MEDIA IN FLUX: DOES CONSOLIDATION PROMOTE THE PUBLIC INTEREST?♦

INTRODUCTION

There was once a time in the United States when people would pick up their newspapers outside their front door, dropped off by the local paperboy fresh off the press, and indulge in the headlines and articles of the day while sipping a cup of joe. After work, they would watch their

favorite anchors speak about, and reporters visit, familiar places in their municipalities because something newsworthy had occurred there. People can no longer indulge in these pastimes like they once could. Today, very few have access to local newspapers because most local publications have folded, and millions have relinquished their access to watching local news by cutting the cord. Instead, they turn on their computers or smartphones and learn about things happening in other people's neighborhoods, but hardly about what is going on in their own. The traditional American news institutions described above have now been pushed aside in favor of the unlimited, unchecked information that is found on the web. With the internet's broad reach and capabilities, anyone can "report" the news, but there is no one to verify whether those current events are true.

While statistics show that the majority of Americans get their primary news from television, particularly local news stations, the numbers are consistently in decline.[1] Local news stations are licensed by and fall under the jurisdiction of the Federal Communications Commission (FCC).[2] Most of these local stations are licensed or owned by giant media corporations, which are consolidating more and more in what has become an onslaught of media conglomeration.[3] Media mergers have become the standard in recent years, as they are one of the only ways preexisting media conglomerates can stay relevant in this unprecedented age of innovative technology, where each new idea replaces decades of an existing industry.[4] Media mergers appear to be accepted in both vertical and horizontal forms by courts today,[5] though such consolidation tends to skew biases one way or another. At the same time and beginning

1 *See* Katerina Eva Matsa, *Fewer Americans rely on TV news; what type they watch varies by who they are*, PEW RES. CTR.: FACT TANK (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/ [https://perma.cc/QCC7-FFXG]; *see also* Keith Nissen, *How Americans Get Their News Research Summary*, S&P GLOBAL MKT. INTELLIGENCE (Nov. 13, 2018), https://www.spglobal.com/marketintelligence/en/news-insights/blog/how-americans-get-their-news-research-summary [https://perma.cc/PU45-RLMZ] (presenting a study showing that while forty-nine percent of internet adults watch local TV news, forty percent of internet adults watch the news on a TV network, and thirty-three percent of internet adults watch cable news, only forty percent of internet adults get their news from an online media source).

2 47 U.S.C. § 307 (2012), https://www.govinfo.gov/content/pkg/USCODE-2017-title47/pdf/USCODE-2017-title47-chap5-subchapIII-partI-sec307.pdf [https://perma.cc/3LA7-K2R7].

3 *See* Tribune Media Co., 34 FCC Rcd. 8436 (2019); *see also Nexstar, Tribune Media in $4 billion deal to be biggest group of local TV stations in U.S.*, CBS NEWS (Dec. 3, 2018, 11:29 AM) [hereinafter *$4 Billion Deal*], https://www.cbsnews.com/news/nexstar-tribune-media-in-4-billion-deal-to-create-biggest-group-of-local-tv-stations-in-u-s/ [https://perma.cc/5W6A-TX8K].

4 *See $4 Billion Deal*, *supra* note 3.

5 *See, e.g.*, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (approving the AT&T-WarnerMedia merger on the vertical end), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see also* United States v. The Walt Disney Co., No. 1:18-cv-05800, 2019 U.S. Dist. LEXIS 178544 (S.D.N.Y. Sept. 23, 2019) (approving the Disney-Fox merger on the horizontal end).

several decades ago, the executive branch has been in the process of reducing the power of the FCC and other agencies so that historically-regulated companies are able to compete with new entrants unimpeded by regulatory oversight.[6] With these workarounds in play, traditional news media is in trouble. Neither deregulation nor integration is the proper long-term solution for these industries. Instead, the government should impose regulations on new entrants, so they are on equal footing with existing businesses that have survived with the assistance and constraints of regulations.

The state of the media—including print, television, and digital—has gone through significant changes over its history; however, the biggest transformations have occurred following the passage of the Telecommunications Act of 1996, which undid many of the regulations imposed by the FCC during the twentieth century.[7] Deregulation has resulted in gigantic corporate conglomerate ownership of the media, where the interest in the bottom line takes priority—as evidenced by an increase in advertising and "viral" stories instead of pure, hard facts that serve the public interest.[8] This is reminiscent of the period of "yellow journalism" at the turn of the twentieth century, where the news was sensationalized to induce readership and draw in larger profits for publishers.[9]

Moreover, the last decade has seen a rise in new, competitive technologies that do not fall under the purview of the regulations that existing media has dealt with for nearly a century.[10] In analyzing recent antitrust opinions, it is clear that courts could not help but accept mergers as a means for older media companies to stay relevant and competitive against the new media entrants.[11] Instead of creating regulations that would put the latest innovators on a level playing field with existing businesses so those businesses could continue to thrive as they did in years past, the government now views deregulation as a means for them

6 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 FCC Rcd. 9802, 9803 (2017); *see* Prometheus Radio Project v. Fed. Commc'ns Comm'n, 939 F.3d 567 (3d Cir. 2019).

7 David Hatch, *Media Ownership*, 13 CQ RESEARCHER 845, 858 (2003).

8 *See AT&T Inc.*, 310 F. Supp. 3d at 164.

9 *See* James Murphy, *Unnoteworthy News*, NEW AM. (Feb. 6, 2018), https://www.thenewamerican.com/print-magazine/item/28196-unnoteworthy-news [https://perma.cc/B455-UQME]; *see also* discussion *infra* Section I.B.2.

10 *See AT&T Inc.*, 310 F. Supp. 3d at 173.

11 *See id.* at 164. For example, "AT&T and Time Warner concluded that each had a problem that the other could solve: Time Warner could provide AT&T with the ability to experiment with and develop innovative video content and advertising offerings for AT&T's many video and wireless customers, and AT&T could afford Time Warner access to customer relationships and valuable data about its programming." *Id.*

to compete efficiently.[12] This is notwithstanding the fact that preexisting companies have built their business models with the industry practices and regulations in mind, so they would now need to expend valuable resources to revolutionize and adapt their existing models in order to compete effectively with the unregulated newcomers.[13] In contrast, new entrants have not spent decades perfecting their business models and are therefore better able to adapt to regulations.[14]

This Note examines the state of print and broadcast journalism, and media in general, in today's digital market and seeks a solution for both to continue serving the public interest despite mass media conglomeration. Part I of this Note begins with an overview of the constitutional and societal underpinnings of journalism in the United States, looking at the history of journalism, broadcasting, content distribution, and advertising. Part II addresses the shift from traditional journalism to the commercial control exerted on the media in the last decade, through advertising issues brought on by digital innovations in tracking consumer data and new, vertically integrated digital companies entering the competitive space without regulation. Part III discusses the legal analyses conducted by the Department of Justice (DOJ), Federal Trade Commission (FTC), and FCC when confronting merger transactions. Part IV analyzes what must be done differently in determining the criteria for mergers. Consequently, it urges the government to impose restrictions on internet-distribution media companies, rather than to encourage consolidation of preexisting media

12 *See* 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 FCC Rcd. 9802, 9803 (2017); *see also* Prometheus Radio Project v. Fed. Commc'ns Comm'n, 939 F.3d 567 (3d Cir. 2019); *see also* Chairman Pai of the Federal Communications Commission, Statement on the Third Circuit's Media Ownership Decision (Sept. 23, 2019), https://docs.fcc.gov/public/attachments/DOC-359794A1.pdf [https://perma.cc/BY5D-L2XR] ("Federal Communications Commission Chairman Ajit Pai issued the following statement regarding the Third Circuit's decision in *Prometheus Radio Project v. FCC*: 'For more than twenty years, Congress has instructed the [FCC] to review its media ownership regulations and revise or repeal those rules that are no longer necessary. But for the last fifteen years, a majority of the same Third Circuit panel has . . . block[ed] any attempt to modernize these regulations to match the obvious realities of the modern media marketplace. It's become quite clear that there is no evidence or reasoning—newspapers going out of business, broadcast radio struggling, broadcast TV facing stiffer competition than ever—that will persuade them to change their minds . . . .'").

13 Kirk MacDonald, *News media companies must create new business models to survive*, INMA (May 20, 2018), https://www.inma.org/blogs/disruptive-innovation/post.cfm/news-media-companies-must-create-new-business-models-to-survive [https://perma.cc/XL2C-GSJR].

14 Joe Nocera, *Can Netflix Survive in the New World It Created?*, N.Y. TIMES (June 15, 2016), https://www.nytimes.com/2016/06/19/magazine/can-netflix-survive-in-the-new-world-it-created.html [https://perma.cc/U2T5-JXHK] ("Worse, [network executives] realized that Netflix didn't have to play by the same rules they did. It didn't care when people watched the shows it licensed. It had no vested interest in preserving the cable bundle. On the contrary, the more consumers who 'cut the cord,' the better for Netflix. It didn't have billions of legacy profits to protect.").

companies, in order to foster competition among all traditional and "new media" information providers. This Note proposes utilizing disability laws and regulations as an entry point to regulate media companies that are only present in the online space.

I. BACKGROUND

A. *Constitutional Considerations*

Prior to the American Revolution, English laws applied to the American colonies, including its laws for publishing news.[15] England recognized that people were free to publish what they wanted, but they were *held liable* for their publications.[16] The law was such that it would punish anyone who criticized the English government.[17]

English law migrated over to the colonies, where colonists were much more critical of the English government.[18] The idea of a free press gained momentum in 1735, when John Peter Zenger, the publisher of the *New York Weekly Journal*, distributed several citizens' articles critiquing the corrupt royal governor, William S. Cosby, for rigging elections and cavorting with enemy countries, among other illegal conduct.[19] The royal governor arrested and tried Zenger for seditious libel.[20] Zenger's attorney brought the first-of-its-kind issue to the forefront of this case: whether truth mattered in publications that criticized the government.[21] In prior seditious libel cases, truth was not an issue because the law stated that any critique of the government qualified as seditious libel, regardless of whether the critique was true or not.[22] Here, the jury determined that Zenger had been telling the truth and therefore was not liable for seditious libel; he was subsequently acquitted.[23]

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15 Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225, 232-33 (1985), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11912&context=journal_articles [https://perma.cc/2SMG-RUCM].

16 *Id.*

17 *See id.* at 233 (quoting DAVID HUME, 1 ESSAYS: MORAL, POLITICAL AND LITERARY 94, 98 n.1 (T. H. Green & T. H. Grose eds. 1907)) ("[T]he 'general laws against sedition and libeling [were] as strong as they possibly can be made.'").

18 Stephen D. Solomon, *The Cost of Criticism: America's journey from suppression of speech to freedom of speech*, COLONIAL WILLIAMSBURG (2017), http://www.history.org/Foundation/magazine/Winter17/PastForward.cfm [https://perma.cc/4GLC-QXQ8].

19 Jax Hunter, *Freedom of the Press Clause*, REVOLUTIONARY WAR & BEYOND, http://www.revolutionary-war-and-beyond.com/freedom-of-the-press-clause.html [https://perma.cc/HRD3-RYXL]; *see The Trial of John Peter Zenger*, U.S. HIST. [hereinafter *John Peter Zenger*], http://www.ushistory.org/us/7c.asp [https://perma.cc/KZL3-ULCT].

20 Hunter, *supra* note 19.

21 *See id.*

22 *Id.*; *see John Peter Zenger*, *supra* note 19.

23 Hunter, *supra* note 19.

As a result of *Zenger*, the English government was less inclined to bring suit against publishers for libel in light of the new "truth" standard.[24] Printers were able to publish information critiquing the government with less risk than before.[25] However, Parliament quashed this additional freedom when it enacted the Stamp Act of 1765 and the Townshend Act of 1767, both of which levied taxes on paper in the colonies.[26] Printers vehemently opposed these taxes, claiming that they prevented publishers from fulfilling their duties to inform the public and check the abuses of the government.[27] Around this time, the American Revolution began: The colonists fought for liberty and independence from England, seeking to establish fundamental freedoms that had previously been withheld from them.

1. Post-Revolution Constitutional Underpinnings

During the Stamp Act crisis, printers and the patriotic leaders of the Revolution worked together for the common cause of freedom.[28] David Ramsay, a South Carolina delegate of the Constitutional Convention and author of *The History of the American Revolution*, found it "fortunate for the liberties of America, that News-papers were the subject of a heavy stamp duty," because "[p]rinters, when uninfluenced by government, have generally arranged themselves on the side of liberty."[29] The revolutionaries understood the vital importance of freedom of the press to self-government.[30]

In 1774, the Continental Congress's Quebec Address focused on the importance of free press for two main purposes: (1) generally protecting the quest for knowledge and (2) providing checks upon the government.[31] First, a free press can provide information to the public free and clear of government censorship.[32] Second, a free press allows the public to protect itself from government officials' abuses of power and learn about the validity and propriety of the laws and policies the

[24] *Id.*
[25] *See id.*
[26] Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 80-81 (2016), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2066&context=fac_artchop [https://perma.cc/AW3D-B23H]. These taxes were the turning point for the colonists, provoking them to organize the Boston Tea Party and fight against taxation without representation. *See A Summary of the 1765 Stamp Act*, COLONIAL WILLIAMSBURG [hereinafter *1765 Stamp Act*], https://www.history.org/history/teaching/tchcrsta.cfm [https://perma.cc/VG9K-FG83].
[27] West, *supra* note 26, at 80.
[28] *Id.*
[29] 1 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION IN TWO VOLUMES 59-60 (Lester H. Cohen ed., 1990).
[30] West, *supra* note 26, at 68.
[31] *Id.* at 68-69.
[32] *Id.* at 68.

government enacts.[33] In forming the new "republican" government, wherein the people rule themselves, a free press is essential because it protects political speech.[34]

Based on these functionalities and considerations, the states and federal government adopted the principle of free press. Nine of the original thirteen states adopted free press clauses in their state constitutions.[35] Most of the state constitutions granted free press to "every man," providing unrestricted freedom for all to share their views in the media.[36] Due to the popularity of free press in a majority of the early states, when the First Amendment was proposed for ratification, many of the states were already familiar with part of the amendment.[37] The First Amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[38] Under the First Amendment, the government cannot prohibit the expression of an idea that is offensive or disagreeable.[39] It was ratified in 1791 by all of the states that were part of the U.S. at the time.[40]

B. *The Evolution of the Press in America*

1. Journalism Along Party Lines

With free press, news publishers could disseminate whatever ideas they wanted.[41] In the early days of the new nation, newspapers were mostly subsidized and supported by political parties, so each publication catered to the views of the party that supported it.[42] "[J]ournalists stressed

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33 *Id.* at 68-69.

34 *See* Kurland, *supra* note 15, at 249 ("Indeed, there is very little to the historical record that was not concerned with justifying the constitutional restraint in terms of the necessity for allowing dissemination of information about government and providing criticism of government behavior. It was protection of political speech that was the objective to be served by the free press clause. And this was all the more necessary for government which was republican in form, where 'we, the people' were sovereign, and the government only a means to self-rule.").

35 West, *supra* note 26, at 64; *see* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 466-67 (2012), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1043&context=penn_law_review [https://perma.cc/Y4MY-LDVM].

36 Volokh, *supra* note 35.

37 West, *supra* note 26, at 64.

38 U.S. CONST. amend. I.

39 MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA § 78 (2018) ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter or its content; restrictions based upon content have been upheld only in the most extraordinary circumstances.").

40 *First Amendment*, HIST. (Dec. 4, 2017), https://www.history.com/topics/united-states-constitution/first-amendment [https://perma.cc/32AL-F73K].

41 *See generally* Tom Price, *Journalism Standards in the Internet Age*, 20 CQ RESEARCHER 821, 830 (2010).

42 *Id.*; *see* Gary Wills, *How Lincoln Played the Press*, N.Y. REV. BOOKS (Nov. 6, 2014), https://www.nybooks.com/articles/2014/11/06/how-lincoln-played-press [https://perma.cc/Q34K-577P] ("Editors ran their own candidates—in fact they ran for office themselves, and often continued in

sensationalism over accuracy, with papers serving as mouthpieces for political parties."[43] On the other hand, some publishers tried to expand readership by being impartial, though only five percent of newspapers were considered neutral or independent by 1850.[44] In 1848, a group of newspapers organized the Associated Press wire service in an effort to deliver objective facts that could be used in all their publications.[45] In 1860, *The New York Times* announced its plans to "publish facts, in such a form and temper as to lead men of all parties to rely upon its statements of facts."[46]

The Civil War era brought about changes in American journalism due to technological advances.[47] The telegraph allowed Civil War reporters to send their stories to their offices faster than ever before and also led to the inverted-pyramid style of reporting, where the most important information in a news story is at the beginning.[48] The advent of photography also allowed publishers to print photographs taken at the front lines of the war.[49] Citizens were interested in hearing about the war, and photographs were an effective means for informing the public—without necessarily tying a political spin to the content provided.

By 1880, a quarter of all U.S. newspapers had dropped their political affiliations—this number increased to a third by 1890.[50] In 1896, the new publisher of *The New York Times*, Adolph S. Ochs, announced that it would "give the news impartially, without fear or favor, regardless of party, sect or interests involved . . . ."[51] This statement was reprinted by editors all over the country.[52] By the start of the twentieth century, journalism had become independent from political parties.[53]

their post at the paper while holding office. Politicians, knowing this, cultivated their own party's papers, both the owners and the editors, shared staff with them, released news to them early or exclusively to keep them loyal, rewarded them with state or federal appointments when they won.").

43 Chuck McCutcheon, *Trust in Media*, 27 CQ RESEARCHER 481, 490 (2017).

44 Price, *supra* note 41, at 832.

45 *Id.*

46 *Id.*

47 Tony Rogers, *Here Is a Brief History of Print Journalism in America*, THOUGHTCO., https://www.thoughtco.com/here-is-a-brief-history-of-print-journalism-in-america-2073730 [https://perma.cc/EM7F-KR2B] (last updated May 15, 2019).

48 *Id.*

49 *See id.*

50 Price, *supra* note 41, at 832.

51 *See id.*; *see also* McCutcheon, *supra* note 43, at 490; *see also* Adolph S. Ochs, *Without Fear or Favor*, N.Y. TIMES, Aug. 18, 1896, at A12.

52 *See* Price, *supra* note 41, at 832; *see also* Ochs, *supra* note 51.

53 *See* Kathy Koch, *Journalism Under Fire*, 8 CQ RESEARCHER 1121, 1130 (1998).

2. Yellow Journalism and the Muckrakers

Following their break with political affiliations, newspapers started controlling their own operations.[54] Media magnates William Randolph Hearst of the *New York Journal* and William Pulitzer of the *New York World* highly sensationalized the news to increase their profit margins.[55] While their stories were based in fact, those facts were stretched beyond their original newsworthiness to create "yellowed" stories—in a time known as yellow journalism.[56] A 1919 exposé on the newspaper industry "compared the brass token used by patrons of prostitutes to wealthy newspaper owners' buying off journalists' credibility."[57]

Yellow journalism was followed by a progressive period in the early 1900s. During the Progressive Era, journalists were galvanized to investigate and expose the truth.[58] They were called "muckrakers" because they were "raking" up the "muck" of corruption in government and big business.[59] In addition to the exposé mentioned above, journalists revealed impropriety and the deplorable conditions of the meatpacking, oil, and housing industries, among others.[60] Newspaper companies at the time did not have interests tying them to protect a certain industry or company because they were not owned by corporations as a secondary industry or investment.[61]

3. Rise of Broadcasting: From Regulation to Deregulation

With the rise in new media technologies, however, this sense of independence from outside interests began to change.[62] The growth in radio and television broadcasting prompted media companies to aim to *entertain* rather than *inform* the public; they had to juggle their business

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54 *See* Price, *supra* note 41, at 833 ("Journalists themselves are sitting in newsrooms and they're starting to worry about their own ability to be accurate informers, because advertising, business interests and the publishers themselves are threatening [the journalists'] independence.").

55 Murphy, *supra* note 9, at 21. These publishers had such a contentious rivalry for sales that their sensationalized stories are believed by some historians to have ignited the Spanish-American War. *Id.*

56 *Id.*

57 McCutcheon, *supra* note 43.

58 *See id.*

59 *Muckrakers*, KHAN ACAD., https://www.khanacademy.org/humanities/us-history/rise-to-world-power/age-of-empire/a/muckrakers [https://perma.cc/SMT6-4EHF].

60 *Id.* Upton Sinclair published a rousing exposé on the exploitation and poor conditions in the meatpacking industry in *The Jungle*. *Id.* Ida Tarbell published a series of articles exposing oil tycoon John D. Rockefeller as a "greedy monopolist." *Id.* Jacob Riis published photos of grim tenement living conditions where recent immigrants lived. *Id.* Ida B. Wells wrote about the lynching and disenfranchisement of Southern blacks and poor whites. *Id.* This muckraker movement inspired legislation to reform the practices that were the subjects of investigative journalism. *Id.*

61 *See* Koch, *supra* note 53.

62 *Id.*

interests with their duty to tell and distribute the news.[63] The Communications Act of 1934 required broadcasters to provide news as a public service.[64] Under the Act, which created the FCC, broadcasters were issued a license by the government to broadcast their programming as long as they acted as "public fiduciaries."[65]

The federal government was concerned that broadcasters would misuse the licenses they were granted to promote their own politically-biased agendas.[66] To prevent political bias from occurring, the FCC sought to regulate the airwaves by issuing the Fairness Doctrine in 1949, requiring broadcasters to include controversial issues and opposing viewpoints in their programming to present viewers with a fair consideration of the topics.[67] In a move for deregulation under the Reagan administration, however, the FCC abolished the Fairness Doctrine in 1987 due to the proliferation of disparate media voices that, in their view, made the requirement obsolete.[68] The Reagan administration also relaxed competitive constraints and government regulation of cable channels by passing the Cable Communications Policy Act of 1984, under which 24/7 cable news channels were able to thrive.[69] Further deregulation led to the Telecommunications Act of 1996, which allowed the formation of media conglomerates at the public's expense.[70]

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63 *Id.*

64 *Id.*

65 Stuart N. Brotman, *Revisiting the broadcast public interest standard in communications law and regulation*, BROOKINGS (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation [https://perma.cc/28T7-Q9M4]. Broadcasters were issued licenses—first for radio by the Radio Act of 1927, and then for television by the Communications Act of 1934—because of bandwidth scarcity: There were not enough frequencies to accommodate everyone who wanted a channel, so the government served as a gatekeeper ensuring that those who received channels served as "proxies for the entire community." JOHN W. BERRESFORD , THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED 1-2 (2005).

66 McCutcheon, *supra* note 43.

67 *Id.* at 490, 492.

68 *Id.* at 491; *see* Hatch, *supra* note 7, at 857. In promoting a deregulatory agenda, the government also rescinded the primetime access rule, restricting local stations in the top fifty markets to only air three hours of network programming a day, during primetime, except Sundays. Hatch, *supra* note 7, at 857. Note that the "Equal Time" rule, which requires broadcasters and cable companies to treat "legally qualified political candidates" equally in terms of selling or giving away air time, is still in effect. *See* Howard Klieman, *Equal Time Rule*, MUSEUM BROADCAST COMM., https://web.archive.org/web/20190128123552/http://www.museum.tv/eotv/equaltimeru.htm [https://perma.cc/39AV-JWGY] ("[A] station which sells or gives one minute to Candidate A must sell or give the same amount of time with the same audience potential to all other candidates for the particular office.").

69 McCutcheon, *supra* note 43, at 494; *see generally* Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543 (1985), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1641&context=all_fac [https://perma.cc/WR5W-2RR6].

70 Koch, *supra* note 53.

4. Shifting to "Soft" Print and Television News

When newspapers began losing readership in the 1970s, market research studies found that readers wanted "softer" news—information that people could use—rather than facts.[71] Publishers began launching daily newspapers featuring lifestyle sections, graphics, shorter articles, and limited government reporting in response to those market studies.[72] By the late 1980s, most newspapers were owned by corporate conglomerates or media chains.[73] Shareholders were mainly concerned with the bottom line of the publication at the expense of facts and story—or any concern for serving the public good.[74] Moreover, an unprecedented wave of mergers and acquisitions began among media giants, such as Time Warner's purchase of Turner Broadcasting and Disney's purchase of ABC, to the point that such media mergers resulted—and continue to result—in transnational companies with global, corporate interests.[75] These mergers and cuts have greatly affected the content and quality of journalism.[76]

In the current ever-changing marketplace, newspaper readership has declined immensely,[77] and many people opt to get their news from television, though the use of traditional television is also steadily declining.[78] Television is the method by which the majority of Americans obtain their news each day,[79] but with the advent of online platforms, many consumers are "cord-cutting"[80] and are less likely to watch local TV news on a regular basis.[81]

Television has a "three-stage chain of production and distribution," consisting of "'content creation, content aggregation, and content distribution.'"[82] Programming is created either by third-party studios or

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71 *Id.* at 1134.

72 *Id.*

73 *Id.* (referring to those newspapers that did not go out of business or become subject to downsizing in light of the economic recession of the early 1980s).

74 *Id.* However, as the number of newspapers declined, the rates for advertising in the surviving newspapers climbed. *Id.*

75 *Id.* at 1135.

76 *Id.* at 1134.

77 In addition, there has been a net loss of 1,779 local newspapers since 2004. Penelope Muse Abernathy, *The Loss of Newspapers and Readers*, *in* THE EXPANDING NEWS DESERT 10, 12 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

78 Amy Mitchell et al., *The Modern News Consumer: 1. Pathways to news*, PEW RES. CTR.: JOURNALISM & MEDIA (July 7, 2016), http://www.journalism.org/2016/07/07/pathways-to-news/ [https://perma.cc/4AGF-3AGX].

79 *Id.*

80 Todd Spangler, *Cord-Cutting Keeps Churning: U.S. Pay-TV Cancelers to Hit 33 Million in 2018 (Study)*, VARIETY (July 24, 2018, 3:00 AM), https://variety.com/2018/digital/news/cord-cutting-2018-estimates-33-million-us-study-1202881488/ [https://perma.cc/QK6B-4GGN].

81 *See* Matsa, *supra* note 1.

82 United States v. AT&T Inc., 310 F. Supp. 3d 161, 167 (D.D.C. 2018).

by the networks themselves.[83] In addition, programmers aggregate content into a group of programming[84] that is licensed out to video distributors.[85] At the third stage, distributors bundle the networks and distribute them to their viewers or subscribers.[86] Programmers rarely distribute their content directly to consumers without going through a third-party distributor,[87] such as Comcast or DirecTV, or a newcomer streaming platform, such as Netflix or Hulu.

Programming is delivered in many forms, including over-the-air broadcast networks, cable networks, premium subscription programming, and online streaming. Broadcast network owners license their networks to third-party TV stations affiliated with the network or to their owned-and-operated TV stations ("O&Os"),[88] which are local stations that obtain licenses through the FCC. These programmers distribute the broadcasting feeds (together with other non-broadcast programming) over the air to the public or via retransmission by the distributors described below.[89] Cable networks and premium subscription programming are delivered through cable and satellite distributors, which license programmers' content,[90] while online streaming programs are available over the internet.[91]

There are three types of distribution: "(1) 'traditional' multichannel video programming distributors ('MVPDs'); (2) 'virtual' MVPDs; and (3) subscription video on demand services ('SVODs')."[92] Traditional MVPDs consist of broadcast and satellite providers, cable TV providers, overbuilders, and telecommunications providers ("telcos"), all of which offer linear television content as well as licensed content to view "on demand."[93] MVPD content is distributed by region, and the cable operator in any given locality is usually the dominant MVPD.[94] Virtual MVPDs also offer linear programming and on-demand content, but the services are provided over the internet instead of by traditional means of cable lines or satellite dishes.[95] SVODs offer extensive libraries of

83 *Id.* For sports content, programmers license the rights to broadcast the sporting events. *Id.*
84 Referred to as a network.
85 *AT&T Inc.*, 310 F. Supp. 3d at 167.
86 *Id.*
87 *Id.*
88 Competitive Impact Statement at 8, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), ECF No. 4, https://www.justice.gov/atr/case-document/file/492251/download [https://perma.cc/SH4H-KJS8].
89 *Id.*
90 *See id.* at 9.
91 *See id.* at 18; *see also AT&T Inc.*, 310 F. Supp. 3d at 173.
92 *AT&T Inc.*, 310 F. Supp. 3d at 169.
93 *Id.*
94 *Id.* at 170.
95 *Id.*

original and acquired content, accessible on-demand via the internet instead of through linear programming.[96]

Distributors pay programmers in the form of "affiliate fees," a quid pro quo giving them rights to distribute the programmers' content.[97] Affiliate fees have been increasing over the past decade, and programmers have been known to provide "volume discounts" on affiliate fees, which are fees discounted pro rata to the size of the distributor's subscriber base in order to incentivize wide distribution.[98] Programmers also sell advertising slots, and the wider the distribution of the network, the more advertising revenue the programmers and the distributors will receive.[99] Both of these revenue methods are declining due to decreasing TV viewership and increasing online and wireless media viewership.[100] News—both national and local—is part of this television programming and distribution model, and is facing the same fallout as other programs from declining revenues and online-only competitors.

5. The Internet Age

With the internet providing more outlets for people to "report" on news, newspapers and television news outlets are less in demand than ever before.[101] Social media has made the news easier to access, share, and discuss. Moreover, Facebook uses algorithms that monitor people's clicks and feed them similar content, making it more likely that they receive one-sided information instead of the objective facts that were once regarded as the bedrock of U.S. journalism.[102] This type of digital monitoring is not only dangerous in terms of disseminating information, but it also changes how consumers are targeted by advertisers and has thwarted age-old business models as a result.[103]

Traditionally, advertising has subsidized the news so that consumers are able to access it at a free or low rate.[104] Advertisements appear in print (newspapers and magazines), video (commercials or product placements in content), and online.[105] As news consumption is shifting to online

96 *Id.* The main SVODs, such as Netflix and Amazon Prime, are vertically integrated, which means they create their own content and distribute it directly to consumers. *See id.*
97 *Id.* at 168.
98 *Id.*
99 *Id.*
100 *Id.* at 173-77.
101 McCutcheon, *supra* note 43, at 495.
102 *Id.*
103 *See AT&T Inc.*, 310 F. Supp. 3d at 164.
104 Adam Thierer, *We All Hate Advertising, But We Can't Live Without It*, FORBES (May 13, 2012, 11:06 AM), https://www.forbes.com/sites/adamthierer/2012/05/13/we-all-hate-advertising-but-we-cant-live-without-it/#6b5ac491359b [https://perma.cc/9UND-9Q6U].
105 *See id.*

forums, however, advertisers are no longer spending as much on marketing in traditional news outlets. There is therefore not enough advertising revenue to sustain print and TV news.[106]

Journalism has always been tied to advertising, according to journalist Jonathan Rauch:

> Over the past 50 or more years, we journalists have had the luxury of thinking of journalism as our product, and of readers as our customers. It was a great ethic to maintain, but from an economic point of view it was never right. In the newspaper business, our real customers were our advertisers, who paid the bills; our product was our readers, whose eyeballs we sold to advertisers; our journalism was our marketing hook, luring readers.[107]

Time after time, advertisers have subsidized the news industry because they knew that their advertisements would be seen by a large number of viewers.[108] However, as readership has declined in the last several decades, advertisers are no longer as likely to pay what they once paid for newspaper advertisements.[109] Many media companies must find other ways to adjust for their expenses and earn profits.[110] In these companies' quests for money, many are finding that the most effective way to survive is by vertically integrating with other companies, so they can compete with the online-only distributors that have been dominating the marketplace.[111]

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106 Robert G. Kaiser, *The Bad News About the News*, BROOKINGS ESSAY (Oct. 16, 2014), http://csweb.brookings.edu/content/research/essays/2014/bad-news.html [https://perma.cc/6XQV-F9UP].

107 Jonathan Rauch, *Sponsored Journalism May Transform Journalists into Commodities*, BROOKINGS (Oct. 17, 2014), https://www.brookings.edu/blog/up-front/2014/10/17/sponsored-journalism-may-transform-journalists-into-commodities/ [https://perma.cc/85YE-YEWA].

108 Kaiser, *supra* note 106; *see* Thierer, *supra* note 104.

109 *See* Kaiser, *supra* note 106 ("Traditional news organizations' financial well-being depended on the willingness of advertisers to pay to reach the mass audiences they attracted. Advertisers were happy to pay because no other advertising medium was as effective. But in the digital era, which has made it relatively simple to target advertising in very specific ways, a big metropolitan or national newspaper has much less appeal."). Advertising forecaster eMarketer predicted that 2019 would see more money spent on digital advertising than traditional advertising for the first time, "representing a landmark inversion of how advertisers budget their resources and highlighting the rise of digital media as platforms seek consumers' attention." Hamza Shaban, *Digital advertising to surpass print and TV for the first time, report says*, WASH. POST (Feb. 20, 2019, 9:53 AM), https://www.washingtonpost.com/technology/2019/02/20/digital-advertising-surpass-print-tv-first-time-report-says; *see* Michael Barthel, *5 key takeaways about the state of the news media in 2018*, PEW RES. CTR.: FACT TANK (July 23, 2019), https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways -state-of-the-news-media-2018/ [https://perma.cc/7M2P-FUAN].

110 *See supra* note 109 and accompanying text.

111 *See* Larry Downes, *Antitrust Is Back – But The Media Industry Doesn't Need It*, FORBES (Aug. 28, 2017, 6:00 AM), https://www.forbes.com/sites/larrydownes/2017/08/28/antitrust-is-back-but-the-media-industry-doesnt-need-it/ [https://perma.cc/GA64-4EUA].

II. SHIFTING PARADIGMS: COMMERCIALISM CONTROLS THE MEDIA

As discussed in Part I, traditional media consumerism has sharply declined in recent years. Even though advertisers have been instrumental in the success of the news business in the past, as Rauch said,[112] the news industry is looking for new ways to stay competitive, as the old model will become obsolete without modification. Media companies are seeking the best options for remaining relevant and popular in an age of increasingly important "web- and mobile-based content offerings[,] the explosion in targeted, digital advertising[,] and the limitations" imposed on traditional business models.[113] Parts II and III will explain the "essential response to [such] industry dynamics."[114]

A. *Advertising Woes*

The fall of traditional media has cut newspapers' and broadcasters' advertising revenues significantly.[115] Prior to the digital age, advertisers targeted mass media audiences because traditional media appealed to all types of people; furthermore, a significant percentage of those audiences could be counted on to succumb to the advertisers' marketing tactics.[116] Now that companies like Google and Facebook have the power to target specific consumers known to be searching for the products that advertisers are trying to sell, advertisers are shifting their spending to such digital targeting, where they can aim their advertisements more directly at those consumers on whom they will have the greatest impact.[117]

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112 *See* Rauch, *supra* note 107.

113 United States v. AT&T Inc., 310 F. Supp. 3d 161, 181 (D.D.C. 2018).

114 *Id.*

115 Kaiser, *supra* note 106 ("[T]he advertising revenue of all America's newspapers fell from $63.5 billion in 2000 to about $23 billion in 2013, and is still falling."); *see* Lucas Shaw, *Advertisers Tuning Out TV in Sign of Trouble for Media Companies*, BLOOMBERG (Feb. 14, 2018, 7:00 AM), https://www.bloomberg.com/news/articles/2018-02-14/advertisers-tuning-out-tv-in-sign-of-trouble-for-media-companies [https://perma.cc/Z3CA-4ULN] ("Television-advertising sales in the U.S. fell 7.8 percent to $61.8 billion last year . . . .").

116 Kaiser, *supra* note 106.

117 Kali Hays, *What's the Role of Today's Magazine Editor?*, WWD (Aug. 31, 2018), https://wwd.com/business-news/media/role-of-modern-fashion-beauty-magazines-editors-1202780616/ [https://perma.cc/WAF7-TMDW] ("[N]ot only were more people looking at Facebook and Google for recommendations on what to buy, but those platforms could offer them much more detail on who was looking at their ads and if they turned into sales, insights magazines have never been able to give."); *see* Kaiser, *supra* note 106. Experts refer to such targeted advertising as a form of "surveillance capitalism," a term coined by Shoshana Zuboff, "where digital platforms make money by profiling our activities online and then selling our attention to political actors, commercial advertisers and others." *See* TIMOTHY KARR & CRAIG AARON, BEYOND FIXING FACEBOOK 13 (2019), https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final.pdf [https://perma.cc/K39G-JBVL].

Where companies are continuing to advertise in traditional media, they are using traditional media in non-traditional ways to compete. For example, in early 2018, a slew of print publications contained advertisements—or what appeared to be advertisements in disguise—on covers of magazines.[118] These covers blurred the line between editorial and advertisement, violating the rules set by the American Society of Magazine Editors.[119] While the FTC has imposed strict rules requiring disclosure to consumers when posts on social media are "sponsored," magazines are not required to follow these restrictions. Instead, they often claim that featuring brand ambassadors in those same brands' apparel in photographs shot by the brands' photographers is merely coincidental.[120] Television has also been inviting advertisers to sponsor traditionally ad-free content, such as the weather report. It has recently slipped into sponsoring the news—further blurring the line between editorial and advertisement.[121] If the news is sponsored, benefactors are unlikely to

118 *See* Yashar Ali, *Beyoncé Given Unprecedented Control Over Vogue's September Issue Cover, Sources Say*, HUFFPOST (July 30, 2018, 3:35 PM), https://www.huffingtonpost.com/entry/beyonce-vogue-september-issue_us_5b5f4e19e4b0b15aba9b694c [https://perma.cc/LH9J-9W6Q]; *see also* Jonah Engel Bromwich, *Today's Supreme Drop Is All Over the New York Post*, N.Y. TIMES (Aug. 13, 2018), https://www.nytimes.com/2018/08/13/style/supreme-new-york-post.html [https://perma.cc/TS47-MEVG]; *see also* Kyle Hodge, *Supreme x 'New York Post' Could Be the Most Brilliant Collab of the Year, Here's Why*, HIGHSNOBIETY (Aug. 14, 2018), https://www.highsnobiety.com/p/supreme-new-york-post-opinion/ [https://perma.cc/3NST-WQHA]; *see also* Michael Sebastian, *Time Inc. Starts Selling Ads on Magazine Covers, Breaking Industry Taboo*, ADAGE (May 22, 2014), http://adage.com/article/media/time-starts-selling-ads-magazine-covers/293361/ [https://perma.cc/Q3DH-2VPX]; *see also Supreme's Latest Collab is an Ad & It Perfectly Embodies the Status Quo of Fashion Publishing*, FASHION L. (Aug. 13, 2018) [hereinafter *Supreme's Latest Collab*], http://www.thefashionlaw.com/home/supremes-latest-collab-is-an-ad-also-soundly-in-line-with-the-times [https://perma.cc/X72K-7VNN]; *see also* Stephanie Clifford, *Magazine Cover Ads, Subtle and Less So*, N.Y. TIMES (June 11, 2009), https://www.nytimes.com/2009/06/12/business/media/12adco.html [https://perma.cc/GE4Q-ELRY]. Moreover, an internal document from Harper's Bazaar shows that editors prioritize brands to feature in their editorials based on whether (and how much) they advertise. Jenna Sauers, *Proof That Ladymags Cater To Designers Who Advertise*, JEZEBEL (Nov. 11, 2010, 2:35 PM), https://jezebel.com/5687622/proof-that-designers-who-spend-more-money-get-better-coverage-in-bazaar [https://perma.cc/6KM5-MZRQ].

119 Clifford, *supra* note 118.

120 *See Advertisement or Editorial: It is all the Same in Fashion*, FASHION L. (Aug. 15, 2017) [hereinafter *Advertisement or Editorial*], http://www.thefashionlaw.com/home/advertising-or-editorial-it-is-all-the-same-in-fashion [https://perma.cc/Q647-BXJ9]; *see also* Katie Notopoulos, *Print magazines get away with ads that Instagrammers can't*, COLUM. JOURNALISM REV. (Sept. 18, 2018), https://www.cjr.org/analysis/magazine-ad-ftc.php [https://perma.cc/SG7Z-57Y2].

121 *See* Jim Naureckas, *CNN on the Frontiers of the Commercialization of News*, FAIR (Mar. 11, 2015), https://fair.org/home/cnn-on-the-frontiers-of-the-commercialization-of-news/ [https://perma.cc/4GFJ-EET3]; *see also* Brian Steinberg, *CNN Tests New Ways To Mix Ads With News*, VARIETY (Mar. 5, 2015, 11:29 AM), https://variety.com/2015/tv/news/cnn-tests-new-ways-to-mix-ads-with-news-1201447078/ [https://perma.cc/P2U5-NY4Y] ("[I]ts embrace of these concepts may be the biggest indication yet that concerns about mixing advertising and journalism seem less pressing when the ad dollars that fuel reportage are migrating away from some TV outlets.").

support any reporting that places the sponsoring company or its parents and affiliates in a negative light.[122]

Television programmers are also looking for alternative ways to increase their advertising revenues, akin to Facebook's and Google's "effective—and lucrative—digital advertisements tailored to the individual consumer."[123] The classic model of TV advertising is inefficient today for two reasons: (1) Programmers rely on *general* demographic data to determine the typical audience for a program and, because of that, (2) programmers saturate all viewers with the same advertisements, despite knowing that the advertisements may not pique the interest of the entire audience.[124] While programmers aggregate content and then license their networks to video distributors,[125] they do not have access to the customer relationships and consumer data that would allow them to target advertisements as effectively as Facebook or Google; however, distributors have access to that information because they work directly with consumers.[126] Due to programmers' lack of access to this important consumer data, they are attempting to vertically integrate with distributors[127] in order to overcome resulting inefficiencies. By vertically integrating with distributors, programmers can easily create or aggregate their content offerings and distribute them directly to consumers, which would help them—among other things—increase their advertising revenues and "catch up with the competition."[128]

The other outlet that media companies are considering as a potential revenue source is subscription-based services.[129] Such services eliminate the need for constant, in-your-face advertisements and help media companies give consumers what they want, thereby encouraging those companies to keep improving their platforms to retain subscribers.[130] Subscription services are prevalent in many forms, including digital print, television, film, and music.[131] However, subscription services

122 *See* discussion *infra* Section IV.A.
123 United States v. AT&T Inc., 310 F. Supp. 3d 161, 164 (D.D.C. 2018).
124 *Id.* at 168 (emphasis added).
125 *Id.* at 167.
126 *Id.* at 164.
127 Distributors are in close proximity to consumers and have the means to collect data.
128 *AT&T Inc.*, 310 F. Supp. 3d at 164.
129 Kaiser, *supra* note 106; *see* Tien Tzuo, *Why newspaper subscriptions are on the rise*, TECHCRUNCH (Mar. 4, 2017, 5:00 PM), https://techcrunch.com/2017/03/04/why-newspaper-subscriptions-are-on-the-rise/ [https://perma.cc/XP5E-38RY].
130 Tzuo, *supra* note 129.
131 DELOITTE, DIGITAL MEDIA: THE SUBSCRIPTION PRESCRIPTION 1 (2017), https://www2.deloitte.com/content/dam/Deloitte/global/Images/infographics/technologymediatelecommunications/gx-deloitte-tmt-2018-digital-media-report.pdf [https://perma.cc/ZA96-SXDG]. Media subscriptions are predicted to keep growing through 2020. *Id.*

complement advertisements, and companies will likely continue using advertising in practice, but in forms that relate to their customer base.[132]

Advertising is necessary in order to lower consumer costs.[133] Advertisers have historically subsidized the costs associated with print publications, broadcasting, and digital media, and they continue to do so today.[134] With ad-blocking[135] and ad-skipping[136] technologies, advertisers will either become more aggressive at infiltrating content in order to get their message out, or they will withdraw and require company sponsorship of programs (as was prevalent in the early days of television).[137] The current state of the media is already heavily consolidated by a handful of parent companies, as discussed below; getting rid of advertisers would further monopolize the media by keeping only the media owners around to publish what most benefits them.

B. *Media Consolidation*

Now, more than ever, the media appears to be concerned with its bottom line over its duty to serve the public interest. Since the mid-1990s, especially following the passage of the Telecommunications Act of 1996,[138] there has been an uptick in media mergers and acquisitions.[139] Presently, there are roughly six[140] media conglomerates that control nearly all the media that U.S. consumers access:[141] ViacomCBS, Disney-

132 *Id.*

133 *See* Thierer, *supra* note 104; *see also* Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 CHARLESTON L. REV. 503, 511 (2011).

134 *See* Thierer, *supra* note 104; *see also* Thierer, *supra* note 133, at 511.

135 Ad-blocking software prevents advertisements from being displayed. Lindsay Kolowich, *How Ad Blocking Works: Everything You Need to Know*, HUBSPOT (Oct. 1, 2015, 6:00 AM), https://blog.hubspot.com/marketing/how-ad-blocking-works [https://perma.cc/ZDF7-KA4F].

136 Ad-skipping is a method to evade advertisements by skipping through them, such as fast forwarding through commercials on a digital video recorder (DVR). Meg James & Stephen Battaglio, *How the big TV networks are adapting to ad-skipping viewers . . . and Google, Snapchat and Facebook*, L.A. TIMES (May 15, 2017, 4:00 PM), https://www.latimes.com/business/hollywood/la-fi-ct-upfront-television-advertising-20170514-story.html [https://perma.cc/VW37-ZAHN].

137 Thierer, *supra* note 133, at 504. For example, consider the television show *Texaco Star Theatre* from 1948 to 1953. *Texaco Star Theater*, TELEVISION ACAD. FOUND.: INTERVIEWS, https://interviews.televisionacademy.com/shows/texaco-star-theater [https://perma.cc/83F6-4SSQ].

138 Hatch, *supra* note 7, at 858.

139 Michael Corcoran, *Twenty Years of Media Consolidation Has Not Been Good For Our Democracy*, BILLMOYERS.COM (Mar. 30, 2016), https://billmoyers.com/story/twenty-years-of-media-consolidation-has-not-been-good-for-our-democracy/ [https://perma.cc/83VN-ESHZ] ("The act dramatically reduced important [FCC] regulations on cross ownership, and allowed giant corporations to buy up thousands of media outlets across the country, increasing their monopoly on the flow of information in the United States and around the world."); *see* Koch, *supra* note 53, at 1135.

140 Due to the fast pace of acquisitions in today's market, this number continues to fluctuate.

141 "To be clear, 'media' in this context does not refer just to news outlets – it refers to any medium that controls the distribution of information." *The 6 Companies That Own (almost) All Media*, WEBFX: FX BLOG: INTERNET [hereinafter *The 6 Companies*], https://www.webfx.com/blog/

Fox, AT&T-WarnerMedia,[142] Comcast, NewsCorp., and Sony.[143] There are concerns that journalists are constrained in what they can report because owners are looking out for their businesses' reputation and finances. It is important to point out that concerns of such constraints would not persist if the FCC had not opted to deregulate.[144]

The FCC's policy objectives are to promote competition, diversity, and localism.[145] To maintain these goals, the FCC only licenses to individual stations for broadcasting, analyzing each current and prospective license under a "service of the public interest" criteria.[146] While big nationwide media enterprises are not themselves eligible to acquire FCC licenses, such companies are permitted to serve as parent companies to the local stations that are qualified to collect such licenses.[147] For example, KGO-TV, the channel seven news station serving the San Francisco Bay Area–Oakland–San Jose market, is an ABC owned-and-operated television network;[148] therefore, the station is owned by the ABC Owned Television Stations subsidiary of The Walt Disney Company.[149] Local stations depend on their geographic "local" market in order to fall within the scope of the FCC, and because MVPDs are also dictated by geography, the FCC may be entitled to jurisdiction over distributors of only the MVPD variety.[150]

internet/the-6-companies-that-own-almost-all-media-infographic/ [https://perma.cc/W8BH-36VN].

142 Upon completing its acquisition of Time Warner Inc., AT&T rebranded Time Warner to WarnerMedia to "represent [its] media business comprising HBO, Turner and Warner Bros." Vivienne Tay, *Time Warner rebrands to WarnerMedia following AT&T acquisition*, MARKETING: MEDIA NEWS (June 18, 2018, 11:35 AM), https://www.marketing-interactive.com/time-warner-rebranded-to-warnermedia-following-att-acquisition/ [https://perma.cc/5QS3-L5N8].

143 Corcoran, *supra* note 139; *see The 6 Companies*, *supra* note 141 (discussing "The Big 6" media conglomerates before the 2019 mergers of AT&T-WarnerMedia, Disney-Fox, and ViacomCBS).

144 Koch, *supra* note 53, at 1135-36; *see* discussion *infra* Section IV.A.

145 FED. COMMC'NS COMM'N, STRATEGIC PLAN 2018-2022 (2018), https://www.fcc.gov/general/strategic-plan-fcc [https://perma.cc/T3Y9-TZFB].

146 FED. COMMC'NS COMM'N, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 8 (2019), https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf [https://perma.cc/544E-MGN4].

147 *See id.*

148 *DTV Reception Maps*, FED. COMM. COMMISSION, https://www.fcc.gov/media/engineering/dtvmaps [https://perma.cc/Q8D9-NMR8] (revealing this information by entering "San Francisco, CA" in the location field search bar and then clicking the "Go!" button).

149 Alina Selyukh, *TIMELINE: AT&T's Merger With Time Warner Follows Decades of Industry Deals*, NPR: TWO-WAY (Oct. 22, 2016, 9:39 PM), https://www.npr.org/sections/thetwo-way/2016/10/22/498996253/timeline-at-ts-merger-with-time-warner-follows-decades-of-industry-deals [https://perma.cc/33HG-FTXH].

150 *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 197 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see also* Meredith Senter & Erin E. Kim, *Recent Trends in Media Industry Mergers and Acquisitions*, LEXIS PRAC. ADVISOR (Dec. 19, 2017), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2017/12/19/recent-trends-in-media-industry-mergers-and-acquisitions.aspx [https://perma.cc/T5KZ-7Z32]. Accordingly, because this may allow all other distribution types to avoid regulation, such distributors would receive less scrutiny and thereby be afforded an upper hand against their competition.

Since the FCC first initiated its era of deregulation, local news quality has been steadily declining.[151] FCC deregulation began with the elimination of the Fairness Doctrine.[152] Then, the FCC no longer required that broadcasts show differing viewpoints of controversial topics addressed over the air.[153] Next, in a push to give local stations more autonomy—and thereby bolster one of its primary goals of promoting local broadcasting and news—the FCC only restricted local stations from operating during the three-hour primetime slot on Mondays through Saturdays, when national programming was televised.[154] However, perhaps the most significant step toward FCC deregulation was the enactment of the Telecommunications Act of 1996, which allowed media companies to consolidate and own more radio and TV properties in specific markets, deregulate cable, expand the viewership of network-owned programs to thirty-five percent of audiences (a ten percent increase from their previous reach), and permit vertical integration between networks and cable companies to control production and distribution.[155] Finally, "in yet another loosening of its rules, the FCC . . . permitted more duopolies—the single ownership of two TV stations in a market—under certain circumstances."[156]

Today, media companies are merging faster than ever as a result of the foregoing deregulation. Before the passage of the Telecommunications Act of 1996, companies could not own more than forty radio stations, but now iHeartMedia alone owns 1,240 stations.[157] Similarly, the loosening of the rules has allowed companies like Gannett to own more than one thousand newspapers and six hundred print periodicals.[158] Other examples include Disney's 1996 acquisition of Capital Cities/ABC;[159] Viacom's 2002 merger,[160] 2007 separation, and

151 *See* Ronald Bishop & Ernest A. Hakanen, *In the Public Interest? The State of Local Television Programming Fifteen Years after Deregulation*, 26 J. COMM. INQUIRY 261 (2002); *see also* Sue Wilson, *Putting the Public Back into Public Interest Broadcasting*, HUFFPOST (May 11, 2010, 5:12 AM), https://www.huffingtonpost.com/sue-wilson/putting-the-public-back-i_b_494307.html [https://perma.cc/MP5Z-SKMG].

152 McCutcheon, *supra* note 43, at 491; *see* Hatch, *supra* note 7, at 857-58.

153 McCutcheon, *supra* note 43, at 491; *see* Hatch, *supra* note 7, at 857.

154 Hatch, *supra* note 7, at 858. The FCC restrictions enforced the "prime-time access rule." *Id.* However, the incentive for this rule failed because most local stations aired syndicated programming during the non-primetime slots instead of original programming. *Id.*

155 *Id.*

156 *Id.* (explaining that, before 1999, "duopolies were permitted on a very limited basis, through waivers intended to aid struggling stations").

157 Corcoran, *supra* note 139.

158 *Id.*

159 Hatch, *supra* note 7, at 855.

160 *Id.*

2019 reunification with CBS[161] to compete with other digital media companies;[162] AOL's historic 2002 merger with Time Warner,[163] 2009 "divorce,"[164] and subsequent acquisition by Verizon;[165] Comcast's 2001 merger with AT&T's broadband division[166] and 2013 takeover of NBCUniversal after the divestiture of General Electric's holdings;[167] Verizon's 2015 buyout of AOL and 2016 merger with Yahoo;[168] AT&T's 2015 buyout of DirecTV[169] and more recent 2019 vertical merger with Time Warner;[170] and, finally, Disney's 2018 acquisition of Twenty-First Century Fox.[171]

Moreover, media parent companies are not the only entities buying out smaller media companies. In 2011, Amazon CEO Jeff Bezos threw himself into the media game when he launched Amazon's Prime Video streaming service, and later showed that he was there to stay when he purchased *The Washington Post* in 2013.[172] Technology companies like

161 *See* Julia Alexander, *CBS and Viacom are merging to become ViacomCBS*, VERGE (Aug. 13, 2019, 2:08 PM), https://www.theverge.com/2019/8/13/20746894/cbs-viacom-merger-acquisition-all-access-mtv-bet-streaming-value [https://perma.cc/A28E-4CTB].

162 Dade Hayes, *Disney-Fox Deal: How It Ranks Among Biggest All-Time Media Mergers*, DEADLINE (Dec. 14, 2017, 1:56 PM), https://deadline.com/2017/12/biggest-media-mergers-disney-fox-deal-list-1202226683/ [https://perma.cc/Y7ZZ-55CV]; *see* Etan Vlessing, *Redstone v. Moonves: National Amusements Adds New Details of CBS Feud in Lawsuit*, HOLLYWOOD REP. (May 29, 2018, 8:18 AM), https://www.hollywoodreporter.com/news/national-amusements-blasts-cbs-les-moonves-new-lawsuit-complaint-1115320 [https://perma.cc/3XWQ-3YR3].

163 Hatch, *supra* note 7, at 855.

164 Dylan Byers, *The Time Warner story: Consolidation, de-consolidation and re-consolidation*, CNN: BUS. (Oct. 23, 2016, 5:31 PM), https://money.cnn.com/2016/10/23/media/history-time-warner-att-consolidation/index.html [https://perma.cc/8MM4-GSWB] ("Time Warner entered a period of de-consolidation. Time Warner dropped AOL from its name in 2003 and spun the company off in 2009. (It spun Time Warner Cable that same year.) In 2013, amid pressure on the publishing industry, it announced plans to spin off Time Inc. as a separate company. Today, Time Warner no longer owns its namesake magazine."); *see* Selyukh, *supra* note 149 (In 2016, "[t]he FCC and DOJ approve[d] the $88-billion merger of Charter Communications with Time Warner Cable and a smaller rival Bright House Networks, creating the second-largest broadband provider and the third-largest video provider.").

165 Hayes, *supra* note 162.

166 *Id.* ("The AT&T acquisition gave the combined company 22 million subscribers in 41 states across cable, phone and Internet, and set the template for Comcast's current cable and broadband portfolio.")

167 Selyukh, *supra* note 149.

168 *Id.*

169 *Id.*

170 The district court approved the AT&T-WarnerMedia merger in June 2018. United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (approving the AT&T-WarnerMedia merger in June 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see* Tay, *supra* note 142.

171 Mike Snider & Brian Truitt, *Disney gets shareholder OK to acquire Fox movie and TV studios, and stake in Hulu*, USA TODAY (July 27, 2018, 10:29 AM), https://www.usatoday.com/story/money/media/2018/07/27/disney-gets-ok-acquire-fox-movie-and-tv-studios-and-stake-hulu/841721002/ [https://perma.cc/SSU3-JCXT].

172 Kaiser, *supra* note 106; *see* Tim Stevens, *Amazon launches Prime Instant Video, unlimited streaming for Prime subscribers*, ENGADGET (Feb. 22, 2011), https://www.engadget.com/2011/02/22/amazon-launches-prime-instant-videos-unlimited-streaming-for-pr/ [https://perma.cc/V6DX-TXBY].

Google (YouTube), Facebook (Facebook TV), Netflix, and Hulu have all become massive giants in the media market, achieving huge market shares.[173] These technology-driven streaming services are, for the most part, vertically integrated, so they "create or aggregate their content offerings and then distribute those offerings directly to consumers."[174] Thus, the question becomes whether the FCC can and ought to extend its jurisdiction over these online media platforms.

C. *Vertical Integration*

Courts view vertical mergers favorably, as evidenced by the AT&T-WarnerMedia transaction in June 2018, because such mergers are seen as being less likely to produce anticompetitive effects.[175] Vertical merger guidelines have not been touched since the 1980s, and these mergers are often accepted because they "produce efficiencies that can be passed onto consumers in the form of lower prices, higher quality, or both."[176] In the case of AT&T-WarnerMedia, AT&T, a highly concentrated telco that distributes programming, sought to merge with Time Warner, a producer of motion pictures (Warner Brothers) and television content (Turner, HBO, and CNN).[177] Such a consolidated company could easily withhold WarnerMedia's programming from other distributors, such as Comcast or other satellite providers.[178] However, because technology companies

[173] Rani Molla & Peter Kafka, *Here's who owns everything in Big Media today*, VOX (June 18, 2019, 4:22 PM), https://www.vox.com/2018/1/23/16905844/media-landscape-verizon-amazon-comcast-disney-fox-relationships-chart [https://perma.cc/3NWV-DKNF]; *see* Kaiser, *supra* note 106 (discussing how, in the digital age, the goal was to make "the bundle"—i.e., "the variety of news, opinion, useful information, and entertainment" offered by media conglomerates—so attractive to a large number of people that they would be willing to pay for it); *see also* Peter Kafka, *The Hulu/Disney/Comcast divorce, explained*, VOX (May 14, 2019, 11:40 AM), https://www.vox.com/2019/5/14/18623063/hulu-disney-comcast-fox-netflix-att-office-friends-streaming [https://perma.cc/K3VN-ZMXB] ("The reason . . . that Comcast is leaving Hulu is that Disney now controls Hulu, because it bought much of . . . 21st Century Fox; [however,] prior to that deal, Comcast, Disney, and Fox each owned 30 percent of Hulu with AT&T's WarnerMedia owning the rest.").

[174] *AT&T Inc.*, 310 F. Supp. 3d at 167 (internal citation omitted).

[175] James B. Stewart, *AT&T-Time Warner Decision Shows Need to Rethink Antitrust Laws*, N.Y. TIMES (June 13, 2018), https://www.nytimes.com/2018/06/13/business/att-time-warner-antitrust-stewart.html.

[176] *Id.*; *see* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R44971, PRE-MERGER REVIEW AND CHALLENGES UNDER THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT 1 (2017), https://crsreports.congress.gov/product/pdf/R/R44971 [https://perma.cc/R6G7-TWRG].

[177] Stewart, *supra* note 175.

[178] *Id.* Notably, on November 1, 2018, after the district court gave the merger the green light, Time Warner blacked out its HBO programming to DISH customers, a rival of AT&T's DirecTV service. Brian Fung, *Why millions of Dish Network's customers have been cut off from HBO*, WASH. POST (Nov. 9, 2018), https://www.washingtonpost.com/technology/2018/11/09/why-millions-dish-networks-customers-have-been-cut-off-hbo/ [https://perma.cc/XME5-DE6Y]. Moreover, this occurred despite the court's comment that blackouts rarely happen, if ever, and that when they do, they last only for a short period. *AT&T Inc.*, 310 F. Supp. 3d at 172 ("Nevertheless, given the negative consequences for both sides from a blackout, 'the reality' is that 'virtually every'

with media components—e.g., Netflix, Hulu, Amazon Prime Video—are already vertically integrated, the courts' allowance of vertical media mergers helps non-technology companies compete in online-centric environments.[179]

When Comcast merged with NBCUniversal in the early 2010s (referred to as "Comcast-NBCU"), the reviewing court similarly did not prohibit the union. Instead, the court issued a long list of restrictions and permitted the transaction to proceed.[180] Vertical mergers are generally approved by the Justice Department and the courts more frequently than horizontal mergers.[181]

Vertical mergers are thought to be efficient for both buyers and sellers and are less likely to be viewed as potentially "anticompetitive."[182] The test for a vertical merger is not spelled out in black and white but is instead reviewed on a case-by-case basis to determine whether the transaction is anticompetitive.[183] In contrast, horizontal mergers, which expand the market share by merging multiple companies within the same industry into a single entity and result in decreased competition among rivals, are reviewed in specific detail and under more scrutiny, as described in Part III.[184] The path in a prima facie horizontal merger case is therefore very clear-cut: The government must produce statistical evidence to show that the proposed merger would create a company that controls a high percentage of the relevant market share, in effect lessening competition.[185]

As discussed below, there must be further antitrust regulation of media conglomerates to prohibit this excessive consolidation of the media, as discussed in Parts III and IV. Currently, roughly six companies own about ninety percent of the market share.[186] Because the FCC has loosened its regulations and taken a lax approach to oversight, these conglomerates are incentivized to consolidate further. For example, it is speculated that the real motive behind Viacom's merger with CBS was to boost the strength of the consolidated company so it could be sold off to another company.[187] Prior to their 2019 merger, these two companies

bargaining impasse between a programmer and distributor 'is resolved after requiring either no blackout or a short-term blackout.'" (internal citation omitted)).

179 Downes, *supra* note 111.

180 United States v. Comcast Corp., No. 1:11-cv-00106, 2013 U.S. Dist. LEXIS 132001 (D.D.C. July 31, 2013); *see* Stewart, *supra* note 175.

181 Stewart, *supra* note 175.

182 *AT&T Inc.*, 310 F. Supp. 3d at 193.

183 *Id.* at 192.

184 *Id.*; *see* Stewart, *supra* note 175.

185 *AT&T Inc.*, 310 F. Supp. 3d at 192.

186 *The 6 Companies*, *supra* note 141.

187 *See* Vlessing, *supra* note 162.

accounted for two of the six top media conglomerates in the United States.[188]

III. LEGAL IMPLICATIONS

The DOJ and FTC review proposed media mergers under the Clayton Antitrust Act of 1914.[189] The FCC also independently investigates proposed mergers if any of the merging entities fall within the FCC's jurisdiction.[190]

A. *Mergers Under the Clayton Act*

Section 7 of the Clayton Act applies to mergers when they seek to lessen competition or create a monopoly in any form of commerce, unless statutorily exempt.[191] Reviewing courts must weigh the parties' "competing visions of the future of the relevant market and the challenged merger's place within it" to decide a claim under section 7 of the Clayton Act.[192] Before the courts can adjudicate, the Hart-Scott-Rodino Antitrust Improvements Act requires businesses of a certain size to notify the DOJ and FTC of the proposed merger, so that one of the agencies[193] can investigate whether the transaction adheres to federal antitrust laws and bring a challenge to the proposed merger if necessary.[194]

For a horizontal merger, the agencies refer to the Horizontal Merger Guidelines[195] to determine whether a proposed merger would "unduly enhance the transacting parties' 'market power,' which is a firm's ability, without causing economic harm to itself, to raise prices, reduce output, reduce innovation, or otherwise harm consumers."[196] The agency must define the relevant product[197] and geographic[198] markets and then

188 *The 6 Companies*, *supra* note 141.
189 RUANE, *supra* note 176.
190 Senter & Kim, *supra* note 150.
191 RUANE, *supra* note 176.
192 United States v. AT&T Inc., 310 F. Supp. 3d 161, 165 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see* United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).
193 One of the agencies seeks clearance from the other to investigate the merger; if both seek clearance from the other, the agency with the most expertise in the relevant market is given the clearance to investigate. RUANE, *supra* note 176.
194 *Id.* at 3.
195 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010) [hereinafter MERGER GUIDELINES], https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/VDH6-46TJ].
196 RUANE, *supra* note 176, at 7 (internal footnote omitted).
197 A product market is a market in which all products that have the same purpose may be used interchangeably by consumers. *Id.* at 7.
198 A geographic market refers to the "'commercial realities of the industry and [is] commercially significant.'" *Id.* at 9 (quoting Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 336 (1962)).

evaluate the potential market harms[199] associated with the merger—particularly its effects on competition.[200]

For vertical mergers, the DOJ and FTC typically resolve anticompetitive transactions through consent decrees.[201] The agencies consider whether the merged entity has incentives to foreclose competition in the market and whether the integration would provide for incentives to coordinate anticompetitive conduct with other parties.[202] Once the agencies complete their review, they then determine whether (a) the merger may proceed; (b) one of the agencies must take action to block the merger, usually in a court or administrative proceeding, depending on the reviewing agency; or (c) one of the agencies must negotiate with the merging parties to alleviate anticompetitive concerns.[203]

B. *FCC Jurisdiction*

The FCC is an independent agency that adjudicates issues within its jurisdiction.[204] In establishing the FCC,[205] Congress determined that common carriage—requiring broadcasters to allow anyone to buy airtime—should be prohibited, and mandated a government-controlled, short-term licensing process that matched broadcasters to the channels available in the electromagnetic spectrum.[206] Additionally, Congress required broadcasters to serve as the trustees of the electromagnetic spectrum on behalf of those who could not obtain a license to broadcast, in order to serve the public interest.[207] However, the "public interest" was never—and still has not been—clearly defined.[208]

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199 Potential market harms include effects on pricing, effects on product output, effects on innovation, and impacts on inter-firm coordination. *Id.* at 10-11.

200 United States v. AT&T Inc., 310 F. Supp. 3d. 161, 191 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see* RUANE, *supra* note 176, at 10.

201 RUANE, *supra* note 176, at 14; *see, e.g.*, United States v. Comcast Corp., No. 1:11-cv-00106, 2013 U.S. Dist. LEXIS 132001 (D.D.C. July 31, 2013).

202 RUANE, *supra* note 176, at 14.

203 *Id.* at 14-15.

204 Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25 ANTITRUST 36, 36 (2011), https://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf [https://perma.cc/E5BC-SGX4].

205 It is important to note that before the establishment of the FCC, there was a Federal Radio Commission, established by the Radio Act of 1927; Congress based the FCC's goals off the FRC's. *See* Brotman, *supra* note 65.

206 *Id.*

207 *Id.* This requirement is similar to having representatives in Congress act on behalf of their constituents, thereby giving broadcasters the task of serving the "'public interest, convenience[,] and necessity.'" *Id.*

208 *Id.* Moreover, the FCC has repeatedly rejected pleas to adopt specific standards to define this term. *Id.*

Judicial review gives great deference to the FCC's administrative rulings.[209] However, the FCC's power is limited to "consider[ing] the advantages enjoyed by the people of the state and their reasonable demands and the services rendered by respective stations, among other factors."[210] It cannot control programs, business matters, or station policies, and is not required to look at potential economic injuries that could affect existing broadcast stations when considering an application for a new station.[211] Importantly, when the government implemented the Telecommunications Act of 1996, it did not clarify the definition of the "public interest," but left it to the unspecific resolutions that emerged over the years.[212]

The public interest standard serves the communications policy objectives of "ensuring that a diversity of information sources and viewpoints are available to the public, accelerating the private-sector deployment of advanced telecommunications services, and assuring attention to local community concerns."[213] Using this standard in a merger inquiry, the FCC considers the effects of the transaction on competition through a broader lens than the DOJ—it looks at whether the merger fosters competition, as well as whether the merger advances the communication policy's objectives in serving the public interest.[214]

In approving the Comcast-NBCU merger, the FCC took the following steps to analyze the possibility that exclusionary harm would result from vertical integration, thereby creating a framework upon which future vertical merger analyses can be based.[215] First, it evaluated whether the merger would increase the merged entity's ability and incentive to exclude competitors.[216] Second, it looked at whether the exclusion of rivals would harm competition.[217] The FCC may find harm to competition even if not all rivals are foreclosed, as long as the foreclosed rivals

[209] *Id.* (first discussing KFKB Broad. Ass'n, Inc. v. Fed. Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); then discussing Trinity Methodist Church v. Fed. Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932)) (construing the substantial deference granted to the Federal Radio Commission's administrative rulings by the court in *KFKB Broadcasting Association, Inc.* and *Trinity Methodist Church*).

[210] *Id.* (construing Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266 (1933)).

[211] *Id.* (construing Fed. Commc'ns Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470 (1940)) ("In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.").

[212] *Id.*

[213] Baker, *supra* note 204, at 38.

[214] *Id.*

[215] *Id.* at 37.

[216] *Id.* ("The Commission considered Comcast's ability to harm its distribution rivals by engaging in three possible exclusionary strategies: (1) permanently cutting off an MVPD rival from access to the joint venture's video programming, (2) temporarily withholding that access, and (3) raising rivals' costs by increasing the price of programming to video distribution competitors.").

[217] *Id.*

constrain the merged entity's pricing, in the case of a coordinating horizontal merger, or the remaining rivals allow the output in the market to decrease and the price to increase instead of competing more aggressively, in the case of "parallel accommodating conduct."[218] Third, it identified the remedies available to prevent these harms, then evaluated the competitive benefits of the integration and compared them with the harms to competition.[219] Now that broadcasts have transitioned from the electromagnetic spectrum into a digital transmission, and especially given the fact that most media sources come through the internet, there is a call to expand the scope of the FCC's review in these changing times.

IV. SOLUTION: RESTORING PUBLIC INTEREST GOALS THROUGH ACCESSIBILITY LAWS

The FCC only licenses individual stations for broadcasting if they serve the "public interest," but these stations may be owned by parent companies that are large media corporations.[220] There have been complaints that local news providers do not serve the public interest as they used to, yet regulators have not disallowed licenses for broadcasters that fail to serve the public interest.[221] In fact, regulators have been *undoing* the regulations that were enacted to protect the public interest in the first place.[222]

Media companies are merging at an ever-increasing rate, with no signs of stopping.[223] Even companies that are individually intact have discussed the prospect of merging in order to then be sold at more profitable prices.[224] Regardless of whether their merger is horizontal, like Disney-Fox,[225] or vertical, like AT&T-WarnerMedia,[226] media

218 *Id.* at 38.
219 *Id.*
220 *See supra* notes 146.
221 Wilson, *supra* note 151.
222 *See* 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 FCC Rcd. 9802 (2017).
223 Alex Eule, *Reeling From Netflix, Big Media Turns to Mergers*, BARRON'S (June 16, 2018), https://www.barrons.com/articles/reeling-from-netflix-big-media-turns-to-mergers-1529107202 [https://perma.cc/UGW2-L6TH] (explaining that "[t]he panicked response" to AT&T-WarnerMedia and Netflix's amassed profits outstripping the value of CBS, Viacom, Discovery, and DISH Network "is more mergers").
224 *See* Vlessing, *supra* note 162.
225 A horizontal merger provides for a merged entity to take up the market share that the pre-merged entities each took up separately, thereby producing less competition in the market. *See The Disney-Fox Deal Sails Through, a Bit Too Easily*, N.Y. TIMES (July 1, 2018) [hereinafter *Disney-Fox Deal Sails Through Easily*], https://www.nytimes.com/2018/07/01/opinion/disney-fox-deal.html [https://perma.cc/MV97-X8EJ].
226 Alternatively, a vertical merger amasses both production and distribution capabilities under one parent company. *See* Competitive Impact Statement at 20, United States v. Comcast Corp., No.

corporations want to be able to compete with the sweeping and unregulated changes currently occurring online.

A. *The Tug of War Between Competition and Public Interest*

As there is a hierarchy in news media—from big, national conglomerates trickling down to more localized programming—such media mergers have an enormous impact on local outlets. Without enacting regulations, local news is at risk of disappearing, particularly on the television scale, because MVPDs cannot afford to compete with SVODs or OVDs.[227] Many consumers are "cutting the cord" on over-the-air and cable/satellite transmissions.[228] Even though broadcast networks are seemingly free for consumers—through the use of an antenna—viewers forgo any traditional television consumption in favor of online streaming nowadays.[229]

The FCC has acknowledged the need for reform, admitting that many of its regulations no longer serve the public interest.[230] However, according to the FCC's 2017 Public Notice, "Commission Launches Modernization of Media Regulation Initiative," it will only reform by way of further deregulation.[231] The government believes it is in the best interests of companies to compete with OVDs by weakening the existing regulations of the FCC. On November 16, 2017, the FCC adopted an Order on Reconsideration and Notice of Proposed Rulemaking (FCC 17-156) that, among other actions, eliminated the Newspaper/Broadcast Cross-Ownership Rule; eliminated the Radio/Television Cross-Ownership Rule; and revised the Local Television Ownership Rule.[232]

1:11-cv-00106 (D.D.C. Jan. 18, 2011), ECF No. 4, https://www.justice.gov/atr/case-document/file/492251/download [https://perma.cc/SH4H-KJS8].

227 *See* Matsa, *supra* note 1.

228 United States v. AT&T Inc., 310 F. Supp. 3d 161, 174 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

229 *See* Mitchell et al., *supra* note 78.

230 FED. COMMC'NS COMM'N, FCC 17-58, COMMISSION LAUNCHES MODERNIZATION OF MEDIA REGULATION INITIATIVE (2017), https://ecfsapi.fcc.gov/file/051878172904/FCC-17-58A1.pdf [https://perma.cc/J39D-9VLL] ("[T]he Commission takes another step to advance the public interest by reducing unnecessary regulations and undue regulatory burdens that can stand in the way of competition and innovation in media markets.").

231 *Id.*

232 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 FCC Rcd. 9802 (2017), *vacated*, Prometheus Radio Project v. Fed. Commc'ns Comm'n, 939 F.3d 567 (3d Cir. 2019) (holding that the petitioners' "analysis [was] so insubstantial that [the court could not] say it provide[d] a reliable foundation for the Commission's conclusions[, and it] vacat[ed] and remand[ed] the bulk of its actions in this area over the last three years [and] decline[d] to grant the requested extraordinary relief of appointing a special master to oversee the FCC's work on remand"); *see* John D. McKinnon, *Court Overturns FCC Changes in Media-Ownership Rules*, WALL STREET J. (Sept. 23, 2019, 1:26 PM), https://www.wsj.com/articles/court-overturns-fcc-changes-in-media-ownership-rules-11569259575 [https://perma.cc/UKS9-2NAT].

This order was adopted in an effort to deregulate local communications in order for local news media, especially television, to compete against OVDs.[233] Such aggressive deregulation of local media opens the doors for media giants to swoop in and dominate large amounts of a local market's share of the news—print, radio, and television, all of which saw looser regulations in the Order on Reconsideration.[234] The FCC's aggressive actions appear to be in line with antitrust objectives[235] rather than protecting the public interest and promoting "localism, diversity of ownership, and diversity of programming"[236]—the values at the foundational core of the FCC.

Consider this example of the differing motivations between antitrust and public interest:

> [S]uppose there are eight broadcasters in a viewing market, two of which offer mostly sports coverage, four of which show mostly dramas, and two of which show in-depth news reporting. Now imagine that the sports and drama stations command large audiences while the news stations attract comparatively few viewers. Assume that most consumers in the market would be happier if they could have even more sports programming in place of the news broadcasts. Assume

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233 *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 32 FCC Rcd. at 9834 ("Consumers are increasingly accessing video programming delivered via MVPDs, the Internet, and mobile devices. Moreover, the online video distributor (OVD) industry—which includes entities such as Netflix and Hulu—continues to grow and evolve. In addition to providing on-demand access to vast content libraries, many OVDs are now offering original programming and/or live television offerings similar to traditional MVPD offerings. . . . Accordingly, we reconsider the Local Television Ownership Rule and adopt common sense modifications that will help local television broadcasters achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace.").

234 Dade Hayes, *In Landmark 3-2 Vote, FCC Relaxes Rules Limiting Local Broadcast Ownership*, DEADLINE (Nov. 16, 2017, 10:53 AM), https://deadline.com/2017/11/in-landmark-3-2-vote-fcc-relaxes-rules-limiting-local-media-consolidation-1202209750/ [https://perma.cc/N3FE-9PLJ] ("[T]he vote opens the door for single owners to roll up stations across the country and control how Americans get their local TV news."); *see* Cecilia Kang, *F.C.C. to Loosen Rules on Local Media Ownership*, N.Y. TIMES (Oct. 25, 2017), https:// www.nytimes.com/2017/10/25/technology/fcc-media-ownership-rules.html [https://perma.cc/W3CL-C2GV]; *see generally 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 32 FCC Rcd. 9802.

235 "Antitrust laws . . . exist . . . to promote competition and efficiencies in the marketplace to benefit consumers." Richard Brand, *All the News That's Fit to Split: Newspaper Mergers, Antitrust Laws and the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 1, 3 (2008), http:// www.cardozoaelj.com/wp-content/uploads/Journal%20Issues/Volume%2026/Issue%201/ brand2.pdf [https://perma.cc/DXY7-25UG].

236 Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 387, 389, 397 (2006), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1268&context=californialawreview [https://perma.cc/TWU6-BYR3] ("Antitrust asks how effectively markets provide consumers with the products they want on the terms they want. The democracy model of the public interest, in contrast, sees diversity and quality of programming as values in themselves, whether or not the market demands them or would prefer something else.").

> also that advertisers would similarly be willing to pay more to market their wares during additional drama and sports shows than during news programs. From an economic perspective, this market is inefficient. From a purely economic perspective, broadcasters should reallocate resources to better serve the preferences of both viewers and advertisers. Suppose the owner of one of the sports stations could purchase the rights to more sports events but lacks a channel on which to broadcast that programming. If that station owner acquired one of the news stations and converted it to a sports station, the transaction would be efficient and in the interest of the consumers in this example. Yet such a transaction would also reduce the already small amount of news programming available in the market and contribute to a trend toward homogeneity in available programming. A positive change according to the antitrust framework can thus be a negative one according to the democracy view of the public interest.[237]

The hypothetical suggests that as companies consolidate, so does the diversity of programming. At the rate that antitrust law is domineering the communications and media industry due to the expansion of media consolidation, it is no surprise that in the last year, there have been numerous reports of the news media being detained from their beats because they clash with their owner's vision. The First Amendment principles guiding freedom of press and speech are in a duel with business and reputational interests because of government agency intervention that aims to intervene less in the future.

For example, Disney banned the *Los Angeles Times* ("*LA Times*") from accessing their advanced screenings and talent in October 2017 because one of the *LA Times*' reporters wrote an exposé on the company's Anaheim theme park and its relationship to the City of Anaheim, painting Disney in a negative light.[238] The media giant received a lot of backlash from journalists, many of whom stated they could no longer attend Disney's screenings or write advanced reviews in good conscience.[239] Disney lifted the *LA Times*' ban after a week, but the damage was already done.[240] Eric Kohn, a film critic, compared the situation to politics:

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237 *Id.* at 397-98.

238 Rory Carroll, *Disney ends blackout of LA Times after boycott from media outlets*, GUARDIAN (Nov. 7, 2017, 3:10 PM), https://www.theguardian.com/film/2017/nov/07/disney-los-angeles-times-media-boycott [https://perma.cc/Y9DV-QQP4].

239 *Id.*

240 Krystie Lee Yandoli, *Journalists Are Nervous About What A Disney And Fox Merger Would Mean For Them*, BUZZFEED NEWS (Jan. 2, 2018, 2:14 PM), https://www.buzzfeednews.com/article/krystieyandoli/journalists-disney-fox-merger [perma.cc/KJ6H-7CLQ] (statement of Jason Bailey) ("The idea of a major, multinational conglomerate being that petty and vindictive and really engaging in an act of retribution against an outlet, and against reporters who had nothing to do with the thing that they were angry about, gave some insight into the length they were willing to go against anyone who didn't toe the Disney company line . . . .").

> We've already had this reality check when it comes to situations in the White House and that level of power . . . . What this makes clear is it's also happening on the level of corporations, where there is an agenda that is seen as being even greater than whatever kind of ethical standards we apply to journalism.[241]

In November 2018, the White House acted similarly to Disney when it revoked a CNN reporter's White House press pass—which he had held since 2013—because he was asking questions that the president construed as critical.[242] Politicians and corporations are both concerned with their reputations, and thus do not want bad press. However, the press has a duty is to be objective, not serve as these entities' publicists.[243]

When media conglomerates consolidate, they become more powerful because they take up a greater percentage of the market share. They are not interested in serving the public; they are interested in getting paid and increasing their business. They will constrain reporters' speech to make themselves look better, as seen above, and un-diversify their programming offerings, whether by showing similar viewpoints on all their channels or cutting the number of channels they own. They will continue to consolidate as new challenges threaten their revised business models. Such actions are unsustainable. There must be an overhaul of media mergers, and the FCC must be granted the authority to determine whether companies are *actually* working to promote the public interest.

B. *Regulating Media Newcomers Through Disability Laws*

When a transaction falls within the scope of the FCC's jurisdiction, the FCC analyzes the impact and potential harms of the transaction against the public interest to determine whether it should approve or disapprove.[244] However, since most new media entrants do not fall under traditional FCC authority but compete directly with those companies that do, the FCC should be given jurisdiction to oversee and regulate newcomers. Of the media mergers discussed in depth in this Note, only Comcast-NBCU received oversight by the FCC in addition to the antitrust regulators discussed in Part III. In that transaction, the FCC concluded

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241 *Id.*

242 Scott Nover, *The Legal Precedent That Could Protect Jim Acosta's Credentials*, ATLANTIC (Nov. 9, 2018), https://www.theatlantic.com/politics/archive/2018/11/legality-revoking-jim-acostas-press-pass/575479/ [https://perma.cc/9S2J-ZS8M]. CNN, a subsidiary of WarnerMedia, has been known as a Trump administration target; critics believed the DOJ gave a lot of pushback on the AT&T-WarnerMedia merger because the president did not want to award WarnerMedia more power. *See* Ariel Shapiro, *Why the DOJ keeps going after the AT&T-Time Warner deal*, CNBC (Aug. 6, 2018, 4:25 PM), https://www.cnbc.com/2018/08/06/why-the-doj-keeps-going-after-the-att-time-warner-deal.html [https://perma.cc/3GS4-A46Z].

243 *See* Yandoli, *supra* note 240.

244 *See, e.g.*, Comcast Corp., 26 FCC Rcd. 4238 (2011).

that the merging parties were "fully qualified and that the public interest benefits promised by the . . . transaction [we]re sufficient to support the grant" of assigning and transferring control of licenses, subject to certain conditions.[245] Meanwhile, horizontal mergers are typically scrutinized under heavy analysis, but Disney-Fox was approved without so much as a fight—Fox was ordered to divest its sports programming from the merger, but otherwise, it made it out unscathed.[246] Vertical mergers like Comcast-NBCU and AT&T-WarnerMedia, however, received a considerable amount of backlash (the latter mainly coming from the Trump administration), though were ultimately resolved through concessions and consent decrees imposing tighter "voluntary" regulations (at least in Comcast's case).[247]

One of the focal points of the AT&T-WarnerMedia opinion was the difficulties that distributors and content creators face in competing individually with SVODs that are already vertically integrated.[248] The court named three "interrelated industry trends" that are relevant for this merger: the "Rise and Innovation of Over-the-Top, Vertically Integrated Video Content Services"; "Declining MVPD Subscriptions Resulting from an Increasingly Competitive Industry Landscape"; and a "Shift Toward Targeted, Digital Advertising."[249] It appears from the language of U.S. District Court Judge Richard D. Leon that he granted the merger in order for the two entities to stay relevant and competitive with the SVODs, in contrast to the Comcast-NBCU merger less than a decade ago. The Comcast-NBCU pleadings did not view SVODs[250] or online video distributors ("OVDs") as *direct* competition to MVPDs, though it noted the OVDs' potential.[251]

The AT&T-WarnerMedia decision, on the other hand, sets a frightening precedent, showing that innovative and novel types of

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245 *Id.* at 4352-53.

246 Competitive Impact Statement, United States v. The Walt Disney Co., No. 1:18-cv-05800 (S.D.N.Y. Aug. 7, 2018), ECF No. 21.

247 Although Comcast's regulations, which expired in September 2018, have entered the sunset period, the effects of the merger are still awaiting review. *See Comcast Corp.*, 26 FCC Rcd. 4238. AT&T's merger was granted. United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

248 *AT&T Inc.*, 310 F. Supp. 3d at 164.

249 *Id.* at 173-77. Ironically, Time Warner previously owned distribution entity Time Warner Cable, which it divested from in 2009, shortly before the Comcast-NBCU merger vertically integrated those two companies. *See* Byers, *supra* note 164.

250 The Comcast-NBCU opinion referred to them as "OVDs"—online video distributors. Memorandum Order at 5, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Sept. 1, 2011), ECF No. 27, https://www.justice.gov/atr/case-document/file/492191/download [https://perma.cc/TF8Z-KCXP].

251 Competitive Impact Statement at 18, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), ECF No. 4, https://www.justice.gov/atr/case-document/file/492251/download [https://perma.cc/SH4H-KJS8].

businesses that enter the market unaffected by regulation are free to harm or kill off existing businesses that are constrained by various regulations that have been in place for decades. The only course of action these long-lasting but ailing institutions can take is to plead with the courts to relax the rules so they can remain competitive with the unregulated entrants. In the new age of digital technology, this trend is taking shape all over, not just in the media. Ride-sharing applications such as Uber and Lyft are a prominent example; they have essentially killed the municipally-regulated taxicab business because many cities chose not to regulate the technology applications, or regulated them to a lesser degree than the taxi business.[252]

The City of New York has already begun to take action to regulate ride-sharing applications, and the federal government should follow suit and impose regulations on OVDs that are akin to those regulations dealt with by MVPDs. It does not seem fair that companies that have been intact for decades are now suffering because they cannot compete with new businesses that entered the market untouched by regulation. While innovation is highly encouraged in all industries, the media industry has been hit time and time again, first with dropping newspaper readership, then dropping magazine audiences, and now dropping traditional television viewers—and nothing has been done to prevent the next significant innovation from grossly harming the existing media business landscape.

Unfortunately, the FCC does not have the authority to regulate OVDs by itself.[253] According to former FCC Chairman Tom Wheeler, regulations are needed for both networks (authorized for regulation) and online platforms (not yet authorized) because of the historic duties to

[252] Michael Goldstein, *Dislocation And Its Discontents: Ride-Sharing's Impact On The Taxi Industry*, FORBES (June 8, 2018, 6:59 PM), https://www.forbes.com/sites/michaelgoldstein/2018/06/08/uber-lyft-taxi-drivers/#34af01d259f0 [https://perma.cc/LA55-3755]. It is notable that New York has recently implemented a cap on ride-share vehicles for the calendar year (although its effects won't be seen until after it is in place for a year). Emma G. Fitzsimmons, *Uber Hit With Cap as New York City Takes Lead in Crackdown*, N.Y. TIMES (Aug. 8, 2018), https://www.nytimes.com/2018/08/08/nyregion/uber-vote-city-council-cap.html [https://perma.cc/855M-PG5C].

[253] Larry Downes, *On Internet Regulation, The FCC Goes Back To The Future*, FORBES (Mar. 12, 2018, 6:00 AM), https://www.forbes.com/sites/larrydownes/2018/03/12/the-fcc-goes-back-to-the-future/#7bb7b555b2e1 [https://perma.cc/D922-RW8M] (referencing point "7. Streaming Media 'Reclassification'").

deal[254] and to care.[255] Companies need to provide accessibility to everyone on a nondiscriminatory basis and anticipate and mitigate against harms they impose on consumers.[256]

> [W]hat happens today is that the networks and platforms are making their own rules, and those are designed to advantage them. Where does the public interest get a seat at the table? That has to be in the form of new rules . . . . That's what we have to have in order to get some sort of equilibrium in the digital era.[257]

Regulation is necessary to accomplish these goals. To obtain jurisdiction over the internet, though, the FCC requires congressional approval—a power that Congress has been reluctant to grant.[258]

Due to the shift in consumers' habits—namely, opting to watch videos online rather than on television[259]—there was a push in 2010 for the FCC to make programming more accessible for television content re-distributed online through the 21st Century Communications and Video Accessibility Act of 2010 (CVAA).[260] The CVAA requires (1) closed

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254 "The duty to deal . . . [refers to] nondiscriminatory access . . . . The first electronic network was the telegraph. In 1860, Congress passed a law that imposed net neutrality on the telegraph saying they couldn't pick and choose who they were going to put on, they had to provide first-come first-served nondiscriminatory access. The necessity for that concept hasn't changed as a result of the fact that we've moved from the dots and dashes of the telegraph to analog waveforms of the telephone to the ones and zeros of the internet." Klint Finley, *Former FCC Chair Tom Wheeler Says the Internet Needs Regulation*, WIRED (Feb. 27, 2019, 7:00 AM), https://www.wired.com/story/former-fcc-chair-tom-wheeler-says-internet-needs-regulation/ [https://perma.cc/9SV4-H6JU]. "Similarly, there needs to be anti-bottleneck openness in the platforms that use the networks. What happens now is that you have the platforms that aggregate all kinds of information about you and me and hoard it and are able to gain dominance in the marketplace by controlling access to that information. Just as there ought to be open access to the networks there ought to be open access to that information." *Id.*

255 The "duty to care" pertains to the responsibility of a service provider to anticipate and mitigate any harm that the service may cause. *See id.* ("When you're dealing with companies whose asset is the collection of your personal information, there is a . . . duty of care: What have those companies done to make sure, to anticipate and mitigate against the harmful effects of what they're doing? Those are the kind of rules we need to have going forward in the digital era.").

256 *Id.*

257 *Id.*

258 Downes, *supra* note 253 ("The Commission's power to regulate communications of any kind and in any way derives from Congressional delegation. Over the last two decades, under both Democratic and Republican control, Congress has given the agency almost no power to regulate any part of the Internet ecosystem."); *but cf.* 47 U.S.C. § 613(c)(2)(A) (2012), https://www.govinfo.gov/content/pkg/USCODE-2017-title47/pdf/USCODE-2017-title47-chap5-subchapVI-sec613.pdf [https://perma.cc/TZ7R-H947] ("Not later than 6 months after the submission of the report to the Commission required by subsection (e)(1) of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.").

259 Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 29 FCC Rcd. 8011, 8034 (2014).

260 *See* 47 U.S.C. § 613(c)(2)(A).

captioning for online video content that was originally broadcast on television with captions[261] and (2) the FCC to submit a report to Congress every two years detailing the extent of closed captioning on television and television programming rebroadcasted online to evaluate the CVAA's requirements.[262]

Aside from the CVAA, the Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in places of public accommodation.[263] The ADA requires "auxiliary aids," such as closed captioning for videos, to be made available to anyone with a disability.[264] The Communications Act satisfied the ADA's closed captioning requirement for broadcast television, and the CVAA updated the Communications Act to extend broadcast television's closed captioning for online use—but only for programming that originally aired on television.[265] Thus, this requirement does not apply to OVDs that only release online content.

If the accessibility rules are extended to online-only distributors, regulating online video content will be an easier feat to come by. The ADA language of "places of public accommodation"[266] has become a breeding ground for debate as to whether the law applies to websites.[267] Before the digital age, it was clear to interpret the terminology as applying only to physical places of public accommodation because there was no other type of "place."[268] However, now, courts are inserting themselves into the issue of accessibility and accommodation on the internet.[269] Some courts have determined that online services are public accommodations and are therefore required to comply with making

261 Sofia Enamorado, *U.S. Laws for Video Accessibility: ADA, Section 508, CVAA, and FCC Mandates*, 3PLAY MEDIA (Dec. 12, 2018), https://www.3playmedia.com/2018/12/12/us-laws-video-accessibility/ [https://perma.cc/FDQ2-53LH].

262 47 U.S.C. § 613(a), (c)(2)(A).

263 42 U.S.C. § 12182(a) (2012), https://www.govinfo.gov/content/pkg/USCODE-2017-title42/pdf/USCODE-2017-title42-chap126-subchapIII-sec12182.pdf [https://perma.cc/PL8U-EWDS] ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.").

264 Enamorado, *supra* note 261.

265 *Id.*

266 42 U.S.C. § 12181(7), https://www.govinfo.gov/content/pkg/USCODE-2017-title42/pdf/USCODE-2017-title42-chap126-subchapIII-sec12181.pdf [https://perma.cc/7M72-4LPC] (delineating a list of "private entities that are considered public accommodations for this subchapter, if the operations of such entities affect commerce").

267 William D. Goren, *The Internet and Title III of the ADA*, ABA (Jan. 1, 2014), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/january_2014/internet_title_iii_ada/ [https://perma.cc/Y59Q-7ZPQ].

268 *See id.*

269 *Id.*

websites accessible to people with disabilities.[270] In a lawsuit against Netflix, "the court found that even though Netflix was a web-based service with no physical presence, the legislative history of the ADA did not intend that accommodation be limited to enumerated examples of places of public accommodation."[271] The court in *Netflix* held that the CVAA does not prevent the invocation of Title III of the ADA.[272] As such, Netflix is required to comply with the ADA because it serves as a place of public accommodation, albeit in a virtual capacity.

The *Netflix* case appeared in the jurisdiction of the First Circuit, which has consistently held that the ADA's "public accommodation" language extends to websites.[273] The Second Circuit[274] and Seventh Circuit[275] apply this view as well. However, other circuits have perceived the opposite,[276] and it will ultimately be up to the Supreme Court to interpret whether websites constitute places of public accommodation.[277] Since the internet is here to stay, some jurisdictions already extend the ADA to websites. Nevertheless, there is still anticipation for future regulations on technology, and the ADA will likely be construed to

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270 Lewis S. Wiener & Amy Xu, *Websites as Public Accommodations: The Circuit Split on Whether Websites Constitute Places of Public Accommodation*, 2016 PARTNERING PERSP. 4, 4 (2016), https://us.eversheds-sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEo4JDpa3!/fileUpload.name=/Websites%20as%20Public%20Accommodations%20-%20The%20Circuit%20Split%20on%20Whether%20Websites%20Constitute%20Places%20of%20Public%20Accommodation.pdf [https://perma.cc/B74L-5RYB].

271 Nat'l Ass'n of the Deaf v. Netflix, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) ("Plaintiffs must show only that the web site falls within a general category listed under the ADA"), *construed in* Wiener & Xu, *supra* note 270, at 6.

272 *Netflix*, 869 F. Supp. 2d at 208.

273 *See, e.g.*, Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) ("The plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter. Even if the meaning of 'public accommodation' is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures."); *see also* Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 574-75 (D. Vt. 2015); *see also Netflix*, 869 F. Supp. 2d at 201.

274 *See, e.g.*, Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) ("Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,' suggests to us that the statute was meant to guarantee them more than mere physical access." (internal citations omitted)); *see also* Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 404 (E.D.N.Y. 2017) ("The Americans with Disabilities Act applies to plaintiff's claim.").

275 Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("The core meaning of [section 302(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do." (internal citation omitted)); *see* Goren, *supra* note 267.

276 *See Blick Art Materials,* 268 F. Supp. 3d at 388.

277 Goren, *supra* note 267.

encompass websites, either through court decisions or legislative amendments.

Reforming accessibility to extend to online content through judicial and legislative means may inspire regulatory action for OVDs. In enacting the CVAA, Congress granted the FCC a sliver of power over online content, although only over content that had already been broadcast on television. If more cases are brought against online video providers, like in *Netflix*, Congress may determine that it would be in the public interest to grant additional authority to the FCC so it could regulate online-only providers in enforcing closed captioning requirements,[278] rather than keeping it solely under the ADA. Once the FCC has that power, it could stretch such authority to other aspects of OVDs. This option may be the only permissible means to help media companies compete against OVDs/SVODs, rather than letting them consolidate, all in the name of benefitting the public interest.

Additionally, given the increased scrutiny of the big players in technology (e.g., Google, Facebook, and Amazon), antitrust law, and privacy concerns, the FTC announced a task force in February 2019 to analyze technology mergers and practices in order to consider whether federal regulation is appropriate.[279] If the task force concludes that these technology giants must be regulated, the authority will stretch to media conglomerates as well.[280]

The number of cord-cutters has been steadily increasing each year,[281] though the most popular medium for news information continues to be television.[282] If the trajectory of the media industry does not change soon, the public will become less informed because it will have less access to reliable news. Congress is pushing for more accessibility, not less. As such, with the help of the ADA, Congress ought to nudge the FCC to police OVDs through accessibility measures, which may lead to extending the FCC's authority to enforce the public interest standard onto

278 Notably, on February 20, 2019, "the Federal Communications Commission . . . announce[d] that the charter of the Disability Advisory Committee ha[d] been renewed pursuant to the Federal Advisory Committee Act (FACA)." Disability Advisory Committee, 84 Fed. Reg. 5079 (Fed. Commc'ns Comm'n Feb. 20, 2019) (notice of renewal), https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-02780.pdf [https://perma.cc/Z6FH-B9VV].

279 *See* Becky Chao, *Where Does Antitrust Law Fit in When Consumer Privacy is at Stake?*, PAC. STANDARD (Feb. 28, 2019), https://psmag.com/social-justice/can-antitrust-laws-help-keep-your-data-private [https://perma.cc/W4MZ-WZBK]; *see also* Finley, *supra* note 254; *see also* Alyssa Newcomb, *FTC's New Tech Task Force Will Keep Watch on Big Tech, Mergers—Including AT&T, Time Warner*, FORTUNE (Feb. 26, 2019), http://fortune.com/2019/02/26/federal-trade-commission-big-technology-mergers-att-time-warner/.

280 Newcomb, *supra* note 279.

281 Spangler, *supra* note 80.

282 Nissen, *supra* note 1.

web platforms so that the traditional television market can coexist with the online video market on fair terms.

CONCLUSION

Since 1987, when the Fairness Doctrine was rescinded, and throughout the 1990s to the present, the FCC has continued to deregulate the news media industry, which has led to a dramatic increase in media conglomeration. Today, much of journalism is written in either "soft" form or from a biased perspective to protect media owners' reputations and beliefs. However, neither variation of journalism supports the "public interest" standard administered by the FCC, nor the ethical principles that the media and related industries adopted in the late nineteenth century. Instead, news today is more reminiscent of yellow journalism, a shameful period in the history of the journalistic profession.

As so many of the media giants become ever-more enormous, the state of the news media is in jeopardy. Americans rely on television for the majority of their news intake, but more Americans are cutting the cord each year in favor of SVODs and OVDs. Today, the media needs to be subject to more regulation instead of engaging in consolidation. Consolidation may help traditional MVPDs compete in the marketplace today, but at what cost to consumers? What will happen when the next big unregulated innovation comes along and wipes out OVDs? If the government can keep traditional media on the favored side, and impose regulations on the newcomers (vis-à-vis accessibility rules), it will preserve the public interest standards for television, particularly in news reporting, because it would serve as the springboard for regulating content online. The longer the media is kept in this deregulated territory, the more it risks hurting the public interest.

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