latin America and Asia’s Star TV—reach about two-thirds of the world’s TV households. Sports is key because it’s one of the few forms of programming that appeals to viewers around the globe.

David Lieberman, *\$1 Billion Bid Draws Static*, USA TODAY, Sept. 10, 1998, at C3.

<sup>155</sup> As noted by one industry executive, “on a worldwide basis, he’s certainly the most aggressive and has accomplished the most in terms of both ownership and regional distribution of sports television.” Michael Knisley, *TSN’s Power 100: All Rupert, All the Time*, SPORTING NEWS, Dec. 14, 1998, at 16 (quoting Turner Sports president Harvey Schiller).

<sup>156</sup> Another executive underscored Murdoch’s particularized method, noting that “[Murdoch will] push pay TV as a strategy as fast as governmental regulations will allow . . . . He’s going to do it in every country he has broadcasting rights.” Lieberman, *supra* note 154. Michael Knisley detailed the effectiveness of Fox Sports Net, a perfect example of Murdoch’s construction of such a distribution network:

You may not have noticed just how far and wide Fox Sports Net ranges because the brilliance of the concept is that it concentrates its coverage on regional levels. You watch Fox Sports New England in Boston, or Fox Sports Rocky Mountain in Denver, or Fox Sports South in Atlanta, or Fox Sports Fill-in-the-blank in 19 other major metropolitan areas. Each bears the same Fox sports logo and each carries the same SportsCenter-like national wrap-up show. . . but each also gives its viewers the regular coverage of their local pro and college teams (with future plans to bring coverage down to the high school level) that ESPN doesn’t. There are 76 U.S.-based teams, combined, in the NBA, the NHL and Major League Baseball. Fox Sports Net owns the local cable rights to 71. That is the genius behind a cable-sports alternative that in two years has become strong enough to force ESPN to ditch its plans this autumn for a regional sports network in southern California.

Murdoch has turned the sports-media industry upside down and challenged its logic. As one executive noted, Murdoch “puts spending on a plateau no one else has ever been on. I mean, there isn’t anybody even close.”<sup>157</sup> News Corporation simply recognizes the power of utilizing sports to achieve success in the broadcast-media market. Murdoch builds the sports backbone and feeds other Fox entities off that market infiltration of the Fox distribution network and brand name. This is no different from Murdoch’s BSkyB, where “[t]he televising of Premier League [football] matches is the hook that brings in millions of Sky subscribers,”<sup>158</sup> and is by far the most important asset that BSkyB possesses.<sup>159</sup> Building a strong, vertically integrated international-national-regional network system on the backbone of sports-media, provides News Corporation with the leverage needed to expand into new media markets. As Murdoch noted, “Sports is [sic] the universal language of entertainment.”<sup>160</sup>

In this vein, News Corporation also pursues many sports-related acquisitions, contracts, and transactions. Fox Broadcasting has a multi-year contract with the NFL.<sup>161</sup> As previously mentioned, BSkyB has exclusive live broadcast rights to all Premier Football League football matches in the United Kingdom until 2001.<sup>162</sup> Fox Sports owns the rights to live U.S. broadcasts of Premier League football matches.<sup>163</sup> Fox/Liberty Networks, through either ownership or affiliation, controls “rights to air games of 70 professional U.S. sports teams in the National Basketball Association, National Hockey League and Major League Baseball (of a total of 75 such teams) and numerous collegiate sports teams.”<sup>164</sup> A wholly-owned subsidiary of News Corpora-

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Knisley, *supra* note 155.

<sup>157</sup> Knisley, *supra* note 155 (quoting an anonymous sports executive).

<sup>158</sup> *Sky's the Limit for Man U*, SUNDAY TIMES, Sept. 9, 1998 (visited Feb. 8, 2000) <<http://www.sunday-times.co.uk/news/pages/tim/98/09/09/timbizpat01001.html?2501972>>.

<sup>159</sup> For an enlightening media industry view on this fascinating keystone relationship, see Tim Westcott, *Soccer Coverage Ups Ante in U.K. B'casting*, VARIETY, Feb. 1-7, 1999, at 44.

<sup>160</sup> *Chief Executive's Review*, *supra* note 69.

<sup>161</sup> *See id.*

<sup>162</sup> *See Examples*, *supra* note 144.

<sup>163</sup> *See* Colin Gibson, *How the Sky Fell in on the Premiership*, Sept. 13, 1998 (visited Feb. 8, 2000) <<http://www.telegraph.co.uk/>>.

<sup>164</sup> ANNUAL REPORT, *supra* note 68.

tion owns the Los Angeles Dodgers baseball club, Dodger Stadium, and the land surrounding Dodger Stadium.<sup>165</sup> The land ownership factor is highly significant, as some think that land may "end[] up being the site of a new football stadium and home to an NFL expansion team."<sup>166</sup> News Corporation itself formed and now owns the National Rugby League in Australia (combining the two major rugby leagues that preceded it—the Super League and the Australian Rugby League).<sup>167</sup> Via Fox/Liberty Networks, News Corporation owns 40% interests<sup>168</sup> in Madison Square Garden (located in New York City),<sup>169</sup> the New York Knicks basketball team,<sup>170</sup> the New York Rangers hockey team,<sup>171</sup> the Staples Center arena (in Los Angeles),<sup>172</sup> and holds an option to acquire minority interests in the Los Angeles Lakers basketball team and the Los Angeles Kings hockey team.<sup>173</sup> It appears that Murdoch will exercise the option that Fox/Liberty Networks holds on the Los Angeles Kings, who coincidentally own 10% of the Los Angeles Lakers.<sup>174</sup> News Corporation is also launching a chain of Fox Sports Cafes in U.S. airports.<sup>175</sup>

News Corporation's acquisitions in both the Los Angeles and New York sports markets have drawn significant attention in the sporting press. Specifically with respect to Los Angeles, combine all of Murdoch's ownership interests together, and, as Knisley put it, "He's putting a half nelson on pro-sports in L.A."<sup>176</sup> In New York City, as noted above, Fox Entertainment owns minority interests in Madison Square Garden, the New York Knicks, and the New York Rangers.<sup>177</sup> The parent company to the company through which News Corporation owns these minority interests

<sup>165</sup> See Knisley, *supra* note 155.

<sup>166</sup> *Id.*

<sup>167</sup> See ANNUAL REPORT, *supra* note 68.

<sup>168</sup> See *Reports: Murdoch to Buy out Partner in Sports Network*, Associated Press, Apr. 2, 1999.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See ANNUAL REPORT, *supra* note 68.

<sup>174</sup> See Knisley, *supra* note 155.

<sup>175</sup> See ANNUAL REPORT, *supra* note 68.

<sup>176</sup> Knisley, *supra* note 155 (noting Murdoch's extensive holdings in Los Angeles).

<sup>177</sup> See *id.*

may purchase the New York Yankees.<sup>178</sup> As Knisley put it again, it “sounds to me like another half nelson on the country’s other major urban professional sports center. You don’t have to be much of a mathematician to add those two halves and get one real stranglehold.”<sup>179</sup>

Through these vertically integrative acquisitions, transactions, and contracts, News Corporation purchases the broadcast product itself and thus builds its ‘sports’ brand name.<sup>180</sup> News Corporation utilizes the operating efficiencies and competitive market strength that this large vertically integrated “network” achieves.<sup>181</sup> Simply stated, Murdoch’s empire is deliberate and extensive about building a sprawling distribution and support network. Sports broadcasting is very much the key to unlocking the door to the efficiencies of scale that the network brings.

### 3.1.2.2. *The News Corporation’s Future Business Strategy*

On a broader level, News Corporation’s business strategy is no different than it is at the more micro-level of sports broadcasting and ownership. News Corporation’s macro-level of business strategy is merely an extension of the method of network building model that Fox Sports and BSkyB employ. In fact, the successes of both Fox Sports and BSkyB are fundamental to the implementation of this overall plan. Specifically, Fox Entertainment Group and News Corporation Europe are the respective broader companion umbrellas that these two entities are likely to support.

In 1998, News Corporation created Fox Entertainment Group and News Corporation Europe. Fox Entertainment

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<sup>178</sup> *See id.*

<sup>179</sup> *Id.* Knisley continues, pointedly begging the question about one of the blatant antitrust issues among many, “[s]o who does [Murdoch] root for in a Dodgers–Yankees World Series?” *Id.*

<sup>180</sup> *See Chief Executive’s Review, supra* note 69.

<sup>181</sup> *See* ANNUAL REPORT, *supra* note 68. News Corporation’s own language draws out these vertically integrative efficiencies.

Other advantages have come to FTS with the unique integration of the FOX network: the larger the station group, the more efficient and effective the network. This is particularly noteworthy with FOX’s investment in sports programming, where FTS has stations in 11 of 15 NFL markets, in 19 of 26 Major League Baseball (“MLB”) markets and in 15 of 20 National Hockey League (“NHL”) markets.

*Id.*

Group essentially brings under one umbrella all of News Corporation's multi-media and sports activities in the United States.<sup>182</sup> Under its foundational mandate, News Corporation Europe "investigate[s] and manage[s] media investments in Continental Europe."<sup>183</sup> News Corporation Europe, although not directly affiliated with BSKyB, is obviously designed to mirror BSKyB's creation of a distribution system foothold, with potential satellite systems slated for both Italy and France. As Murdoch noted, "[f]ollowing the outstanding success of BSKyB in the U.K., we see opportunities to participate in media developments across Europe."<sup>184</sup> Although not directly affiliated with BSKyB, the Chairman of News Corporation Europe sits on the board of News Corporation and of BSKyB itself.<sup>185</sup> This arrangement is no coincidence, underscored by Erich Boehm's comment that "[t]here is . . . the real possibility that BSKyB may venture onto the Continent."<sup>186</sup>

Both of these umbrella organizations put News Corporation in a better position to exploit economies of scale and build "networks" on the backbones of Fox Sports and BSKyB. In addition, sheer buying power helps News Corporation to purchase entities that further tap into these economies of scale. The Fox Enterprises Group IPO raised \$2.8 billion.<sup>187</sup> When asked what News Corporation would do with this influx of funds, News Corporation and Fox Television stated that it would "see what opportunities come our way as life goes forward."<sup>188</sup>

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<sup>182</sup> See ANNUAL REPORT, *supra* note 68. As News Corporation described its formation of Fox Entertainment Group:

[I]t says something about our News Corporation philosophy. We are responding, as we always do, to the market. Analysts and investors have told us, as I mentioned above, that they find News Corporation daunting to follow. And, despite the fact that we generate the bulk of our earnings in the U.S., many traditional American investors do not own our stock because they view News Corporation as a non-U.S. stock and therefore not a required holding. The Fox Entertainment Group will be a U.S. company. It will hold our U.S. television, film, and sports assets and it will help unlock the value of our holdings.

*Chief Executive's Report*, *supra* note 69.

<sup>183</sup> *Formation of News Corporation Europe*, *supra* note 83.

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> Boehm, *Stratospheric*, *supra* note 133, at 36.

<sup>187</sup> *See* Knisley, *supra* note 155.

<sup>188</sup> *Id.*



News Corporation exploits economies of scale that give it the power to broadcast major events and to profit from offering a wider array of specialized entertainment options to an ever-fragmenting media audience.<sup>189</sup> News Corporation caters to and further saturates this fragmented audience by developing efficient delivery structures, purchasing desired product entities, and establishing strategic partnerships with developing media outlets.<sup>190</sup> News Corporation has much power in determining what the television viewers of the world watch—whatever content, in whatever form, in whatever package.

#### 4. THE INTERNATIONAL ANTITRUST PROBLEM PRESENTED BY NEWS CORPORATION

The antitrust problem presented by News Corporation is rooted in a hard-to-define, rapidly evolving market—a market that blurs the lines between distribution, content, and delivery. The development of this market leads to: 1) business relationships that create international markets by combining formerly domestic products; 2) regulatory hesitancy, as regulators would

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<sup>189</sup> See *Chief Executive's Report*, *supra* note 69.

<sup>190</sup> Commenting on the fragmentation of the broadcast-media audience, Murdoch notes that:

Thanks to improved delivery, the number of television channels available to the consumer is proliferating. And thanks to advances in computers, the consumer is now able to access, and even interact with, news, entertainment, and information in a wholly new medium, the Internet. It all adds up to an explosion of choice.

At the same time, the mass audience is there for big events such as the Super Bowl, the O.J. Simpson trial and the World Cup. These occasions are all the more startling because of the increased reach (and demand) provided by developing technology.

We benefited from one of these big events this year—the Titanic phenomenon. We are systematically creating others—hence our interest in televising major events.

We also know that a key part of the answer to both fragmentation and big events is branding. Faced with the chaos of choice on the one hand, and the need to plug quickly into whatever's happening on the other, consumers will increasingly turn to familiar names to guide them. News Corporation possesses an unrivaled array of these familiar names. We are working to position them even better—for whichever way our audience chooses.

*Id.*

like the market to mature before they deem if regulation is necessary; and 3) regulatory market definition problems, as regulators— due to nation-based bias— incorrectly examine only the nationally relevant antitrust issues.

The answer to the regulatory problem is too often either no regulation or a limited regulation of News Corporation's transactions and conduct. Standing idly by, regulators ignore the urgent antitrust problem presented by News Corporation's conduct— and the broader, more general international antitrust concerns that News Corporation's activities trigger. The broadcast-media market is *changing*, not necessarily in the early stages of growth. In changing markets, market power tends to remain in the hands of the already empowered. This condition sits contrast to emerging markets, which tend to have more fluctuation in who the powerful market players are as the product itself rapidly evolves. Corporations enjoying current market power work to leverage that power to gain controlling influence in the changing marketplace. In terms of conduct and influence, one factor remains constant in broadcast-media: News Corporation. As News Corporation lithely shifts from distribution to content dominance, it demonstrates how quickly monopoly power can accrue and adapt before regulators are able to identify an antitrust concern. The fact that News Corporation's monopolistic activities only occur at an international level exacerbates the issue. Even if regulators were to act more swiftly, they would be ill-equipped to frame News Corporation's conduct in an analytic structure capable of addressing the international nature of News Corporation's motives. If the regulatory community does not take affirmative steps to monitor and moderate News Corporation's activity, market structural internalization, and reinforcement of monopolistic behavior will ensue. An international approach is required for regulating companies like News Corporation. The remainder of this Article examines why an international approach is needed and proposes an international solution.

#### 4.1. *The Totality of the News Corporation International Antitrust Quandary*

News Corporation does not think in terms of national boundaries or geographic location.<sup>191</sup> News Corporation instead conceives of its business in terms of horizontal reach.<sup>192</sup> News Corporation's global control of the sports media market is a prime example of how it operates in this manner. This control also demonstrates the broader market power that News Corporation aims to achieve in the broadcast-media market. As illustrated, the expanding "sports-media" sector is a leading "market" example, demonstrating how the globalization and redefinition of

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<sup>191</sup> For a background on European Union antitrust regulation of media markets, see John Temple Lang, *Media, Multimedia, and European Community Antitrust Law*, 21 FORDHAM INT'L L.J. 1296 (1998).

<sup>192</sup> As noted *infra* note 195, the News Corporation arguably participates in a rapidly evolving high-technology market. Often times, such rapid evolution of technology occurs concomitant with the rapid construction of a network—a network in terms of the "network effect" alluded to throughout this article. Considering the plethora of benefits that networked, high-tech monopolies such as News Corporation create for the consumer, judging how best to go about the antitrust analysis in such contexts is understandably quite difficult. As one author notes, "the application of antitrust enforcement principles to dynamic network industries is intellectually demanding." Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, ANTITRUST BULL., Sept. 22, 1998, at 859, 882. Rubinfeld underscores the root of the intellectually demanding task, the interplay between technological advancement and benefit via the 'monopolistic' network itself, the importance of allowing technological innovation, and the importance of keeping the market competitive. As Rubinfeld notes,

In dynamic, high-technology industries, the antitrust enforcement stakes are raised. On one hand, because the path of innovation today will significantly affect future product quality and price, the potential benefits of enforcement are huge. On the other hand, because the path of innovation is highly uncertain and technology is rapidly changing, the potential costs of enforcement errors are also large.

*Id.* at 860. Rubinfeld's solution to this quandary:

I believe it vital that while being appropriately cautious about criticizing aggressive procompetitive behavior, the antitrust authorities make every effort to insure that dominant incumbent firms with monopoly power (firms with the ability to raise prices above and/or reduce quality below competitive levels and/or to exclude competitors) not use their substantial market power to harm innovation, to retard technological progress, and ultimately to harm consumers.

*Id.* The solution seems warranted with respect to broadcast-media, particularly due to the political and economic power held by broadcast-media.

product and geographic markets is propelling News Corporation forward.

Sports media mergers in general—like most cross-media mergers—are, for the most part, pro-competitive, offering efficiencies for the consumer and creating better, more differentiated products and choices. With the advent of these mergers, sports-media offerings grow exponentially, particularly across international boundaries. As Rupert Murdoch gains greater control and leverage in televising Premier League Soccer games, consumers in the United States can now purchase a channel that carries the same slate of the Premier League games that is available to U.K. consumers who purchase Murdoch's BSkyB.<sup>193</sup> In the United States, Murdoch has followed a parallel path of acquisition, using Fox as the vehicle to acquire the Los Angeles Dodgers, a minority interest in both the New York Knicks and New York Rangers, and an option to purchase a minority interest in both the Los Angeles Lakers and Los Angeles Kings.

Consumers obviously both profit from the “network effect” created by News Corporation's vertically integrated, extensive media distribution, marketing, and support system.<sup>194</sup> News Corporation is an innovator in the delivery of the broadcast-media product.<sup>195</sup> With increased vertical control comes the dan-

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<sup>193</sup> Individuals in the United States can purchase a pay-per-view English Premier League game package through the Fox Sports entity Fox Sports World. Fox Sports, Fox Sports World, *Premier League Live* (visited Feb. 8, 2000) <[http://www.foxsports.com/js\\_index.frm?content=/foxsportsworld/index.sml](http://www.foxsports.com/js_index.frm?content=/foxsportsworld/index.sml)>.

<sup>194</sup> The “network effect” is “the increasing return in value to the owners and participants in a network as the number of members or components in it increases.” Arquit, *supra* note 2, at 162.

<sup>195</sup> The News Corporation arguably offers a high technology product in an ‘innovation market.’ The rate of innovation in the delivery of broadcast-media is extremely rapid, particularly considering the growing convergence between cable, digital, internet, and telecommunications mediums. While News Corporation is a leader in the delivery of broadcast-media content via such mediums, its distribution network does not *directly* control the *evolution* of such mechanisms. Whether this nuanced distinction has any antitrust implication is a point for debate. Arguably, as these delivery mechanisms become more integrated and technologically advanced, News Corporation's ability to maintain its market position will wane, as more adept competitors utilize the emerging electronic medium. Even if one believes that News Corporation does assert some modicum of control over innovation in these emerging technologies, the antitrust theory of innovation markets may apply. Innovation/high-tech markets:

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[Are] characterized by many functional service relationships between companies as buyers and suppliers of infrastructure. These relationships, which often involve a high degree of dependence, give rise to legal questions of access, exclusivity, and foreclosure, as well as access charge policies and interconnection issues that are usually thought of as regulatory rather than antitrust issues. They also give rise to the possibility of day-to-day minor discrimination and resulting controversies . . . .

High-tech markets are characterized by complex relationships, due in part to the number of different kinds of companies that may be involved in any given situation. For example, in cable TV there are the companies that own the transmitters and satellites, program producers, advertisers, and cable-owning companies, as well as viewers and competitors of any or all of these companies. There are also companies such as sports organizations, stadium owners, and Olympic committees that own the right to broadcast sport events, and film studios with portfolios of films.

It is sometimes said that in these markets innovation may be more important than prices, in particular where the market itself is emerging and wholly new products or services are coming into existence. It is, however, important to be clear. In these markets, price is often less important than the technical or other advantages of the product. These advantages are usually due to an innovation, which is likely to be a recent innovation because all or almost all the features of these products are changing. But, it is not innovation as such that constitutes the advantage, and one cannot assume that any innovation is always and automatically an improvement or is better than a competitor's product that has not changed in the same respect.

John Temple Lang, *European Community Antitrust Law: Innovation Markets and High Technology Industries*, 20 FORDHAM INT'L L.J. 717, 720-21 (1997) (describing thirteen "features" of high technology markets and in turn discussing the EU's approach to antitrust regulation of such markets). Under the theory of innovation markets, antitrust regulation in high-technology sectors is viewed as an inefficient encumbrance upon the rate of innovation. Many argue that in such markets, antitrust intervention forestalls product development and discourages risk-taking—the very engine of technological development. See *id.* at 767.

Lang's factors unwittingly describe the functioning of the market in which News Corporation operates. International antitrust regulation of News Corporation should certainly take into account the innovative nature of the broadcast-media market. A more in-depth analysis of these innovation market implications, while intriguing, is beyond the direct scope of this Article. Regardless, such analysis may be a mere exercise in futility, obscuring the true problem that News Corporation creates. Like Microsoft, while News Corporation innovates, it also controls the market. See *supra* note 4 and *infra* note 202 and accompanying text. Innovation becomes a hollow defense of monopoly. As the analysis in this Article suggests, the concept of News Corporation driving an "innovation market—just like News Corporation (and Microsoft for that matter) producing a "network effect"—may merely constitute the benign surface on a more malignant reality of distribution control.

gers that traditionally goes hand-in-hand with such excessive control of a distribution chain. While consumer choices and network efficiencies may grow exponentially, the vertical integrator obviously chooses which efficiencies to exploit. As a company vertically integrates its distributed product, it gains control over how the product is priced, packaged, and distributed. Traditional market forces lose control as the vertical integration itself creates a unique product—a market unto itself. The “network” then becomes the product, with one entity controlling the product network. Entry becomes nearly impossible as the vertical integrator cuts off all entry points.<sup>196</sup> The consumer is at the mercy of the product network owner.

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The role of innovation market theory analysis has a place in the overall News Corporation antitrust calculus. The concepts of high-technology and innovation theory concomitantly trigger ancillary issues that dwell in the growing conflict between intellectual property and antitrust regulation. In simple terms, the conflict arises when intellectual property rights become either a weapon in unfair competition with rival firms or a shield from antitrust regulation itself. For an interesting look at the little analyzed confluence of intellectual property rights and the regulation of mergers and acquisitions, see McManis, *supra* note 1. McManis's analysis is somewhat tangent to antitrust analysis itself; yet, his conclusion that more focus must be placed upon the international effects of intellectual property recognition, particularly via the WTO and Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”), has specific applicability here further reinforcing the importance of an international antitrust vision. *See id.* at 1308.

<sup>196</sup> The expansion of News Corporation may very well make entry prohibitively difficult in the worldwide broadcast-media distribution market. In the future, many content providers may have no choice but to contract with News Corporation to bring their product to the international (or even domestic) market. Due to the transparent (non-content) nature of News Corporation's monopoly (i.e., its distribution network) this scenario could imply that, at least in the context of pay-TV broadcast-media, News Corporation has become an “essential facility.” The application of the “essential facilities doctrine” to News Corporation, while certainly intriguing and a topic that would likely generate heated debate, is beyond the scope of this Article. For an intriguing look at how Microsoft Corporation might be affected by the European Union's application of this doctrine, see Mercer H. Harz, *Dominance and Duty in the European Union: A Look Through Microsoft Windows at the Essential Facilities Doctrine*, 11 EMORY INT'L L. REV. 189 (1997). Harz argues that under the liberal construction of the European Union essential facilities doctrine, “regardless of Microsoft's treatment by U.S. authorities . . . Microsoft may have violated a duty of nondiscrimination imposed under European Union law by reason of its marketplace dominance and control of an essential facility.” *Id.* at 190-91. For an antitrust comparison of Microsoft and New Corporation, see *infra* note 202.

Specifically with respect to sports broadcast-media, in attempting to acquire Manchester United,<sup>197</sup> and acquiring the Los

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<sup>197</sup> The BSkyB—Manchester United transaction was a major attempt to solidify News Corporation's backbone in the United Kingdom, Europe, and around the world. The transaction was rejected by the Competition Commission in early April of 1999. Regardless, the attempted transaction is still an example of the complexity of antitrust analysis in the face of a News Corporation transaction. With a variety of relevant product markets and geographic markets at issue, U.K. antitrust regulators very well may not have focused on the more international anti-competitive effects and international public policy concerns that the potential merger created. While the Competition Commission's decision was to reject the merger, it is apparent that, at least in that case, the nation-based concerns resulted in the same result that would have followed in an international context of antitrust scrutiny. A similar result is not likely in every News Corporation transaction that raises international antitrust concern. With the myriad of factors at play in nation-based analysis, the international factors seem to fade into the background, even though "international" antitrust concerns have direct national implications on a tertiary level.

The reality was that many different product markets were relevant depending on through what product filter one looked at the BSkyB—Manchester United transaction. There were two, broad ranging, universal markets that were potentially effected by the merger: the broadcast-media market and the actual football club market. On a more detailed level, these two broad markets break down into other variations. Some of these markets included: the overall broadcast market, the overall sports-media broadcast market, the market for broadcast of Premier League football games and Manchester United football games, the market of football teams and Premier League football teams, the market for a certain caliber of team, the market for teams to gain broadcast slots, and the advertising market. The further difficulty in determining the relevant product market is that in sports broadcast-media, geographic market definition is difficult to separate from the product itself. The broadcast product changes as the geographic market changes. Such is the true beauty of Murdoch's overall strategy. As he acquires various sports properties and media entities across national borders he combines products, offers them in different packages, forms, and in turn changes the products as he expands the geography of where these products are offered.

With respect to the BSkyB—Manchester United transaction, the U.K. football club market was unfortunately too readily apparent. Looking at the market concentrations at this level lead one to believe that the BSkyB—Manchester United merger presented very little concern. As the press noted, "Given that Sky is buying but a single club, it is hard to see where there is a real competition issue." City Editor, *Sky's the Limit for Man U*, SUNDAY TIMES, Sept. 9, 1998 (visited Jan. 13, 2000) <<http://www.sunday-times.co.uk/news/pages/tim/98/09/09/timbizpat01001.html?2501972>>. The real market concerns over power concentration are, however, in the realm of broadcast-media—the broader market (worldwide and U.K.) all the way down to the football broadcast market. In the end, U.K. competition regulators recognized this, yet, only with respect to the U.K. market.

The true product market conceptualization difficulty in the BSkyB—Manchester United antitrust analysis emanated from the convergence of both broader markets—the football and broadcast markets—and the dynamic and

Angeles Dodgers<sup>198</sup> (and similar entities), Murdoch's business strategy is simple—create a “product network” of complete control. By controlling both ends of the product—the assembly (the

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confusing definition of those product markets in the context of varying geographic markets. The resulting antitrust concern lay in what anti-competitive conduct could ensue from such a merger—something that plainly results from the simple combination of the world's most extensive sports-media network (that is fully entrenched in the United Kingdom) and the world's most popular football club. Traditional antitrust analysis, which is not circumscribed to deal with such confluence and adaptation of market structures, could never really grasp the fullness of the anti-competitive effect without realizing the three-dimensional nature of the true product market at issue in the BskyB/Manchester United merger.

Most importantly, in the United Kingdom, control over football broadcast rights in many ways determines the success (subscriber level) of a particular broadcast service. By purchasing Manchester United, BskyB potentially could have exploited this inefficiency in the broadcast market by leveraging one quasi-monopoly (Manchester United) too artificially, i.e. not competing on a basis of price, service, innovation, etc.; propping-up the underlying business or other products; and creating or artificially reinforcing another monopoly, the broadcast service. This is known as monopoly leveraging. *See infra* note 202 (citing *United States v. Griffith*, 334 U.S. 100, 108 (1948)). In such a climate, BskyB most likely would have been able to charge a higher overall price than would have been the case if it did not control Manchester United's broadcast destiny as such matters would instead be determined by “market-factors.” In a “market” scenario BskyB has to compete with other media outlets for broadcast rights—sitting on only one side of the bargaining table. On the surface, allowing BskyB to control Manchester United might have appeared to promote pure competition among rival clubs—essentially rival businesses. To BskyB and News Corporation, however, control of Manchester United meant power, media power that had very little to do with just the United Kingdom and everything to do with a “world TV picture,” and at best, had very little to do with “the beautiful game.”

<sup>198</sup> Murdoch has already begun to use News Corporation's monetary girth in supporting the Los Angeles Dodgers. For example, the Dodgers spent \$105 million over seven years to obtain all-star Pitcher Kevin Brown. The contract, at the time, was a baseball record. *See* Ronald Blum, *Brown Signs for \$105 Million Dodgers Snare Padres Pitcher with Baseball's Richest Contract*, PITT. POST-GAZETTE, Dec. 13, 1998, at D16, available in 1998 WL 14519604. Upon the announcement of the deal it was noted in the press that Brown's \$100 million plus deal may have signaled the beginning of the end for small-market teams. *See id.*

The Cincinnati Reds, a small-market team, recently successfully traded for and signed future hall-of-famer Ken Griffey Jr. *See* Jim Cour, *Griffey Era Ends in Seattle*, (last modified Feb. 10, 2000) <<http://espn.go.com/mlb/news/2000/0210/380700.html>>. This deal is commonly seen as the exception to small market teams being able to attract and afford big-name talent. Mr. Griffey requested the trade for family and personal reasons, also accepting what was widely believed to be below-market pay. *See* Peter Gammons, *Cincinnati Going Goofy for Griffey*, (last modified February 12, 2000) <<http://espn.go.com/gammon/s/update/0212.html>>.



trol. By controlling both ends of the product—the assembly (the team itself) and the packaging (the broadcast network)—he determines all allocation factors.<sup>199</sup> In more general terms, Murdoch has constructed a delicate web of control in which he owns and/or controls terrestrial television and satellite-television outlets, major newspapers, and leading major league sports franchises and stadia. As Murdoch gains more control over the general broadcast-media product, he solidifies his ability to bury his rivals throughout the world.

News Corporation's extensive worldwide distribution, marketing, and support system is unparalleled. News Corporation, via various entities that it either owns or controls, adds small pieces to this network every year. These pieces, when considered part of the greater whole that is News Corporation, come together to form a powerful structure that can deliver services and products that no other media organization can deliver. In essence, Murdoch has created a product market encapsulated by his own distribution network. Despite the wide range of new choices that News Corporation as a whole can offer consumers, there is a highly dangerous element that underlies each of these

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<sup>199</sup> Such control by media entities, just on competitive terms within a sports league itself, produces an anti-competitive situation. As Arsène Wenger, manager of the Arsenal Football Club, a competing club in the Premier League, noted about the then pending BskyB/Manchester United merger and future media-football club mergers, "The big danger is when three or four [clubs] can break away from the others and the rest cannot keep up . . . . They can pay players three or four times the salary. The rules of the game could change if four or five clubs have owners from the media." Matt Dickinson, *Carlton Sets its Sights on Arsenal*, *TIMES* (London), Sept. 11, 1998, available in 1998 WL4862198. With News Corporation's current holdings of American sports teams and networks, concern that such a scenario may occur on the other side of the Atlantic, regardless of the sport, is not unwarranted. The concern should not be just for the competitive health of a league, but also for the broader "distribution network control" implications. To News Corporation, sports teams and networks are just tools of international construction and reinforcement. This is precisely the point that nation-based antitrust law misses. For a closer look at the application of antitrust law to sports leagues in the context of growing corporate ownership, see Thomas Kennedy, Comment, *Will America's Pastime Be a Part Of America's Future?: An Antitrust Analysis That Enables Sports Leagues to Compete Effectively in the Entertainment Market*, 46 *UCLA L. REV.* 577 (1998).

choices. All of these choices are produced, packaged, and distributed by News Corporation.<sup>200</sup>

The true antitrust question is whether one entity should have so much market power in broadcast-media.<sup>201</sup> While Murdoch is able to use his expansive network and media-power to create products and variety for the consumer that previously did not exist, there are negative externalities that arise in this network that are too detrimental to ignore. For example, one entity ends up holding vast economic power in the television content market. This leads to the constructive question: how does antitrust regulation account for this?<sup>202</sup>

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<sup>200</sup> In an abstract sense, News Corporation's distribution network is the type of vertically integrated network that usually raises interoperability concerns. As one author described interoperability:

An antitrust concern over standards for interoperability, or interface standards, may arise where third parties seek access to the network, where communication among elements of the network is governed by particular standards, and where a party (or an exclusive group) has intellectual property rights that ostensibly control access to the network through control over a dominant technology and/or standards.

Arquit, *supra* note 2, at 162.

<sup>201</sup> Such non-economic concerns over concentration frequently enter the antitrust calculus. This paper specifically addresses this historical trend. See *supra* notes 6-17 and accompanying text.

<sup>202</sup> The entirety of the News Corporation antitrust problem closely resembles the anti-competitive network effects paradox/problem posed by the Microsoft Corporation. News Corporation and Microsoft both have constructed distribution networks that embody a true monopoly. Microsoft's Windows operating system is quite similar to News Corporation's media network. Without those "networks," consumers could not access multitudes of front-end products. Both Microsoft and News Corporation own and control exclusive conduits for products. Via such conduits, both entities can engage in monopoly leveraging—using the conduit monopoly to gain an unfair advantage in secondary product markets (content, i.e., computer software [Microsoft] or programming [News Corporation]). See generally *United States v. Griffith*, 334 U.S. 100, 108 (1948) (detailing the concept of monopoly leveraging). The policy questions are very much the same. Despite the benefits to the consumer and the reality that no other entity could bring such products to the market, the dilemma is clear—are consumers really better off having to access News Corporation and Microsoft Corporation for so many products? While this comparison is certainly revealing, it is beyond the scope of this Article.

For background on the antitrust issues raised by the conduct of Microsoft, see generally Michael P. Kenny & William H. Jordan, *United States v. Microsoft: Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351, 1356-58 (1998) (arguing that the Department of Justice usurped its statutory authority in issuing the consent decree in the first Microsoft case, and noting, "The dispute resolution process the Division initially de-

Oftentimes, the international effects of News Corporation transactions escape the eyes of national antitrust regulators.<sup>203</sup>

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cided to use to challenge Microsoft's distribution of Internet Explorer . . . could not have been more ill-conceived for resolving this complex issue . . . [and] the common-law tradition of antitrust is better served when novel cases presenting controversial issues are resolved in the due course of open litigation on the merits, and not through the back door of truncated contempt proceedings"); Charles F. Rule, *Overview of Section 2 of the Sherman Act and its Application to Microsoft*, in INTELLECTUAL PROPERTY ANTITRUST 1998, at 253 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 64-4037, 1998) (delineating the basic legal arguments behind the antitrust issues surrounding Microsoft); Abraham Perlstein, *Microsoft and its Antitrust Violations*, 11 J. SUFFOLK ACAD. L. 85 (1996) (detailing an analysis of the potential antitrust violations of Microsoft in the context of the IBM and AT&T antitrust cases and the connection of the computer industry to the health of the economy); Daniel J. Gifford, *Microsoft Corporation, The Justice Department, and Antitrust Theory*, 25 SW. U. L. REV. 621 (1996) (using the Microsoft case as catalyst for a policy analysis of the Justice Department's current theoretical underpinnings that motivate its approach to antitrust regulation); Willard K. Tom et al., *Competitive Impact Statement in United States v. Microsoft Corporation*, in TECHNOLOGY LICENSING LITIGATION 1995, at 404, 449 (PLI Patents, Copyrights, Trademarks, and Literary Property Handbook Series No. 64-4037, 1998) (setting forth the statutorily required Competitive Impact Statement which delineates the government's arguments in the first Microsoft case); Victoria E. Briant, *The Microsoft Consent Decree: A Case Study (and a Suggestion that Antitrust Enforcement Become Less Political)*, C137 ALL-ABA COURSE OF STUDY: ANTITRUST/INTELLECTUAL PROPERTY CLAIMS IN HIGH TECHNOLOGY MARKETS 55 (1995) (commenting on the political underside of the Microsoft consent decree—that of avoiding potentially long litigation that would span future administrations which might not share the same view of Microsoft's actions—and arguing for institutional change that might create a less politicized atmosphere and more consistency in antitrust regulation); Robert P. Taylor, *Pilkington, Microsoft, and S.C. Johnson Signal a Policy Shift at the DOJ*, 9 ANTITRUST 23, 23 (Fall 1994) (arguing that via the Draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property and the Pilkington, Microsoft, and S.C. Johnson cases, a picture emerges of what the Department's rekindled interest in intellectual property may portend. The preview, however, is not at all clear. Although there is no basis for predicting a return to the rigid per se approach used by the Department to analyze these transactions during the 1970s, it is apparent that this Justice Department is likely to be substantially more interventionist than its predecessors).

<sup>203</sup> The U.K. regulatory stance on the BskyB purchase of Manchester United serves as a good example of the phenomenon. Upon referral to the Mergers and Monopolies Commission ("MMC"), the MMC itself posted a letter detailing the specific competition questions it was investigating in its determination on the merger. See Mergers and Monopolies Commission, *BskyB/Manchester United Merger Inquiry*, BSKYB/MANCHESTER UNITED: ISSUES LETTER (visited Feb. 7, 2000) <<http://www.mmc.gov.uk/bskyiss.htm>>. In its market inquiry, the MMC focus was somewhat open-ended, leaving room for some international concentration concerns. However, noticeably absent is any inquiry about any interconnection between BskyB

When News Corporation purchases media outlets in a jurisdiction in which it previously did not operate, traditional antitrust red flags never rise. Even when News Corporation purchases entities in a jurisdiction in which it previously operated, regulators are slow to show concern. The U.K. regulatory investigation into BSkyB's purchase of Manchester United was the exception.<sup>204</sup> Despite the rejection of the merger by the U.K. Competition Commission,<sup>205</sup> is clear that its analysis was not based upon international antitrust concerns.<sup>206</sup>

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and any other News Corporation entity. *See id.* The letter focuses primarily upon a long list of public interest questions. Interestingly enough, the focus within this section is without exception upon the football and U.K. broadcast market effects of the transaction. The only mention of News Corporation, while straightforward enough, is quite revealing. It asks "[w]hether News International has the ability materially to influence BSkyB and whether this raises public interest issues additional to those identified in this letter." *Id.* If U.K. competition regulators are only at this point in their understanding of News Corporation, one must pause to wonder if they truly appreciate the macro motivations behind the transaction itself. By all means, this is not to fault the regulators themselves. Rather such misunderstandings demonstrate the inadequacy of nation-based antitrust law to compensate for multinational corporation conglomerate international business strategy. In this instance, it is clear that U.K. antitrust law itself dictates the angle at which U.K. competition regulators view the BSkyB/Manchester United transaction. From such an angle, viewing the transaction from the outset as merely a News Corporation transaction is difficult, if not technically impossible, due to the particular corporate ownership structures of News Corporation and BSkyB.

<sup>204</sup> See Chris Ayres, *Mandelson Refers BSkyB's Man United Bid to MMC*, SUNDAY TIMES, Oct. 30, 1998 (visited Mar. 24, 2000) <<http://www.sunday-times.co.uk/news/pages/tim/98/10/30/timbizbiz02028.html?2501972>>.

<sup>205</sup> See *Summary of British Sky Broadcasting Group PLC Manchester United PLC: A Report on the Proposed Merger* (visited Mar. 24, 2000) <<http://www.mmc.gov.uk/cm4305.htm>>.

<sup>206</sup> See *id.* The analysis, while taking a broad look at the impact of the merger on the broadcast market itself, tended to focus on sports broadcasting specifically. In addition, nowhere in the analysis was a mention of international effect. *See id.* The following excerpt from a commentary on the BSkyB/Manchester United deal elucidates the antitrust dynamic of concern—the paradox of conflicting national and international concerns—giving flavor and color to the control and morphing of product markets by News Corporation:

At the same time another report, this time in last Sunday's Observer, should also set alarm bells ringing throughout the Premier League [the top-flight U.K. football league in which Manchester United competes]. 'Rupert's Fox is off and running' was the headline on a story that revealed Premiership matches are being shown on a pay-per-view basis in the United States through Fox Sports Network. Fox bought rights to the Premiership from IMG/Canal Plus, who paid £100m for

While it is true that some jurisdictions—particularly the United States<sup>207</sup>—provide for some measure of antitrust extraterritoriality, those provisions are usually centered on anti-competitive effects that are felt in the regulating national jurisdiction.<sup>208</sup> Virtually no national antitrust provisions capture the

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the overseas sales, to screen the Premiership matches live in the United States. “Fox are pushing very hard with soccer in America,” crowed Andrew Croker, of IMG. Of course they are. Fox are owned by Rupert Murdoch, who just happens to own BSkyB and soon Manchester United. A substantial number of live Sky matches in a season involve United and so this fits neatly into the ‘globalisation’ plan of the [Manchester United] board. Other Murdoch groups which have Premiership deals include Fox in Australia and Latin and South America as well as JSkyB in Japan, Sky in New Zealand and ESS, a joint venture with ESPN, in India, Pakistan, Taiwan and the Middle East. It gives the Premiership access to around 170 million subscribers worldwide. While there is no suggestion that Fox, ESS or JSkyB will abuse the contract over the next three years by screening Manchester United incessantly, even though they can screen whoever they want as their live match, other clubs will be monitoring the situation. By thinking they are creating a market for English soccer abroad, the Premier League might simply be strengthening Manchester United’s position. If the television contract negotiations become a free-for-all in 2001, with the clubs holding the television rights to their own games, then no one in the Premiership will be able to rival United’s dominance. Not only will United hold the strongest hand in Britain but they will also have the agreements in place to attack the American, Far East, Australian and South American markets—which every Premier club has identified as key to future expansion in merchandising.

Colin Gibson, *How the Sky Fell in on the Premiership*, ELECTRONIC TELEGRAPH (Sept. 13, 1998) <<http://www.telegraph.co.uk/et?ac=000258787409999&rtmo=lwlnunnt&atmo.../sfmna213.htm>>.

<sup>207</sup> The United States’ extraterritorial application of antitrust law is embodied within what is known as the “effects” doctrine. The effects doctrine, circumscribed by court cases and statutes, states that a foreign entity may come under the scrutiny of U.S. antitrust laws if the alleged conduct was intentional and affects U.S. commerce in a direct, substantial, and reasonably foreseeable manner. See, e.g., Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1997); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); Stark, *supra* note 1, at 662.

<sup>208</sup> “Certain commentators have argued that U.S. assertions of extraterritorial jurisdiction are often problematic and that [U.S.] courts tend to be cavalier about other nations’ interests.” Debra A. Valentine, *Building A Cooperative Framework for Oversight in Mergers—The Answer to Extraterritorial Issues in Merger Review*, 6 GEO. MASON L. REV. 525 (1998); see also Stark, *supra* note 1, at 660-62. In general, the degree of extraterritoriality varies greatly from nation to nation. As Guzman notes,

negative antitrust effect that occurs cross-jurisdictionally in a product/geographic market sphere that is truly international.

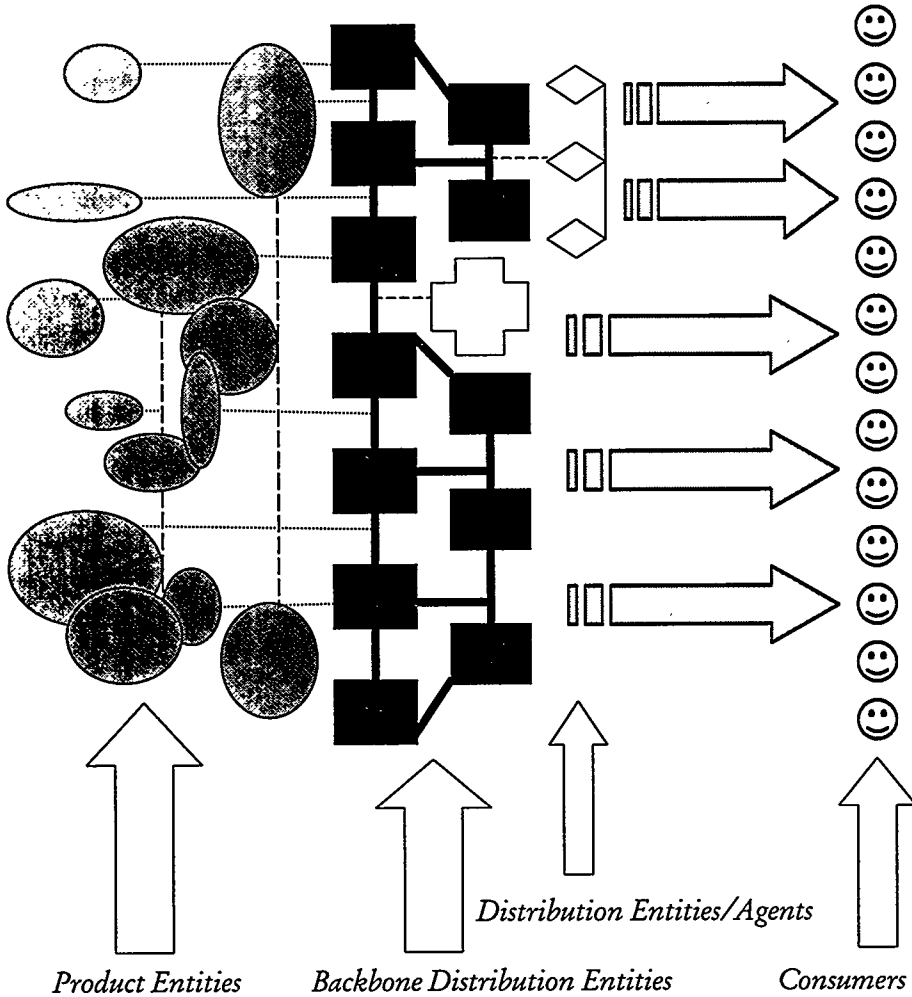
4.2. *The Redefinition of Product: A Distribution Network Establishes A Product Network*

The key to understanding the fundamental antitrust problem precipitated by News Corporation is an understanding of the evolution of the News Corporation product. As implied above, the ultimate product that the News Corporation currently offers the consumer is a broadcast-media distribution network. Distinct from the sub-products delivered by the network, the network itself is what consumers pay for when they each access the News Corporation product. Whether the consumer is a citizen of the United States who pays to view Premier Football League matches via Fox Sports World or is a citizen of the People's Republic of China who pays to view ESPN/STAR Sports, the consumer pays to gain the viewing power that News Corporation affords. The end-product to the user—that which factors into the user's own demand curve and preferences—may be the programming options themselves. Schematically, the current News Corporation dynamic could be viewed as the following abstract diagram:

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Countries vary in their abilities to regulate foreign activity. At one extreme, for example, is a country that has minimal power over the behavior of foreign firms because those firms do only a small fraction of their business in the country and hold no assets there. Such a country, even if it threatens to deny access to the national market, will be relatively powerless to affect the behavior of foreign firms. Alternatively, a country may simply decide that it does not wish to apply its laws to conduct that occurs abroad, leaving foreign conduct beyond its reach.

Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1506 (1998). Guzman's comments allude to the connection between trade and antitrust policy. This connection is further discussed in note 249.



The diagram graphically delineates how News Corporation’s distribution backbone system operates. The major players that participate to bring the broadcast-media product to the market are divided into four categories: product entities, distribution entities, distribution agents and consumers.

- *PRODUCT ENTITIES* primarily produce broadcast product. Television production companies like Twentieth Century Fox

are the most obvious examples. However, sports teams are likewise product entities.

- *DISTRIBUTION ENTITIES*, as the term aptly describes, primarily focus on the distribution of media product. These entities essentially integrate the connections between different product entities, in turn amalgamating a package of broadcast items for delivery to consumers. These entities also house marketing mechanisms. DBS providers often fill this role. Entities such as BSkyB, STAR, and DirectTV constitute distribution entities. In the future, high-speed Internet modem access by cable and local exchange companies will play a major role in distribution.
- *DISTRIBUTION AGENTS* function as intermediaries between distribution entities and consumers, oftentimes obtaining a package of broadcast items from a distribution entity and then repackaging them for final sale to the consumer. Many cable companies function as distribution agents. Entities such as TCI, Comcast/MediaOne, and Time Warner Cable constitute distribution agents.

The uniqueness of the News Corporation scheme is not so much in how the business organization is structured—there exist numerous other media entities that share similar vertically integrative strategies. The benefits of vertical integration are by no means a novel concept. Rather, it is the extent of the vertical integration—at numerous points along the horizontal line—that makes News Corporation unique in its market power.

The more core distribution entities that News Corporation controls, the more News Corporation gains in furthering control over both product entities and distribution agents. In attaining control, News Corporation uses its previously gained core distributional control as leverage. In many ways, BSkyB controls both the product entity and distribution agent sides of the broadcast equation even though it does not specifically own or directly control each entity's price structure. While BSkyB may not specifically own the Premier Football League or particular cable-based outlets in the U.K., BSkyB wields massive control over those entities as they depend on the BSkyB product to maintain their respective minimum efficiency scales. BSkyB also fosters



control via media partnerships with product producers.<sup>209</sup> Without the BSkyB distributional muscle, broadcast video products are at a disadvantage in market competition, as are U.K. cable outlets that lack access to competitive programming. Those associated with BSkyB see BSkyB's way of doing business in a different light, claiming that "BSkyB has been a force for good in every sense—it has introduced choice into the market . . . . I think it's an amazing company. It's one of the great success stories of our time. And it will still go from strength to strength."<sup>210</sup> BSkyB may have originally infused competitiveness into the British video broadcast market. That state of competitiveness, however, is now questionable.<sup>211</sup>

Product entities depend on end-user distribution for competitive survival, end-user distribution agents depend on product for competitive survival, and News Corporation controls the conduit and major sources of related product that feed this mutually dependent relationship.<sup>212</sup> Historically, News Corporation has reified its power control position by expanding its existing distributional network via merger and acquisition—regardless of what new technologies emerge in broadcast-media delivery.

Yet, as digital cable and high-speed integrated telecommunications promise to "level the playing field" in satellite-television-dominated areas of the world,<sup>213</sup> it is quite possible that the current News Corporation distributional dominance will decline. To a certain point, News Corporation is not completely shifting away from distribution. Even as digital cable begins its initial in-

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<sup>209</sup> See Erich Boehm, *New Co-Ventures Signal Era of Partnerships*, VARIETY, Feb. 1-7, 1999, at 40 [Boehm, *New Co-Ventures*]. The writer notes that:

[BSkyB] is a partner in several top-brand thematic channels—including Nickelodeon (50%), the History Channel (50%), National Geographic (50%) and Paramount Comedy (25%). It also supplies programming to its distribution rivals, cablers Telewest, CWC and NTL, as well as the digital terrestrial platform ONdigital, and has working relationships with the established terrestrials, most notably the BBC, with which it shares rights to English Premier League soccer.

<sup>210</sup> Boehm, *Stratospheric*, *supra* note 133, at 36 (quoting Sam Chisholm, former BSkyB chief executive, current consultant to BSkyB).

<sup>211</sup> See *id.*

<sup>212</sup> The News Corporation dynamic of perpetuation of power is somewhat Foucault-like in operation. See 2 MICHEL FOUCAULT, *AESTHETICS, METHOD, AND EPISTEMOLOGY: ESSENTIAL WORKS OF FOUCAULT, 1954-1984*, (James D. Faubion ed., 1998).

<sup>213</sup> 1997 KEY NOTE REPORT, *supra* note 37, at \*25.

roads into the broadcast marketplace, News Corporation is mounting its own digital cable onslaught, particularly in the United Kingdom.<sup>214</sup> News Corporation is using its current distributional dominance to leverage a dominant position in the broadcast marketplace that results from whatever video broadcast-media delivery mechanism emerges in the future. News Corporation is creating this leveraged position by shifting its control toward content entities and pairing this control with strategic distribution relationships with different delivery entities.

News Corporation is quickly shifting its focus toward direct control over specific product entities. In the rapidly evolving "media-delivery" marketplace, where the ultimate delivery method of choice is unclear, News Corporation is hedging its monopolistic bets. As quickly as it gained market power in delivery, News Corporation is shifting and translating this power into the media product marketplace. News Corporation leverages its distributional control to gain this direct control. News Corporation is also creating strategic partnerships with various delivery partners in different "integrated" relationships. For example, the second largest shareholder of News Corporation is cable magnate John Malone, who, via LibertyMedia, is the largest shareholder of the telecommunications and cable giant Time Warner.<sup>215</sup> While delivery methods may change, media product is what the consumer desires. Whatever delivery emerges at the end of the current evolutionary period, News Corporation will be strongly positioned by its strategic partnerships providing cheap and efficient delivery of the product it already controls.

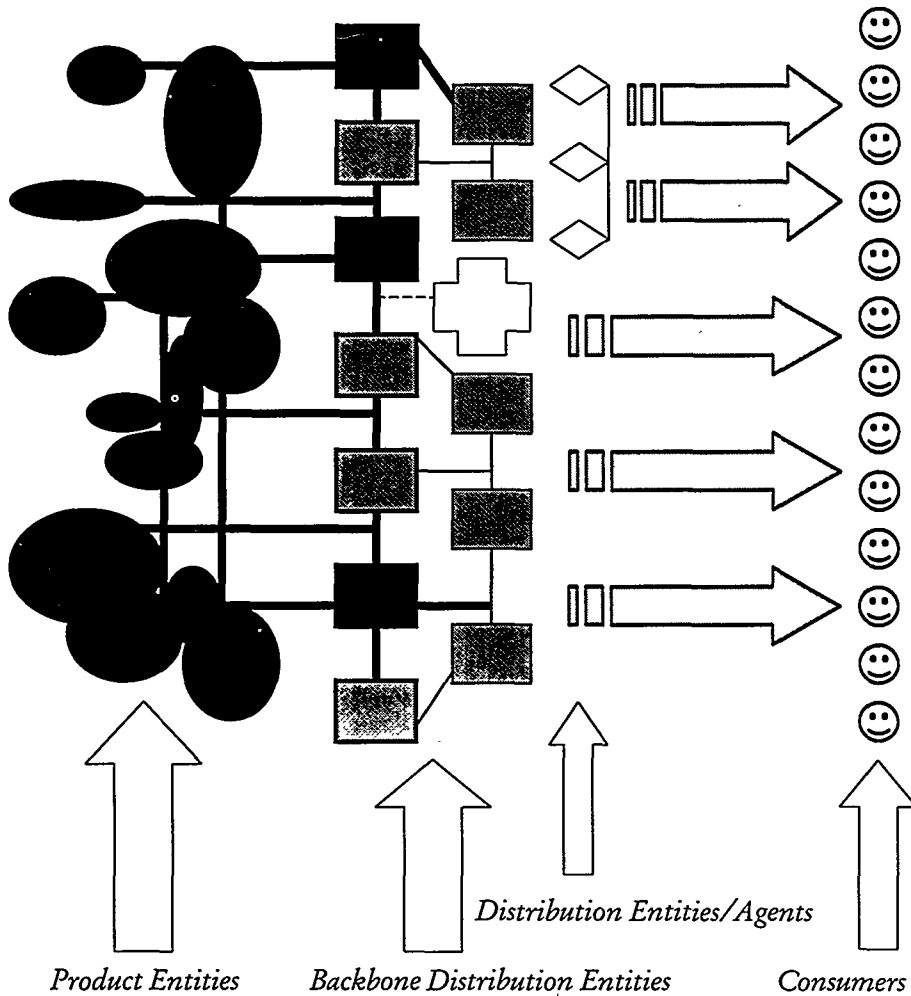
This emerging second stage in the evolution of News Corporation can be portrayed by the following abstract diagram. While the entities and structure remain the same as the first schematic, the control structure changes. The power now flows through News Corporation, the content owner. News Corporation's strategic relationships with various methods and providers of broadcast-media allow it to be strongly positioned, regardless of which delivery method emerges as the market leader. In this uncertain *delivery* climate, control over specific consumer-desired broadcast-media *product* leads to the only truly powerful market

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<sup>214</sup> See *Digital Television Introduction*, *supra* note 53; see also *supra* notes 51-54 and accompanying text.

<sup>215</sup> See *supra* notes 55-56 and accompanying text. For a discussion of the AOL-Time Warner merger, see *supra* notes 26, 60 and accompanying text.

position. Power thus shifts from *distribution* to the *content owner*, in the following manner:



4.3. *The Pragmatic Problems of Regulating the Anti-competitive Conduct of News Corporation*

On purely a functional level, attempting to regulate the anti-competitive conduct of News Corporation presents myriad inefficiencies and difficulties. All of these problems share a common cause—nation-based antitrust regulation—and a common re-

sult—differentiated treatment. When large vertically and horizontally integrated multinational entities like News Corporation enter the regulatory picture, the inefficiencies only become magnified. Significant conflicts of law questions arise, mutual full faith and credit between countries begins to slip, and national sovereignty becomes an all too familiar defense mechanism.

Many of these differentiated treatment problems begin as questions about jurisdiction. Valid jurisdiction in the antitrust context varies, as always, from forum to forum. The elements themselves, however, usually remain the same from nation to nation, encompassing, in some manner, competitive effects, product market, and geographic market.<sup>216</sup>

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<sup>216</sup> In some balance, the combination of above mentioned factors must be such that the regulating nation has some valid interest in actual regulation of the transaction. The difficulty lies in how competition regulators choose to circumscribe these elements. A jurisdiction that certainly has an interest in the transaction, but has no underlying structural power to adjudicate that particular transaction, gives one pause to wonder how effectively such jurisdictional constraints may operate in reality. See G. Porter Elliott, *Learning to Fly: The European Commission Enters Unfamiliar Skies in its Review of the British Airways-American Airlines Alliance*, 64 J. AIR L. & COM. 157, 160-61 (1998). Elliot describes how the European Commission competition regulators manipulated their grant of authority in exercising jurisdiction in the politically pivotal British Airways/American Airlines ("BA/AA") alliance case:

Despite having based its review of the BA/AA alliance on a virtually obsolete treaty provision, the Commission refused to acknowledge its relative legal impotence, remaining resolute amidst challenges to its . . . established antitrust systems. Rightly or wrongly, the Commission established itself as a regulatory body to be taken seriously on both sides of the Atlantic in a sector where its extraterritorial jurisdiction for so long had been unclear.

*Id.* (citations omitted).

The BA/AA alliance case pitted the EC against British competition regulators in a battle for regulatory power. Obviously, the EC won out, yet, in terms of pragmatic implications for the EU as a whole, the case resonates on a larger level: "The possibility of concurrent reviews by the Commission and Member States has given rise to a battle of competencies, which, based on its actions in the BA/AA case, it appears the Commission is winning by might, if not by right." *Id.* at 163. Simply stated, the BA/AA case only further underscores how antitrust jurisdiction is, at its core, a result of political considerations, regardless of the structural legal gymnastics in which a competition regulatory agency must engage to "validly" obtain jurisdiction. Validity, as critical legal scholarship is quick to point out, is all relative, and thus, reality (which itself is pure conjecture and artifice) is purely indeterminate. See Eric K. Weingarten, Comment, *An Indeterminate Mix of Due Process and Equal Protection: The Undertow of In Forma Pauperis*, 75 DENV. U. L. REV. 631, 651 (1998). As one of the authors of this Article duly noted,

Multiple problems ensue from the threshold issue of jurisdiction.<sup>217</sup> Conceivably, a country that is relatively unaffected by a transaction could still potentially enforce some sort of jurisdiction over a particular transaction. An affected nation might prefer to turn a blind eye to the anti-competitive effects of a particular transaction and not pursue jurisdiction where it rightfully could. The regulatory situation becomes even more convoluted when anti-competitive conduct affects multiple nations in different ways. The current structure of nation-based antitrust regulation precipitates a host of jurisdictional determinations that either conflict, are unnecessarily duplicative, or are inadequate. These jurisdictional conflicts lead to the next pragmatic problem—substantive conflict of antitrust law application.

The larger problems surrounding substantive application of varying antitrust law from jurisdiction to jurisdiction are obvious and well known. Conduct allowable in one jurisdiction may not be legal in another jurisdiction. The practical complications arising from these basic conflicts of law, however, are more subtle when dealing with a continuously evolving new product—particularized by the News Corporation dynamic.

The following scenario demonstrates this subtle complication. News Corporation—a multinational conglomerate—does most of its business in the United States. Among other places, News Corporation also holds assets in Europe, China, and Australia. News Corporation attempts to merge with Company B, which is

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The radical indeterminacy argument can be drawn out to absurd lengths. Taken to extremes, everything, anywhere in the universe, is entirely indeterminate because it can only be defined relative to something else. That “something else” itself must be defined before it can be used in relation to the original object, color, shape, etc., for definitional purposes. In turn, the “something else” is defined in relation to another “something else,” and so on, and so on ad nauseum. So every [legal] term . . . is in the purest sense indeterminate. However . . . some terms can be defined with sufficient determinacy if placed in a quantifiable matrix.

*Id.*

All absurdity aside, the point should now be painfully clear. Current nation-based jurisdictional constructs are too vague to supply a sufficient amount of determinacy. In other words, the current antitrust matrix is simply not sufficiently quantifiable. Jurisdictional questions currently present a rather easy avenue for political considerations to overtake quality economic analysis in the totality of the antitrust regulatory calculus.

<sup>217</sup> See discussion *supra* note 216.

headquartered in Australia. Company B also holds assets in China. By law, both companies must file for pre-merger notification in both the United States and the European Union. Yet, while no pre-merger notification is required in China, due to a jurisdictional clause in China's regulatory code, China decides to challenge the merger (despite no pre-notification requirement). The merger is allowed by both the United States and the European Union. China blocks the merger and freezes the assets in China of News Corporation and Company B until both agree to consent decrees.

Despite the high cost involved, the transaction may proceed, regardless of the proceedings in China. Due to the ethereal nature of the broadcast-media product,<sup>218</sup> it is likely that News Corporation and Company B will proceed with the merger in some capacity, and begin service as a new entity in the United States and the European Union. It obtains consent decrees, ordering a partial sale of assets, some of which are based in Australia. News Corporation/Company B fails to assent to the signed decree. In turn, a China-based competitor of News Corporation/Company B seeks to have the consent decree enforced by an Australian court. The Australian court refuses to enforce the consent decree on the grounds that China had no valid jurisdiction to mandate disposal of Australian-based assets.

The above scenario may never see fruition, since faced with mounting litigation or administrative costs, the newly formed company—News Corporation/Company B—may just choose to sell off assets in China to avoid any further costs. Either way, while China maintains its sovereignty in antitrust, the efficient result disappears. When such results ensue, other companies become more cautious about entering into similar transactions.<sup>219</sup>

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<sup>218</sup> In other words, the broadcast-media product is one that is inherently intangible, constantly changing, and difficult to define. The myriad transmission methods perpetuates the difficulty in regulating and "containing" such a product.

<sup>219</sup> It is true that such uncertainty of legal treatment often causes parties to agree to contract provisions for the resolution of future problems. Such impetus has spawned the growth and concomitant world acceptance of arbitration—a sort of "privatization" of the law. Arbitration essentially allows parties to limit uncertainty, and in turn contract more freely. See Stephan J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999). Unfortunately, the nature of antitrust is public, and as such arbitration, while somewhat useful in the abstract, has very little substantive value to antitrust *regulation*. The proposal forwarded by this

Particularly if China oversteps reasonable jurisdiction, the original action creates what amounts to negative externalities in the form of unneeded transaction costs and subsequent international business stalemate. These transaction costs manifest themselves in other companies' hesitance to enter into similar transactions in the future. In such a business environment, where efficient pro-competitive mergers such as the News Corporation/Company B merger are discouraged or thwarted, global Pareto efficiency is lost.

#### 4.4. *The Limitations of the Current Theoretical Underpinnings of Antitrust Regulation in the Context of News Corporation's Transactions of International Effect*

The primary thrust of the antitrust concern surrounding the expansion of News Corporation is excessive concentration of economic power.<sup>220</sup> The concern over News Corporation's, and

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article offers an arbitral element. It is, however, meant as a supplement to the antitrust regulatory matrix; a supplement that is intended to efficiently manage antitrust disputes that arise between two contracting parties—at this point a small minority of antitrust cases. It is envisioned that consistent antitrust arbitration results may encourage future contracting parties to include such arbitral provisions, and in turn, foster greater confidence and predictability in the substantive application of antitrust law. A more efficient global market may result, averting the market inefficiencies discussed in this section.

<sup>220</sup> See Ilene Knable Gotts, *The Competitive Analysis of Communications and Entertainment Mergers*, in TELECOMMUNICATIONS MERGERS & ACQUISITIONS: FINANCING, REGULATORY, AND BUSINESS ISSUES 1998, at 27, 29-31 (PLI Corporate Law and Practice Course Handbook Series No. 1060, 1998). Gotts delineates antitrust law's historical penchant for aspiring to achieve noble goals—goals that, while resonating with economic justification, strove to actively pursue equality and free access in markets. *Id.* Early on, in combating oppressive railroad monopolies in the late 1800s and with the passage of the Sherman Act in 1890, it was clear that antitrust had to be more than an economic concern. This is supported by Senator Sherman's statement, "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life." *Id.* at 29 (quoting Senator Sherman, found in A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 13 (2d ed. 1970)). Gotts notes that with advent and popularization of the Chicago School in the late 1970s and 1980s, political factors became de-emphasized in the antitrust calculus. *See id.* at 30-31. However, with respect to media antitrust issues specifically, Gotts points to a resurgence in recognizing the political concerns raised by concentration in the media industries. To illustrate, she quotes Robert Pitofsky, current chairman of the Federal Communications Commission, "Because I think decentralization in the media is central to a democratic society, I think you might want to pay more attention to mergers in book . . . magazine, newspaper or electronic media . . . [i]n those industries, there is more at stake than

in turn Murdoch's, growing control over an information and knowledge medium mirror the traditional fear of oppressive monopolistic power.<sup>221</sup> Despite such equation in underlying political theory something is lost in the regulatory transposition of this concern upon the situation at hand. Nation-based analysis, as mentioned throughout this article, supplies the front-end of the answer to why this analysis is so. These inadequacies of nation-based antitrust law, however, are merely the outgrowth of the underlying theoretical economic deficiencies, particularly those emanating from a lack of rational expectations analysis integrated into traditional antitrust calculus. On the most basic terms, these theoretical deficiencies inhibit regulators' abilities to fully describe and inspect consumers' and firms' internationalized reactions to the 'domestic' business conduct of News Corporation.<sup>222</sup>

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high prices or low quality to consumers—there is a more fundamental issue of avoiding centralized control over access to the [marketplace] of ideas.” *Id.* at 31 (quoting Robert Pitofsky, in Jube Shriver, Jr., *FTC to Broaden Investigation of Media Deal*, L.A. TIMES, Nov. 9, 1995, at D1, and Testimony of Robert Pitofsky before the Subcommittee on Antitrust Monopolies and Business Rights of the Senate Judiciary Committee 8-9 (Dec. 16, 1993)).

<sup>221</sup> See 54A AM. JUR. § 789 (1996) (citing a basis for antitrust statutes as the desire to “protect people from the possible tyranny and oppression of combined wealth”); see also Walther A. Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, U. COLO. L. REV. 257 (1995).

<sup>222</sup> On a purely economic level, current antitrust policy and practice is fundamentally rooted in Keynesian economic theory. At its most basic, Keynesian economic policy rests on the belief that markets in the real world are imperfect where “[t]he failure of prices to adjust to clear markets is a central element of [the root economic model].” ROBERT J. BARRO, *MACROECONOMICS* 593 (4th ed. 1993). Granted, Keynesian theory underlies even the most advanced current scholarship in economics; however, it is an understatement to say that economics has become more sophisticated since the advent of the bulk of antitrust case law. The problem is rather simple. Current antitrust law, particularly that in the United States, performs what is essentially a static, “historical snap-shot” analysis. However, in the 1970s and 1980s, the rational expectations school of economics emerged, demonstrating the tragic failures of exactly such a type of static macroeconomic policy analysis. For all its advancement over the past 20 years, antitrust law has failed to account for such realization. The rational expectations school has in a sense, left antitrust behind. While economists in the 1980s went about “a well defined and compelling research agenda—the application of rational expectations to the policy world—which is now more-or-less complete,” this task seems to be less complete in the area of antitrust, ironically one of the most identifiably ‘economic’ of legal areas. *Journey Beyond the Stars: The Brightest Young Economists are Outgrowing Their Discipline’s Traditional Boundaries*, *ECONOMIST*, Dec. 19, 1998, at 108. Rational expectations theory has been described as “a reaction against Keynesian thought which formalised the idea that people learn from their mistakes . . . .” *Id.* at 107. The foundations of the rational expecta-



As a broad generalization, competition regulations operate as functions of historically based data. That is, when government regulators and agencies across the world undertake competitive analysis of business activity, they rely upon historical data to draw conclusions about future competitive impact. While these analytical structures are readily evident in merger/acquisitions regulation,<sup>223</sup> they are no less structurally determinative in analysis of anti-competitive conduct itself.<sup>224</sup> The current inability to assess the impact of News Corporation transactions in a manner that accounts for international changes in consumer preferences and firm budget functions structurally limits regulators in pursuing valid regulatory justification.

When antitrust regulators examine mergers, common areas of analysis include concentration numbers (commonly calculated as the HHI), both product and geographic market definition and concentration analysis, competitive effect, and entry-factors.<sup>225</sup> The current methods of examining each area fail to recognize the above-described dynamic and, in turn, miss the structural changes in the marketplace that allow News Corporation to enjoy an international monopolistic position.

HHI numbers are based on historical percentage concentrations in particular product and geographic markets.<sup>226</sup> While it is

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tions approach are rooted in the idea that if economic models of policy choices do not account for individuals' (and corporations', for that matter) reactions to those policy choices themselves, the economic model as a whole is internally set-up for failure. *THE RATIONAL EXPECTATIONS REVOLUTION* xiv (Preston J. Miller ed., MIT Press 1994). It is important to note that antitrust policymaking, primarily done in an informal manner via agency and government guidelines, consent decrees, pre-merger analysis, and case law, does not completely mirror the sort of macroeconomic policymaking anticipated by the pure rational expectations school of thought. Regardless, on a more abstract scale, antitrust legal analysis can be critiqued by rational expectations, as firms' and individuals' budgets and cost structures are directly affected by particular decisions of the antitrust regulatory agencies.

<sup>223</sup> See, e.g., The 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (visited Feb. 7, 2000) <[http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html)> [hereinafter *U.S. Horizontal Merger Guidelines*]; The 1989 Merger Regulations, European Community (visited Feb. 7, 2000) <[http://europa.eu.int/eur-lex/en/lif/dat/1989/en\\_389R4064.html](http://europa.eu.int/eur-lex/en/lif/dat/1989/en_389R4064.html)> [hereinafter *EU Merger Regulations*].

<sup>224</sup> See, e.g., *Berkey Photo, Inc., v. Eastman Kodak Co.*, 603 F.2d. 263 (2d Cir. 1979) (analyzing—in an abuse of market power case—historical market concentrations for both plaintiff and defendant).

<sup>225</sup> See, e.g., *U.S. Horizontal Merger Guidelines*, *supra* note 223.

<sup>226</sup> See *id.* (describing market concentration and the compilations of HHI).

true that HHI numbers are merely a threshold element in the antitrust regulatory calculus, they create problems in light of current theoretical economic assumptions. If individuals and firms adjust preference and budget curves in response to government 'regulation,' then these numbers are likely to be inaccurate in predicting any future concentrations after a particular merger. Regulation in this context can be understood liberally—any action by the government with respect to the merger: approval, disapproval, consent decree, can be seen as macroeconomic policy to which consumers and firms react. Product and geographic market analysis both fail in a similar regard to concentration analysis. Product and geographic market analysis are commonly done by specifically analyzing consumer demand preferences between different goods and services. Again, if individuals adjust demand preference and budget curves in response to government 'regulation,' any demand preference or budget calculation based upon historical data is likely to be inaccurate in predicting any future consumer response after a particular merger.

Anti-competitive effect and entry factors are commonly determined by looking at firm production curves and responses to particular conduct.<sup>227</sup> While all of these factors focus analysis of the transaction in a normal *stochastic* manner, they do so based upon data and assumptions that are grounded in the normal *current* budgetary constraints of firms. Not only does this analysis fail to take into account how the competitive marketplace will react specifically to the transaction and regulation, but the analysis also fails to account for the changes in firm budgetary constraints that precipitate from technology advances, as manifested by News Corporation conduct.<sup>228</sup> Regulation of non-merger conduct fails on virtually identical grounds. If firms adjust their production choices in response to government 'regulation,' any firm production choice calculation based upon historical data is likely to be inaccurate in predicting any future firm response after a particular merger.

Specific to the News Corporation regulatory dilemma, this problem is exacerbated when consumers and firms react in an *international* manner upon regulation by antitrust authorities.

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<sup>227</sup> See HERBERT HOVERKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (1994).

<sup>228</sup> See discussion *supra* Section 3.

While News Corporation purchases entities that participate in domestic product markets, these purchases change the expectations of consumers and competing firms alike. When News Corporation makes these purchases, consumers react to a fundamental change in what products are now available to them. The News Corporation conduct alters the product offered, creating a more international product. Thus, consumers reclassify the News Corporation product, making formerly competitive products and services less attractive. News Corporation conduct forces formerly competitive firms to reassess in which product market they compete. Firms must reassess their ability to compete with the formerly non-News Corporation entity. As the News Corporation product and influence become more international, consumers shift their preferences and firms must change their production curves accordingly. Oftentimes firms determine that they will be unable to continue competing with the former non-News Corporation entity because the entity now constitutes a smaller part of a larger, differentiated product whole. News Corporation's transactions change the structure of broadcast-media competition. What appear to be domestic competitive entities are really the *domestic front-ends* of an international broadcast-media product. Former competitors cease to be competitors.

Very simply, when concentration data (HHI or otherwise) is based on historical, non-international concentrations and the substantive economic fallout from a particular merger is international, government regulators are likely to miss the major anti-trust concerns. As such, News Corporation transactions that facilitate the creation of an international product market structure that previously did not exist are less likely to be caught via the initial concentration threshold web. Similarly, in the heart of regulatory analysis, regulators are likely to examine consumer demand and firm production capabilities and responses in a framework that is unable to accurately predict and incorporate consumer and firm adjustment to the particular regulatory response itself.

The regulatory solution to the rational expectations critique is one of subtle change. The News Corporation dilemma elucidates how one might conquer the critique. The key is that the method of analysis must change. The method of antitrust analysis itself must allow regulators to speculate on how consumers and firms may react to the regulatory response, and in turn, adjust their

preferences/budgetary constraints. Such alterations in consumer demand and firm supply elasticities would be internally accounted for via a movement away from total reliance on historical data. Replacing this total reliance would be a concomitant emphasis on econometric analysis that would allow for alterations in relevant variables (i.e., demonstrating changes in consumer/firm expectations) *in accord* with variances in “antitrust policy” (i.e., different regulatory) outcomes. Such actual methodological adjustment should go far in enabling regulators to capture the growing international anti-competitive effects of transactions like those of News Corporation. While such structural change in analysis may enable nation-based antitrust regulators to capture more of an international focus, as we shall see in the next section, it is nation-based antitrust regulation itself that can be the ultimate limiting factor— even in the context of an internationally cooperative antitrust proposal.

##### 5. THE INTERNATIONAL ANTITRUST DEBATE & NEWS CORPORATION

Product demand is becoming more international in nature, and thus a force in the globalization of the product markets themselves. On a specific broadcast-media level, News Corporation helps further market globalization. Broadly speaking, “globalization of markets has led inevitably to proposals for the globalization of antitrust.”<sup>229</sup> On a pragmatic level, the international aspects of competition regulation are commonplace. As an attorney in the Antitrust Division of the U.S. Department of Justice noted, “Dealing with transnational competition issues— and

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<sup>229</sup> Some of the reasons cited for this proliferation include: attempts to reconcile competition policy and trade policy driven by a “growing recognition of links” between the two (*see generally infra* note 259); “the growing number of countries that enforce reasonably comprehensive and sophisticated systems of competition law has produced pressure from the business community and national governments to work toward more uniform systems of notification by private parties and greater cooperation between national authorities, and has created a desire for more uniform rules of both jurisdiction and substantive law”; substantive and enforcement conflict between nations over antitrust law; and the proliferation of “new competition regimes in developing market economies.” Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 560 (1994); *see also* Eleanor M. Fox, *International Antitrust: Against Minimum Rules; For Cosmopolitan Principles*, ANTITRUST BULL. 5 (1998) (discussing the globalization of markets).

working with our counterparts at competition agencies in other countries—are now a regular, everyday part of our work.”<sup>230</sup> The international antitrust quandary results directly from the fact that, while many transactions reside in a global economy, there is no concomitant international regulatory structure to mediate that economy.<sup>231</sup>

International antitrust regulation is a frequently debated subject. The debate focuses on either the harmonization of antitrust laws themselves,<sup>232</sup> the creation of a system of comity in the context of nation-based antitrust regulation, or a movement toward a world regime in a context similar to that of the WTO. This section presents a brief outline of the current approaches to solving

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<sup>230</sup> A. Douglas Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437, 437 (1998). Melamed was Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice at the time of writing; he delivered the article as a speech at a symposium at George Mason Law School. See *id.* Melamed notes,

Nearly 30 percent of the Antitrust Division’s enforcement work involves international or transnational matters.

Last year [1996], fines imposed for criminal antitrust violations exceeded \$200 million—by far the largest amount ever—and most of that came from international cartel activity.

The Division . . . had 25 [then] active grand jury investigations into possible international cartels, with potential defendants from more than 20 different foreign countries on 4 different continents.

On the civil side, too, both the Division and the FTC regularly deal with antitrust issues of global significance: mergers like BT/MCI and Ciba-Geigy/Sandoz and non-merger civil investigations like the now-settled investigations by the EC and the Antitrust Division of Microsoft.

*Id.*

<sup>231</sup> See *id.* Melamed adds,

While we live in a global economy, however, we do not live in a global state. There is no international antitrust code, nor are there international rules for resolving issues of jurisdiction and enforcement procedure. A key challenge facing all of us who are interested in competition policy is how to deal with transnational competition problems in a global economy in the absence of a global state—how, in the absence of international rules, to deal with the increasingly common phenomenon of marketplace conduct that takes place in one nation but has harmful effects in another nation.

*Id.* at 438.

<sup>232</sup> See, e.g., Waller, *supra* note 229.

the international antitrust quandary using News Corporation to demonstrate the limitations of each of these proposals.

### 5.1. *Current Approaches to International Antitrust Regulation*

Three basic international antitrust approaches are found in the literature and in practice: harmonization,<sup>233</sup> structuralized comity,<sup>234</sup> and "overarching framework principles" modeled in some sort of WTO context.<sup>235</sup> Harmonization holds that antitrust policy and practice can be molded into one coherent set of rules and procedures. Structuralized comity works from the opposite angle, utilizing "unilateral action including positive comity,"<sup>236</sup> or bilateral agreements that institutionalize comity. The overarching framework principles approach is somewhat of a hybrid, involving multinational treaties in which participating nations assent to a broad policy list of antitrust principles that require the extensive use of positive comity (either self-imposed or via bilateral/multinational agreement).

In the very broadest sense, the advocates of harmonization believe that the concept of antitrust, as positive law, is transferable from nation to nation, culture to culture, jurisdiction to jurisdiction.<sup>237</sup> Among the efforts toward harmonization, "[f]ive great attempts have been made to achieve a true international harmonization of competition law in the twentieth century," and "[n]one has been successful."<sup>238</sup> Current proposals for harmonization take various approaches:

The 1990s blueprint for international harmonization of antitrust law includes proposals for changing the jurisdiction over transnational anti-competitive behavior, the pro-

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<sup>233</sup> See *id.*

<sup>234</sup> See, e.g., Rill, *supra* note 3.

<sup>235</sup> Fox, *supra* note 229, at 5 n.1.

<sup>236</sup> *Id.* at 5.

<sup>237</sup> See Waller, *supra* note 229, at 562-69 (discussing the transferability of national law in a political theory/socio-political context, and relating that discussion specifically to the transferability of antitrust law).

<sup>238</sup> *Id.* at 558. Waller lists the following five: the League of Nations, the International Trade Organization ("ITO") [proposed], the Economic and Social Council of the United Nations, the Organization for Economic Cooperation and Development ("OECD"), and the United Nations Conference on Trade and Development. See *id.* at 558-59.

cedures for investigation of transnational competition matters and the substance of competition law, and suggestions for promoting antitrust enforcement in foreign markets as a means to enhance United States export and investment opportunities.<sup>239</sup>

A large push for harmonization has come from the United States, arguably the world's most experienced and active antitrust regulator. The U.S. antitrust enforcement agencies—the Department of Justice and the Federal Trade Commission—and the American Bar Association have been instrumental in efforts to export U.S.-style antitrust regulation to Japan, the Soviet Republics, and the developing economies in Eastern Europe.<sup>240</sup> This wholesale exportation has been viewed by some as nationalistic—protecting U.S. trade interests abroad, using the export of U.S.-style antitrust law as a “trade weapon.”<sup>241</sup> Under this protectionist rhetoric, American antitrust law is “competing with the competition law of the EU for the hearts and minds of eastern Europe.”<sup>242</sup>

The antitrust regulations promulgated by the EU harmonize antitrust law across national boundaries. The EU, via various constitutional and statutory mechanisms, enforces substantive antitrust and competition law found in the Treaty Establishing the European Economic Community (“Treaty of Rome”—1957). The majority of regulation is directly administered by Directorate General IV (“DG-IV”) headquartered in Brussels.<sup>243</sup> Cases are brought by the processes of notification, complaints, or public knowledge.<sup>244</sup> Member States of the EU have varying national en-

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<sup>239</sup> *Id.* at 559-60.

<sup>240</sup> *See id.* at 569-70.

<sup>241</sup> *Id.* at 571.

<sup>242</sup> *Id.* at 570. While the validity of exporting antitrust law is seen as rooted in positive law, this “competition” between the United States and EU reeks of normative legal judgement, as the following comment demonstrates, “EU competition provisions . . . ‘may do too much to protect individual competitors rather than the competitive process.’” *Id.* (quoting Janet Steiger, former Chairman of the Federal Trade Commission).

<sup>243</sup> *See* Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 *FORDHAM INT'L L. J.* 18, 31 (1996).

<sup>244</sup> *See id.*

forcement authority.<sup>245</sup> Generally speaking, substantive EU law supercedes national law.<sup>246</sup> The Draft International Antitrust Code was another effort towards harmonization.<sup>247</sup> Proposed by a group of antitrust scholars, the Draft was a direct attempt at implementing a unifying minimum set of antitrust standards to be adopted by the General Agreement of Tariffs and Trade ("GATT") nations.<sup>248</sup>

Positive comity is a much more common approach to the problem of transnational antitrust regulation.<sup>249</sup> Under traditional bilateral agreements, positive antitrust comity between nations occurs when one

[c]ountry may request another country to take enforcement action against domestic anti-competitive activity affecting the ability of the requesting county's firms to compete in the market of the requested country. Under this voluntary approach, an agency which is notified of possible anti-competitive activities within its borders must consider the foreign enforcement authority's request for assistance but retains complete discretion as to whether to initiate or expand enforcement activities.<sup>250</sup>

The United States and the EU entered this type of agreement in 1991, "allowing the respective jurisdictions' competition authorities to exchange information and coordinate joint investi-

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<sup>245</sup> See *id.* at 33. This authority varies "depending upon whether the specific Member State has adopted necessary enabling legislation," and also depending on the specific national antitrust body's "degree of autonomy from political influence in executing [its] powers." *Id.*

<sup>246</sup> See *id.* at 34 n.75.

<sup>247</sup> See Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 4-5 (1997) (arguing that the Draft International Antitrust Code, while an important event in the movement towards harmonization, fails to establish an international antitrust law that works).

<sup>248</sup> See *id.*

<sup>249</sup> See Guzman, *supra* note 208, at 1505 (presenting some reasons why this may be the case). "Bilateral negotiations provide the most promising forum for reaching agreement [on antitrust policy] because they require only two countries to agree that cooperation will increase national welfare, and transfer payments through concessions in other areas of dispute are more likely." *Id.*

<sup>250</sup> Rill, *supra* note 3, at 322.



gations.”<sup>251</sup> In 1994 the European Court of Justice invalidated this agreement on procedural grounds.<sup>252</sup> Regardless, some commentators propose a further exploration of this direction of international antitrust enforcement, working from an EU/U.S. basis.<sup>253</sup> On a somewhat different level, the International Antitrust Enforcement Assistance Act (“IAEAA”) authorized “the DOJ and the FTC to negotiate bilateral ‘mutual assistance agreements’ with foreign antitrust authorities, under which the agencies would make requests of foreign authorities for evidence located abroad, as well as consider requests from foreign authorities for evidence located in the United States.”<sup>254</sup> IAEAA is recognized as a “commendable first step” towards “[c]loser cooperation between antitrust authorities [that] is necessary to achieve more effective [antitrust] enforcement as the process of market globalization and liberalization continues.”<sup>255</sup>

The overarching framework principles approach is offered as a “pragmatic” solution to the international antitrust quandary and as an alternative to harmonization and unilateral employment of positive comity. Key principles include national enforcement, procedural safeguards with access to national courts, and choice of law rules “where the significant antitrust effects are localized within one nation.”<sup>256</sup> One proposal uses the WTO’s TRIPs agreement as a model.<sup>257</sup> The proposal’s set of principles focuses on having participating nations: (1) assent to the creation and enforcement of antitrust laws; (2) recognize and account for “global impacts” in antitrust analysis; (3) respect antitrust laws of other nations through positive comity agreements; (4) recognize other nations interests; (5) implement safeguards of due process;

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<sup>251</sup> *Id.*

<sup>252</sup> See Case 327/91, French Republic v. Commission, 1994 E.C.R. II-3641, 3662.

<sup>253</sup> See Valentine, *supra* note 208, at 525 (“[The EU and United States] have a cooperative framework . . . for reviewing mergers with transborder effects and need such a framework with other countries.”).

<sup>254</sup> Laraine L. Laudati & Todd J. Friedbacher, *Trading Secrets—The International Antitrust Enforcement Assistance Act*, 16 NW. J. INT’L L. & BUS. 478, 480 (1996).

<sup>255</sup> *Id.* at 496.

<sup>256</sup> Fox, *supra* note 229, at 6.

<sup>257</sup> *Id.* at 8-9.

and (6) use dispute resolution when any of the principles are violated by another signing nation.<sup>258</sup>

### 5.2. *Critique of Current Approaches to International Antitrust Regulation*

If News Corporation were to be regulated under any of these nation-based proposals, the true international antitrust issues would be overlooked. The full range of anti-competitive effects that derive from News Corporation's activities take shape only in an international marketplace. While a particular media acquisition may not look anti-competitive in the nation in which the transaction occurs, these transactions build Murdoch's worldwide distribution and content network. A particular transaction may be highly beneficial to consumers in the country of origin because the transaction brings new broadcast-media choices. The country of origin may also be a developing nation and view the capital influx as a domestic welfare benefit. At the same time, the transaction at issue could very well be anti-competitive on an international marketplace level.<sup>259</sup>

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<sup>258</sup> See *id.*

<sup>259</sup> This paragraph subtly raises the connection between antitrust and trade regulation. This is no coincidence. There is growing sentiment among scholars that antitrust regulation and trade policy need to be cohesive to be effective. See, e.g., Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393 (1994) (addressing the conflict between protectionist antitrust policy and true free trade, a conflict that is a common result of nation-based antitrust regulation); Christopher M. Barbuto, Note, *Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047 (1994) (suggesting how the convergence of antitrust and trade laws can both encourage competition and protect domestic interests).

What seems to be occurring in developing nations, however, is just the opposite. In these nations, government regulators and politicians alike are jumping at the opportunity to allow foreign corporate trade and investment. China has increasingly encouraged investment in its media sector by News Corporation. See News Corporation, *News Corporation Optimistic About China Market* (visited Mar. 5, 1999) <<http://www.newscorp.com/public/news/index.html>>. This capital influx often occurs at the expense of domestic producers and the long-term stability of a domestic economy. There is some evidence of concern over such trends. In this context one scholar recognizes the need for specialized merger regulation schemes in emerging economies. See William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075 (1998).

One antitrust publication recognized the connection between trade and antitrust policy in offering a pragmatic solution for global businesses confronted with antitrust concerns of an international nature: "In light of [the] potential

Against this collective backdrop of political economy, the overriding difficulty with many of the current proposals lies in their reliance on a nation-based perspective in the administration of antitrust law.<sup>260</sup> Without eradicating this bias from the antitrust calculus, News Corporation's transactions will continue to be viewed through filters predisposed to favoring transactions that benefit the home-regulating nation.<sup>261</sup>

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for international conflict and the absence of any likely early movement for 'harmonization' of merger review standards or procedures, global businesses need to be aware not only of their antitrust risks, but also of the importance of international trade law as a means of dispute resolution." Michael L. Weiner, *Conflict and Cooperation: Meeting the Challenge of Increasing Globalization*, 12 ANTI-TRUST 4 (Fall 1997). The connection between antitrust and trade regulation, while quite intriguing and relevant, is beyond the direct scope of this paper.

<sup>260</sup> The nationalist tone is not solely confined to the purely 'national-sphere' of antitrust regulation. The recent actions of the EU in both the Boeing/McDonnell Douglas merger case and the British Airways/American Airlines alliance case demonstrate that extraterritorial action is at its root driven by protectionist rhetoric and goals—even outside of the purely national regulatory context. Some scholars suggest that in these cases the EU overstepped its constitutionally granted authority (as embodied in the Treaty of Rome) in its efforts to protect the competitive environment for home (EU-based) firms. See, e.g., G. Porter Elliott, *Learning to Fly: The European Commission Enters Unfamiliar Skies in its Review of the British Airways-American Airlines Alliance*, 64 J. AIR L. & COM. 157 (1998) (providing detailed analysis of the EU's actions with respect to the British Airways/American Airlines alliance); Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998) (providing a detailed analysis of the EU's actions with respect to the Boeing/McDonnell Douglas merger).

<sup>261</sup> The aforementioned approaches to international antitrust regulation also fail on the more abstract, secondary level of economic analysis. Each of the proposals creates a myriad of "transaction costs" that discourage a nation from participating in a manner of full faith, credit, and disclosure with other nations. Such an apprehensive and defensive posture in regulation further explains the unfortunate result of many of the proposals—a nation putting its own antitrust concerns before others in extraterritorial enforcement of antitrust law.

The issue of transaction costs in "the development and operation of international institutions," as delineated by William J. Aceves is an intriguing one. Aceves, *supra* note 6, at 1003. Aceves works from a definition of transaction costs borne out of the work of Ronald Coase (the "Coase Theorem") and refined by Oliver Williamson. See *id.* at 1006-07 (citing R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 15-52 (1985)). In Aceves's final calculation, these costs—monetary or otherwise—are associated with the conflicts that a nation faces (within itself and with other nations) in maintaining the upkeep and efficient operation of an international cooperative institution (governance or otherwise). See Aceves, *supra* note 6, at 1006-07. The greater

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the transaction costs of participation, the less likely nations are to form international organizations. *See id.* at 1016-18. Aceves notes the consequences of such transaction costs: "First, states may face costly adjustments to address unforeseen contingencies. Second, states may seek to extract quasi-rents from other states through opportunistic behavior." *Id.* at 1016-17. Aceves points out that states can avoid such transaction costs through two types of international governance structures: exogenous and endogenous. *See id.* at 1018, 1022-23. He describes exogenous government structures as

Exogenous governance structures address the problems raised by transaction costs by authorizing a third party to address any disputes or unforeseen developments that may arise in the course of the relationship. The third party acts as an independent actor with no interest in the substantive matter of the parties' relationship. Exogenous structures can take several forms, including arbitration and judicial settlement.

Exogenous governance structures apply the basic rules of the game to the myriad of unanticipated contingencies and disputes that may arise in the relationship. The inherent flexibility of these structures is one of their more powerful attributes. These structures can administer the rules developed by the parties, monitor adherence to these rules, and publicize transgressions. In order to succeed, the parties must recognize the binding nature of the decisions made by exogenous structures.

*Id.* at 1018. Aceves describes endogenous governance structures in the following manner:

In contrast to exogenous governance structures, endogenous structures allow states to address the problems raised by transaction costs within the context of their relationship. Unlike exogenous structures, endogenous structures do not rely upon a third party or other outside mechanism to resolve disputes. Rather, disputes are resolved by the parties within the course of their relationship.

The concept of endogenous governance structures is consistent with transaction cost economics, which recognizes the advantages of informal structures over more formal and structured mechanisms for dispute settlement. Indeed, endogenous governance is 'based on empirical evidence and growing sentiment among legal scholars and practitioners that legal centralism places far too much emphasis on formal written contracts and their effective adjudication in courts of law.' Rather, transaction cost economics focuses 'on private ordering and the concept of contract as framework.' Unlike formal adjudication, informal governance structures are not confrontational in nature. By emphasizing the relationship, they encourage cooperation rather than conflict. Informal structures are also more flexible than the adjudicatory process. They offer a quicker solution than more formalized dispute settlement mechanisms can provide.

*Id.* at 1022-23.

It is the author's belief that none of the previously noted approaches to international antitrust regulation fully embrace this attempt at exhuming transaction costs. Nation-based analysis, regardless of the context, in one way or an-

Proposals advocating the harmonization of antitrust law<sup>262</sup> make a normative determination regarding the correct vision of antitrust<sup>263</sup> and often are forwarded to economically favor certain nations.<sup>264</sup> In the context of the News Corporation, this harmonization would fail in two ways: 1) the harmonized law would not fully capture the international anti-competitive effects of News Corporation's behavior and 2) any harmonized law<sup>265</sup> still would be implemented on a nation-based basis. Considering what the common causes of international antitrust disputes are, harmonization seems ill-fated because "[g]enerally, [antitrust conflicts among nations] have been caused by nonenforcement of law, different interpretations of permissible extraterritoriality, and nationalistic action that is either protectionist, blindered to global impacts, in disregard of sovereign prerogatives, or the credible perception that one of the above has occurred."<sup>266</sup>

These sorts of problems are certain to arise under the News Corporation scenario, and they would only continue under the application of any sort of common antitrust law. As decisions begin to economically favor certain nations, disfavored nations

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other prohibits the efficient functioning of exogenous or endogenous structures. This reality, as it is merely a subtext of this article, will be noted in *infra* notes 289-92. The topic of transaction costs must be analyzed in a more in-depth manner before any more serious conclusions can be drawn about their substantive impact on the analysis of this paper. The critique that follows in the ensuing footnotes is therefore placed merely to provoke discussion, debate, and future study.

<sup>262</sup> These proposals are neither exogenous nor endogenous in their makeup. They do not create a disinterested third party regulator (exogenous), nor do they create an informal structure for nations to participate in regulation from their own "privately ordered" positions (endogenous). These proposals only serve to alienate those nations that do not agree with the harmonized law— which in turn creates higher transaction costs for participating nations.

<sup>263</sup> They may also determine whether the existence of antitrust law is a good policy choice at all.

<sup>264</sup> This posture, in and of itself, will create high transaction costs for a disagreeing nation. The cost of compliance for such a nation is prohibitively high—the nation perceives that its sovereignty will be lost. The subsequent facilitation of such proposals therefore entails even higher transaction costs for all nations involved. The lack of sufficient compliance would be one of the leading transaction costs.

<sup>265</sup> Regardless of origination— nation-based or created from abstract by a group of nations.

<sup>266</sup> Fox, *supra* note 229, at 6.

may object and not follow the group of nations.<sup>267</sup> Harmonization in the context of this backdrop, while not only quite difficult, would only capture a slanted vision of the antitrust issues.

Proposals that structuralize positive comity fail in a similar regard.<sup>268</sup> Structuralization is only as effective as the number of nations that sign an international agreement or that unilaterally decide to abide by the principle of positive comity. Regardless of how many nations agree to positive comity, each nation still retains discretion over whether to agree to extraterritorial jurisdiction and the right to regulate international antitrust disputes in which it receives comity.<sup>269</sup> As with harmonization, these factors allow nation-based antitrust bias to enter into the international

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<sup>267</sup> The economic concerns of disfavored nations are likely to be slight. If the conduct of News Corporation is beneficial to the favored nation, but harmful to the disfavored nation, the conduct is still likely to be approved. The disfavored nation must absorb the negative externalities of the harmful conduct. If the conduct of News Corporation is harmful to the favored nation, yet beneficial to the disfavored nation, the conduct is likely to be disapproved. The disfavored nation must again absorb the negative externalities, this time in the area of lost capital influx and growth opportunity. In such cases transaction costs of implementing judgment, or even arriving at any satisfactory judgment for all nations involved, would quickly rise—as the Boeing/McDonnell Douglas and British Airways/American Airlines cases attest. See *supra* note 260.

<sup>268</sup> On the surface, structuralization acts as an endogenous governance structure. Yet, for many reasons, structuralization falls short of eradicating the transaction costs that true endogenous governance structures avoid. Structuralization is simply too formal. Agreements institutionalizing positive comity are exactly the type of “contracts” that endogenous governance structures are designed to avoid. Each signing nation must fulfill the level of comity it agrees upon in the contract. The formalized nature of this relationship runs counter to the more flexible agreements that characterize endogenous governance structures. This formalization makes it more difficult for nations at the bargaining table when negotiating a system of private ordering. Positive comity agreements force nations to apply contract expectations and promises to unforeseen situations. The difference between the contract expectation and the private ordering creates transaction costs for all nations involved. This difference creates animosity, as one nation expects the other to perform some level of regulation, and the other nation fails to live up to that expectation. This breakdown too often creates an adversarial and hostile atmosphere between nations. Obviously, the more that nations are involved in the agreement, the more expectations are generated, the greater the transaction costs, and the more tense the regulatory atmosphere. Endogenous relationships engender the opposite—they are relationships, not contracts. Thus, each nation comes to the bargaining table without any previously made promises or expectations.

<sup>269</sup> In the context of an antitrust dispute, the cost of one nation acquiescing to another is just too high in such a formalized agreement to expect efficient compliance.

antitrust calculus. Unless the participating nations are equally powerful, a positive comity agreement will naturally favor one nation over the other.<sup>270</sup> When News Corporation's activities are beneficial to the regulating nation (e.g., bringing in new services or capital influx), that nation will be unlikely to grant or demand comity—whatever the case may be. Additionally, not all the nations affected by News Corporation's transactions may be covered by comity. To fully regulate the extent of News Corporation's anti-competitive transactions, a more international body of participating nations is required.

A general set of antitrust principles suffers from similar failings. These proposals only *encourage* signers to implement and enforce the desired principles.<sup>271</sup> All the nations that are affected by News Corporation's conduct may not adopt the principles. Even if these nations do adopt the principles, they may not implement all of these principles. Even if the affected nations choose to implement all of the principles, they may not choose to enforce all of them (e.g., positive comity).<sup>272</sup> Enforcement in the News Corporation situation could very well be a variable of whether News Corporation's conduct economically benefits the regulating country in an amount that overrides the cost of antitrust regulation. Even if all affected nations do in fact adopt and enforce all the principles, News Corporation's acquisitions and

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<sup>270</sup> See Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190, 200 (1999) (demonstrating via economic modeling that “[t]he reason why bilateral enforcement is less effective than multilateral [trade regulation] enforcement is that, in each bilateral relationship, the gains from cooperation accrue unevenly to the two partners”).

<sup>271</sup> These proposals are not truly exogenous because they never transfer decision-making power to a third party. Additionally, these proposals fail to be endogenous because they force nations out of their own private ordering and into a quasi-formalized structure of dispute settlement at a level that obviously creates its own transaction costs of compliance. Due to the discretionary nature of the principles and the high transaction costs of implementing these principles, many nations might choose not to participate at a level that would make the regulatory structure efficient.

<sup>272</sup> Adopting nations might choose only those principles that create low transaction costs. The more costly provisions, such as positive comity (provisions that have “antitrust bite”) would gain only middling recognition. Thus, similar to costs associated with the enforcement of harmonization, implementation of antitrust regulation would inure high transaction costs upon implementing nations (i.e., these nations would essentially internalize the costs that non-participating nations were unwilling to bear).

conduct are still regulated from one nation's perspective—the home (affected) nation. A regulating nation is less likely to recognize the extraterritorial anti-competitive effects (i.e., international monopolization) of News Corporation's media entity acquisition if that acquisition has beneficial or pro-competitive effects in that regulating nation (e.g., new media services to the consumer, capital influx, etc.).

## 6. A NEW VISION OF INTERNATIONAL ANTITRUST

As antitrust and competition regulators turn toward a rapidly evolving technological matrix in the twenty-first century, one dynamic is clear: to be effective, antitrust regulation must adapt to changing international market structures more swiftly. No longer do corporations march onward in the traditional tycoon schematic. Multinational corporate conglomerates function at many different business levels, in many different business forms, and in many different countries. Although the state of the "antitrust nation" may be undisputed in that regard, a more challenging question is where to move from *that* understanding. It is obvious that we simply can not use traditional nation-based antitrust tactics to fight a guerilla-run business war. As previously described, the attempts at moving in the direction of a more international antitrust scheme have been merely attempts. These attempts have, however, furthered understanding of how difficult any sort of international antitrust system is to achieve.

These actions and proposals have moved the collective antitrust concern forward, and more importantly, have begun to gain a grip on the impact of monopolistic and anti-competitive behavior on a global scale. A better understanding of previous legal failings leads to a better construction of future legal entities. The previous international antitrust proposals are limited for one very simple reason—each proposal fails to think outside of its nation-based bias. The next step for international antitrust is to move beyond national boundaries.

To be more effective, a scheme of international antitrust regulation must fully capture the international anti-competitive effects of transactions by conglomerates like News Corporation. At the same time, this new vision must be able to provide adequate structural and behavioral *international* remedies. Simply stated, "regulating antitrust at the national level is suboptimal, and an international approach to antitrust is likely to be welfare increas-



ing.”<sup>273</sup> Imperative in any scheme of international antitrust regulation is a system that has the ability to look at an international market, reduce national bias, and produce confidence in the international business community. The following section is a proposal for an international antitrust solution. This proposal is in turn applied to News Corporation.

### 6.1. *Building upon Previous Proposals and Attempts*

Previous proposals for a framework of international antitrust regulation set out the obvious primary goal of international cooperation. Agreements structuralizing positive comity are a necessary first step in achieving cooperation. Positive comity agreements place nations in policy situations where they begin to learn the mutually beneficial results of compliance.<sup>274</sup> As delineated above, previous international antitrust proposals have used the existing structure of GATT as a starting point for international antitrust regulation.<sup>275</sup> These proposals understood the utility in building acceptance for international antitrust regulation via the conduit of a previously established acceptance of another international organization. The beauty of working within the construct of GATT is rather simple; establishing international antitrust regulation thus only becomes a task of adding *additional responsibilities* to an *already existing* mutually beneficial relationship and legitimate dispute resolution mechanism.<sup>276</sup> The next step, merg-

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<sup>273</sup> Guzman, *supra* note 208, at 1504.

<sup>274</sup> Efforts to harmonize antitrust law across national boundaries further a different, yet important, aspect of the overall international antitrust project. These efforts assist in the spread of the antitrust language throughout the international business regulatory community. Without common language, any sort of international antitrust regulatory structure is doomed to fail. Compliance equals success.

<sup>275</sup> See, e.g., Fox, *supra* note 229, at 8 (arguing for an international antitrust agreement mirroring the TRIPs agreement on the trade-related aspects of intellectual property, signed by GATT nations); see also Gifford, *supra* note 247, at 4 (detailing the Draft International Antitrust Code proposed by a group of antitrust scholars, which requires GATT nations to adopt minimum antitrust regulatory standards).

<sup>276</sup> Such construction, at least at the outset, theoretically helps eliminate some modicum of transaction costs normally associated with international organizations. See discussion *supra* note 261 and accompanying text. This factor provides an initial endogenous element to proposals that work from the GATT construct. However, as was demonstrated in previous footnotes, there are other reasons why previous proposals founded on this structure fail to ade-

ing a competition policy focus into the WTO, has begun at a basic level. In 1996 the WTO itself set up a working group on the Interaction of Between Trade and Competition Policy ("WGTCP"). By 1999, the WGTCP had moved closer to suggesting some level of WTO multilateral framework for competition policy. Such proposals have been met with mixed reviews about what form such framework would take and even on whether such a framework is necessary at all. At this stage the WTO appears stalled.<sup>277</sup> The authors' proposal, by underscoring the acceptance and flexibility of the WTO, hopefully addresses some of the concerns that have created this roadblock.

## 6.2. *The Framework and Vehicle: The World Trade Organization*

The task set out is rather simple: 1) work in the GATT/WTO construct and 2) eliminate nation-based antitrust bias. The WTO continues the tradition of international cooperation in the area of trade—a tradition begun by the GATT. Originally established in 1947 by an affiliation of a group of nations as an international mechanism for resolution of tariff disputes,<sup>278</sup> the GATT has evolved over the years<sup>279</sup> into an international institution whose dispute resolution powers have grown beyond the original tariff resolution directive.<sup>280</sup> Noted as the "principal international agreement regulating trade between nations,"<sup>281</sup> the GATT now plays a prominent and respected role in the international business and trade community—the heart of which is international trade dispute resolution.<sup>282</sup> In 1994, GATT member nations signed the

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quately conquer the international antitrust matrix—namely eradicating the nation-based bias from antitrust regulation.

<sup>277</sup> See World Trade Organization, *Trade and Competition Policy, Working Group* (visited Mar. 24, 2000) <[http://www.wto.org/wto/minist1/16comp\\_e.htm](http://www.wto.org/wto/minist1/16comp_e.htm)>.

<sup>278</sup> See ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 70 (1997).

<sup>279</sup> See Robert E. Hudec, *The New WTO Dispute Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 3-15 (1999).

<sup>280</sup> See PETERSMANN, *supra* note 278, at 71-72.

<sup>281</sup> PIERRE PESCATORE, 1 *HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT* 7 (1998).

<sup>282</sup> See generally Hudec, *supra* note 279 (examining the, then current, state of WTO's dispute resolution practice and procedure).

agreement establishing the WTO, which now is the principal forum for resolution of trade disputes between nations.<sup>283</sup> The GATT existed for many years without any specifically delineated organizational structure. The main thrust behind the establishment of the WTO was to supply this needed structure and tie it together with an enforceable dispute resolution mechanism.<sup>284</sup>

The GATT/WTO schematic is ideal for the foundation of the regulation of any international competition concern.<sup>285</sup> GATT established the underlying mutually beneficial international relationships. The WTO supplied a flexible organizational structure from which to expand GATT's scope to additional international trade issues. And, at the apex, the WTO added an effective dispute resolution mechanism—giving legal legitimacy to the WTO process. The basic WTO organizational structure consists of a General Council and three specialized sub-councils.<sup>286</sup> The Gen-

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<sup>283</sup> See PESCATORE, *supra* note 281, at 7 (noting that “[t]he WTO has taken over GATT’s role as the principal international forum for trade negotiations and dispute settlement”).

<sup>284</sup> See *id.* at 11-12.

<sup>285</sup> At the level of underlying economic efficiency, it has been demonstrated that the GATT dynamic merely is the manifestation of “simple rules that assist governments in their effort to implement efficient trade agreements.” Kyle Bagwell & Robert W. Staiger, *An Economic Theory of GATT*, 89 AM. ECON. REV. 215, 215 (1999). Bagwell and Staiger note that “[a] trade agreement can . . . promote a more efficient outcome for its member governments, if it serves as a means to eliminate the terms-of-trade-driven restrictions in trade that arise when policies are set unilaterally.” *Id.* at 216. Bagwell and Staiger develop an economic model of GATT—a model based upon “reciprocal trade agreements,” which promotes Nash equilibrium via the principles of reciprocity of and non-discrimination in trade. *Id.* at 219-37.

<sup>286</sup> PESCATORE, *supra* note 281, at 12. The full description of the WTO structure states,

The WTO provides the common institutional framework for the conduct of trade relations among its members in matters covered by the General Agreement and its side agreements, GATS and TRIPS (the so-called Multilateral Trade Agreements). It is specifically provided that the Multilateral Trade Agreements are binding on all WTO members. The WTO's main functions are to facilitate the operation and further the objectives of the Multilateral Trade Agreements. In addition, it is charged with serving as a forum for international trade negotiations and administering the dispute settlement system. The WTO agreement provides that all decision-making powers shall be in a Ministerial Conference, which is to be held every two years. In the interim, those powers shall be exercised by the General Council, which shall also function as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Under the General Council are three specialized councils: The Council for Trade in Goods; the Council for

eral Council of the WTO is empowered with expanding the scope of WTO trade involvement.<sup>287</sup> The sub-councils administer the Multilateral Trade Agreements.<sup>288</sup> For expansion of the WTO coverage to international competition issues, the authors propose the establishment of a new specialized sub-council: the Council for Competition ("CFC") and a new Multilateral Trade Agreement—to be administered by the new CFC—an agreement on Competition, Antitrust, and Trade ("CAT").<sup>289</sup>

### 6.3. *The Proposal: The WTO Council for Competition and Agreement on Competition, Antitrust, and Trade*

Not only must a proposal for international antitrust regulation strive to eliminate nation-based bias, it must also provide a regulatory environment that promotes healthy competition. Currently, clarity and predictability are not hallmarks of antitrust

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Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights. The specialized councils also have subsidiary bodies.

The WTO agreement provides that the WTO shall continue the practice of decision making by consensus used by GATT in the past. However, if a decision cannot be arrived at by consensus, the agreement provides for voting on a one-country, one-vote basis, with majority rule unless otherwise provided. The WTO has three important decision-making powers, each of which requires a super-majority vote. First, by a vote of three-quarters of the members, the Ministerial Conference and General Council have the right to adopt interpretations of the WTO Agreement and the various Multilateral Trade Agreements . . . . Second, the Ministerial Conference and the General Council have the power to waive obligations under the WTO Agreement and the Multilateral Trade Agreements, by a three-quarters vote if a consensus decision cannot be reached . . . . Third, the Multilateral Trade Agreements may be amended under certain circumstances.

*Id.* at 12-14.

<sup>287</sup> *See id.*

<sup>288</sup> *See id.*

<sup>289</sup> This proposal shares the direct underlying spirit of the international antitrust proposal forwarded by Fox, the overarching principles proposal. *See supra* notes 256-58 and accompanying text. Yet, in function, these two proposals are far from similar. Fox centers her proposal around the TRIPs and, assumedly, the underlying WTO. However, the similarity ends at utilizing the WTO, its organizational structure, and the tool of Multilateral Trade Agreements. Fox's proposal, as this article points out, suffers from indeterminate application, and concomitant room for political abuse. *See supra* notes 271-72 and accompanying text. The proposal forwarded here moves beyond the failings of Fox's proposal, attempting to eliminate nation-based bias.

law.<sup>290</sup> This situation arguably allows sophisticated international monopolists<sup>291</sup> like News Corporation to go undetected, while, at the same time, confusing and deterring less sophisticated, more localized pro-competitive actors. Legal clarity and predictability contribute to a setting in which better contracts and acquisitions can be made—all of which in turn encourage investment at *all* geographic market levels. Any system of international antitrust regulation must provide clarity and predictability for businesses and legal practitioners.

The proposed CFC and CAT together provide a solution. The CFC itself would be comprised of representatives of WTO member nations. Fundamentally important to the operation of the CFC and adjudication of the CAT is that no international antitrust “code” would be adopted. The absence of any semblance of an international antitrust code would allow the CFC to sustain the benefits associated with integration into the structure of a mutually beneficial international organization and would also eliminate most of the nation-based bias. The CFC would be staffed with antitrust regulators from all member nations (“FC staffers”). These regulators would have two responsibilities: case distribution and case investigation. Each regulator would be allowed to work from the understanding of his or her home country’s antitrust/competition law.

The CFC could also serve as an expert arbitral organization, providing appointed qualified panel members (selected similar to the dispute resolution panel members) as arbitrators. In keeping with the goals of consistency and predictability, these arbitrators would apply traditional rules of International Chamber of Commerce arbitration. The CFC could be either designated in contracts as an antitrust arbitral entity or retained after antitrust disputes arise.

Actual antitrust regulation by the CFC would occur in the following manner. For international transactions of a certain size, or international business conduct by an actor of a certain

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<sup>290</sup> See generally Derek Devgun, *Crossboarder Joint Ventures: A Survey of International Antitrust Considerations*, 21 WM. MITCHELL L. REV. 681, 685 (1996) (noting that “[a]ntitrust law in the 1990s [has] consist[ed] of a vast and complex maze of rules and policies.”).

<sup>291</sup> International monopolists not only have a business strategy that eludes traditional antitrust norms, but they also have a business structure that is disparate and complex enough to disguise true entity control.

size, a team of CFC staffers would first determine what the most relevant geographic market is for the transaction or conduct at issue. This team would consist equally of regulators from technologically developed, developing, and undeveloped nations.

If the antitrust concerns were only nation-based, the team, with the approval of a CFC standing committee (a rotating panel of five CFC national members), would forward the case directly to the regulatory authority in the nation of concern. Standard WTO dispute resolution would be available for appeal of this decision or appeal of the final national regulatory decision. If the antitrust concerns were on any international level, the affected nations' antitrust regulators would be invited to investigate the transaction in parallel with a group of disinterested CFC staffers. If all member states were interested parties to the transaction, an even contribution would be made between beneficially and detrimentally affected nations to the entire CFC investigation team. The entire group would make a final recommendation to a CFC panel (comprised of three disinterested national CFC representatives), who then in turn would make a final determination and decree. This CFC panel would have multiple means of sanction— structural, behavioral, and financial. The panel would also be empowered to defer sanction to particular nations or groups of nations. The legal power of the decree would be enforced through member state reciprocity, similar to current WTO trade resolutions.<sup>292</sup> Appeals by WTO member nations would be made

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<sup>292</sup> How nations arrive at a position in which they accept such phantom judgments— judgments that carry no *direct* enforcement power— is fascinating. The growing acceptance of arbitral agreements, U.N. resolutions, and WTO trade resolutions have all followed a similar path. In lay terms, under concepts of reciprocity, nations move towards a position of acceptance when they realize an “I’ll scratch your back if you’ll scratch mine” attitude. Giovanni Maggi performs a much more technical, economic-based analysis of this very situation at the level of multilateral international institutions. See Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999). Maggi specifically analyzes the WTO; in turn, he constructs an economic model of a multilateral trade institution, “examin[ing] two potential benefits of a multilateral trade institution: first, verifying violations of the agreements and informing third parties, thus facilitating multilateral reputation mechanisms; second, promoting multilateral trade negotiations rather than a web of bilateral negotiations.” *Id.* at 190. Working with game theory and Nash equilibria, Maggi demonstrates that “[t]he gains from multilateral enforcement [of trade regulation] . . . can be thought of as gains from *exchanging* enforcement power across bilateral relationships. There also may be gains from *aggregating* enforcement power in the trading system.” *Id.* at 208. Maggi also concludes that multilateral trade regulation enforcement internalizes ex-

to the WTO itself via the current standard dispute resolution mechanism.

This proposal sets forth an ideal framework. It is unrealistic to believe, however, that even a WTO enacted international antitrust regime could be implemented at the outset with wide-ranging force. Rather, the proposal is forwarded here to demonstrate the possibilities that the WTO may pose for an ultimate international antitrust solution. If some form of this proposal were adopted, implementation would most likely have to occur at a gradual pace. With respect to the WTO generally, the nations of the world gradually have accepted and recognized the true benefits of a mutually beneficial international trade regulatory body (GATT/WTO). The WTO dispute resolution mechanism embodies and structuralizes this evolved international commitment—yet, the mechanism is young, and its force is still tentative. Similarly, gradual acceptance and recognition are the only promising routes for true international antitrust.<sup>293</sup> Just as with the acceptance and growing reciprocity of commercial arbitration, nations will slowly realize the economic benefits of full participation in a non-nation-based system of international antitrust regulation. Recognizing that actual implementation of the proposal will take many years, the proposal is next applied in the ab-

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ternalities normally associated with bilateral negotiation of trade regulation rulemaking. *See id.* at 209. Maggi concludes with an assertion that the GATT/WTO has been efficient in the manner described by his model. Maggi notes:

There is some evidence that the GATT has effectively promoted a multilateralization of the bargaining process in recent decades . . . . A more controversial question is whether the activity of GATT's dispute settlement procedure has improved the enforcement of trade agreements in the way that the model suggests . . . . There are several examples of GATT disputes in which there was a clear imbalance of power between the disputants, and the DSP panel ruled in favor of the weaker country. . . .

*Id.* Maggi's model, analysis, and conclusions are quite helpful. His work indicates that the GATT/WTO construct very well may be effective in eliminating nation-based bias—which would result in weaker countries being “oppressed” by stronger nations. As the result seems to be the opposite, GATT/WTO may be able to cut through the nation-based bias of a consortium of antitrust regulators, balancing interests via this dynamic of reciprocity in a game-theory construct.

<sup>293</sup> Actual implementation of the proposal herein would most likely begin at some quasi-regulatory level, ultimately moving from the discretionary realm to adjudication with more force.

stract to News Corporation, demonstrating the power potentialities for such a proposal.

#### 6.4. *Applying the Proposal to News Corporation*

While the CFC has no substantive law, it would still engender antitrust regulatory confidence. By providing a clear *procedural* system of regulation for international business transactions and activity, the CFC, like other WTO constructs currently already do, would give businesses the certainty they need to calculate the timing of business transactions. By guaranteeing that no conflicting antitrust judgments exist (as the CFC would be the only body authorized to make a decree in any international antitrust case), businesses would gain confidence that transactions in one nation would not be foreclosed in others (e.g., no asset freeze). The WTO dispute resolution mechanism would cement this climate of certainty. The availability of an expert body of antitrust arbitrators may encourage more parties to choose to include antitrust arbitral clauses in their contracts. Overall, this arbitral activity would add to the consistency of antitrust law. Due to growing business confidence, the mere existence of CFC antitrust arbitration may encourage more parties to do business.

The CFC minimizes nation-based antitrust regulatory bias and eliminates choice-of-law issues. By allowing each regulator to represent the concerns of his or her home country (without guidance from an international antitrust code), truly international regulatory scrutiny results. The CFC essentially removes the national discretionary function from positive comity and places comity power in a deliberative environment with disinterested and interested parties sharing decision-making power. This amalgamation would hopefully capture, as closely as possible, the broad-range of anti- and pro-competitive effects resulting from News Corporation's transactions. Extreme, nation-based, interested party views would cancel each other out.

A CFC type organization would see the international anti-competitive effects of News Corporation's acquisitions and conduct. A CFC type organization would also be more likely to move conceptions of the antitrust calculus beyond current nation-based confines and into a realm of analysis that begins to conceptualize international product and geographic markets without us-



ing national boundaries as a guide.<sup>294</sup> After all, News Corporation operates with this understanding of the relevant international market in which its vertically integrated broadcast-media distribution network holds actual monopoly power. If News Corporation operates in this manner, why should regulators do otherwise?

## 7. CONCLUSION

With its vertically integrated media distribution network, News Corporation has exclusive ownership and dominion over an unparalleled conduit without which consumers across the world could not access a myriad of broadcast-media products. Quite simply, News Corporation monopolizes media distribution. When News Corporation purchases an entity in a certain jurisdiction, it adds to its extensive network, further entrenching its international monopoly. Much of this distribution network is founded upon a backbone of sports-media.

The News Corporation confounds the traditional nation-based antitrust paradigm. News Corporation's broadcast-media distribution, marketing, and support network is highly vertically integrated and spreads horizontally throughout the world. Nation-based antitrust regulation, regardless of extraterritorial arrangements, is naturally bound to focus upon national anti-competitive concerns. Nation-based antitrust analysis of News Corporation is likely to follow this pattern. The only way to truly capture the anti-competitive effects of News Corporation actions is via an international filter. The filter of the WTO offers

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<sup>294</sup> The International Antitrust Clearinghouse acts as a hybrid exogenous and endogenous governance structure. In an abstract sense, a third party resolves disputes, even though each nation participates in the "third party" by contributing representatives. The third party retains independence via the sheer number of opinions that go into any particular case. While the foundation and structure of the International Antitrust Clearinghouse is exogenous, the way it functions and substantively regulates is very much endogenous. As the nations directly affected by suspect conduct/transactions participate in resolution, this participation allows for endogenous "private ordering." Thus, nations are not subject to a pure "contract application" of international law. Without any set "contract" containing applicable substantive law, nations are encouraged to participate so as to maintain their own sovereignty, forwarding their own national interests involved in any particular antitrust case. The applicable substantive law will be the confluence of these interests. As such, each case is an exercise in informal decision-making, the results being an expression of "private ordering," not the applicability of an individual nation's law or a particular harmonized law.

this opportunity. To do otherwise is to regulate with a phantom fist, all the while allowing one entity to gain dangerous and chilling control over the international broadcast-media market.