# Antitrust in the Entertainment Industry

## Reviewing the Classic Texts

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*United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)*

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*Amendment of the Federal Communications Commission's Rules with Respect to Competition in Network Television Broadcasting, 70 F.C.C. 466 (May 4, 1970)*

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*United States v. National Broadcasting Co., Inc., Civil No. 74-3601-RJK (C.D. Calif., January 26, 1978)*

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*United States v. CBS Inc., Civil No. 74-3599-RJK (C.D. Calif., July 3, 1980)*

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*United States v. American Broadcasting Companies, Inc., Civil No. 74-3600-RJK (C.D. Calif., November 14, 1980)*

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*Viacom International v. Time Inc., 89 Civ. 3139 (S.D.N.Y., May 8, 1989)*

IN ANCIENT GREECE, it was the custom to slay the messenger who brought bad news. Messengers were thought to be very powerful and were held responsible for the events they reported. In America, too, the news media are thought to be very powerful. We are more civilized, though; we do not kill our messengers. Our custom is to straitjacket them through zealous application of the antitrust laws.



Antitrust law in America took its modern form in the Sherman Act of 1890 and the Clayton Act of 1914, with roots in the turn-of-the-century Populist (anti-bigness) era and the Progressive (good government) era 10 or so years later. In the antitrust arena the Populists combined an emphasis on the benefits of preserving small companies with a distrust of large firms. The Progressives placed greater weight on the aim of promoting market efficiencies that increase consumer welfare. Both traditions share a hostility to concentrations of economic power, however, and most early antitrust cases dealt with the fear that, through business agreements and combinations, vital yet relatively static industries (like the railroads and steel) would escape the discipline of marketplace competition.

For the most part antitrust doctrine follows straightforward principles, condemning "horizontal" agreements among competitors to fix prices or allocate customers, or more permanent business combinations, like mergers or joint ventures, that give the participants an unrestrained ability to set prices free of competition or to exclude new competitors.

On the surface at least, the world of entertainment would seem an unlikely arena for antitrust concerns. The myriad sources of talent and the mercurial changes in public taste should ensure that existing firms never escape the threat of new competition. But the entertainment industry has been the scene of more antitrust battles than almost any other American industry. Substantial chapters of antitrust doctrine have already been written, however unwittingly, by Hollywood and the broadcasting industry. And more chapters will likely be added by the cable industry in the future.

ALTHOUGH THE MOST CELEBRATED entertainment industry antitrust cases have involved some of the horizontal business practices that have attracted Washington's attention in other industries, they have, for the most part, focused instead on allegations of the use of economic power in one market to foreclose competition in another. Usually the two markets are "vertically" related—that is, they involve buyers and sellers, like wholesalers and retailers, linked together in the distribution chain of a product.

The connection between vertical arrangements and the creation of market power is far from clear, and indeed is treated with considerable

skepticism by modern economists. These economists are generally willing to recognize that integration of firms in vertically related markets through common ownership or contractual obligation can benefit consumers by facilitating more efficient methods of distribution. While certain types of vertical arrangements can be harmful, particularly those that fix resale prices and insulate the participants from fresh competition by other firms seeking to enter their business, most have raised little concern.

The entertainment industry, however, is strewn with cases brought to challenge such vertical integration and with regulations enacted to prohibit them. These have led in some instances to tortured reasoning in the courts and dubious conclusions in Washington. Why has it proved such a fertile breeding ground? The probable explanation lies in two factors—the unusual vitality of Populist attitudes toward entertainment media and the particularly strong incentives to producers of entertainment to use the methods of vertical integration to control the distribution of their products.

The Populist tradition has been unusually influential, at least with respect to whatever entertainment medium was regarded in Washington as dominant at any given time. During the "golden age" of Hollywood the motion picture industry was subject to extraordinary antitrust scrutiny; so, too, were the TV networks in their heyday; now cable is emerging as the *bête noire*. It is not that there has been greater concentration of market power in these industries than in, say, the steel or railroad industries, but rather that there has been greater concern about the size of individual firms and the concentration of power in the marketplace of *ideas*.

This Populist concern helps to explain the intensity of antitrust interest in the entertainment industry, but it is not sufficient to explain why that interest has so often resulted in arcane theories of vertical restraint. Here, we believe, the reasons lie in the peculiar factors that give media firms an incentive to seek to control their distribution outlets or sources of programming. As big media firms in different eras have built profitable types of vertical relationships, the antitrust enforcers, fueled by a Populist distrust, have reached out to condemn whatever measures are believed to account for their success.

SEVERAL FACTORS encourage vertical arrangements in the mass media. Economists today would surely deem most of them benign.



The most important is probably the high degree of risk inherent in the entertainment world. Except perhaps for formula productions (and sequels), no wizard has found the crystal ball that permits a reliable prediction of the public's reaction before an entertainment program is exhibited. As a result, the producers and financers of entertainment shows try to spread their risk over enough programs to compensate for the near certainty that there will be more failures than successes.

A second (and related) impetus is the high ratio of fixed to total costs in the production and distribution of video and film entertainment. High-quality programs are expensive to produce, but once they are produced they are easy to copy and disseminate. Once a program is produced, its owners have every incentive to encourage as wide a distribution as possible. Vertical integration is one way to ensure that programs reach the largest possible audience.

Third, entertainment programs have different values to different audience segments and distribution windows. Whoever owns the program rights wants to be able to charge the different prices that will maximize the value of each audience segment. This, in turn, requires some contractual or ownership control of each window in the distribution chain.

There are other reasons for vertical integration that may be less benign. It is hard to imagine anyone cornering the production of entertainment programs. Viewer tastes are too fickle, and there are too many ways for creative people to express their ideas on tape or film. Thus one can imagine that producers bent on monopolizing the entertainment business would seek to control the distribution of programming in order to deny other producers access to the audience. It is unlikely, however, that a distributor would seek to integrate into production for any anticompetitive purpose, because doing so would not enhance its market power.

THE SUPREME COURT'S 1948 decision in *United States v. Paramount et al.* was the culmination of a series of antitrust cases that challenged the practices by which, according to the government, the major movie companies controlled America's first mass entertainment medium during the first half of this century. Hollywood has probably been the subject of more antitrust cases—including at least a half-dozen major Supreme Court decisions—than any other industry in the United States. These

cases present a complex but fascinating picture of almost every possible theory of antitrust violation.

The instinct for control of motion pictures — through both horizontal and vertical integration, by contract or by ownership — is nearly as old as the industry itself. The history of its conflict with the antitrust laws is recounted in detail in Michael Conant's *Antitrust in the Motion Picture Industry* (University of California Press, 1960), on which we rely here. The story begins when the first American film narrative, Porter's *Great Train Robbery*, was exhibited in 1903. Its success encouraged new competitors to enter the business, and in response to this threat the major producers joined forces. By 1908 the seven largest producers in this country and three foreign firms had formed the Motion Picture Patents Company, through which they pooled their patents on motion picture cameras and projectors, licensing them only to members. The company issued distribution licenses to "exchanges" through which its member companies agreed to distribute their films. The exchanges in turn agreed to distribute only films of the pool members and to distribute only to exhibitors that had projection licenses from the company. This contractual arrangement was solidified in 1910 with the organization of General Film Company, a distribution subsidiary of the Patents company. General Film acquired most of the independent exchanges and drove the others out of business by refusing them films.

An antitrust action brought by the government in 1912 found both companies to have engaged in unreasonable restraints of trade and to have monopolized commerce in films, cameras, projectors and accessories. In a related private case, the Supreme Court upheld a challenge to the defendants' patent license, ruling that the sale or lease of motion picture projectors on the condition that they be used only for the exhibition of films distributed by General Film was not protected by the patent laws and violated the Clayton Act. The patent pool was finally broken up in 1918.

As motion pictures became longer and more expensive, producers felt a greater need for the kind of vertical integration that could assure national distribution of their films. Paramount Pictures Corporation was organized in 1914 as a consolidation of distribution exchanges, and following its affiliation with the largest feature film producer in 1916, the company merged with 12 other producers to form Famous Players-Lasky Corporation. The Paramount exchanges, the distribution branch, first



instituted the practice of block booking, which required exhibitors to license films in packages, including less desirable films with the more popular ones. Local exhibitors reacted by merging into theater "circuits" that could exercise their collective buying power to obtain preferential treatment from distributors. The power of these horizontal combinations by exhibitors proved to be a more effective lever for control of distribution than the earlier combinations at the equipment and production levels. This, in turn, led the major producers and distributors, including Paramount, Loew's, RKO, Warner and 20th Century-Fox, to integrate into theater ownership.

In two 1930 cases the Supreme Court struck down agreements among these competing companies that set the terms on which motion pictures could be distributed. Subsequently the acquisition and use of market power by various combinations of movie distributors and exhibitors was challenged in a series of cases culminating in the Supreme Court's decisions in *Interstate Circuit* (1937) and in three cases brought in 1939, *Crescent Amusement* (1944) and the *Griffith* and *Schine* cases (1948). In the first the Court found that parallel pricing and other restrictions adopted by eight distributors at the urging of a major theater circuit amounted to an unlawful horizontal agreement among the distributors. In the last three the Court condemned the circuits' use of buying power to obtain preferential access to films in cities where they faced competition.

The antitrust challenges to the web of horizontal and vertical arrangements by which the Hollywood "majors" controlled the motion picture industry reached their apogee in the *Paramount* case. The Department of Justice filed this suit in 1938, alleging that the five integrated producer-distributor-exhibitors (Paramount, Loew's RKO, Warner and Twentieth Century-Fox) and three producer-distributors (Columbia, Universal and United Artists) had restrained trade and attempted to monopolize the motion picture industry. The case was settled in 1940 by a consent decree that created a complex system for settling disputes between distributors and exhibitors. In 1944, however, apparently at the urging of dissatisfied exhibitors, the government reopened the case, this time seeking the total divorcement of exhibition at the five majors from production and distribution.

It was not until 1947 that the case was initially decided by the trial court in New York. The court found that the five majors controlled only

17 percent of America's motion picture theaters and that their theater holdings did not give them, individually or collectively, monopoly power over exhibition. It also found that, while the majors controlled at least 70 percent of all the first-run theaters in the nation's largest cities (over 100,000 population), independent first-run theaters competed with the majors in the majority of those cities.

Nevertheless, the court concluded that the Hollywood majors had violated the antitrust laws, not because of their ownership of theaters, but rather because of the pervasive web of agreements among them — agreements by which the majors licensed each other's films pursuant to a uniform system of runs, clearances and admission prices, and eliminated competition among their local theaters through joint ventures and pooling arrangements. In the court's view these arrangements amounted to an illegal restraint of trade. The court enjoined the various agreements it had condemned and ordered that films be auctioned to exhibitors in each community, picture by picture.

On appeal, the Supreme Court affirmed the New York trial court's findings of illegality. But the Court questioned the workability of the trial court's competitive bidding remedy and focused instead on the vertical integration of the majors. The Supreme Court described the "central problem" of the case as "which distributors get the highly profitable first-run business" and ruled that the trial court's findings were deficient in their failure to examine the first-run market. It viewed the conspiracy found by the trial court as a justification for treating the five majors collectively. "The aim of the conspiracy," said the Court, "was exclusionary, i.e., it was designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for one of its goals. . . . " The vertical integration of producing, distributing and exhibiting motion pictures was not illegal per se; in other words; its legality turned on its purpose and effect in creating market power. Integration "runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition rather than an expansion to meet legitimate business needs," said the Court. It then returned the case to the trial court for further consideration of these questions.

In its decision on remand in 1949, the New York trial court again pointed out that the purpose of the defendants' vertical integration had



not been shown to be market control, but rather to assure outlets for their films and product for their theaters. It now found, however, that these vertical integrations had "powerfully aided" the conspiracy, rendering them "in this particular case illegal, however innocent they might be in other situations." Accordingly, it ordered total divorcement of the defendants' distribution and exhibition operations.

THE *PARAMOUNT* CASE set an important precedent for the future application of the antitrust laws to other industries, but one may question the direction in which some parts of its complex analysis have led. The Supreme Court was undoubtedly correct in rejecting the government's argument that the vertical integration of producing, distributing and exhibiting motion pictures was illegal per se and in recognizing the interest of producers, distributors and exhibitors in such integration to accomplish legitimate business purposes. As the Court held, "the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent."

The Supreme Court was on much thinner ice, however, in its attempt to apply this general standard to the specific facts of the case before it. It is not apparent why any market power created by the horizontal arrangements among the defendants was enhanced or made more harmful by the defendants' vertical integration. By horizontal arrangements the defendants had created a bottleneck in the distribution and exhibition that made the existence of vertical integration unnecessary to the achievement of any monopolistic purpose. Nor is it plain why the fact — if it was the fact — that the defendants' vertical integration "powerfully aided" their conspiracy required divorcement rather than more limited relief. The Supreme Court thought the trial court's initial competitive bidding remedy was unworkable, but when the courts, after recognizing the legitimate functions of vertical integration, nevertheless ordered the divorcement of the defendants' distribution and exhibition operations, they created a regime of cumbersome and unnecessary regulation that is still with us today. According to Judge Palmieri, who until his death earlier this year was responsible for the administration of the resulting consent decrees, the court has had to rule on as many as 74 different petitions by the Paramount defendants in a single year.

In the Spring of 1989, 41 years after the Supreme Court's decision in *Paramount* and 51 years after the complaint was first filed, Warner, one of the original defendants, was still appealing one of Judge Palmieri's decisions. Warner had requested a decree modification that would permit it to reenter the exhibition business, arguing that "this would allow Warner to diversify against the risks inherent in motion picture production and in distribution — essentially a volatile business. Entry into exhibition would give Warner 'the opportunity to share some portion of the profits on the successful films of other distributors.'" The Justice Department, now far more receptive to such claims of the efficiencies of vertical integration, supported Warner's appeal from continued regulation by the court. But by 1989 the shape of the entertainment industry was radically different.

BY THE TIME the remand proceedings in the *Paramount* case ended in 1949, Hollywood in its classic configuration was already on the decline. Through the 1950s and certainly by the early 1960s, network television supplanted theatrical movie viewing as America's dominant entertainment medium. Even the motion picture newsreel became a quaint artifact. This change did not directly affect the *manufacturing* level of entertainment programming; as with motion pictures, the Hollywood studios remained the principal program suppliers. But the television networks replaced the movie distributors as the dominant national wholesalers of entertainment. And local television stations, instead of motion picture theaters, served as the retail distributors.

As often happens when a previously dominant industry is threatened by technological change, the major motion picture producers resorted to the courts for relief. In September 1970 most of the major Hollywood studios — Columbia Pictures, Paramount Pictures, United Artists and Warner Brothers — brought an antitrust action against ABC and CBS premised on the networks' vertical relationships. Each network owned television stations in five markets, through which approximately one-fourth of all television households were reached. Each also maintained contractual relationships with local affiliates in other cities. Unlike *Paramount*, the Hollywood lawsuit did not allege that the networks' market power was a result of agreements among them. Rather it alleged that the networks had power in distribution because of their vertical relationships with affiliated local stations and had "spread their market power vertically over another market boundary and into a new industry — production of television programming." The effect, the studios complained, was that the networks were keeping programs that they did not directly own off the air.



Although the lawsuit never came to trial (and was dismissed by consent of the parties in 1988), it presaged a new era, one in which the Big Three networks would be subject to antitrust restrictions on vertical relationships not unlike those embodied in the *Paramount* decrees. These antitrust restrictions took their most important form in two separate but related government actions.

First, in May 1970, the Federal Communications Commission (FCC) promulgated a set of three related regulations "intended to multiply competitive sources of television programming" (70 F.C.C. 466). The "prime-time access rule" prohibited a network affiliate from taking more than three hours of network programming during the four prime evening hours (7 p.m. to 11 p.m.); this rule has led to the airing of first-run syndicated programming like "Family Feud" and "Jeopardy" on Monday through Friday between 7 and 8 p.m. The "financial interest" rule barred a network from acquiring from a program producer any program right other than the right to exhibit the program on the network. The principal effect of this rule has been to prohibit networks from acquiring rights to share in the profits from off-network reruns. The "syndication" rule prohibited networks from distributing any programs, even those produced by the network itself, to local television stations for off-network exhibition.

The three FCC rules departed from the ordinary presumption that buyers and sellers ought be permitted to engage freely in market transactions. Antitrust laws do, under some circumstances, prohibit arrangements between buyers and sellers pursuant to which one promises the other not to do business with third parties, but they have rarely, if ever, been used simply to prevent a buyer and a seller from engaging in a willing transaction that did not directly restrain the ability of either to deal with others.

In support of its decision to enact such rules, the FCC noted that

two-thirds of the television stations in the top 50 local markets were network affiliates and that independent stations existed in only 14 of those markets. But the commission all but ignored the fact that the networks were three entities, not one, and it did not charge the networks with aggregating their market power through horizontal agreements. There was more at work in the decision to adopt the rules than ordinary notions of antitrust analysis and market power. "The three national television networks," the commission decried in the report accompanying the announcement of the rules, "for all practical purposes control the entire network television program process from idea through exhibition.

"Furthermore, to the extent that close network supervision of so much of the Nation's programming centralizes creative control, it tends to work against the diversity of approach which would result from a more independent position of producers developing programs in both network and syndication markets. It appears to be, based on the testimony and especially the statistical evidence, that network judgment in choosing new programs is substantially influenced by their acquisition of subsidiary interests in the programs chosen. But in any event, even were we not to reach that conclusion, it is clear that the existence of subsidiary interests does pose a significant conflict of interest in this selection of programming of other networks, and that as a prophylactic measure, the public interest would be served by the elimination of this conflict."

In short, the prime-time access, financial interest and syndication rules were not promulgated because of any demonstrable creation or exercise of market power by the networks. The FCC acted out of fear that networks had too much influence in the marketplace of ideas, and its solution was to restrict their size. The commission later explained:

"We concluded that it was not desirable for so few entities to have such a degree of power over what the American people may see and hear over so many television stations; and, that a diversification of economic interest and power in this area was a cardinal principle of the public interest standard of the Communications Act. Therefore the Commission believed that a rule was needed to . . . promote a healthy independent production industry as well as diversify the sources of program production" (47 Fed. Reg. at 32962).



IT WOULD BE TEMPTING but wrong to dismiss the FCC's 1970 network rules as an oddity of the Washington bureaucracy. But the FCC's views about network concentration were not unique. In 1972 and again in 1974, the Justice Department brought antitrust lawsuits against each of the three major television networks, seeking in essence to achieve by litigation what the FCC had imposed by regulation.

The Justice Department actions alleged that each of the networks had "used its control over access to the broadcasting time on the [network] during prime evening hours" to exclude programs in which it had no financial interest, to compel independent program suppliers to sell financial interests to it, and otherwise "to obtain competitive advantages over other producers and distributors of television entertainment programs and motion picture feature films" (Competitive Impact Statement, 45 Fed. Reg. 58441, 58446, September 3, 1980). The Justice Department focused explicitly on the vertical relationships between the networks and the program producers, noting, for instance, that in 1957 41 percent of all prime-time entertainment programs on ABC were advertiser-supplied and "advertisers constituted a substantial market for independent program suppliers." By 1967 only 4 percent were advertiser-supplied (Id. at 58446). Similarly the Justice Department noted that in November 1956 ABC owned subsidiary rights, such as the right to syndicate off-network, in only 31 percent of its prime-time entertainment programs; by 1967 that percentage had risen to 86 percent.

The network antitrust cases were settled by consent decrees with NBC in 1978 and with CBS and ABC in 1980 that imposed quotas until 1990 on the amount of entertainment programming the networks could produce themselves and they effectively incorporated into court orders the FCC's financial interest and syndication rules. As in the *Paramount* decree, the manufacturers (the producers) had been separated from the wholesale distributors (the networks). The networks were now prohibited from syndicating entertainment programs or acquiring a financial interest in them.

FEW DISINTERESTED OBSERVERS today believe that the network antitrust proceedings of the 1970s make sense as competition policy. The idea was that the networks are bottlenecks that impede the ability

of new producers and creators of entertainment programs to get their shows on the air. But the remedy embodied in the Justice Department consent decrees and the FCC rules does not make it easier for new producers.

Producing TV entertainment programs is enormously costly and risky, and the costs can be borne most efficiently only by those who are able to spread the risks over a large portfolio of programs. The networks are probably the best able to bear and reduce these risks. If they are prohibited from purchasing financial interests in the programs — and thus from sharing in the value of the programs after the initial network exhibition — the amount they will be willing and able to invest in programs will naturally be diminished. The less the networks invest in entertainment programs the more others will have to invest, and the more risks others will have to bear. Shifting the risks from the networks to others less able to bear them efficiently has two consequences: It increases the costs of programming and encourages bland, less risky programming.

Small producers and new producers are in no position to bear the economic risks of program development themselves. Financial institutions are not well equipped to appraise program value and underwrite their risks. So what White Knight, knowledgeable about the industry and endowed with a deep pocket, has filled the breach left by the banished networks? The major Hollywood studios. The effect of the FCC rules and court decrees has thus been to force small producers to sell their programming to conglomerate producers in Hollywood, concentrating production in the hands of a few and foreclosing the opportunities for newcomers to deal directly with program distributors.

These consequences did not go unnoticed at the FCC, and in 1977 the commission instituted a broad inquiry into the network television business that led to the issuance of a Special Staff Report in 1982. The commission thereafter asked for public comment on the modification and/or repeal of the financial interest and syndication rules and on August 22, 1983, published its proposed changes. The FCC's proposals would have eliminated the financial interest rule and narrowed the syndication rule. "It appears from the record," the commission observed, "that the other restraints of the rules were either initially misguided or no longer necessary in light of evolving market conditions and we intend to eliminate them" (48 Fed. Reg. 38021).



By 1983 the Justice Department also appeared to have abandoned the theory behind its antitrust cases against the networks. In its comments on the commission's proposed rule changes, it said that any market power of the networks derives from the structure of the affiliate arrangements and that the regulation of one element in the bargaining process, such as the acquisition of program rights from producers, will simply cause the networks to shift their focus to other parts of the bargaining process (Id. at 38024). The commission agreed.

There was empirical support for the commission's fears that the rules diminish rather than enhance competition. Following the rules' adoption in 1970, the FCC found "the number of producers supplying programming for prime-time network exhibition declined rather dramatically" from 61 in the 1969–1970 season to as few as 30 in the 1974–1975 season (Id. at 38039). Moreover, it concluded, the rules are inefficient:

"[They] prevent networks from obtaining a financial interest in programs produced by others. Therefore, the rules force suppliers who wish to permit others to have a financial interest in their programs to choose between: (1) selling in a market with an artificially reduced number of prospective purchasers, since three major purchasers in a position to offer favorable terms have been excluded by the rules, or (2) retaining the rights or interests they would prefer to sell, thus bearing by themselves the risks they would prefer to share or shift to others. The result of this artificial altering of the program market may be to reduce efficiency, competition and diversity in supply of network programming" (Id. at 38038).

The FCC's proposed amendments to the financial interest and syndication rules in 1983 unsettled the status quo and were not, in the end, carried out. An all-out lobbying campaign in Congress and the White House, orchestrated by the major Hollywood studios, led then-FCC chairman Mark Fowler to announce on November 16, 1983, that the commission would "forbear from any action to amend, modify or repeal the financial interest and syndication rule. . . . We have made this determination on the basis that both houses of Congress, in one form or another, have expressed the desire to permit private parties time to settle their differences." The commission has taken no further action on the financial interest and syndication rules since this statement. The antitrust consent decrees remain in effect.

This singular resistance to deregulation of the networks, at a time when deregulation for the most part succeeded in most other industries, was largely a function of politics. The Hollywood studios that benefit from the FCC rules are well organized in Washington. Hollywood personalities are proven money raisers for politicians and popularize their causes and candidacies.

But politics is a vessel, filled by ideas as well as special interests. The underlying theories behind the financial interest and syndication rules and the government antitrust cases were always outside the boundaries of routine antitrust or competition regulation. The antitrust cases did not allege a conspiracy by the networks and were thus brought against individual companies, none with more than 25 percent of the relevant market. The remedies sought were at best unusual antitrust-type remedies, for they prohibited willing trades between buyers and sellers, not in order to protect excluded third parties, but in order to protect the sellers. It is as if the nation has chosen to ensure that what it believes to be the dominant entertainment medium — in the 1970s, the television networks, in 1948, Hollywood — will not be allowed to get too big, even if that means reducing industry efficiency and even the number of program producers.

This unusual notion of competition regulation is rooted, we believe, not in the corridors of power politics but in the soil of Populism, and a special kind of Populism at that. The American people are unusually suspicious of the mass media and express that suspicion in antitrust enforcement and competition regulation. When the time comes that the networks are no longer regarded as the dominant source of entertainment programming and news, they will in all likelihood be subject to more conventional antitrust scrutiny focusing on the traditional standards of market power and efficiency.

SIGNS HAVE ALREADY APPEARED on the horizon that the next wave of antitrust regulation will break elsewhere. Just as Hollywood ceased to be a target of overzealous enforcement thanks to network broadcast television, network broadcast television may escape excessive regulation thanks to cable. Cable has now replaced the local television station as the principal local distributor of television programs.



Cable television's growth has been stunning. More than 55 percent of America's homes are now wired for cable. An additional 25 percent can have it if they choose to buy it. Cable systems typically offer 60 or more channels, only a tiny fraction of which transmit broadcast network programming.

In this environment the influence of broadcast networks is plainly on the wane. More people receive entertainment television programming each day from cable systems owned by Telecommunications Inc. (TCI) than from any television network. But in all but a handful of communities there is only one cable operator. Not surprisingly, Populist concern and antitrust scrutiny has begun to turn in the cable industry's direction.

In 1980 the United States brought an antitrust case against several motion picture companies, including Columbia, Paramount and Twentieth Century-Fox, alleging that they had formed an illegal joint venture to pool their movies for sale to cable television. The court enjoined the formation of the venture, which was called Premiere, and it never got off the ground. *United States v. Columbia Pictures Industries* was a transitional case. While the focus was still on Hollywood, the awareness was emerging that cable distribution might warrant antitrust scrutiny.

Since then the federal government's concerns have increased. The Justice Department and the Federal Trade Commission have repeatedly been urged by Congress to investigate arrangements between cable operators and program suppliers that allegedly disadvantage other kinds of local program distribution. Various bills have been introduced in Congress to limit so-called siphoning of programming (especially sports) from broadcast to cable, reimpose rate regulation on cable operators, restrict the terms on which cable operators may deal with programmers, and limit common ownership of cable programmers and cable operators.

No one cable operator has a monopoly throughout the country, but subsidiaries and affiliates of TCI, the largest, pass approximately 25 percent of the nation's homes. Cable operators are thought by many to have monopoly power in local markets, but regulating the size of the multisystem operators cannot change that structural condition.

The regulatory scrutiny has thus begun to focus on vertical relationships. The Justice Department and several states have launched investigations. And on May 8, 1989, two major cable programmers brought suit

against ATC, the second largest cable operator, Home Box Office (HBO) and others. ATC and HBO are both owned by Time Inc. (now Time-Warner). The suit, captioned *Viacom International v. Time Inc.*, charges the defendants with, among other things, using their power in local cable markets to gain an anticompetitive advantage for Home Box Office in the pay cable television programming marketplace. As in the financial interest and syndication rules and the antitrust cases against the networks, the suit's premise is that powerful program distributors favor programs in which they own a financial interest. As before, there is no allegation that the defendants have enhanced their market power by means of agreements with competitors.

THE PARALLELS IN ANTITRUST REGULATION between the cable industry, the network television industry and the motion picture industry are compelling. In the 1940s the motion picture industry, aided by a then state-of-the-art technology, was America's dominant source of entertainment and was subjected to sweeping antitrust scrutiny that was based at least partly on arcane theories better explained by Populist fervor than by the kinds of economic analysis ordinarily found in this kind of investigation. Two decades later, when broadcast television had supplanted Hollywood as the dominant entertainment medium, the networks were subjected to a similarly pervasive scrutiny, one which, because it was not based on the market power of individual firms, was even more flawed. Now the cable industry is on the verge of becoming the dominant mode of transmission for entertainment programming, and it is on the verge of being subjected to antitrust scrutiny based on theories at least some of which appear unsound.

Regulatory history seems to be repeating itself. By the time the antitrust incursion against Hollywood was complete in the late 1940s, the primacy of the networks seemed inevitable. By the time the networks were in the grip of antitrust and FCC regulation in the 1970s and 1980s, the cable industry was on the ascent. And today, while cable is being scrutinized, there is the new specter of local telephone companies entering the video transmission business. It is an entry opposed by some because of the size of the telephone companies and the fear that they may use their regulated local telephone monopolies to subsidize other



businesses. The entry is applauded by others, who regard telephone companies as an efficient alternative to local cable monopolies. Given past history, it may not be too farfetched to imagine that antitrust scrutiny of the cable industry will reach a peak just when the telephone companies (or perhaps a new technology) emerge to supplant cable as our dominant source of entertainment programming.

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