Content and Broadband and Service... Oh My - Will a United AOL-Time Warner Become the Wicked Witch of the Web, or Pave a Yellow Brick Road; Note

Joseph P. Reid

Follow this and additional works at: http://scholarship.law.nd.edu/jleg

Recommended Citation
Reid, Joseph P. (2000) "Content and Broadband and Service... Oh My - Will a United AOL-Time Warner Become the Wicked Witch of the Web, or Pave a Yellow Brick Road; Note," Journal of Legislation: Vol. 26: Iss. 2, Article 8.
Available at: http://scholarship.law.nd.edu/jleg/vol26/iss2/8

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
Content and Broadband and Service ... Oh My!
Will a United AOL-Time Warner Become the Wicked Witch of the Web, or Pave a Yellow Brick Road?

I. Introduction

In early January 2000, computer power America Online announced plans to acquire media giant Time Warner.1 Valued between $160 and $180 billion, the proposed merger would be the largest ever.2 Naturally, given the size and influence of the two companies, the fanfare surrounding the move was equally great. America Online’s chairman Steve Case proclaimed that the merger would “launch the next Internet revolution,” while Time Warner chairman Gerald Levine cooed that “[t]hese two companies are a natural fit.”3 Following the announcement, stock prices of both computer and media companies soared as frenzied market-watchers buzzed about what other mergers might ensue.4 In addition, analysts exalted the sense of the proposed union: not only did each company offer what the other most coveted,5 but the terms of the deal also pleased those who believed that internet companies were slightly overvalued.6

Not all reactions to the announcement were equally positive, however, as critics quickly appeared to decry the union. Some analysts predicted that the marriage was doomed to fail because of stark differences in the two companies’ cultures.7 Still others urged that the merger should be stopped at all costs due to concerns over the potential

2. Compare AOL Buys Time Warner for $166 Billion in Stock, supra note 1 (valuing merger at $166 billion) with Syre & Stein, supra note 1 (valuing merger at $178 billion).
4. See, e.g., Chuck Philips, Media Mega-Merger: Impact on Music, L.A. TIMES, Jan. 11, 2000, at C1 (suggesting that the merger “sets the stage for the possible takeover of other entertainment companies”); Syre & Stein, supra note 1 (quoting several analysts regarding the potential catalytic effect of the AOL-Time Warner merger).
5. See AOL Buys Time Warner for $166 Billion in Stock, supra note 1 (quoting one analyst that the merger “makes a lot of sense [because] AOL [will] provide[ ] a huge platform for all of Time Warner’s content, and Time Warner’s cable systems provide a good network for AOL’s on-line services”); Syre & Stein, supra note 1 (“The logic seems simple. The old media companies [like Time Warner] need access to the distribution system of the future, which is clearly the Internet. Leading Internet companies that have amassed millions of customers need to pump more content through their Web portals to continue building revenues. Their mergers would be a marriage of convenience, if not downright necessity.”).
6. See id. (“Achieving a genuine merger between two such different companies will be very difficult. Quite apart from the personalities involved, AOL is essentially a single-product company and Time Warner is home to a bunch of feuding baronies.”); Philips, supra note 4 (“Analysts and competitors cautioned that the newly merged organization could run into serious problems, however, if AOL and Time Warner fail to integrate the drastically different cultures of the two corporations.”).
for monopolistic pricing, threats to continued open-access to the Internet, and even journalistic integrity.

This Note analyzes the complex legal and practical issues surrounding the proposed AOL-Time Warner merger. In order to fully convey the breadth of the two companies and the merger's resulting significance to the average person, Part II first recounts the history and current status of both, emphasizing each firm's products as well as the competition each faces in its various markets. Part II then concludes by describing the post-merger "vision" articulated by AOL and Time Warner in anticipation of the union. Part III analyzes the antitrust issues surrounding the proposed merger itself and then, given the forecasts by many that the merger will sail through governmental scrutiny, Part III attempts to predict the long-term implications if the merger is allowed to proceed. Finally, Part IV concludes by summarizing the events surrounding Time Warner's recent boycott of ABC and then suggesting that such a showing of power and arrogance should cause the FTC to reject the merger outright.

II. The Firms

A. America Online

America Online, Incorporated ("AOL"), began its existence in May 1985 as a fledgling computer company called Quantum Computer Services ("Quantum") based in Dulles, Virginia. The brainchild of James Kimsey and Steve Case, Quantum sought to create "an interactive world where people all over the country could gather." To

---

8. See Elizabeth Douglass, Consumer Groups Alarmed Over AOL's "Pullback", L.A. TIMES, Jan. 12, 2000, at C4 (noting concern that the merger "could lead to fewer choices and higher prices for consumers").

9. See id. (quoting several sources concerned about AOL's "pullback" from their endorsement of open access following announcement of the merger"); Jube Shiver Jr., Despite Warnings, Opposition Unlikely, L.A. TIMES, Jan 11, 2000, at C11.

10. See, e.g., Glass, supra note 1 (discussing the fear of academics and consumer groups that the merger "could lead to undue media domination"); Shiver, supra note 9 (quoting Minnesota Sen. Paul Wellstone, who was "very concerned about the effect these massive mergers will have on the flow of information in our democracy").


12. Kimsey, now 60, has now been named "Chairman Emeritus" of AOL, and has gone on to dabble in foreign affairs. See Kathleen Day & Shannon Henry, Guerrilla Economics; U.S. Execs to Columbian Rebels: Make Money, Not War, WASH. POST, Mar. 15, 2000, at E1 (detailing Kimsey's efforts to end fighting between Marxist guerrillas and the government of Colombia); David Broder, Viet Vets Leave Legacy of Schools, DENVER POST, Nov. 11, 1999, at B11 (describing Kimsey's role in funding Vietnamese schools being built by American veterans).

13. Case, now 41 and the chairman and chief executive of AOL, began his career with marketing jobs at Proctor & Gamble and PepsiCo. See No. 3 America Online Shooting for No. 1 Computer Service Is Trying to be "Younger, Smarter" Than Competitors, SAN DIEGO UNION-TRIB., Nov. 9, 1993, at 22. In 1983, however, he left PepsiCo for the Control Video Corporation, a startup company that hoped to provide online services to users of Atari videogame systems. See id. When the videogame market crashed so did Control Video, but Case persevered, partnering with Kimsey to create Quantum. See id. While the failure of Control Video and early struggles of AOL gave no hint of his future success, Case is now described as a visionary and is compared to Bill Paley, the CBS chairman who led the television revolution. See id.; Amy Harmon, Media Megadeal: The Chameleon; AOL Chief Relaxes a Dress Code But Not His Vision of the Internet, N.Y. TIMES, Jan. 11, 2000, at A1 (describing Case's "combination of idealism and pragmatism"); Steve Lohr, Steve Case at a Crossroad, N.Y. TIMES, Aug. 14, 1995, at D1. While praising "Mr. Case's willingness to adapt to an ever-changing environment," however, some have also commented that this strategy "has not come without casualties," referring to the AOL executives Case has "pushed aside" at time to advance AOL's interests. Harmon, supra.

achieve this end, Quantum offered its first online service, named "Q-Link," later that year. At the time, Quantum's three main competitors in the online service market...
were: (1) CompuServe, a Columbus, Ohio company that had been the first to offer businesses electronic mail, real-time chat capabilities, and network services,17 (2) Prodigy, a joint venture between International Business Machines Corporation and Sears, Roebuck, and Company,18 and (3) GEnie, owned by General Electric and known for its interactive games and software offerings.19 Given CompuServe's headstart within the industry and the resources of Prodigy and GEnie's parent companies, few gave Quantum any chance of survival.20

Quantum forged ahead however, stressing user-friendliness as the key to success.21 In 1989 Quantum created a point-and-click version of the Q-Link service for Apple II and Macintosh users, changing the name of the service to “America Online.”22 Two years later, Quantum unveiled a DOS version of the America Online service and changed its corporate name to match its now-signature product.23 But, despite going public in March of 1992,24 by the end of that year AOL was still the smallest of the major online services.25

In 1993, though, after eight years of struggles, AOL looked to be finally hitting its stride. It began the year by releasing a version of its software for the then-new Microsoft Windows operating system.26 Still stressing interactivity and ease of use, AOL proved to be “hipper, cooler, and faster on its feet” than its competitors,27 users, drawn in by AOL’s graphical interface with pull-down menus,28 seemed to be embracing Case and Kimsey’s idea of an electronic community.29 By the end of 1993, AOL was “the nation’s fastest-growing commercial computer network,” had doubled its revenues, and had pushed its way into third place among the online service companies in terms of subscriptions.30

hypertext language. Ultimately, because of hypertext’s easy-to-use format, the Internet itself became more accessible and content appealing to mainstream users appeared in greater and greater amounts. For more on the hypertext revolution and its implications for AOL, see infra notes 40–45 and the accompanying text.

16. See AOL Timeline, supra note 11. Marketing the possibilities of an online community, Kimsey and Case originally designed Q-Link to operate on Commodore computers, which at the time led the consumer market. See id.; Dresser, supra note 11; Harmon, supra note 13.


19. See Cathy Madison, Choosing the Right Service Takes Time, Research, STAR TRIB. (Minneapolis), Dec. 6, 1992, at 4D.

20. See Dresser, supra note 11; Harmon, supra note 13.

21. See Dresser, supra note 11.

22. See AOL Timeline, supra note 11; Dresser, supra note 11.

23. See AOL Timeline, supra note 11.

24. See id.

25. See Madison, supra note 19.

26. See id.

27. Daniel Southerland, America Online’s Rapid Rise: It’s the Hottest Player in Dial-Up Computer Services. But Stiff Competition Looms, WASH. POST, Nov. 8, 1993, at F1 (quoting Joshua Harris, an industry analyst from a New York research firm); see also Dresser, supra note 11 (“The key to America Online’s success has been simplicity. Prodigy and Compuserve might have a richer store of information, but even America Online’s critics concede that it is the most user-friendly of the major on-line services.”); Harmon, supra note 13 (“But Prodigy, which was slower [than AOL] to introduce Internet access and e-mail, stumbled as Mr. Case’s company gathered momentum.”).

28. See Madison, supra note 19; Southerland, supra note 27.

29. See No. 3 America Online Shooting for No. 1 Computer Service Is Trying to be “Younger, Smarter” Than Competitors, supra note 13 (“In eight years, Case helped construct a community of 400,000—without laying a brick.”); Southerland, supra note 27 (detailing online matchmaking anecdotes).

30. No. 3 America Online Shooting for No. 1 Computer Service Is Trying to be “Younger, Smarter” Than Competitors, supra note 13 (detailing AOL’s “having doubled in size in a year and adding more than 150,000 customers over the past six months—nearly 1,000 new subscribers a day”). Although AOL had passed GEnie in subscriptions, Case was only moderately pleased, saying “We don’t want to stay number 3.
Furthermore, during 1993 AOL overcame what had the potential to be a company-ending nightmare. When it drastically reduced prices for its online service, users new and old flooded AOL’s telephone systems, causing long delays in logging on and slower service once online.\(^{31}\) For a company that had been gaining popularity by word-of-mouth and that had held itself out as the user-friendly alternative, such hardware problems could have been deadly.\(^{32}\) Fortunately for AOL, Steve Case repeatedly apologized to subscribers and then delivered on promises to solve AOL’s technical difficulties.\(^{33}\)

Although impressed by these successes, market analysts continued to forecast gloomy skies for AOL.\(^{34}\) Many suggested that new entrants to the online service market would either “blow[] away” AOL\(^ {35}\) or take it over.\(^ {36}\) Simultaneously, AOL’s traditional competitors continued their practice of copying AOL’s user-friendly features in an attempt to match AOL’s growth.\(^ {37}\) Even in the face of these challenges however, AOL, and Steve Case especially, retained a humble optimism about the company’s vision and future.\(^ {38}\) And, over the next few years, AOL’s subscriber base grew almost exponentially, pushing the company into first place.\(^ {39}\)

AOL still faced two more significant obstacles, however. From the very beginning, a substantial attraction of the online service companies had been the ease of using such systems compared with linking directly to and maneuvering within the Internet. With the invention of hypertext and the World Wide Web (“Web”)\(^ {40}\) and the popularization of

---

31. See Dresser, supra note 11 (“America Online’s smooth-running system began to go haywire, abruptly bounding users off the network, or taking agonizing minutes to post a message in a supposedly real-time chat. Signing on during peak evening hours became an hourlong ordeal.”); No. 3 America Online Shooting for No. 1 Computer Service Is Trying to be “Younger, Smarter” Than Competitors, supra note 13 (“Recent growth has not come painlessly.”).

32. See Dresser, supra note 11 (quoting a PC Magazine editor’s suggestion that “If they [AOL] don’t clean up their act very quickly, they will . . . become a laughingstock.”).

33. See Harmon, supra note 13.

34. See, e.g., Lohr, supra note 13 (“Yet Mr. Case and his company now find themselves facing challenges as never before. . . . Today, as the frontrunner in the online industry, America Online must fend off threats to its fast-growing business—from the rapid growth of the Internet, powerful new corporate rivals, even experts questioning its accounting.”).

35. Dresser, supra note 11 (quoting analyst Joshua Harris that “America Online is in danger of being ‘blown away’ when some powerful new competitors enter the market later this year. They include Ziff Communications, publisher of PC World and other magazines, Rupert Murdoch’s Delphi, the software giant Microsoft Corp., and AT&T.”); see also Southerland, supra note 27 (“[P]owerful companies such as Microsoft Corp. are expected to eventually enter the commercial online market.”).  

36. See Southerland, supra note 27 (“One possible result is that America Online could become the target of a takeover.”).

37. See id. (“On another front, Prodigy is taking steps to halt some of its losses to AOL. It is expected to launch some new features in coming weeks.”); see also Lohr, supra note 13 (noting that “America Online’s traditional rivals . . . have given their services facelifts or new management or both” to compete with AOL).

38. In particular Case remarked that “a new medium is emerging. It’s an interactive medium in which the key driver will be participation.” Dresser, supra note 11. Case foresaw “a time . . . when a computer online service is almost as much of a fixture in the U.S. home as the television and telephone.” Id. As for his company’s place in this new medium, he commented only that “The investment debate comes down to two different views of the future. One view is that we’re a leader in an exciting new field, and we could become another Wal-Mart, Home Depot or even a Microsoft. The other is that we’re a very fragile franchise about to be battered by competition from Microsoft and the Internet. We’ll see.” Lohr, supra note 13.

39. See AOL Timeline, supra note 11 (detailing AOL’s passing subscriber milestones of one million in 1994, three million in 1995, and seven million in 1996); Lohr, supra note 13 (labeling AOL “the nation’s leading online computer service in 1995). While AOL has controlled its own growth in most countries, AOL has also utilized joint ventures to expand into certain international markets. See AOL Timeline, supra note 11 (contrasting the autonomous creation of AOL UK, AOL Canada, and AOL France with AOL’s cooperation with Bertelsmann AG in launching AOL Germany and with Nikkei and Mitsui in launching AOL Japan).

40. For more detail on the history and technology of hypertext and the World Wide Web, see supra note 15.
browser software, however, the simplicity advantage of the online service companies seemed to evaporate and many predicted that as a result, online service subscribers would defect from their contracts. Having fought for almost a decade to establish its huge ranks of subscribers, AOL now faced the question of how to approach Web access. In response, in late 1996 Case brought new executives into the company, including Robert Pittman, the man who had branded such successful businesses as the Music Television Networks ("MTV"), Six Flags Theme Parks, and Time Warner Enterprises.

With this new staff in place, AOL began to redefine itself. Rather than the home of an interactive electronic community, AOL now billed itself as a tool of convenience, a place from which users unfamiliar with the Web could launch themselves and then to which users could safely and easily return. To further facilitate this transformation, AOL unveiled a new "flat-rate" pricing scheme in December of 1996, designed to encourage AOL subscribers to use the Web without penalty.

The new pricing scheme was an instant success, but one which came at a tremendous cost: because AOL had not enhanced its capacity enough in anticipation of the flat-rate switchover, AOL subscribers completely overwhelmed AOL's telephone system, leaving millions of customers unable to access the service. As a result of these problems and its restructuring, AOL posted huge fiscal losses in early 1997, and even found itself the target of potential lawsuits over the delays. As in 1993, however, Steve Case and AOL acted quickly to fix the technical problems and appease customer opinions. The company committed $350 million to increase the capacity of its system, and distributed another thirty million dollars in suit settlements and user refunds.

41. The first web browser was developed in 1993 by Marc Andreessen, then a 22-year-old graduate student at the University of Illinois. See Coats, supra note 15; Peniston & Bachmann, supra note 15. Called "Mosaic," this software allowed users to easily navigate through the hypertext links of the Web, and was seen as the critical tool in allowing public access to usher in the Internet revolution. See Coats, supra note 15; Peniston & Bachmann, supra note 15. After creating Mosaic, Andreessen and several of his colleagues moved to California and teamed with Jim Clark, the former head of Silicon Graphics, Incorporated. See Coats, supra note 15; Peniston & Bachmann, supra note 15. With Clark's financial backing, Andreesson and his team developed the "Netscape Navigator" browser, which they gave away online. See Coats, supra note 15; Peniston & Bachmann, supra note 15. This marketing strategy caused Netscape to be the most prominently used browser in the market—by the end of 1995, Netscape's browser was used in almost 80% of the computers that had Web access. See Coats, supra note 15. After fighting off challenges from startup companies like itself, however, Netscape then faced increased competition from the likes of Sun Microsystems, creators of "Java," an extension of and improvement to html, and Microsoft, whose Internet Explorer browser became included with the Windows operating system and resulted in the now-famous antitrust litigation against Microsoft. See id.; see also e.g., James Grimaldi, Microsoft Response: Don't Kill Success; Company Offers Alternatives to Breakup Plan, WASH. POST, May 11, 2000, at A1 (describing the most recent details of the Microsoft litigation, i.e. the company's reaction to the breakup plan proposed by the Department of Justice).

42. See Harmon, supra note 13 ("With the birth of the World Wide Web, industry pundits again predicted the end for proprietary services like America Online."); Lohr, supra note 13 (noting that "[a]s the Internet becomes easier to use" for "consumers equipped with more powerful computers, modems and specialized browsing software," it threatens "online services like America Online, whose appeal to many subscribers has been as a hand-holding middleman making 'Net technology less forbidding'").

43. See id.; see also AOL: Who We Are: Bob Pittman (visited Apr. 9, 2000) <http://corp.aol.com/whoswho.html#Pittman> (describing Mr. Pittman's hiring and responsibilities at AOL).

44. See Harmon, supra note 13.

45. See id.; AOL Timeline, supra note 11.


47. See Chandrasekaran, supra note 46 (detailing AOL's approximately $155 million second quarter loss).

48. See, e.g., Howard Wolinsky, AOL Says "Gridlock" Is Over, CHI. SUN-TIMES, June 13, 1997, at Fin. 37 (noting that AOL agreed to terms "[t]o avoid being sued by the attorneys general of 36 states").

49. See Chandrasekaran, supra note 46; Jon Swartz, Beefed-Up AOL Says It's Ready to Grow: Online
technical overhaul, AOL reduced advertising and distribution of its software,50 and even rented thousands of extra modems to ease the burden on subscribers until renovations could be finished.51 While these steps did not sooth everyone,52 by the summer of 1998 most analysts agreed that AOL had "turned the corner" on the crisis.53

With these technical problems behind them, AOL pressed on and by late 1997 had almost recreated the tremendous subscriber growth rate it had experienced earlier in the decade.54 Powered by invigorated shareholder confidence55 and its ever-increasing subscriber base, AOL began to acquire56 and enter into strategic partnerships57 with other computer industry heavyweights. Furthermore, AOL began to consolidate its competition—in particular it began acquisitions of former rivals CompuServe and Netscape in 1998.58 Taken together, these most recent moves have left AOL nearly alone in the online service market59 and, along with Microsoft, one of two major players in the web


50. See Swartz, supra note 49.

51. See Chandrasekaran, supra note 46.

52. See Swartz, supra note 49 (describing how some "flustered customers" referred to AOL as "America Offline" and "AO Hell").

53. Wolinsky, supra note 48 (quoting Case about the crisis in June 1997); see also Chandrasekaran, supra note 46 (quoting an equity analyst that AOL's tactics "won't fix everything for them, but it's a positive step in the right direction"); Swartz, supra note 49 (quoting another analyst that "[t]he demand problem is behind them").

54. See AOL Timeline, supra note 11 (detailing AOL's growth from seven million subscribers in 1996 to ten million in 1997, then to 15 million in 1998, to 20 million in 1999, and finally to 22 million in March of 2000).

55. AOL split its stock two-for-one in March and November of 1998, and was added to the Standard & Poor's S&P 500 Index in December. See id.

56. Since its move to flat-rate pricing in December of 1996, AOL has purchased at least 13 companies. See id. Beyond acquiring its rivals CompuServe and Netscape, AOL has also gained control of the leading Internet music companies (Spinner.com, Winamp, and SHOUTcast), the biggest online marketing company (Digital Marketing Services, Inc.), the leading movie listing/ticketing service (MovieFone, Inc.), and one of the most popular online communications portals (Mirabilis Ltd., whose ICQ portal offered email and real-time chat capability through its Instant Messenger service). See id.; AOL: Who We Are (visited Apr. 9, 2000) <http://corp.aol.com/whoweare.html>.

57. Although AOL has engaged in numerous partnerships and joint ventures in its history, some recent pairings are particularly worthy of note. First, AOL has aligned itself with Gateway, Incorporated, the United States' second-leading direct marketer of computers. See AOL Timeline, supra note 11: Hoover's Online: Gateway, Inc.: Capsule (visited Apr. 9, 2000) <http://www.hoovers.com/co/capsule/6/0,2163,16706,00.html>. Next, AOL has partnered with Motorola in an attempt to create a wireless version of AOL's Instant Messenger service. See AOL Timeline, supra note 11. Furthermore, AOL and 3Com Corp. have strategically partnered to give AOL users access to email via handheld computers. See id. Finally, AOL has signed agreements with DirecTV, Incorporated, and others to meld television and computer interactivity. See id. This last set of agreements is especially troublesome when one considers that DirecTV, the leading direct satellite television provider, is a direct competitor of Time Warner's cable systems. See AOL-Time Warner Merger: Hearings Before the Senate Jud. Comm. (2000), available in 2000 WL 227878 [hereinafter Hearings] at *9 (statement of Sen. Herbert Kohl); Hoover’s Online: DirecTV, Inc.: Capsule (visited Apr. 9, 2000) <http://www.hoovers.com/co/capsule/50,2163,47725,00.html>; see also infra Part II.B.5.

For an even more extensive list of those with whom AOL does substantial business, in and outside of the computer industry, see AOL: Who We Are: Our Partners (visited Apr. 9, 2000) <http://corp.aol.com/partners.html>.

58. See id. AOL completed the CompuServe acquisition in 1998 and the Netscape acquisition in early 1999. See id. As part of the Netscape deal, Marc Andreessen, the creative mind behind Mosaic and the Netscape Navigator became AOL's Chief Technology Officer. See id.

59. In terms of subscriptions, AOL has now far outpaced all of the other online service companies. While Prodigy remains in the industry with just over a million subscribers, see Hoover's Online: Prodigy Communications Corp.: Capsule (visited Apr. 12, 2000) <http://www.hoovers.com/co/capsule/3/0,2163,42473,00.html>, other companies have now become AOL's primary, albeit distant, rivals. See, e.g., Matt Richtel, Two Providers of Net Access Set to Merge, N.Y. TIMES, Sept. 24, 1999, at C6 (discussing the merger of Earthlink Network, Incorporated and Mindspring Enterprises, Incorporated that "create[d] a company with 2.8 million subscribers" which is now "the clear but distant second-place service provider in the
browser industry. Thus, while new challenges will certainly arise,\textsuperscript{60} AOL’s stature, combined with its strong management, history of overcoming adversity, and huge subscriber base, make it one of the most powerful companies in the one of the fastest growing industries in America.

B. Time Warner

Time Warner, Incorporated ("Time Warner"), headed by its chairman Gerald Levin, is one of several massive media conglomerates that have been formed in recent years, along with Rupert Murdoch’s News Corporation Limited ("News Corp."),\textsuperscript{61} the Walt Disney Company ("Disney"),\textsuperscript{62} Bertelsmann AG ("Bertelsmann"),\textsuperscript{63} Viacom, Incorporated ("Viacom"),\textsuperscript{64} the Sony Corporation ("Sony"),\textsuperscript{65} and most recently, Dreamworks SKG ("Dreamworks").\textsuperscript{66} Like the others, Time Warner is a complex collection of di-

\textsuperscript{60} See id.


\textsuperscript{63} See id.

\textsuperscript{64} See id.

\textsuperscript{65} See id.

\textsuperscript{66} See id.
verse media companies; however, the company has organized itself into five basic industry units. This Section will briefly describe those units and discuss the competition Time Warner faces within each one.

1. Publishing

The oldest of Time Warner's companies is its publishing group, run by Time Incorporated ("Time"). Although it began its publishing empire with the introduction of *Time Magazine* in 1923, Time now publishes both magazines and books, and sells its merchandise through book clubs and direct marketing. Accounting for approximately fifteen percent of Time Warner's total business, Time had almost $4.5 billion in sales in 1998.

Each of Time's many magazine titles faces competition from rivals covering similar topics and, because new magazines are becoming more focused than ever before, such "intra-niche" competition is likely on the rise. However, when one considers the sum of Time's wide variety of titles, one can see that few companies rival Time's massive distribution and readership. One such firm is Advanced Publications, Incorporated.

---

68. See id.
71. For example, Time Warner operates the popular Book-of-the-Month Club, as well as other smaller book clubs. See About Time Warner: Publishing: Time, Inc.: Businesses, supra note 69.
75. See William Glanz, *Number of New Magazines Rises as Publications Cater to Niche Markets*, WASH. TIMES MAG., July 6, 1999. The total number of magazines published in the United States more than doubled from 1985 (2,500 titles) to 1998 (5,500 titles), largely due to the increase in so-called "niche magazines" which focus on narrow issues. See id.
76. Despite the increase in the number of total magazine titles available, overall consumer readership has remained constant. See id. While this has left traditional titles fighting to keep hold of their readers, the effects on top sellers are not yet clear; some traditionally popular magazines have lost business—*Family Circle*’s sales fell almost 10% between 1997 and 1998—while others, such as *Time*, have actually increased readership and revenues. See id. Complicating matters is the low survivorship of new magazines. Although on average three new titles debuted per day in 1998, some analysts suggest that only half of new titles survive their first year, and only three of 10 remain four years after introduction. See id. Although these trends make the future of individual magazines difficult to predict, Time as a whole is likely insulated from these effects because of its size, breadth of titles, and the ability to release its own niche magazines. For example, one of the top niche debuts in 1998 was *Teen People*, a Time publication. See id.
("Advanced"), which sold $100 million worth of its magazines in 1998. Similarly, the Washington Post Company ("Washington Post"), with $2.2 billion in 1999 sales, and The McGraw-Hill Companies, Incorporated ("McGraw-Hill"), with almost $4 billion, each produce magazines that directly compete with Time titles. However, because Washington Post and McGraw-Hill each produce only one major magazine, the majority of those companies' revenues are derived from their other industries.

In addition to Advanced, Washington Post, and McGraw-Hill, companies for whom publishing is a primary or exclusive industry, Time also faces magazine competition from three media conglomerates. First and foremost among these is Bertelsmann which, producing eighty magazine titles and ten newspapers, is an even more powerful publishing force than Time itself. Furthermore, News Corp. and Disney should be considered major players in the industry because, while the two companies currently have


78. See Hoover's Online: Condé Nast Publications, Inc. Capsule (visited Mar. 8, 2000) <http://www.hoovers.com/co/capsule/60,2163,57226,00.html>. In addition to its magazine titles, Advanced publishes daily newspapers in 22 cities, local business journals in another 40 cities, and has a minority interest in Discovery Communications, Inc., the company behind cable networks such as the Discovery Channel and Animal Planet. See id.; also see Hoover's Online: Discover Communications, Inc. Capsule (visited Mar. 8, 2000) <http://www.hoovers.com/co/capsule/1,0,2163,43731,00.html>.


83. Disney publishes magazines of its own, primarily aimed at children, such as Disney Magazine and Disney Adventures Magazine. See Disney Homepage (visited Mar. 20 2000) <http://disney.go.com/home/homepage/index.html?clk=1004398>. In addition, Disney subsidiaries also publish magazine titles. For example, Disney's television network, ABC, Inc. ("ABC"), owns ESPN, the cable sports network that publishes ESPN The Magazine. Also, ABC created A&E, the arts and entertainment cable network, as a joint venture with NBC and Hearst Publishing; A&E now publishes Biography: The Magazine, based on A&E's hit show Biography. See A&E: Shop A&E (visited Mar. 22 2000) <http://store.aetv.com/cgi-bin/aec.storefront/0/Ext/OutsideFrame/UT/32/IntroPage/UT/1>. Finally, one of Disney's film companies, Miramax, just expanded into magazine publishing in 1999 with Talk magazine, a joint venture with the Hearst Corporation. See Walt Disney Company 1999 Annual Report, supra note 62.
limited magazine holdings, their overall power allows them to leverage themselves media markets.\(^{84}\)

Time faces a slightly different kind of competitive pressure in the book publishing arena. Time has embraced a generalist strategy, utilizing its several publishing houses to cover a wide range of popular authors and subjects.\(^{85}\) As such, it faces primary competition from other wide spectrum publishers, which are also owned and controlled by some of the other media conglomerates: Random House, Incorporated (owned by Bertelsmann),\(^{86}\) Simon & Schuster, Incorporated (part of the Viacom conglomerate),\(^{87}\) HarperCollins Publishers, Incorporated (owned by News Corp),\(^{88}\) and Hyperion Books (owned by Disney).\(^{89}\) Two other major publishers, Pearson, PLC\(^{90}\) and McGraw-Hill,\(^{91}\) could also be considered secondary competitors of Time, but their more-specialized ranges of books only partially overlap with Time’s product line.

2. Filmed Entertainment

Time Warner’s filmed entertainment group consists of two\(^{92}\) basic companies: Warner Brothers\(^{93}\) and New Line Cinema ("New Line"),\(^{94}\) While New Line is a “tradi-

84. Such maneuvering has already taken place. As one example, consider ESPN the Magazine, published by Disney. See supra note 83. While ESPN had been the foremost cable sports network for many years, once it was acquired by Disney, ESPN had the resources to expand its businesses tremendously. In addition to adding more channels (ESPN2, ESPNews, ESPN Classic) and a chain of theme restaurants ("ESPN Zones," located in five cities), ESPN launched ESPN the Magazine, a biweekly sports magazine, in 1998 which can directly compete with Time’s Sports Illustrated. See generally ESPN Homepage (visited Apr. 23, 2000) <http://espn.go.com/> (describing ESPN’s range of channels and restaurants); Walt Disney Company 1999 Annual Report, supra note 62 (noting ESPN the Magazine’s near tripling of its circulation since its founding).

85. This variety is fully displayed on the website Time has established to represent its book publishers. See Time Warner Bookmark: Subject and Sites (visited Mar. 21 2000) <http://www.twbookmark.com/subjectandsites/index.html> (providing the consumer with 12 broad categories from which to choose, including art, business, fiction, non-fiction, health and beauty, children’s books, mystery, romance, and science fiction).


88. See Hyperion Books Homepage (visited Apr. 22, 2000) <http://hyperion.go.com/>. Disney created its trade publisher Hyperion in 1991. See id. As such, Hyperion has a smaller range of authors and books than most of the other conglomerate book publishers, which had been independent companies prior to their acquisition by the conglomerates. See id. Beyond Hyperion, which publishes books for adults, Disney also claims to be "the number one publisher of children’s books" worldwide.


91. It should be noted there that, although New Line and Warner Brothers are the only companies formally subsumed under the filmed entertainment group heading, all of Time Warner’s cable networks produce some proportion of their own programming, including weekly series, features, or special events. See infra Part II.B.4.

92. Warner Brothers, along with Home Box Office and Time Warner’s cable system holdings are actually owned by the Time Warner Entertainment Company, a limited partnership of which Time Warner owns 74.49%. See About Time Warner: Filmed Entertainment: Warner Brothers (visited Mar. 7 2000) <http://www.timewarner.com/corp/about/entertainment/warnerbros/index.html>; see also infra note 154 and
tional” film production company. Time Warner proclaims that Warner Brothers “has evolved into a fully integrated global entertainment company.” As a result of this evolution, Warner Brothers not only makes new movies and television shows, but also publishes comic books and a magazine, operates a chain of mall stores and its own broadcast television network, and markets and licenses its vast catalog of movie, television, and cartoon titles.

In terms of feature films, Warner Brothers and New Line face competition from a number of production companies. In terms of 1999 market share percentages, these

accompanying text.


98. Five of Warner Brothers’ other subdivisions produce a wide range of television programming. Whereas Warner Brothers Television Animation controls the Looney Toons and Hanna-Barbera catalog of cartoon shorts, see id., Warner Brothers Television is responsible for many of the highest-rated primetime network comedies and dramas, such as ER, Friends, The Drew Carey Show, and The West Wing. See About Time Warner: Filmed Entertainment: Warner Bros.: Selected Brands & Products (visited Mar. 7, 2000) <http://www.timewarner.com/corp/about/entertainment/warnerbros/selected.html>. Telepictures Productions produces daytime variety and talk shows, including Change of Heart, EXTRA, Jenny Jones, and The Rosie O’Donnell Show. See id. Finally, Warner Brothers Animation produces cartoons, such as Batman and Superman, for the WB Network. See id.


103. While Time Warner has historically retained the rights to its own catalog of films, television shows, and cartoons, this is just a portion of the vast library Time Warner has now amassed, which includes approximately 5,700 feature films, 32,500 television titles, and 13,500 animated titles. See About Time Warner: Filmed Entertainment: Warner Bros., supra note 93. The key to assembling this large collection was Time Warner’s purchase of Ted Turner’s Turner Broadcasting in 1996—Turner had previously bought both the MGM library of films and Hanna-Barbera library of cartoons to fuel his cable networks. See About Time Warner: Executives: R.E. Turner (visited Apr. 16, 2000) <http://www.timewarner.com/corp/about/timewarnerinc/corporate/exec-turner.htm>. As a result of the merger, Turner was made a vice-chairman of Time Warner and a member of its board of directors, while Turner’s businesses were spun into various parts of the Time Warner empire. See id.; see also infra Part II.B.4.
companies fell into one of two basic categories—an "upper tier," in which firms each garnered about ten percent or more of the total box office take, and a "lower tier," consisting of firms garnering less than five percent.\textsuperscript{104} All but one of the upper tier companies were owned by media conglomerates; among this more-powerful group, Warner Brothers finished second, capturing 14.2% of market and trailing only Buena Vista, a Disney company which led the industry with seventeen percent.\textsuperscript{105} Also finishing in this upper segment of the industry were: Universal Studios, Incorporated, the only upper tier company not owned by a media conglomerate,\textsuperscript{106} with 12.7%; Paramount Pictures, a Viacom subsidiary with 11.6%; Twentieth Century Fox, part of Rupert Murdoch's News Corp., which collected 10.8%; and Sony Pictures, with 8.6%.\textsuperscript{107}

The rest of the non-conglomerate film companies could be found in the lower stratum of the industry in 1999, along with the conglomerates' smaller subsidiaries that produce independent, foreign, or lower budget movies. For example New Line, with a market share of 4.2%, was virtually tied with Disney's subsidiary, the Miramax Film Corporation, and two independent firms, Artisan Pictures, Incorporated, and Metro-Goldwyn-Mayer, Incorporated ("MGM").\textsuperscript{108} The only conglomerate to finish in this lower tier was Dreamworks, which finished the year with only 4.4% of the market.\textsuperscript{109}

Warner Brothers stands similarly strong in terms of television production. While there are numerous production companies generating television shows each year, many are smaller and either specialize in one genre of shows\textsuperscript{110} or have only one or two reliable hits.\textsuperscript{111} Given that viewer tastes change\textsuperscript{112} and even "hit"\textsuperscript{113} shows typically retain

\textsuperscript{104} See Studio Scorecard, ENT. WKLY., Feb. 4, 2000, at 34–38.
\textsuperscript{105} See id. Buena Vista "devoured the competition," bringing in $1.24 billion with movies such as The Sixth Sense, Toy Story 2, and The Insider, and by finishing first in overall box office sales for the fifth time in six years. Id.
\textsuperscript{106} Ninety-two percent of Universal Studios is owned by the Canadian Seagram Company, Ltd. ("Seagram"). See Hoover's Online: Universal Studios, Inc.: Capsule (visited Apr. 10, 2000) \url{<http://www.hoovers.com/co/capsule/9/0216343679.00.html>}. While Seagram, a liquor company, is not typically included among the major media conglomerates, it now actually receives a majority of its revenues from its entertainment businesses. See Hoover's Online: Seagram Company Ltd.: Capsule (visited Apr. 10, 2000) \url{<http://www.hoovers.com/co/capsule/7/0216341797.00.html>}. In addition to Universal Studios, Seagram also owns the Universal Music Group, see infra note 140, a percentage of the USA Cable Network, and about one quarter of the Loews Cineplex Entertainment Corporation ("Loews"), the second largest movie theater chain in the world. See id.; see also infra Part II.B.3.
\textsuperscript{107} See Studio Scorecard, supra note 104. Sony creates films under its Columbia Pictures and Sony Picture Classics labels and also owns 40% of the Loews theater chain. See Hoover's Online: Sony Corp.: Capsule, supra note 65; see also supra note 106 (discussing Seagram's stake in Loews).
\textsuperscript{108} See id.
\textsuperscript{109} See id. The year began poorly for Dreamworks when its film Saving Private Ryan lost the Academy Award for best picture to Miramax's Shakespeare in Love. See id. However, that trend was reversed this year, as Dreamworks' American Beauty captured the best picture award, possibly signaling a banner year for the young company.
\textsuperscript{110} See, e.g., Bunim/Murray Productions Homepage (visited Apr. 20, 2000) \url{<http://www.bunim-murray.com/>} (offering information on company producing several "reality"-based shows, such as MTV's The Real World); Wolf Creek Productions Homepage (visited Apr. 20, 2000) \url{<http://www.wolfcreekinc.com/>} (producing shows about hunting, fishing, and the outdoors).
\textsuperscript{111} For example, Wolf Films, Incorporated, generates two successful primetime shows, Law & Order and Law & Order: Special Victims Unit. See Wolf Films Homepage (visited Apr. 10, 2000) \url{<http://www.wolffilms.com/>}.

In addition, it should be noted that many of these smaller production companies are owned by writers who, having experienced so much success, wanted to produce their shows as well as write scripts for them. Examples of these companies include David E. Kelley Productions (The Practice, Ally McBeal) and Stephen Bochco Productions (NYPD Blue).

\textsuperscript{112} Compare Sally Bedell, For the TV Networks, the Key to Success is a Long Story, N.Y. TIMES, Apr. 24, 1983, § 6 at 1 (pronouncing the "sudden revival" of the television miniseries genre by The Winds of War in January 1983) with Allan Johnson, Miniseries Genre's Hour of Truth?, THE RECORD (Bergen County), Feb. 27, 2000, at Y4 (suggesting that the fate of the miniseries genre hung on the success or failure of the NBC
their popularity only for short periods, most production companies face constant challenges as the industry preferences fluctuate. By utilizing its different divisions to generate vastly different kinds of shows, however, Warner Brothers can insulate itself from such fluctuations, capitalizing on whatever genre is "hot" while simultaneously garnering revenues with so-called "counterprogramming" from its other divisions. Empowered by similar resources, the other conglomerates pursue similar strategies.

As another example of conglomerate presence on television, consider Sony, which produces programming ranging from cheaper game shows, talk shows, "reality" shows, and news magazine shows. See, e.g., Bill Carter, "Cable Television Ups the Ante on the Outrageous," N.Y. TIMES, Mar. 22, 1999, at C1; Weinraub, supra. For a discussion of how the term "hit" can be applied liberally in the television business, see Brian Lowry, "On TV, Is a Show a Hit Just Because They Say It Is?" L.A. TIMES, Mar. 28, 2000, at F1.

As one example, consider Viacom. Viacom currently has a significant presence in the television production industry—its Paramount Television division, which already produced a number of series (Frasier, the Star Trek franchise of shows) and syndicated shows (Entertainment Tonight, Leeza, Montel Williams) recently merged with famed producer Aaron Spelling's Spelling Television Group, Incorporated (Beverly Hills 90210, 7th Heaven), to increase its output. See Viacom: Businesses: Television: Paramount Television (visited Apr. 16, 2000) <http://www.viacom.com/prodbyunit1.htm?ixBusUnit=17>. In addition, Viacom is in the midst of acquiring the broadcast network CBS, which will greatly expand its role in the television industry. While CBS purchases some of its programming from independent production companies (City of Angels, Everybody Loves Raymond), the network also bolsters both its own and other networks' lineups with programming generated by its divisions and subsidiaries. For instance, CBS's news division produces all of CBS's news shows (60 Minutes, 48 Hours, CBS Evening News, Face the Nation), while King World Productions, Incorporated, a CBS subsidiary, produces syndicated programming available to CBS and other networks, including game shows (Hollywood Squares) and talk shows (Oprah, the Martin Short Show, the Rosie Anaye Show). See CBS News Homepage (visited Apr. 16, 2000) <http://cbsnews.cbs.com>; King World Homepage (visited Apr. 10, 2000) <http://www.kingworld.com>.

Disney, owner of the ABC broadcast network, and News Corp., which owns the Fox network, both have divisions that engage in similar practices as CBS's. See, e.g., Fox Entertainment Group Annual Report 1999: Business Overview (visited Apr. 22, 2000) <http://www.newscorp.com/public/nfox/report99/Navigation/fox_second.html> (discussing the "record-breaking" amount of programming generated by Twentieth Century Fox Television); Walt Disney Company 1999 Annual Report, supra note 62 (describing Disney's Buena Vista Television and ABC Entertainment Television Group and the shows those divisions produce). Furthermore, there is evidence that the trend of networks producing their own programming is constantly increasing, which concerns some media analysts. See Brian Lowry, "The Fittest? Make That Survival of the Biggest," L.A. TIMES, Apr. 11, 2000, at F1 (noting that of ABC's 16 new primetime series in production, 14 are produced by divisions of Disney).

As another example of conglomerate presence on television, consider Sony, which produces programming through its Columbia TriStar Television subsidiary. See Hoover's Online: Sony Corp.: Capsule, supra note 65. Like Warner Brothers and Viacom, Sony generates a wide range of shows, including comedies (King of Queens, NewsRadio), dramas (Dawson's Creek, Party of Five), game shows (Jeopardy, Wheel of Fortune), talk shows (Donnie & Marie, Ricki Lake), cartoons (Godzilla, Men in Black), and soap operas (Days of Our Lives, Young & the Restless). See Sony Pictures Entertainment: Columbia TriStar Television: Shows (visited Apr. 16, 2000) <http://www.spe.sony.com/TV/shows/index.htm>.
Only five years old, the WB Network is one of the youngest and smallest broadcast television networks. Although it has scheduled a complete prime time lineup and daytime offerings such as talk shows and children's cartoons, the WB has far fewer affiliates carrying its programming than the major networks. In terms of ratings then, the WB does not challenge the “Big Three”—ABC, NBC and CBS—but

116. See supra note 102.  
117. See supra note 98.  
119. Television “ratings” have been computed by Nielsen Media Research since the 1950s as “an estimate of audience size and composition for television programmers and commercial advertisers.” Nielsen Media Research: Who We Are & What We Do (visited Apr. 18, 2000) <http://www.nielsenmedia.com/>. Simply stated, Nielsen Media Research measures viewership by surveying over 5,000 homes in the United States—the residents in those homes, who are chosen to represent a cross-section of American viewers, volunteer to have their viewing habits monitored, and these data are converted to “ratings.” See Nielsen Media Research: What Do Ratings Really Mean (visited Apr. 19, 2000) <http://www.nielsenmedia.com/>. Ratings are reported as “points,” where each point represents one percent of the estimated 99.4 million television households in the United States; thus, a show receiving one ratings point was watched by 994,000 households. See Ultimate TV: TV News & Ratings (visited Apr. 19, 2000) <http://www.ultimate.tv.com/news/nielsen/networks/000410network.html>. Individual networks then use the ratings information to compute how much to charge advertisers for commercials during their programming. See Nielsen Media Research: Who We Are & What We Do, supra.  
120. ABC, Incorporated, now part of the Disney conglomerate, is also heavily involved in television production and radio, and owns pieces of two joint ventures, the A&E family of cable networks and Lifetime Entertainment Services. See supra note 83; see also Hoover’s Online: ABC, Inc.: Capsule (visited Apr. 23, 2000) <http://www.hoovers.com/co/ capsule/1/0,2163,47291,00.html>.  
122. The CBS Corporation is about to be purchased by media conglomerate Viacom. See Hoover’s Online: CBS Corporation: Capsule (visited Apr. 22, 2000) <http://www.hoovers.com/co/capsule/6/0,2163,10256,00.html>. In addition to its broadcast network, CBS owns two cable stations and is heavily involved in television production and radio. See id.; supra note 115.
instead routinely battles with UPN, Viacom's young network also established in 1995, and sometimes with Fox.

Warner Brother's extensive catalog of movies, television shows, and cartoons generates revenue for the company in several ways. While the other conglomerates have also accumulated such libraries, it is difficult to determine the relative strength of each company because not the conglomerates publish how large their libraries are and, even if they do, one cannot tell how valuable a library is from mere numbers alone.

Even with its mall stores, Warner Brothers faces significant conglomerate competition; Disney has a similar line of stores dealing in the same kind of merchandise, such as videos, clothing, and collectibles, but has many more locations. In fact, Warner Brothers' only real refuge from conglomerate competition lies in the comic book business, where Warner Brothers' DC Comics is one of only two major publishers in the country, along with the Marvel Entertainment Group, Incorporated.

3. Music

As with its other industries, Time Warner does not focus solely on recording music, but instead has gathered companies involved in every aspect of the music business under its broad Warner Music Group ("Warner Music") heading. This diversification allows Time Warner to exert influence and exact a profit at every point between the time when a song is written and when it finally reaches its listener. To control songwriting and licensing, Warner Music owns two music publishing companies: Warner/Chappell.

123. Despite being founded the same year, UPN is currently carried by even fewer total affiliates, 179, than the WB. See UPN Homepage (visited Apr. 23, 2000) <http://www.upn.com/>; see also Carter, supra note 102.

124. As Fox discussed in its most recent annual report, "[w]hen the Fox Broadcasting Company was created . . . in 1988, few predicted that its popularity would soar." Fox Entertainment Group Annual Report 1999: Business Overview, supra note 115. However, despite continuing to finishing fourth in the overall ratings, Fox has now moved into second place in terms of capturing the most valuable viewer demographic, adults age 14 to 49. See id.

125. Warner Brothers can (1) sell the movies, shows, and cartoons directly to consumers on video tapes or DVDs, (2) license rental chains to rent video tapes or DVDs to the public, and (3) license them to broadcast or cable networks so they can be shown on television.


129. The Marvel Entertainment Group, home of Spiderman, the X-Men, and the Incredible Hulk, publishes 24 monthly comic book titles. See Marvel.com: Subscribe to Marvel Comics (visited Apr. 10, 2000) <http://www.marvel.com/direct/subscribe/subscribe_print.html>. While Marvel and DC have been consistent rivals for years, DC just shocked the industry by hiring Stan Lee, the 77 year-old creator of most of Marvel's characters. See Robert Thompson, Famed Comic Creator Quits Marvel for Rival, NAT'L POST, Apr. 14, 2000, at C3. Lee, who had spent almost 60 years with Marvel, had his contract voided in 1998 as part of Marvel's bankruptcy proceedings. See id. Jenette Kahn, DC's president and editor-in-chief "expect[s] that the financial upside . . . [of Lee's hiring] will be tremendous." Id.

Music, Incorporated (“Warner/Chappell”), and Warner Brothers Publications, Incorporated. In the recording arena, Warner Music owns eight record labels outright and has an interest in several other joint ventures. Furthermore, under each of these recording labels, Warner Music maintains a stable of popular artists that span a range of musical styles. Once music is recorded, Warner Music then turns the product over to its in-house media services firm, which is responsible for the reproduction and packaging of Time Warner merchandise. Finally, Warner Music also has resources in music distribution to ensure that its products reach its customers.

Competition within the music industry has fluctuated wildly over the years but, despite a tumultuous history, the industry has become increasingly concentrated in the past decade or so. As a result of this trend, five major companies, known collectively as the “Big Five,” now dominate the music marketplace. Currently, the largest company


135. Unlike filmed entertainment, where Time Warner has utilized New Line and Warner Brothers to target different markets within the film industry, see supra notes 94–96 and accompanying text, each of the Warner Music labels covers a broad scope of music. For example, Atlantic artists range from country western (Tim McGraw, John Michael Montgomery) to popular (Brandi, Hootie & the Blowfish), from “soft” rock (Phil Collins, Jewel) to “classic” rock (Led Zeppelin), and from alternative (Tracy Chapman, Sinead O’Connor) to rap (Kid Rock). See About Time Warner: Music: Selected Brands & Products (visited Apr. 16, 2000) <http://www.timewarner.com/corp/about/music/wmg/selected.html>.

136. The Ivy Hill Corporation and Warner Media Services are divisions of WEA, Incorporated, a Time Warner company. Together, these two divisions mass-produce Time Warner’s compact and digital video discs, and audio and video cassette tapes, as well as the artistic covers, liner notes, and packaging for all of those products. See Ivy Hill Corporation/Warner Media Services Homepage (visited Apr. 17, 2000) <http://www.ivyhill-wms.com/home.html>.

137. Warner Music sells its merchandise directly to the public in two basic ways. First, Warner Music operates several online music stores, including CDNow, the Direct Audio Video Express (D.A.V.E.), and Ear1. See About Time Warner: Music: Websites, supra note 133. In addition, Warner Music markets music through the Columbia House Company (“Columbia House”), the “largest club-based direct marketer of music… in North America.” Hoover’s Online: Columbia House Company: Capsule (visited Apr. 17, 2000) <http://www.hoovers.com/col/capsule/60,2163,60526,00.html>. Columbia House, which sells to its members via its monthly subscriber magazines and two websites, was started in 1955 but is now jointly owned by Time Warner and Sony. See id.

138. See Brenda Bouw, Big Seven is Now Down to Four: 10 Years, Three Big Deals, NAT'L POST, Jan. 25, 2000, at C8. As Bouw discusses, although the early years of the music industry were dominated by CBS, RCA, and Capitol, but by the end of the 1980s seven major companies ruled the market: Universal (then called RCA), A&M, PolyGram, Warner Music, EMI, Sony, and BMG. See id.

139. PolyGram bought A&M in 1990, and then in 1997, Universal merged with PolyGram, reducing the
among the "Big Five" is the Universal Music Group ("Universal Music"), followed by Sony Music Entertainment, Incorporated ("Sony Music"), the EMI Group PLC ("EMI"), BMG Entertainment, and Warner Music.

Warner Music has a larger presence in the more-specialized music publishing industry, where Warner/Chappell is second only to EMI's publishing arm. Like Warner/Chappell, EMI deals with song rights worldwide, but EMI controls slightly more copyrights than Warner/Chappell, and is the "world's largest music publisher in terms of copyrights." Together, though, Warner/Chappell and EMI's two million plus copyrights account for at least twenty percent of the publishing industry's total revenues. The company closest to EMI and Warner/Chappell in terms of publishing is Universal Music, which owns only 700,000 copyrights.

Complicating this situation are signs on the horizon indicating that the music industry as a whole may soon become even more concentrated: just after announcing its merger with AOL, Warner Music announced plans to purchase half of EMI.

"Big Seven" to the "Big Five." See id.

140. Universal Music led the industry with about 20% of the market in 1999. See Hoover's Online: Universal Music Group: Capsule (visited Apr. 17, 2000) <http://www.hoovers.com/co/capsule7/0,2163,100557,00.html>. In addition to its 20 recording labels and popular artists (Sheryl Crow, Elton John), Universal Music has an extensive publishing business, and has now moved online with concerts and downloads (through its Jimmy & Doug's Farm Club site) and sales (through GetMusic, a joint venture with BMG Entertainment). See id.; infra note 148. Like Universal Studios, the Universal Music Group is owned by Seagram, which is not typically considered a media conglomerate but may be on the verge of becoming one. See supra note 106.


142. EMI is one of the only major music companies not owned or controlled by a conglomerate, however this independent status has led to constant speculation regarding potential takeovers and mergers. See Hoover's Online: EMI Group, Inc.: Capsule (visited Apr. 17, 2000) <http://www.hoovers.com/co/capsule9/0,2163,41769,00.html>. Like the other major music powers, EMI has several recording labels (Capitol, Chrysalis, Virgin) and a stable of artists (Garth Brooks, Tina Turner); what sets EMI apart, however, is its top-ranked music publishing business. See id.

143. BMG Entertainment is owned by the German conglomerate Bertelsmann, and currently encompasses 200 recording labels (Arista, RCA), a music publishing arm, and disc and cassette manufacturing capability. See Hoover's Online: BMG Entertainment: Capsule (visited Apr. 17, 2000) <http://www.hoovers.com/co/capsule8/0,2163,58218,00.html>. In addition, BMG Entertainment owns and operates the BMG Music Club, Columbia House's main competitor in direct marketing, and has jointly created GetMusic, an online music source, with the Universal Music Group. See id.

144. See Bouw, supra note 138 (chronicling industry's current rankings); Roger Smith, It's Only Money, VARIETY, Mar. 20, 2000, at 3 (discussing events leading up to the proposed Warner-EMI merger). Warner Music was the strongest music company in the 1980s, especially domestically, however management shakeups and movement by the other members of the "Big Five" in the 1990s caused Warner Music's status to dip. See id. Kept alive by Warner Chappell's growing profits, Warner Music reorganized its executives and now, as a result of the AOL and EMI deals, seems poised to recapture its former position. See id.

145. See David Lieberman, Musical Merger Creates Royal Flush, USA TODAY, Feb. 8, 2000, at 3B.


147. See Lieberman, supra note 145.


149. See id.; Andrew Pollack & Andrew Sorkin, Time Warner to Acquire Control of EMI Music, N.Y. TIMES, Jan 24, 2000, at C1 (noting that "[p]eople familiar with the Warner-EMI deal... expect[ ] it to win
the tremendous ramifications of this acquisition, especially in the publishing arena, other members of the "Big Five" are now rumored to be negotiating mergers that could further reduce the "Big Five" to the "Big Three."#151

4. Cable Networks

Time Warner subdivides its collection of cable networks into three basic clusters: the TBS Entertainment group, the CNN News group, and the Home Box Office group.#152 While Time Warner owns the TBS and CNN groups outright due to its purchase of Turner Broadcasting in 1996,#153 it controls the Home Box Office group through the Time Warner Entertainment Company limited partnership.#154

The first cluster of networks, the TBS Entertainment group, encompasses ten cable channels with varying degrees of specialization.#155 On the narrower side of this spectrum, the Cartoon Network targets primarily children,#156 while Turner Classic Movies is designed for nostalgic film buffs.#157 In contrast, the other TBS Entertainment networks, including Turner Network Television ("TNT"),#158 the Turner Broadcasting System Superstation ("TBS"),#159 and the new Turner South,#160 target broader audiences with an antitrust approval in the United States and Europe," although "some analysts said that with the number of companies shrinking, the antitrust scrutiny could grow more intense"); Smith, supra note 144.

150. As Lieberman discusses, while an EMI-Warner Music merger would form the largest music company, the most significant implication of such a deal would be in the music publishing industry, where the combination would be "so huge that it [would] be pretty daunting to rivals." Lieberman, supra note 145 (quoting editor of Music Business International). Because of Warner/Chappell and EMI's stature above the rest of the publishing industry, the proposed merger could result in the combination controlling up to 45% of the market. See id. This proposed market power becomes even more troublesome when one considers the financial benefits that can be derived from publishing because "it costs so little to run, and big hits pay off handsomely." Id. (detailing the various ways that publishing leads to high revenues with little corresponding effort or cost).

151. See, e.g., Bouw, supra note 138 ("Industry insiders also believe that they [the "Big Five"] are only a few one-hit wonders away from more consolidation . . . that could bring the number of record labels to three."); Lisa Brownlee, Sony-BMG Would Be Music Leader, N.Y. POST, Jan. 31, 2000, at 38 (suggesting that BMG and Sony were planning a merger, and noting that the heads of both companies were "under mounting pressure" to move in response to the EMI-Warner Music announcement); Chuck Philips, BMG at Loss After Rival's Merger Stole Its Thunder, L.A. TIMES, Feb. 2, 2000, at C1 (describing frustration within BMG caused by the EMI-Warner Music announcement).


153. See supra note 103.


156. Showing cartoons 24 hours per day, seven days per week, the Cartoon Network and its siblings, Cartoon Network Europe, Cartoon Network Latin, and Cartoon Network Asia Pacific, rely heavily on the Warner Brothers library of animated Looney Tunes and Hanna-Barbera shorts. See Cartoon Network Homepage (visited Apr. 17, 2000) <http://www.cartoonnetwork.com>; About Time Warner: Cable Networks: TBS Entertainment, supra note 155; see also supra note 103. In addition to these classic cartoons, however, the various Cartoon Networks also televise newly produced animated features and shows. See Cartoon Network Homepage, supra. Despite what would appear to be a limited audience, the Cartoon Network has grown to the point that it can be seen in 85% of American cable-equipped homes, and was the third-highest rated ad-supported cable network in 1999. See About Time Warner: Cable Networks: TBS Entertainment: Overview (visited Apr. 17, 2000) <http://www.timewarner.com/corp/about/cablenets/turnerent/about.html>.


158. TNT provides a wide variety of programming choices, including feature films, sports, syndicated series, special events and original made-for-television movies. See TNT Homepage (visited Apr. 17, 2000) <http://tnt.turner.com>.

larger variety of programming. Beyond merely operating cable networks, however, the TBS Entertainment group also owns several professional sports franchises, a professional wrestling organization, and an international amateur sports competition. Finally, TBS Entertainment has also cooperated with other companies in joint ventures for cable television, such as the CourtTV Network.

In contrast to the eclectic TBS Entertainment approach, Time Warner’s other two network clusters are much more narrowly focused. First, all of the thirteen networks within the CNN group concentrate on either general or specialized news reporting. Next, the Home Box Office group contains ten premium networks under the Home Box Office (“HBO”) and Cinemax labels that show movies and some individualized programming, and one joint venture, the Comedy Central cable network.

Driven by reruns and movies, TBS competed with the broadcast networks and became the first cable station to qualify for ratings. See id. Today, TBS estimates place the network and its lineup of movies, reruns, and sporting events in three quarters of the households in America. See TBS Homepage: About TBS supra. The newest of the TBS Entertainment networks, Turner South is “the first entertainment network for a region of the country—TV from the South, by the South, and for the South.” Turner South: About Us (visited Apr. 17, 2000) <http://www.turnersouth.com/about_us/index.html>. Broadcasting movies, sports (coverage of the three franchises owned by TBS Entertainment, see infra note 161), and original programming (Southern Living Presents, Live from the Bluebird Cafe), the network hopes “to provide quality entertainment, but also help build regional pride and a sense of community.” Id.

TBS Entertainment owns three major sports teams, all based in Atlanta: the Braves (Major League Baseball), the Hawks (National Basketball Association) and the Thrashers (National Hockey League). See About Time Warner: Cable Networks: TBS Entertainment: Businesses (visited Apr. 17, 2000) <http://www.timewarner.com/corp/about/cablenets/turnerent/compbrandprod.html>. TBS Entertainment owns World Championship Wrestling, a professional wrestling association whose matches are broadcast on several of the TBS Entertainment networks. See id.


For example, while CNN remains committed to being “the number-one news network among Americans,” it has now added extra networks to cover more specific topics, including financial news (CNNSi) and sports (CNNSi), and to deliver news in different ways, such as providing quick updates of major stories (Headline News) or news for travelers (CNN Airport). About Time Warner: Cable Networks: CNN (visited Apr. 18, 2000) <http://www.timewarner.com/corp/about/cablenets/turnernews/index.html>; see also About Time Warner: Cable Networks: CNN: Businesses (visited Apr. 18, 2000) <http://www.timewarner.com/corp/about/cablenets/turnernews/businesses/index.html>

Networks are denoted as “premium” when they are not included in standard cable packages, but instead must be purchased for an additional fee. One purpose of this extra cost is to subsidize the networks’ programming to eliminate the need for commercial advertisements.

Note that although HBO and Cinemax began with only one network each, and are often still referred to by consumers as if they were single, discrete networks, both have now expanded to include additional networks under their broader headings. Thus, while the “basic” HBO and Cinemax networks both still show movies and programming appealing to a wide audience, five additional HBO networks (HBO Family, HBO Comedy) and three additional Cinemax networks (ActionMax, ThrillerMax) offer a narrower range of material. See About Time Warner: Cable Networks: Home Box Office: Businesses (visited Apr. 18, 2000) <http://www.timewarner.com/corp/about/cablenets/hbo/comprandprod.html>.

While Cinemax remains exclusively a movie channel, HBO has added weekly series (Arli$$, Oz, the Sopranos), sports coverage, and other specialized programming. See About Time Warner: Cable Networks: Home Box Office: Brands & Products (visited Apr. 18, 2000) <http://www.timewarner.com/corp/about/cablenets/hbo/selected.html>.

Comedy Central, a 24-hour comedy network, is a joint venture between HBO and Viacom. See, e.g., Viacom: Businesses: Television: Comedy Central (visited Apr. 22, 2000) <http://www.viacom.com/prodbyunit1.tin/?xBusUnit=27>.
As one might expect, Time Warner's cable networks experience two kinds of competition. First, because all networks fill some kind of niche, each of Time Warner's networks must compete with those other channels televising similar kinds of programming. For HBO and Cinemax, networks that primarily or exclusively show recent feature films, this direct competition comes primarily from the other premium channels, including Showtime[169] and the Movie Channel,[170] both owned by Viacom, and the Starz Encore Group channels[171] owned by the Liberty Media Group LLC.[172] Similarly, classic movie enthusiasts can turn to Turner Classic Movies or the likes of American Movie Classics, Bravo!, and the Independent Film Channel.[173] Likewise, the CNN family of networks faces direct competition from other news channels, such as FoxNews and MSNBC.[174] Although the highly-specialized Comedy Central, CourtTV, and Turner South have no true peers, the Cartoon Network must compete with Nickelodeon[175] for children's attention.

Finally, generalists such as TBS and TNT must confront constantly-shifting competition. Because these channels offer a variety of different programming, they face competition from other generalist channels, such as USA[176] and Fx,[177] but also from other competitors depending on what type of shows TNT and TBS are televising. For example, if TNT or TBS shows a movie, as they often do on weekend nights, that channel has


172. The Liberty Media Group LLC is an individually run company, but it is actually a subsidiary of AT&T. See Hoover's Online: Liberty Media Group: Capsule (visited Apr. 22, 2000) <http://www.hoovers.com/co/capsule/5/0,2163,51395,00.html>. In addition to having small stakes in approximately 100 cable networks owned primarily by other companies, the Liberty Media Group also owns its own online company, Liberty Digital, as well as pieces of TV Guide, Time Warner and News Corp. See id.


174. See, e.g., Martha Moore, Winning the Race to Declare Who Won the Race, USA TODAY, Mar. 8, 2000, at 10A (detailing the competition between CNN, FoxNews, and MSNBC to cover the presidential race).

175Nielsenodeon, which broadcasts children's programming during the day and "classic" television shows such as I Love Lucy and Happy Days in the evening as "Nick-at-Night," is owned and operated by Viacom. See Viacom: Businesses: Television (visited Apr. 23, 2000) <http://www.viacom.com/unitbyseg.tin?BusSegmentNickname=tv>.


177. Fx is one of the many cable channels operated by Fox Broadcasting. See Fox Entertainment Group Annual Report 1999: Business Overview, supra note 115. Like TBS and TNT, Fx shows a mixture of movies, syndicated series, and original programs. See id.
to battle the variety of movie channels mentioned previously during that time period. In contrast, when one of the Time Warner networks shows a professional baseball or basketball game, it competes for viewers with the sports networks, such as the ESPN networks and FoxSports.

Complicating this entire picture even further, however, is the fact that most viewers do not watch one kind of programming exclusively. As a result, all of Time Warner's cable networks must also indirectly compete against all of the other available cable networks. Particularly in today's culture, where "channel surfing" has become an everyday phrase, the cross-elasticity of demand in cable television programming is extremely high. Furthermore, although to this point cable networks have been discussed as a separate industry from broadcast networks, as far as viewers and ratings are concerned, the lines of demarcation between cable and broadcast television are blurring like never before. Unlike the early days of cable programming, when fewer households had cable access and most cable networks were highly-specialized, today's cable channels are increasingly willing to challenge the broadcast networks. And analysts suggest that the cable networks are succeeding in "stealing" broadcast television's viewers in greater and greater numbers. Given the ever-increasing competition between cable and broadcast television, then, it is fair to conclude that all networks, broadcast and cable, must now compete with each other and that the cross-elasticity of demand among television networks may increase even further.

178. ESPN actually operates four sports networks: ESPN and ESPN2, which both show a variety of sports programming, ESPNews, which features round-the-clock sports news reporting, and ESPN Classic, which replays tapes of historic and memorable games. See ESPN: TV Listings (visited Apr. 23, 2000) <http://espn.go.com/tv/listings/index.html>; see also supra note 84.

179. FoxSports is actually a number of local sports networks all joined together under the Fox moniker—cable viewers then receive coverage of their nearby sports teams. See Fox Entertainment Group Annual Report 1999: Business Overview, supra note 115.

180. As early as 1960, courts recognized that "[v]ariety is the spice and therefore the necessity of TV programming." United States v. Columbia Pictures Corp., 189 F. Supp. 153, 164, 189 (S.D.N.Y. 1960). This realization, combined with the similarity of purpose behind all broadcast television programming, i.e. the gathering of advertising revenues, led the court in Columbia Pictures to conclude that broadcast television programming in general (rather than any one type of programming individually) was a line of commerce. See id.

181. Given that today the cable networks fight among each other just as the broadcast networks did in 1960, it logically follows that all cable networks are together in one line of commerce. See, e.g., Cable Holdings of Georgia v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987); Satellite Television v. Continental Cablevision, 714 F.2d 351 (4th Cir. 1983).

182. In fact, in the years since Columbia Pictures, courts have recognized cable and broadcast television as interchangeable substitutes, despite the fact that broadcast stations are "free." See, e.g., Cable Holdings of Georgia v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987); Satellite Television v. Continental Cablevision, 714 F.2d 351 (4th Cir. 1983).

183. See, e.g., Carter, supra note 112; Weinraub, supra note 112.

184. See, e.g., Tom Bierbaum, 'B'casters Can't Sweep Away TBS, ESPN, Nick, VARIETY, Dec. 6, 1999, at 28 (noting that even ABC's Who Wants to Be a Millionaire couldn't keep cable networks TBS, ESPN, and Nickelodeon from posting ratings gains); Weinraub, supra note 112 ("CBS, like the other [broadcast] networks, is struggling to retain audiences for its series ... . [Broadcast network] television audiences have diminished because of competition from cable ... .").

The broadcast networks are not powerless in this struggle, however; each member of the big three has started its own cable network(s) and is affiliated with others. NBC operates CNBC and MSNBC and joined with ABC and the Hearst Corporation to create the A&E family of networks. See Hoover's Online: National Broadcasting Company, Inc.: Capsule, supra note 121; see also supra note 83. In addition to A&E, ABC is linked to the ESPN and Disney networks through its parent company, Disney. See Walt Disney Company 1999 Annual Report, supra note 62. CBS owns the Nashville Network and Country Music Television, and soon will be owned by Viacom, which already owns MTV, Nickelodeon, VH1, and other cable networks. See Hoover's Online: CBS Corporation: Capsule, supra note 122; Viacom: Businesses: Television (visited Apr. 22, 2000) <http://www.viacom.com/unithyseg.tin/?BusSegmentNickname=tv>.
5. Cable Systems

As Section 3 indicated with regard to the music business, Time Warner has vertically-integrated itself into that industries, so as to have as much control over and exact as much of a profit from it as possible. Time Warner’s approach to cable television is no different: in addition to owning cable networks, i.e. the channels that provide the programming, Time Warner has also gathered extensive holdings in the cable systems industry, i.e. the companies that wire houses and provide cable access to paying subscribers. In fact, Time Warner Cable has now equipped over twenty million homes and currently has over twelve million subscribers. In contrast to its other industries, however, Time Warner’s primary competition in cable systems is not a media conglomerate. Instead it is the telecommunications giant, Atlantic Telephone and Telegraph Corporation (“AT&T”), whose Broadband and Internet Services division is now poised to overtake Time Warner as the number one provider of cable service in the country.

While the cable systems industry may seem to be just one piece of the overall cable industry and nothing more, however, in actuality it is currently the site of a flurry of competitive maneuvering. Because Internet access over copper telephone lines has both speed and volume limitations that prevent many information-sharing tasks from being performed efficiently, Internet users are now turning to cable modems and DSLs.

186. See Hoover’s Online: AT&T Broadband and Internet Services: Capsule (visited Apr. 23, 2000) <http://www.hoovers.com/co/capsule/1,0,2163,14891,00.html> (detailing AT&T’s 1999 purchase of major cable provider TCI and its upcoming acquisition of the MediaOne Group, Inc. which will push it into first place.
187. For example, Bill Gates described how, with current technology and transfer speeds, downloading music off the Internet is practical while downloading video is not. See Noah Robischon, The Emperor Strikes Back, ENTERTAINMENT WKLY., Jan. 7, 2000, at 28 (discussing the future of technology and media with Bill Gates). In addition, current dial-up service requires the user “to place—and pay for—a telephone call to establish a connection.” David D. Clark, High Speed Data Races Home, S.CI. AM., Oct. 1999, at 94.
188. Cable modems perform basically the same function as the telephone modems with which most people are more familiar: they facilitate a two-way transfer of information. See Clark, supra note 187. However, cable modems allow transfers to be made to and from televisions over cable lines instead computers via phone lines—the cable lines can accommodate a much larger amount of information and can perform transfers much faster than traditional phone lines, plus there is no need to ever disconnect from the Internet. See id. Different kinds of cable allow for different transmission speeds—traditional coaxial cable, which most people use within their homes to connect the television set to the cable jack, transmits faster than telephone wire, while transmissions along fiber-optic cable, which sends information in the form of light, can literally approach lightspeed. See id. In such fiber-optic systems, transmission is only slowed by the transformation of information from electrical signals into light and back, but current research is close to eliminating even this barrier. See John S. MacNeil, Information Acceleration: New Device Speeds Data, U.S. NEWS ONLINE (Apr. 17, 2000) <http://www.usnews.com/usnews/issue/000417/opto.htm>.
189. Most cable companies have now upgraded their systems to a hybrid of coaxial and fiber-optic cables. See Clark, supra note 187. However, rather than replace their entire systems with fiber-optic lines, a move that would cost too much money, time, and inconvenience for customers, companies have chosen to integrate the two forms of cable. See id. Fiber-optic lines now typically run either to the curb or to the house, where coaxial cable begins. See id.

These systems are not perfect, however. The two inherent drawbacks to cable Internet systems are fluctuations in transfer rates and security. Much like a common water or gas utility, the capacity of cable systems is shared among one’s neighbors—which, thus, transfers can slow as more people connect to the Internet. See Harry Levin, Cable and High-Speed Telephone Lead the Way toward Faster Access, ST. LOUIS POST DISPATCH, Apr. 9, 2000, at A7. Furthermore, because cable is a “shared” system, and users’ PCs remain connected to the Internet, there is the risk that enterprising hackers could infiltrate the users’ computers. See id. For even more information on Internet access via cable systems, see Milo Medin & Jay Rolls, The Internet Via Cable, S.CI. AM., Oct. 1999, at 100.
to provide so-called “high-speed” access. Because these two technologies are currently seen as at least the near-future of Internet access, companies such as Time Warner and AT&T are staking out as much territory in the cable systems industry as possible in an attempt to become the primary conduit to the Internet. But, given that both cable and DSL access have drawbacks and mainstream America is currently unfamiliar with both, it remains unclear which system will win out. While AT&T, with telephone and cable systems, has the luxury of positioning itself in both technologies, Time Warner has emphasized cable modem technology to maximize the importance of its cable systems.

One final wrinkle in the cable systems industry is the growing presence of satellite programming companies. Frustrated with the limited choices offered by local cable systems, many customers have started purchasing service from satellite companies that can beam signals to subscribers’ homes from almost anywhere in the world. Unlike “traditional” cable systems, which charge only a monthly fee, satellite television customers must often purchase hardware, such as a satellite dish, in order to receive their programming—in the past, such start-up costs were a major drawback to satellite service. However, major satellite providers now offer financing that can significantly reduce costs that must be borne up-front. This development, combined with recent legislative proposals that would allow satellite providers to carry local broadcast channels, has greatly increased the attractiveness of satellite television. And, while satellite technology has not yet begun to challenge wiring systems in terms of Internet access, as some technology experts believe it ultimately will, satellite television has grown to the point where both satellite and “traditional” cable companies now target each other relentlessly in mainstream advertising.

To respond to the growth in satellite subscriptions, “traditional” cable systems companies such as Time Warner and AT&T have taken strides to make cable connections more valuable to consumers. To this end, the companies have expedited their integration of fiber-optic cable into their networks, have begun massive advertising campaigns of never having to disconnect one’s system from the Internet. See id. Unlike cable systems, however, DSLs are individualized—not having to share the connection with neighbors means guaranteed transmission speeds and system security. See Leivins, supra. However, DSLs are slower than fiber-optic cables, and currently DSL customers must be within a certain distance of their telephone company’s switching station to take advantage of them. See Clark, supra note 187. For more information on DSLs, see George T. Hawley, DSL: Broadband by Phone, SCI. AM., Oct. 1999, at 102.

See DirecTV: About DirecTV: DirecTV Receivers (visited Apr. 26, 2000) <http://www.directv.com/overview/overviewpages/0,1098,77,00.html> (discussing the receivers which include an 18” satellite dish).


193. See Pollack, supra note 192 (describing in detail the recent successes of Hughes Electronics, owner of DirecTV and subsidiary of General Motors). But see Peter Foster, Satellite Nationalism, NAT’L POST, Mar. 17, 2000, at C7 (commenting on the news that U.S. satellite telephone company Iridium would deorbit its satellites and noting “how costly it can be to misread fast-changing telecommunications and entertainment delivery markets”).

194. See, e.g., Robert P. Norcross, Satellites: The Strategic High Ground, SCI. AM., Oct. 1999, at 106 (suggesting that “if you want to see the future of broadband communications, look to the stars” because satellite systems “avoid many of the complications that plague ground-based networks” such as the distance limits of DSLs and the volume constraints of cable modem technology). But see Clark, supra note 187 (“Of all the broadband options now emerging, satellite-based service is the most advanced and the most risky—from both a technical and an investment perspective.”).

195. Advertising from the traditional companies has been extremely focused, suggesting that the purchase of hardware is expensive and unnecessary when digital cable programming and high speed Internet access are possible “through the cable you already have.”
regarding cable Internet access, and also have begun offering digital programming, which offers more network choices and a higher quality picture.\textsuperscript{196} Furthermore, to capitalize on high-speed cable access while it is still "hot," both AT&T and Time Warner have introduced high-speed Internet services.\textsuperscript{197} While high-speed cable Internet access may attract customers back away from satellite systems in the short term, it remains extremely unclear how the future of all of these technologies will coalesce.

\textbf{6. Summary}

While Time Warner's subdivisions each face competition within their particular industry, very few companies boast holdings with either the breadth or depth of Time Warner. As a result, when seen as a giant amalgam of media companies, Time Warner faces competition primarily from the other massive media conglomerates. While not every conglomerate has a presence in every media industry, the overlaps that exist between these giant companies mean that at least two or three conglomerates are active in every area. The one glaring exception to this pattern is in the cable systems market, where Time Warner is competing not with entertainment companies, but instead with traditional communication powers such as AT&T.

\textbf{C. The AOL/Time Warner "Vision"}

When the AOL-Time Warner merger was first announced, the most common sentiment expressed was that the companies were "a natural fit" for one another.\textsuperscript{198} AOL, despite its huge membership and historic success, knew that a challenge was on the horizon: the speed of cable modems and DSLs threatened to make AOL's dial-up access to the Internet obsolete.\textsuperscript{199} Time Warner, by investing so heavily in these technologies, would provide AOL with a way to recreate itself as the public begins to switch over. Plus, as always, AOL was looking for more online content to feed its subscribers to keep them satisfied—unlike AT&T, a media conglomerate such as Time Warner would also fill that need perfectly.\textsuperscript{200} From Time Warner's perspective, AOL represented not only millions of customers for its various products, but a new way to access those customers that was even more direct than the Web itself: via most people's launching point to the Web.\textsuperscript{201}

These shorter-term benefits to the companies were only a part of the reasoning behind the merger, however. Both Case and Levin envision a not-too-distant future when listening to the radio, watching broadcast television or cable, and using Internet applications will all be merged into one process that can be performed on one piece of equip-

\textsuperscript{196} See Pollack, supra note 192.
\textsuperscript{197} There are two leading cable online service providers: Road Runner and AT&T@Home. Road Runner was created in 1998 as a joint venture between Time Warner, MediaOne Group, Inc., Microsoft, Compaq Corp., and Advance/Newhouse. See Road Runner High-Speed Online: Company Online (visited May 1, 2000) <http://www.rr.com/rdrun>. Road Runner provides high-speed Internet access through the subscriber's cable lines. See id.
\textsuperscript{198} AOL Buys Time Warner for $166 Billion in Stock, supra note 1 (quoting Time Warner CEO Gerald Levin). See also Glass, supra note 1; Syre & Stein, supra note 1.
\textsuperscript{199} See AOL Buys Time Warner for $166 Billion in Stock, supra note 1; Glass, supra note 1; Syre & Stein, supra note 1.
\textsuperscript{200} See AOL Buys Time Warner for $166 Billion in Stock, supra note 1; Glass, supra note 1; Syre & Stein, supra note 1.
\textsuperscript{201} See AOL Buys Time Warner for $166 Billion in Stock, supra note 1; Glass, supra note 1; Syre & Stein, supra note 1.
The executives' faith in this forecast, and their corresponding belief that a unified AOL-Time Warner can best help the world reach such a technological plateau, was blatantly evident during their recent testimony before the Senate Judiciary Committee (the "Committee") regarding the merger's implications. There, Case described the marriage of the two companies as not just a merger of businesses, but rather "a merger of ideas, a shared commitment to empower consumers, community, families and citizens, building a global medium that benefits society." The new AOL-Time Warner, Case continued, would "be able to provide consumers [with what they need], across industries, across platforms, across media."

Levin echoed his new partner's sentiments, noting that the two men had seen "the company of the future, a company with the creative infrastructure to provide a constant stream of quality content, plus a genetic appreciation of how to form web communities and how to serve them easily and conveniently." Levin further postulated that the merger "could create the first enterprise not only fully prepared to compete on the Internet ... but a company ... to bring[ ] consumers everywhere the speed and immediacy of broadband across all delivery platforms, wired or wireless, thus unlocking the fullest possibilities of interactivity." Finally, Levin somewhat immodestly concluded that AOL-Time Warner would be "really a prototype [company] for the 21st century."

It should be noted that this theory of an impending computer-media unification is not solely the product of Case and Levin's inspiration; rather it is a concept shared by other technological visionaries as well. Given that fact, and the other powerful players in the computer and media industries, Case and Levin were each under considerable pressure before the merger to ensure that their companies would not be bystanders to the coming revolution. Thus, when the possibility of the AOL-Time Warner union arose, both men recognized that such a marriage would provide the bases in the computer and media industries necessary to launch such a daring venture, and both jumped at the chance.

Beyond their new company's ability to revolutionize technology, Case and Levin also alluded to AOL-Time Warner's capacity to evoke social reforms via their burgeoning enterprise. Case articulated special concern over what he called "the digital divide"—the disparity of access to computers based on socioeconomic status—and,
after recapping AOL's efforts to bridge that gap, Case expressed optimism at the thought of AOL and Time Warner "joining . . . [their] resources and sharing . . . [their] ideas to close this divide." Case also emphasized his commitment to "make sure that the Worldwide Web is not worldwide in name only," comparing the quick strides made in wiring the country and the world to the far slower spread of electricity across America during the previous century. Case concluded this part of his remarks by restating "AOL-Time Warner's shared mission of building a truly global medium, as essential to people's lives as the telephone or the television."

Building on Case's comments, Levin reiterated his firm's "sense of community responsibility," exemplified by Time founder Henry Luce's edict that the company always operate "in the public interest as well as the interest of . . . [its] shareholders." After detailing Time Warner's individual efforts toward community service, Levin again commented on the "clear and present danger" of the "digital divide." But Levin assured the Committee that "nothing has been more crucial to the agreement we've reached . . . than our vision of AOL-Time Warner's ability to be a catalyst for meaningful change in the way our country, indeed our world, offers its children the opportunity for creative expression, intellectual enrichment and material success."

III. Analysis of the Merger and its Implications

As Part II describes, the proposed AOL-Time Warner merger is truly a union of giants. Consequently, this Part examines the legality of the proposed merger in two different ways. First, the marriage will be analyzed using the government's merger guidelines to simulate the Federal Trade Commission's ("FTC") pending review of the deal. Second, given the widespread predictions that the merger will be approved, the proposed union will be scrutinized in terms of its long-term implications for the computer and media industries and consumers.

A. The Government's Upcoming Analysis of the Merger

Governmental review of mergers is dictated by section 7 of the Clayton Act, which forbids acquisitions whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly." Although the statute itself lacks definitive enforcement standards, the Department of Justice and the FTC have promulgated Horizontal and Non-Horizontal Merger Guidelines ("Guidelines") to describe their enforcement poli-

---

210. Id. at *15 (statement of Stephen Case, CEO AOL).
211. Id. at *16.
212. Id.
213. Id. at *21 (statement of Gerald Levin, CEO Time Warner).
214. Id.
215. Id.
   
   No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
   
217. There are two sets of Merger Guidelines, one for horizontal mergers, i.e. mergers between direct competitors within the same industry, and another for non-horizontal mergers, i.e. vertical or conglomerate mergers between non-competing companies engaged in different industries. Although both sets of Guidelines
cies. Thus, to anticipate the FTC's review, this section will apply the Guidelines to the AOL-Time Warner merger. Such an analysis involves three broad steps: identifying the companies' relevant geographic and product markets, calculating the primary market's Herfindahl-Hirschman Index ("HHI") of concentration, and finally examining whether, given the market definition and concentration, the merger portends any conduct that the Guidelines deem problematic.

1. Market Definition

Analysis of the AOL-Time Warner pairing must begin with a definition of the product and geographic markets occupied by the two companies.

a. Product market

To delineate the scope of the product market and to account for cross-elasticity of demand, the Guidelines prescribe the "price increase test," wherein one imagines a hypothetical monopoly in a given product and then asks what would happen if the monopolist increased prices by a "small but significant and nontransitory" amount. If, as a result of the price increase, enough customers switched to the "next best substitute" of the given product to make the increase unprofitable, that substitute is included within the product market definition. This test is performed until all suitable substitutes are accounted for; the product market is defined as the smallest group of products that satisfy the price increase test.

To define AOL's product market, one must begin with the narrowest possible definition of AOL's service: AOL acts as its subscribers' dial-up Internet service provider ("ISP"), i.e. facilitating access to the Web, while simultaneously offering online "services," i.e. providing email, other programs, and content. Currently, AOL, Earthlink, and Prodigy are the only companies that provide this kind of product to a significant number of customers. The only real alternatives for consumers come from either (1) dial-up companies that act strictly as ISPs with no content or service, or (2) companies offering AOL-like service combined with high-speed access through cable connections. However, one must seriously question whether either of these sets of companies passes the price increase test.

First, consider the ISP-only companies. While most of the ISP-only companies remain small, they are increasing in number and have begun to present themselves in ad-
vertising as competitors of AOL.\textsuperscript{223} However, several of the ISP-only services are completely free to consumers,\textsuperscript{224} yet AOL with its monthly fee does not appear to be losing any subscribers to them.\textsuperscript{225} Given that AOL customers are willing to pay approximately $20 per month\textsuperscript{226} rather than utilize an ISP-only service free of charge, it is unlikely that a "small but significant and nontransitory" price increase would drive AOL customers away.

Similarly, the high-speed services seem like they should be more attractive. Their services are easy-to-use and have the advantages of cable access.\textsuperscript{227} However, these companies have not slowed AOL's meteoric growth, nor have they achieved subscriber bases of their own sufficient to compete with AOL's.\textsuperscript{228} In addition, the primary high-speed services are already significantly more expensive than AOL.\textsuperscript{229} Thus, a "small but significant and nontransitory" AOL price increase is unlikely to drive AOL customers away.

Given that ISP-only and high-speed companies fail the price increase test, AOL's product market should be defined narrowly. AOL is an ISP that also provides "service" via a dial-up connection.

Time Warner's product markets are a bit more challenging to define, given the breadth of Time Warner's operations. One can begin with any one of Time Warner's four media industries, publishing, filmed entertainment, music, or cable networks—an application of the price increase test suggests that all four industries can be considered together under a broad "media entertainment" product heading. Such a conclusion is reached by considering first the interchangeability of products within each media industry. For example, within the filmed entertainment industry, if feature film prices were increased a "small but significant and nontransitory" amount, the video, cable, and network television sectors would likely reap the benefits as movie-goers began to stay home more regularly and search for alternative visual entertainment.\textsuperscript{230} Similarly, if the price of books were raised, avid readers could shift to buying magazines, or vice-versa.

Moving onward, then, one can imagine analogous interchangeability between media industries, i.e. that if prices within all of one media industry were elevated, consumers who traditionally favor that industry would look elsewhere for entertainment. For example, if the entire publishing industry, magazines, newspapers, and books alike, raised.

\textsuperscript{223} See, e.g., NetZero Homepage (visited Apr. 26, 2000) <http://www.netzero.com/> (offering itself to consumers as an ISP and including its national television advertising campaign presenting itself as an alternative to AOL).

\textsuperscript{224} See id. (offering free Internet access); see also supra note 59.

\textsuperscript{225} This conclusion is based on the fact that AOL's subscriber totals keep increasing. Note, however, that because there are no data tracking individual subscribers, one cannot refute the proposition that AOL's positive growth rate is a product of greater numbers of new subscribers "masking" the number of AOL subscribers leaving the company for ISP-only companies and other competitors.


\textsuperscript{227} See supra note 197 (describing the Road Runner and AT&T@Home services).

\textsuperscript{228} One reason may be that the high-speed services are not even available in all the places where the particular parent company does business. See, e.g., Road Runner High-Speed Online: Availability, (visited May 1, 2000) <http://www.rr.com/rrun/> (listing the locales where the service is currently available, and suggesting that "[a]t this time we do not have definitive plans to launch Road Runner in your area.... However, our goal is to have Road Runner available to all of the homes passed by Time Warner and MediaOne cable systems by year-end 2000.").

\textsuperscript{229} For example, RoadRunner charges a monthly fee of approximately $40, twice as much as AOL, plus a one-time connection fee of $100. See Roadrunner High Speed Online: Availability, supra note 228. AT&T charges similar rates for its AT&T@Home service. See AT&T@Home: Frequently Asked Questions, supra note 197.

\textsuperscript{230} This conclusion rests on the assumptions that (1) the higher prices charged by the filmmakers will be passed on by theater chains to movie-goers, and (2) most movie-goers have television sets and/or cable subscriptions.
its prices a "small but significant and nontransitory" amount, readers might begin to watch more cable and network television, listen to more music, or attend more movies.231 While this logic relies on the idea that media entertainment is fungible, such an assumption is justified when one considers that each of the media industries targets a nearly identical demographic group as its key consumers.232

In addition to a "media entertainment" market, however, one must also consider Time Warner's interests in cable systems. The narrowest definition of a cable systems industry would include only those "traditional" companies that delivered programming to paying subscribers via some mix of coaxial and fiber-optic cable. However, the popularity of satellite television systems has now increased to the point where such systems may be a legitimate substitute for most traditional cable customers. Significantly, "[s]atellite television has attracted not only rural dwellers who do not have access to cable"; instead, a majority of satellite companies' new subscribers are "urban consumers who want more channels than cable can provide or are disenchanted by their local cable monopoly's service."233 This trend, combined with the decreasing price and increased availability of satellite programming,234 suggests that a price increase by traditional cable providers would drive customers to satellite service. As such, the proper product market for Time Warner's cable systems would be a "cable provider" market that includes both traditional and satellite programming providers.

b. Geographic market

Closely related to the product market definition is the geographic market determination—as with product markets, one must calculate the geographical limits to which consumers will go for alternatives when faced with a hypothetical monopolist's "small but significant and nontransitory" price increase.235

In AOL's case, consumers looking for an alternative online service provider could and would probably search the Internet for a replacement. Based on the online service product definition, an alternative company would have to be providing some kind of content to its members—this means that the service would likely have established a website to supply its existing customers and to attract new ones. The existence of a website means that prospective subscribers worldwide would be able to find and access

231. This, of course, assumes that the different kinds of entertainment are relatively fungible for consumers, but such assumptions have been relied upon before. See, e.g., Satellite Television v. Continental Cablevision, 714 F.2d 351 (4th Cir. 1983) (utilizing district court's product market definition that combined "cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses").

232. Compare Geoff Boucher, Selling Millions on a Sour Note, L.A. TIMES, Feb. 20, 2000, at Calendar p.6 (detailing the mixed emotions of music industry executives who "can't stand much" of today's teen pop music, but are thrilled because "albums are flying off the shelves and selling to [their] key demographics"), with Ann Marie Kerwin, Bet is Set for Us Weekly as Showtime Approaches, ADVER. AGE, Mar. 13, 2000, at 3 (discussing the risks taken in launching a new weekly magazine that attempts to steal readers "18-to-34, the key demographic"), with Bob Raissman, Network Takes Gamble, Risks Conflict of Interest, DAILY NEWS (New York), Mar. 30, 2000, at 6 (noting that televised broadcasts of the World Wrestling Federation have "already captured the key 12-to-24 age group"), with Susan Stark, Scream 3 Ends the Hip Slasher Trilogy with a Good Thrill, DETROIT NEWS, Feb. 4, 2000, at D1 (alluding to the talents of screenwriter Kevin Williamson, "whose uncanny way of tapping into the key 18-30 demographic" has driven the success of the film franchise). If different forms of media entertainment were not interchangeable, one would expect to see each industry targeting different groups of consumers, i.e. movie fans would be distinguishable from music buffs, and so forth.

233. Pollack, supra note 192 (noting that "some 70% of DirecTV's new subscribers live in areas where cable television is available").

234. See supra notes 190–95.

the service. Conversely, because subscribers will be accessing the service electronically, the service could be headquartered almost anywhere in the world. Given all of these possibilities, AOL is competing in a truly global geographic market.

In contrast to AOL, the media entertainment market occupied by Time Warner seems primarily local. Because media industries trade in physical goods rather than services, if a monopolist in any of the industries were to raise prices, consumers would be limited to the retailers within their general locale in searching for substitutes. For example, a music listener who wants to purchase a particular CD will be able to hunt through local record stores. But assuming that all of the local retailers pass on the monopolist recording company's price increase, the customer will have no choice but to pay the higher price or do without. Even the Internet will probably not help the hypothetical CD hunter—because many of the record companies own their online direct marketers, as is the case with Time Warner and Columbia House, the CD hunter that checks the Web will likely face the same price increase that he encountered at his local store. A similar trend is apparent in the cable provider market. Typically, geographic regions are served by only one traditional cable provider. While a national satellite provider may also cover that geographic region, if one does not, the consumer has little choice but to pay the cable provider's price increase or go without cable television. Thus, both of Time Warner's industries compete on local levels.

2. Computation of HHIs

Once product and geographic markets have been defined, one must determine the degree of the market's concentration—as a market becomes increasingly concentrated, the potential for a given merger to harm competition rises. To calculate concentration, the Guidelines invoke the Herfindahl-Hirschman Index ("HHI"). By summing the squares of the market shares of a given market's participants, the HHI "reflects the distribution of the market shares," while simultaneously "giv[ing] proportionally greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions." Market shares are typically measured by dollar sales, but the shares should be computed "using the best indicator of firms' future competitive significance." HHI values can range from almost zero to 10,000 in the case of a complete monopoly—the government classifies a market based on its HHI value as being either unconcentrated (values less than 1000), moderately concentrated (1000-1800), or highly concentrated (above 1800).

Subscribership is the lifeblood of the online service market; ever since Compuserve, Prodigy, and AOL began competing in the 1980s, companies within the online service market have ranked themselves based on their subscribership totals. As such, sub-

---

236. Naturally, satellite providers are limited by the locations and coverage of the satellites they use to beam signals to their customers. As a result, some more remote regions of the country, such as Hawaii, currently receive far less satellite service than more densely populated areas, such as the East Coast. See, e.g., EchoStar: About Us: Our Satellites (visited Apr. 27, 2000) <http://www.dishnetwork.com/profile/third_level_content/echostar_launches/index.asp>. However, such limitations could be overcome by a proliferation in the number of satellites that some analysts expect in the near future. See Norcross, supra note 194.

237. Note that unlike horizontal mergers, which by definition increase market concentration, vertical mergers cannot affect the concentration of a given market. As a result, instead of calculating market concentration pre- and post-merger to see the merger's effect, as one would when evaluating a horizontal merger, here one must calculate the market HHI simply to see if the market is ripe for the kinds of anti-competitive effects that vertical mergers can produce.


239. Id. § 1.41, at 41,557.

240. Id. § 1.5, at 41,557 n.17.

241. See supra Part II.A.
scriber ship, not dollar sales, is probably the best indicator of future competitive significance within the online service industry. Currently, AOL has amassed 24.5 million subscribers between its AOL and Compuserve services, while Earthlink has gathered 2.5 million and Prodigy has roughly another million. Crunching these numbers, the HHI for the online service market is approximately 7800.

Similarly, the cable provider market also measures success in terms of subscribership. Among traditional cable systems, which have approximately seventy-five million subscribers nationwide, Time Warner, with 12.6 million, and AT&T, with eleven million, and Comcast Corporation ("Comcast"), with eight million, currently dominate. Furthermore, AT&T is in the process of acquiring the MediaOne Group's five million subscribers, a deal that will elevate AT&T to the top spot in this sector of the market. Satellite programming is currently a duopoly, as Echostar Communications Corporation ("Echostar"), with 3.4 million subscribers, and DirecTV, with eight million, have "acquired all their competitors." Combining these two sectors, then, the cable provider industry has a base of 83.4 million subscribers; Time Warner's share of the market is fifteen percent, while AT&T with its new purchases will swell to nineteen percent. Comcast, third among traditional providers, and DirecTV, the leader of the satellite companies, each hold about ten percent of the market; other companies post modest market shares, including: Cox Communications, Incorporated, 6.5 percent, Adelphia Communications Corporation, six percent, Liberty Media International, five percent, and DirecTV's rival Echostar and the Cable Systems Corporation each with four percent. These market shares result in an HHI for the cable provider industry of approximately 900, indicating that it is relatively unconcentrated.

243. See Hoover's Online: Prodigy Communications Corp.: Capsule, supra note 69; Richtel, supra note 69.
244. Using a total subscriber base of 28 million people, AOL's market share becomes 88%, Earthlink's 9%, and Prodigy's 3%. Thus, the HHI equation becomes: HHI = (88)^2 + (9)^2 + (3)^2 = 7834.
245 See Pollack, supra note 192 (noting that in 1999 "there were 3.75 million digital subscribers, just over 5% of all cable customers.").
246. See About Time Warner: Cable Systems, supra note 185.
249. See Pollack, supra note 192.
250. See Hoover's Online: Cable Systems Corp.: Capsule, supra note 69; Richtel, supra note 164, 172.
252. Pollack, supra note 192. In addition, market forecasters predict that satellite television will add four million new customers during the year 2000. See id.
257. The HHI equation becomes: HHI = (19)^2 + (15)^2 + (10)^2 + (10)^2 + (6.5)^2 + (6)^2 + (5)^2 + (4)^2 + (4)^2 = 921. While the firms listed account for only 80% of the cable provider market, the remaining firms lack
AOL-Time Warner Merger

2000

Unlike the online and cable provider markets, which are service-oriented, the media entertainment market is more traditional because of its reliance on sales of tangible merchandise. As such, the media entertainment HHI can be evaluated in terms of dollar sales. Computing the market shares of media entertainment market, Time Warner led all of the conglomerates in 1999, capturing roughly twenty-five percent of the market, followed by Disney with twenty-one percent, Sony, sixteen percent, Bertelsmann and News Corp. each with about thirteen percent, Viacom with twelve percent, and Dreamworks with one percent. Converting these percentages into an HHI, one finds that the media entertainment market is moderate to highly concentrated, with an HHI of roughly 1800.

3. Objectionable Conduct: Erecting Barriers to Entry

By definition non-horizontal mergers cannot change a market’s concentration. Thus, the Guidelines prohibit vertical mergers only when very specific market conditions are present and, as a result, the merger creates the potential for particular forms of anti-competitive behavior. Given that Time Warner was not a disruptive buyer, and neither AOL nor Time Warner is a public utility, the significant concerns from the Guidelines’ perspective are the possibilities that the merger will eliminate potential competition or erect “competitively objectionable barriers to entry.”

To begin, one could consider AOL’s purchase of Time Warner as an attempt to eliminate potential future competition in the online service market from Time Warner’s high-speed Internet service, Road Runner. However, to be objectionable, a non-horizontal merger must “eliminate” or “remove” a firm from potential competition.

significant market share; as such, their exclusion from the HHI calculation is not troublesome because the small shares will become even smaller when squared, and therefore will not affect the HHI significantly. See 1992 Horizontal Merger Guidelines § 1.5, 57 Fed. Reg. 41,552,41,557–58 (1992).

258. The total 1999 sales among the conglomerates were worth approximately $111 billion. See Hoover’s Online: Bertelsmann AG: Capsule, supra note 63 (reporting $14.2 billion); Hoover’s Online: Dreamworks SKG: Capsule, supra note 66 (estimating $1 billion); Hoover’s Online: News Corp.: Capsule (visited May 11, 2000) <http://www.hoovers.com/co/capsule/6/0,2163,41816,00.html> (reporting $14.3 billion); Hoover’s Online: Sony Corp.: Capsule, supra note 65 (reporting $18.1 billion); Hoover’s Online: Time Warner: Capsule (visited May 11, 2000) <http://www.hoovers.com/co/capsule/20/0,2163,11482,00.html> (reporting $27.3 billion); Hoover’s Online: Viacom: Capsule, supra note 64 (reporting $12.9 billion); Hoover’s Online: Walt Disney Company: Capsule, (visited May 11, 2000 <http://www.hoovers.com/co/capsule/3/0,2163,11603,00.htm> (reporting $23.4 billion).

It should be noted that Dreamworks is a privately-held company on a different fiscal year schedule than the other conglomerates—as such, financial information about the company is based primarily on speculation and is therefore less reliable. The earnings figure used here is the best number available, but it is merely an estimate made for Dreamworks’s 1998 fiscal year. See Hoover’s Online: Dreamworks SKG: Capsule, supra note 66. Because of this limitation, the calculations here likely underestimate the total size of the market and Dreamworks’s participation therein.

259. The HHI calculation for the media entertainment industry becomes: HHI = (25)² + (21)² + (16)² + (13)² + (13)² + (12)² + (1)² = 1805. However, this HHI value should be considered an overestimate; if Dreamworks’s earnings were underestimated by financial analysts, as they probably were, see supra note 66, Dreamworks would hold a larger share of the market, stealing percentage points away from the other conglomerates. Squaring these altered market shares would then decrease the HHI value, so it is extremely likely that the media entertainment market is only moderately concentrated.


261. See id.

262. This condition is required to find a violation under § 4.222 of the Non-Horizontal Guidelines. See id. § 4.222, at 26,836.

263. This is a prerequisite for a violation of § 4.23 of the Non-Horizontal Guidelines. See id. § 4.21, at 26,836.

264. See id. § 4.1, at 26,834.

265. See id. § 4.21, at 26,835.

266. Id. § 4.11, at 26,834.
Here, that will not be the case because, while the acquisition will give AOL a stake in Road Runner, the company is a joint venture between Time Warner and several other firms. As such, AOL will not be able to unilaterally remove Road Runner from the competitive market. Because Road Runner can still survive and compete with AOL, the merger will probably not be prohibited on these grounds.

Next, to find that a merger creates objectionable barriers to entry, the Guidelines require that three "necessary (but not sufficient)" conditions all be satisfied. First, the degree of integration between the two companies' markets must be "so extensive that entrants to one market (the 'primary market') also would have to enter the other market (the 'secondary market')," where the "primary market" label refers to the market in which the competitive concerns are founded. Because there are three markets implicated in the AOL-Time Warner merger, one must consider which to designate as the "primary market," the site of competitive concern. Because of AOL's dominance in the online service market, one could imagine that the availability of Time Warner's massive content and access to Time Warner's cable systems could give AOL even more of a competitive edge over the other online service companies. In addition, one could imagine Time Warner obtaining competitive benefits over the other media conglomerates by having an affiliation with the dominant online service provider. As a result, either the online service or the media entertainment market could be a "primary market."

However, neither of these scenarios would likely rise to the point of requiring potential competitors to enter the secondary market. A potential AOL competitor could still provide online service—even if such a company was completely deprived of Time Warner's content or cable systems, there are enough other cable and media companies to give such a competitor sufficient content and high-speed access to target a significant population of subscribers. Furthermore, an entrant to the media entertainment market would not require an online presence to survive—to even enter the market, such a company would have to be a media conglomerate. As such, even if Time Warner were able to gain a competitive advantage over other media conglomerates, such a conglomerate company would still have enough assets to be viable on its own. Given that double entry will not be required, the AOL-Time Warner merger lacks this factor "necessary" for finding a vertical merger objectionable.

Not only must a merger compel double entry, however. In addition, the Guidelines require that a vertical merger must make the simultaneous entry into both markets more difficult than it had been previously in order to be objectionable. Obviously, because the AOL-Time Warner merger will not compel double entry, this second factor is similarly unsatisfied.

The final criterion required by the Guidelines to establish the erection of objectionable entry barriers is an HHI value of greater than 1800. Because the Guidelines assume that "[b]arriers to entry are unlikely to affect performance if the structure of the primary market is otherwise not conducive to monopolization or collusion," they scrutinize only vertical mergers affecting highly-concentrated markets. Here, the only conceivable primary market that would satisfy the condition is the online service market, with its HHI of 7800.

267. Although this does not eliminate the possibility that the FTC might require a unified AOL-Time Warner to relinquish its ownership in Road Runner remove any suggestion of anti-competitive potential.
269. Id. at 26,835 & n.30.
270. See id. § 4.212, at 26,835.
271. See id. § 4.213, at 26,836.
272. Id.
Despite the high market concentration in the online service market, two of the three criteria "necessary but not sufficient" to prohibit the merger remain unsatisfied. As a result, it is highly unlikely that the FTC will prohibit AOL-Time Warner based on objectionable barriers to entry. Furthermore, without the possibility of objectionable conduct, the FTC will have no choice but to approve the merger overall.

B. Implications if the Merger is Approved

As one can see from the analysis imposed by the Guidelines, vertical mergers are rarely challenged successfully. Most antitrust experts seem comfortable with this limited approach because "vertical mergers generally have no inherent anticompetitive characteristics," some have even maintained that vertical mergers should be considered legal per se. Given this kind of commentary and the preceding mock-analysis, it is not surprising that analysts have suggested the proposed AOL-Time Warner union will meet little resistance from the FTC.

Unfortunately, however, the proposed AOL-Time Warner union is not "most mergers." As such, the predictions of easy approval raise a difficult question: assuming that the merger is allowed to proceed, what will post-merger life be like for consumers and the computer and media industries? While the merger may ultimately benefit mankind tremendously, this Section proposes that consumers and industry insiders alike should be concerned by AOL-Time Warner's presence because it presents a variety of potentially anti-competitive effects that are not elucidated by a typical merger analysis.

1. Reduction of Current Horizontal Competition

Decreases in horizontal competition pose a range of hazards to markets and consumers including increasing prices, a reduction in creativity and innovation, and the limiting of consumer choice. Because of these dangers, both section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act ("FTC Act") prohibit multifirm behavior that can produce such consequences. Unfortunately, a unified AOL-Time Warner could eliminate, or at least substantially reduce, existing horizontal competition in either or both of two ways.

273. IV EARL W. KINTNER, FEDERAL ANTITRUST LAW § 35.3 at 188 (1984).
275. See, e.g., Hearings, supra note 67, at *8 (prepared statement of Sen. Kohl, suggesting that the "merger is likely to pass, in whole or in part, at both the FTC and FCC"); Shiver, supra note 9 (quoting analyst that "It's very unlikely that this deal gets blocked.").
276. One possibility that should not be ignored is that the AOL-Time Warner merger will receive governmental approval, but the union will ultimately fail for practical reasons. See supra note 7.
277. In fact, senators raised several of these concerns during the Judiciary Committee's recent hearings regarding the merger. See, e.g., Hearings, supra note 67, at *5 (opening remarks of Democratic Sen. Leahy) (wanting "to explore the issue of privacy" in an era where our media tastes can be tracked); id. at *7 (opening remarks of Republican Sen. Dewine) (worrying about "exactly how [companies such as an AOL-Time Warner] will be able to continue in the journalistic tradition of unbiased reporting"); id. at *9 (opening remarks of Democratic Sen. Kohl) (expressing concerns about "the emerging American kiretzu of inner-locking relationships among the major media, Internet and telecom baronies").
278. See, e.g., I EARL W. KINTNER, FEDERAL ANTITRUST LAW, § 2.5, 51–54 (1980).
First, both AOL and Time-Warner have entered into binding agreements with their new partner's horizontal competitors. For example, AOL has teamed with several of the media conglomerates, creating the European and Australian AOL services with Bertelsmann and contracting with Viacom channels for news and entertainment content. In addition, AOL has also collaborated with direct competitors of Time Warner's cable systems, such as the satellite provider DirecTV and DSL providers Ameritech, Bell Atlantic, and GTE. Time Warner is similarly encumbered—along with Microsoft, MediaOne, Comaq and others, Time Warner owns a piece of the Road Runner joint venture, which now offers a cable-access online service similar AOL's but at faster speeds. The persistence of any or all these agreements after the merger could lead to horizontal collusion between AOL-Time Warner and the implicated firms.

The second way a unified AOL-Time Warner might harm horizontal competition is by continuing the trend of increasing concentration and cooperation within the industries implicated by the merger. In traditional media sectors, conglomerates are rapidly reducing the number of players in the market—this pattern is exemplified by Time Warner and EMI's current merger attempt, which will reduce the size of the music industry oligopoly from five to four. Furthermore, consolidation is spreading across industries as well; as large conglomerates swallow independent companies within individual sectors, the conglomerates are increasingly the only companies left standing to compete with each other.

By itself, such consolidation might not be harmful, because horizontal competition is maintained overall if similarly-sized companies must fight with each other across a range of industries. However, in fragile or burgeoning industries, concentration can be highly detrimental, stifling the innovation and creativity necessary for the industry to reach its potential. Consider as one example the cable-access online market—because it involves new technology and is a new phenomenon to consumers, there are only two major firms in the market, Road Runner, a joint venture, and AT&T Home, owned by AT&T. Not only is Time Warner, one of Road Runner's co-owners, being bought out by Road Runner competitor AOL, but MediaOne Group, another of Road Runner's co-owners is being purchased by AT&T. With AT&T holding interests in both companies and AOL having a stake in one, what are the chances that the cable-access industry will blossom and thrive as it would without such influences?

Furthermore, in addition to the decreasing number of market participants, the few conglomerates that remain are working together like never before. For example, many cable networks are the products of joint ventures. Similarly, high budget feature films are increasingly the products of multiple studios acting in concert. As consolidation and cooperation both peak simultaneously, then, one sees fewer and fewer companies

281. See AOL: Timeline, supra note 11; see also AOL: Who We Are (visited May 1, 2000) <http://www.corp.aol.com/whoare.html>.
282. See AOL: Who We Are: Our Partners (visited May 1, 2000) <http://www.corp.aol.com/partners.html> (listing partnerships with channels such as CBS, Nickelodeon, and MTV).
284. See id.
285. See supra note 197.
286. See id.
287. See supra note 186.
288. See supra notes 83, 164, 168.
289. See, e.g., Claude Brodesser & Charles Lyons, Studio's Feisty Helpmates Carve Tougher Deals, VARIETY, Feb. 21, 2000, at 1 (suggesting that because studios are "[f]orced to grapple with slashed operating budgets and ever-dwindling profit margins," "[o]ne of the rarest birds in Hollywood these days is a studio movie fully financed" by one studio).
working more and more intimately with each other—as a result, these industries become ripe for collusion and anti-competitive behavior.

2. Proprietary Conduct and Potential Monopolization

Section 2 of the Sherman Act and section 5 of the FTC Act also forbid individual firms from using their market power to "monopolize, or [to] attempt to monopolize... any part of the trade or commerce among the several States, or with foreign nations." However, the next troubling facet of an AOL-Time Warner marriage is the possibility that one part of the new company could engage in proprietary conduct on behalf of another part. Given the combined power and influence of AOL and Time Warner, such proprietary conduct could significantly harm AOL-Time Warner’s competitors in any or all of its markets.

The most obvious way for a unified AOL-Time Warner to dominate the landscape would be for it to completely refuse to deal with other firms. Such refusals could take a variety of forms: (1) AOL might decide to carry only Time Warner content, (2) Time Warner might to allow its cable systems’ subscribers to only select AOL as their ISP, or (3) Time Warner could prevent its content from being accessed by non-AOL users.

Concerns about such comprehensive boycotts have been raised by both industry insiders and members of the Senate Judiciary Committee. In fact, AOL and Time Warner’s competitors are so concerned about such scenarios that these companies have dispatched lobbyists to Congress to protest the merger, but have insisted that such talks be confidential, lest they face retribution if the union is allowed to proceed. Public interest groups have also expressed concern, especially regarding the open access to the Internet that comes from having a choice of ISPs. For their part, AOL and Time Warner have taken steps to try and alleviate these fears by releasing a Memorandum of Understanding endorsing ISP choice on Time Warner cable systems and by testifying before Congressional hearings.

---

291. 15 U.S.C. § 2 (1994). The elements of the offense of monopolization include not only having monopoly power, see, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956), but also using that power to control prices or exclude competition. Compare United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (articulating the "old view" of the conduct element, i.e. that a monopolist cannot defend his monopoly even with otherwise legitimate conduct), with Olympia Equip. Leasing Co. v. Western Union Telegraph, 797 F.2d 370 (7th Cir. 1986) ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."). Attempts to monopolize are also characterized by exclusionary conduct, see, e.g., Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209 (1993) (describing predatory pricing); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (describing essential facility doctrine); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (describing leveraging), but require additional showings of intent and a dangerous probability of success, i.e. the ability of the company in question to become a monopoly if the exclusionary conduct is left unchecked. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).
292. For example, Senator Orrin Hatch of Utah expressed concerns about proprietary conduct. See Hearings, supra note 67, passim (remarks by Sen. Hatch).
293. See Eunjung Cha, supra note 218 (chronicling how “Walt Disney Co., several major music companies and about ten Internet service providers have been holding meetings” with Congressional members, but how such efforts have been kept confidential so as “to not jeopardize the[ ] relationships” between the companies and AOL).
294. See Douglass, supra note 9 (noting that, although AOL has traditionally favored open access, since the announcement of the merger with Time Warner, “AOL Chairman Steve case [has been] very ambiguous” about ISP choice).
295. AOL and Time Warner released the Memorandum of Understanding (“MOU”) on the eve of their Congressional testimony. See About Time Warner: Cable Systems: Releases/News (visited May 1, 2000) <> (announcing the companies’ “agreements” about ISP choice and including the text of the MOU). While the document broadly proclaims that “AOL Time Warner is committed to offer consumers a choice among multiple ISPs,” and that “AOL Time Warner will not discriminate in... arrangements [with ISPs] based upon
before Congress.296 Despite these protestations to the contrary, however, boycotts are already being taken place.297 While it is often said that each company can choose with whom to do business,298 unilateral refusals to deal such as these can be the basis of monopolization charges if the refusals are designed to harm competition or deny competitors access to an essential facility.299

Steve Case has been quick to point out that “the bedrock principle of the Internet . . . is that [customers] will have access to everything,” implying that if AOL-Time Warner were to eliminate choices consumers would go elsewhere. However, proprietary conduct need not completely deprive consumers of certain content to be objectionable.300 Rather, AOL-Time Warner could also steer consumers to its own products in more understated ways. Some have suggested that AOL could implement a proprietary start-up screen with multiple links to AOL-Time Warner merchandise and services.301 An even subtler example would be if AOL-Time Warner manipulated the MovieFone listings of feature film start times to favor those films produced by Warner Brothers and New Line.302 In addition, given AOL-Time Warner’s goal of “build[ing] some new kinds of products and services,”303 Time Warner competitors are concerned about being excluded technologically.304

whether or not the ISP is affiliated with Time Warner,” the MOU also notes that “all of the foregoing is subject to all pre-existing obligations of Time Warner.” Id. This broad qualification as well as the voluntary nature of the MOU led several senators to question “whether or not . . . the promises presented in this [MOU] will ever materialize in the marketplace.” See Hearings, supra note 67, at *3 (prepared statement of Sen. Hatch).

296. In the face of concerns over proprietary conduct, both Case and Levin repeatedly referred to their new company’s “commitment to provide consumers with an empowering range of choices.” See Hearings, supra note 67, at *11 (prepared statement of Steve Case, CEO AOL).

297. See, e.g., Jim Rutenberg, ABC Goes Off Cable Systems in Key Markets, N.Y. TIMES, May 1, 2000, at A1; see also infra Part IV.

298. See United States v. Colgate & Co., 250 U.S. 300 (1919) (“In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . .”). This Colgate doctrine has been held to mean that unilateral refusals to deal cannot violate Sherman section 1 although, as the Colgate case even indicates, such behavior can violate Sherman section 2. See, e.g., Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

299. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (holding that defendant owner of three ski mountains had duty to cooperate with owner of fourth mountain in joint lift ticket arrangement); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (holding that power plant and high tension lines owned by power company were an essential facility and therefore power company had to deal with town that wanted to run its own utility franchise).

300. Hearings, supra note 67, at 24 (response of Steve Case, CEO AOL).

301. In particular, Senator Orrin Hatch of Utah expressed concern over the use of proprietary start-up pages that “would tend to usher the subscribers or the consumers to AOL-Time Warner-owned content.” Hearings, supra note 67, at *24 (questions posed by Sen. Hatch). Case denies that such proprietary pages would ever be problematic because consumers can get to any site from the AOL start-up page and, although AOL does promote certain sites, in the future AOL “will not just promote AOL-Time Warner properties.” Id. While Case’s first assertion is technologically true, it ignores the fact that many consumers implicitly trust AOL and, because AOL’s “easy-to-use” approach appeals most to novice computer users who may not understand the range of available choices, consumers may be practically limited by start-up pages despite not being actually limited. See Paula Felps, Why AOL? Despite Complaints, Millions of Subscribers Just Won’t Cut the Cord, DALLAS MORNING NEWS, Apr. 20, 2000, at 1F (discussing how the ease of use and familiarity of AOL is helping the company retain old subscribers and gain new ones).

302. Imagine, for example, that when consumers call in to the MovieFone listings, Warner Brothers and New Line films are always listed first. Although many movie-goers call to find out the running times for specific movies they want to see, such behavior might be enough to steer previously-undecided consumers toward AOL-Time Warner features. As such, the behavior would affect competition.

303. Hearings, supra note 67, at *30 (response of Steve Case, CEO AOL). In particular, Case has alluded to what he calls “AOL TV,” which is “a bit more personalized, a bit more interactive,” and an
With its dominant presence in the online service market and strong positions in the media entertainment and cable systems markets, the new AOL-Time Warner would certainly meet the “dangerous probability of success” criterion of a monopolization attempt analysis. Given that the intent to monopolize is often inferred from conduct, a unified AOL-Time Warner will have to tread lightly to avoid trampling competition and running afoul of Sherman section 2.

3. Loss of Privacy and the Potential for Price Discrimination

A growing public policy concern regarding the AOL-Time Warner merger involves subscribers' potential loss of privacy. Both AOL and Time Warner maintain subscriber databases—given that such lists are already blamed for public harassment by telemarketers, some interest groups are concerned about the potential for abuse when AOL and Time Warner merge and begin sharing their lists. When Senator Diane Feinstein raised these concerns at the congressional hearings on the merger, Case and Levin downplayed them, suggesting that “the real concern is . . . more likely to be the smaller companies” because “the big companies . . . really recognize the importance of privacy . . . and trust.”

Feinstein also noted public alarm at the ways personal information, ranging from Social Security numbers to financial data, is used for commercial purposes. In response, Levin and Case reiterated only that choice would be an integral part of AOL-Time Warner.

One disturbing antitrust implication of information sharing in electronic commerce is the increased potential for price discrimination, which is prohibited by section 2 of the Clayton Act as amended by section 2(a) of the Robinson-Patman Act and section 5 of the FTC Act. While there are a number of jurisdictional prerequisites, stated most simply, price discrimination occurs when a seller charges two different prices for the same goods. Price discriminating behavior is further subdivided based on whether those harmed by the behavior are rival sellers or buyers competing with each other, but the behavior required for a violation is substantially the same.

“electronic jukebox” that would be “a more convenient way to get music.” Id.

304. See Rutenberg, supra note 297. Disney, particularly, is concerned about enhanced television features—Disney's lobbyist has suggested that (1) Time Warner will block interactivity features of competitors’ programming to enhance its own, (2) that AOL-Time Warner on-screen programming guides will favor Time Warner shows, and (3) that Time Warner will only allow its programming to utilize advanced interactive advertising. See id.

305. Hearings, supra note 67, at *52 (response of Steve Case, CEO AOL).

306. See id. at *52–53.


309. To come within the bounds of the Robinson-Patman Act, one of the sales must have crossed state lines, there must have been a difference in price, not cost, between the two actual sales (offers are not enough), the sales must have been of like quality goods or merchandise, and at least one of the sales must have occurred in the United States. See III EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 19.5, 63-69 (1983).

310. So-called “primary line” price discrimination occurs when manufacturers discriminate in price to harm rival manufacturers, i.e. others in the “primary line” of distribution. See, e.g., Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) (holding that defendants were guilty of price discrimination by charging less in Utah for pies than competition could charge, and recouping those losses with higher prices in Los Angeles).

311. In “secondary line” discrimination, different prices are charged to different buyers that are in competition with one another—thus the harm is in the “secondary line” of the distribution scheme.
As David Balto, the Assistant Director of the FTC’s Bureau of Competition’s Office of Policy and Evaluation, has explained, “certain aspects of electronic commerce . . . allow the monopolist the ability to discriminate among groups of consumers.”\(^{312}\) As a seller becomes increasingly aware of a buyer’s financial status, purchasing habits, and other information, the seller can better estimate the buyer’s willingness to pay.\(^{313}\) This, in turn, gives the seller the ability to maximize its profits by tailoring prices to fit whichever consumer it is currently dealing with.\(^{314}\) The competitive harm is committed against the unwitting buyer, who thinks he has paid a fair price, when in reality, he may have paid more because the seller knew the buyer was willing to pay more.

If AOL and Time Warner do merge, they will likely cross-promote as many products as possible. While superficially this may benefit the consumer, in that he can shop for more items or related items simultaneously, it also may allow AOL-Time Warner to track purchasing habits. This kind of information, combined with the information already obtained from the consumer when they subscribe to either AOL or one of Time Warner’s services, might provide the united company with the kind of unfair selling advantage Balto has described.

4. The Loss of Journalistic Integrity

A final problem that concerns many public interest groups involves the notion of journalistic integrity: consumer groups are increasingly worried about news that comes from subdivisions of corporate entities. The AOL-Time Warner merger threatens to combine an impressive collection of news organizations, the CNN Group, Time Magazine, and so forth, that is already linked to one corporate entity, Time Warner, with the online portal through which a growing population receives its information.

Given the heated competition that currently exists in news reporting,\(^{315}\) the proposed merger could exacerbate tensions and flaws in the news industry. One can envision AOL-Time Warner utilizing its news branches as either a shield, deflecting or down-playing scrutiny of AOL-Time Warner enterprises when necessary, or as a sword, investigating and attacking AOL-Time Warner’s rivals under the guise of “news.” Beyond even the proprietary concerns, however, one must also consider the intrinsic value of impartial reporting to the public—some suggest that AOL-Time Warner has already exerted its massive influence to affect the way a recent presidential debate was covered.\(^{316}\) If such a claim were true, it would strike directly at the heart of the election process and the government in general. When confronted with this charge during the congressional hearings, however, Levin assured that “there is nothing more important to [his] trusteeship at Time Warner—now AOL-Time Warner—than journalistic independence.”\(^{317}\) Consumer groups may have no choice but to hope that Levin’s pledge is an honest one if the merger proceeds.

\(^{312}\) Balto, supra note 307, at 10–11.

\(^{313}\) See id.

\(^{314}\) See id.

\(^{315}\) See Moore, supra note 174.

\(^{316}\) During the congressional questioning, Senator Kohl of Wisconsin related what he had observed about the CNN-sponsored Democratic debate held in the Apollo Theater in New York the week before the hearings. In particular, Senator Kohl noted that all of the panel of journalists were from Time Warner organizations, as was the moderator, Internet questions were taken only from AOL or Time Warner websites, and no journalists not affiliated with Time Warner were allowed inside the theater. See Hearings, supra note 67, at *37.

\(^{317}\) Id. (response of Gerald Levin, CEO Time Warner).
IV. Conclusion

The preceding section of this Note touched upon several of the anti-competitive effects that could result if AOL and Time Warner are allowed to merge. And, although the Guidelines suggest that the merger is not problematic, one can see from the mock analysis that the Guidelines do not account for many of the ways in which AOL-Time Warner could damage or influence its markets. While vertical mergers such as AOL-Time Warner’s do often produce pro-competitive effects, here the tremendous anti-competitive risk outweighs any potential benefit the merger could provide.

One last illustration may be necessary to demonstrate the point. The anti-competitive possibilities discussed in Part III are merely speculations; as such, their inherent uncertainty may diminish their persuasiveness. In contrast, recent events have provided a vivid and concrete picture of the potentially destructive power of a unified AOL-Time Warner. On May 1, 2000, televisions tuned to ABC stations in such major cities as New York, Philadelphia, Los Angeles, and Houston went black as Time Warner stopped broadcasting the network on several of its cable systems. The boycott was the result of five months of hard-ball negotiations between Time Warner and ABC’s parent, Disney—the previous broadcast contract between the companies had expired in December, but the two had agreed to monthly extensions ever since. During the ensuing talks, Disney had demanded extensive concessions from Time Warner. These included $300 million for the right to carry seven ABC stations, but also that Time Warner carry Disney’s two newest channels and make the original Disney Channel part of Time Warner’s basic service package. While Time Warner agreed to Disney’s channel carriage demands, it bluntly refused to pay the $300 million.

While Disney held ABC out as its trump card, Time Warner suspected that Disney’s motivation was to complete the contract before approval of the AOL merger. Disney, like many other companies, has come to rely upon AOL subscribers for a substantial portion of its online business and fears the loss of AOL “keyword status.” As such, Disney would be in a much weaker position if bargaining with a united AOL-Time Warner. With all this in mind, when Disney approached Time Warner in April with another extension to continue broadcasting ABC through the end of the spring sweeps period, Time Warner refused. Instead, Time Warner demanded an eight month extension; knowing that such a delay would ensure negotiations were resumed after approval of the merger, Disney declined Time Warner’s terms.

Time Warner then escalated the “game of corporate chicken” by blocking ABC signals as soon as the previous extension expired at 12:01 a.m. on May 1. The move made ABC unavailable in approximately 3.5 million households nationwide, depriving...
ABC of valuable sweeps ratings in several of the country’s largest media markets.\textsuperscript{328} In place of ABC programming, Time Warner televised a screen proclaiming that “Disney has taken ABC away from you.”\textsuperscript{329} Disney struck back quickly through the media, however, claiming that Time Warner’s actions were “thoroughly outrageous,” and arguing that once it had offered the May extension, Time Warner was required to accept.\textsuperscript{330} Meanwhile, Disney also distributed 18,000 free satellite dishes in an attempt to influence Time Warner’s cable subscribers to switch to satellite providers, and appealed to the Federal Communications Commission (“FCC”) for assistance.\textsuperscript{331}

Finally, thirty-nine hours after it had begun, Time Warner ended the blackout, agreeing to a new July 15 deadline with Disney; the truce was announced just as the FCC was preparing to rule in Disney’s favor.\textsuperscript{332} Although the FCC still released statements full of harsh rhetoric against Time Warner, had the agency actually been forced to intervene, it could have only charged Time Warner with a violation due to the timing of the boycott, not the conduct itself.\textsuperscript{333}

The country was stunned by the ABC blackout, even after it had ended. It was the lead story in every major newspaper.\textsuperscript{334} It inspired endless editorials and op-ed pieces.\textsuperscript{335} But the ABC blackout was significant for more than just the public reaction it provoked. First, the boycott illustrated Time Warner’s tremendous arrogance: Time Warner did not target some weakling, but instead struck directly at Disney, its top competitor among the media conglomerates. Remember that, unlike AOL, which has clearly dominated its market for years, Time Warner has always been considered one of several major players in the media entertainment industry. Instead, the boycott demonstrated that Time Warner has power that its rival conglomerates cannot match—its cable systems allow it to directly attack its competitors by removing them from viewers’ screens. And, especially for channels that are only available on cable, Time Warner’s subscribers have no choice but to endure such a boycott or switch to a satellite alternative.

Second, and perhaps more even more troubling, the ABC blackout was significant because Time Warner accomplished it acting alone. Despite the “competition” among the conglomerates, and before it ever gained access to AOL’s hold on online users, Time Warner was powerful enough to challenge Disney and win. It has been said repeatedly that the antitrust laws exist not to protect competitors, but to protect competition.\textsuperscript{336} Competition in the media industry barely survived a boycott by an independent Time

\textsuperscript{328} See Rutenberg, supra note 297. But see Carter & Labaton, supra note 320 (suggesting that “ABC’s ratings were not severely affected”).

\textsuperscript{329} See Rutenberg, supra note 297; see also Jim Rutenberg, Reconstructing the Genesis of a Blunder, N.Y. TIMES, May 8, 2000, at C20.

\textsuperscript{330} Rutenberg, supra note 297.

\textsuperscript{331} See Carter & Labaton, supra note 320; Rutenberg, supra note 297.

\textsuperscript{332} See Carter & Labaton, supra note 320; Rutenberg, supra note 297.

\textsuperscript{333} See, e.g., Carter & Labaton, supra note 320 (quoting FCC chairman William Kennard that “[t]he television sets of average consumers should never be held hostage in these disputes” and noting that the FCC had concluded that the Time Warner boycott violated a 1993 commission regulation prohibiting a cable system from pulling a broadcaster during a ratings sweeps month).

\textsuperscript{334} See, e.g., Rutenberg, supra note 297.

\textsuperscript{335} See, e.g., Editorial, Battle of Media Giants, supra note 326; William Safire, Editorial, Th-Th-That’s All, Folks!, N.Y. TIMES, May 4, 2000, at A27 (beginning with the African proverb “when elephants fight, it is the grass that suffers” and concluding that “[c]oncentration of power over what we see in the news—and even if we see a competitor’s news—is a danger to democracy”); Editorial, The Elephants Fight, WASH. POST, May 4, 2000, at A24; Editorial, Who Wants to Be a Monopoly?, CHI. TRIB., May 4, 2000, at N22.

Warner—just imagine what Time Warner could and will do once it joins forces with AOL and obtains access to almost ninety percent of the country's online service subscribers. What company will be too big for a unified AOL-Time Warner to challenge, threaten, or cajole?

Fortunately, the ABC blackout has raised public awareness and concern about the merger. But, ultimately, the fate of the media industry as we now know it lies with the FTC. If the FTC has been paying attention, and if it acts responsibly, the FTC will go beyond the formalisms of the Guidelines and reject the AOL-Time Warner merger outright. However, if the FTC flinches, it is we the consumers—we who watch the movies, read the books, listen to the music, and surf the Web—that will pay the price in the long run.

Joseph P. Reid*

---

337. See Rutenberg, supra note 329 ("The question now is how much the dispute will hurt Time Warner as it tries to conclude its merger with America Online.").

* Candidate for Juris Doctor, Notre Dame Law School, 2000; M.S., University of California, Davis, 1997; B.S., Duke University, 1995. Thanks especially go to Professor Joseph Bauer for his help and advice regarding this Note in particular and with antitrust law generally. Thanks also go to my wife, family, and friends for all their patience, support, and encouragement.