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Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies

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JURISDICTIONAL AND ANTITRUST CONSIDERATIONS IN THE REGULATION OF THE NEW COMMUNICATIONS TECHNOLOGIES

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I. Introduction

At least four new telecommunications technologies—cable television, multipoint distribution service (MDS), subscription television (STV), and direct broadcast satellites (DBS)—promise to provide substantially new and perhaps innovative video programming services to consumers. In dealing with these new technologies, an initial question for policy planners is whether or not to regulate. Two of the many factors in making this type of far-reaching decision are the extent of present regulatory jurisdiction and the potential impact of the antitrust laws.

This article attempts to examine the statutory authority of the Federal Communications Commission (FCC), as well as the applicability of the antitrust laws to cable, MDS, STV, and DBS. It begins by exploring the general scope of the FCC's powers and their applicability to cable, MDS, STV, and DBS. It then moves on to consider antitrust policy in relation to communications media, and identifies potential antitrust issues.

This piece is in no way definitive, partially because it considers only two aspects of the regulation versus non-regulation issue, and partially because the still-developing economic as well as technical parameters of these new technologies are still quite unclear. Nevertheless, it is hoped that this preliminary analysis will be of use to commentators, the Commission, the Congress, and the courts.

II. Jurisdiction

A. *Present and Potential Jurisdictional Bases*

At the outset, it may be useful to identify briefly the general jurisdictional bases available to the Commission under the Communications Act. It is important to keep in mind that the meaning

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of "jurisdiction" is different in the judicial as opposed to the administrative context. In the former context, traditional theories of jurisdiction concern courts' powers to adjudicate particular types of disputes; a court's power to impose particular types of requirements on parties involves remedial rather than jurisdictional considerations. In the latter context, however, jurisdiction encompasses not only an agency's power to exercise authority over regulated entities, but also the type of regulatory requirements which an agency may impose. For example, the Commission's jurisdiction over broadcasters clearly precludes some types of regulatory requirements—*e.g.*, requiring access time for the public. As used in this discussion, "jurisdiction" thus includes the Commission's power to impose particular types of regulatory requirements, as well as its power to impose some type of regulation in the first place.

With these general observations in mind, it may be useful to discuss the major sources of the Commission's jurisdiction. There are five different permutations and combinations of these sources.

First, under Title II of the Communications Act,[1] the Commission has jurisdiction over "common carriers." The Act provides comparatively little elucidation of the concept of common carriage, since it defines "common carrier" as "a common carrier for hire in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy."[2] Going back to common law theories about common carriers—which primarily, of course, were railroads and other methods of transportation[3]—the basic concept is comparatively simple; a common carrier is a firm which holds itself out by its business practices or is required by law to provide transmission services to any properly qualified customer.[4] The most common examples of communications common carriers, of course, are telephone and telegraph companies. Although the basic notion of common carriage thus is reasonably clear, there are still substantial questions as to the appropriate definition of a carrier and as to permissible types of regulatory requirements for carriers.[5]

Second, the Commission has jurisdiction under Title III[6] of the Act over use of "any apparatus for the transmission of energy or communications or signals by radio"[7] in interstate or foreign commerce. The effect of this grant of jurisdiction is to allow the Com-

1. 47 U.S.C. §§ 201-24 (1976).
2. *Id.* § 153(h).
3. E.g., United States v. California, 297 U.S. 175 (1936).
4. *See* text accompanying note 69 *infra*.
5. *See* text accompanying notes 59-61 *infra*.
6. 47 U.S.C. §§ 301-99 (1976).
7. *Id.* § 301.

mission to regulate any use of the radio frequency spectrum for over-the-air transmission; for example, the Commission does not have Title III jurisdiction over cable television because it does not use over-the-air transmissions.[8]

The Commission's Title III jurisdiction in turn breaks down into three distinct subcatagories. The most visible type, naturally, is jurisdiction over broadcast stations, and Title III contains special provisions applicable only to them.[9] In addition, however, a license is necessary under Title III for any Title II common carrier—such as a microwave relay station—which uses over-the-air radio transmissions; as a result, the Commission regulates many media under both Title II and Title III.[10] In addition, Title III gives the Commission jurisdiction over spectrum uses which are neither common carriers under Title II, nor broadcasters under the relevant provisions of Title III.[11] A common example of this jurisdiction is regulation of citizens band operators.[12]

Finally, the Commission has a vaguely defined type of implied or residual jurisdiction over activities which do not fall squarely within either Title II or Title III. Perhaps the most striking example of this to date has been the Commission's "reasonably ancillary" jurisdiction over cable television.[13] Although the extent of this jurisdiction is open to question, it apparently does not expand any other grant of jurisdiction under Title II or Title III; instead, it solely confers jurisdiction where no Title II or Title III jurisdiction exists in the first place.

In regulating cable, STV, MDS, and DBS, the Commission has used all of these jurisdictional bases. It has regulated cable under the "reasonably ancillary" jurisdiction recognized by the courts.[14] On the other hand, STV has been regulated as a Title III broadcaster,[15] while MDS has been regulated as a Title II common carrier.[16] And the Commission apparently would be free to regulate DBS as a common carrier, broadcaster, or non-carrier non-broadcaster use of the radio spectrum.[17] As will be seen, the reasons behind these differing regulatory regimes often are somewhat less than clear.

8. *See* text accompanying note 21 *infra.*
9. *E.g.,* 47 U.S.C. §§ 311, 315, 317 (1976).
10. *E.g.,* Carter Mountain Transmission Co. v. FCC, 321 F.2d 359 (D.C. Cir. 1963).
11. *E.g.,* National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976).
12. 47 C.F.R. § 95.401 *et seq.* (1979).
13. *See* text accompanying note 21 *infra.*
14. *Id.*
15. *See* text accompanying note 46 *infra.*
16. *See* text accompanying note 56 *infra.*
17. *See* text accompanying notes 66-83 *infra.*

B. *Jurisdiction Over Cable Television*

Cable television distributes programming through a system of coaxial cables, rather than over-the-air. It offers two main types of service: "basic" and "pay" (with the recent proliferation of programming supplied by domestic satellites, some cable systems have chosen to market their services under a system of three or more tiers). Basic service usually includes locally receivable signals, "distant signals" not otherwise available over-the-air, a limited amount of locally originated programming, and time, news, and weather information. Pay channels cannot be received without a special filter or converter supplied by the cable operator. Virtually all pay cable programming presently is distributed on a national basis through common carrier communication satellites. Traditionally, pay cable has consisted mainly of an additional "premium" channel of recently released motion pictures, current sporting events, and a few special productions. More recently, pay cable programmers have begun to offer a variety of more specialized services, such as children's programming and continuous news coverage. Since the equipment necessary for per program charges still is not readily or inexpensively available, operators either bill subscribers a flat monthly fee for a particular service or pay program distributors a charge of between five and twenty-five cents per month for a particular service and then pass the cost on to all subscribers.[18]

To a very real extent, a pay cable operation thus is quite similar to the notion of "community reception" used by the International Telecommunications Union (ITU);[19] the main difference, of course, is that the programming is provided by already existing common carrier communications satellites in the 4/6 GHz band, rather than by broadcasting satellites in the 12/14 GHz band. Since the ITU's classifications have no legal effect on domestic regulatory schemes, however, they do not restrict the Commission's policy in any way.[20]

Until recently, the Commission's jurisdiction over cable television seemed comparatively clear. Because it does not use over-the-

18. NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS (Aug. 1979) app. Recent Trends in Cable Television Related to the Prospects for New Television Networks [hereinafter cited as Recent Trends in Cable Television].

19. ITU Resolution S4 APB, Spa 2 defines "community reception" as "the reception of emissions from a space station in the broadcasting-satellite service by receiving equipment, which in some cases may be complex and have antennae larger than those used in individual reception, and intended for use . . . through a distribution system covering a limited area."

20. Rutkowski, *International Data Transfer, Satellite Communication and the 1979 World Administrative Radio Conference,* THE NEW WORLD INFORMATION ORDER 3 (1979).

air radio frequency transmission, cable does not fall within Title III; and the courts have sustained the Commission's refusal to regulate cable as a common carrier under Title II. The original Communications Act contained no mention of cable television, largely because cable existed only in highly experimental form in 1934. Nevertheless, the courts consistently have interpreted the Act to support at least limited Commission regulation. In *United States v. Southwestern Cable Co.*,[21] the Supreme Court upheld the Commission's issuance of an order to comply with the Commission's 1966 rules.[22] These rules restricted the number of signals which a cable system could "import" from outside its local area and required "exclusivity" for local network stations. The Court did not pass upon the validity of the specific rules, but instead spoke somewhat vaguely about the scope of the Commission's jurisdiction:

> There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.[23]

This less than precise language naturally touched off a debate over the meaning of "reasonably ancillary."[24] Several years after *Southwestern Cable*, a plurality of the Court seemed to broaden the scope of the "reasonably ancillary" test. In *United States v. Midwest Video Corp. (Midwest I)*,[25] the Court found that the Commission had jurisdiction to require cable systems with 3,500 or more subscribers to "originate" a substantial amount of local programming. The four-person plurality's test was whether a regulation fulfilled "objectives for which the Commission's regulatory power over CATV might properly be exercised."[26] The plurality opinion noted almost casually that "the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV might have on broadcast services."[27] Indeed, the plurality indicated that the Commission had jurisdiction to impose regulations which enhanced services provided by cable as well as

21. 392 U.S. 157 (1968).
22. 47 C.F.R. § 74.1101 *et seq.* (1971).
23. 392 U.S. at 178.
24. Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419, 456 (1972).
25. 406 U.S. 649 (1972).
26. *Id.* at 661.
27. *Id.* at 664.

which protected broadcast television from cable.[28] In concurring and providing a fifth vote in favor of the Commission's jurisdiction, however, Chief Justice Burger noted that "[c]andor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the Courts."[29]

Most recently, the Court may have contracted the Commission's jurisdiction. In *FCC v. Midwest Video Corp. (Midwest II)*,[30] the Court held that the Commission lacked statutory jurisdiction to require cable television systems with 3,500 or more subscribers to offer "access" channels for use by the public. The access channel rules required operators to set aside channels for public use on a "first-come, nondiscriminatory" basis, maintain basic production equipment, and have a minimum channel capability.[31] The extent to which the Court actually relied upon and narrowed the "reasonably ancillary" test is less than clear. Although the Court recited the *Southwestern* formulation,[32] it appeared to rely mainly upon section 153(h) of the Communications Act.[33] Section 153(h) provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[34] The majority reasoned that an access scheme was a carrier-type regulation, since it deprived a cable operator of control over program content[35]—control which a broadcaster normally exercises and which a carrier normally does not.[36]

As Justice Stevens' dissenting opinion pointed out, the language of section 153(h) seems to be definitional in nature.[37] Nevertheless, the majority interpreted that language to prohibit the imposition of carrier requirements upon either a broadcaster or cable operator, and concluded that the access rules unduly limited cable operators' control over programming on their systems.[38] At the same time, the Court was careful to distinguish its result from that in *Midwest I*, on the ground that the origination rule at issue there did not go as far as the access rules. The Court noted that the origination rule "did not abrogate the cable operators' control over the composition

28. *Id.* at 664-65.
29. *Id.* at 676.
30. 440 U.S. 689 (1979). Chief Justice Burger voted with the majority.
31. 47 C.F.R. § 76.252 (1979).
32. 440 U.S. at 706-08.
33. *Id.* at 699-708.
34. 47 U.S.C. § 153(h) (1976).
35. 440 U.S. at 701-04.
36. *Id.* (construing CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).
37. 440 U.S. at 709-10.
38. *Id.* at 705-08.

of their programming, as do the access rules. It compelled operators only to assume a more positive role in that regard, one comparable to that fulfilled by television broadcasters."[39]

The breadth of the FCC's jurisdiction over cable thus is unclear in the wake of *Midwest II*. The opinion is subject to at least three different interpretations. First, the Court may have relied upon section 153(h) in order to narrow its holding to invalidate only "access" schemes which impinge upon the "journalistic discretion" of cable operators; after all, the Court consistently has been hostile to access requirements for either broadcasting or print media.[40] If this is the case, the Commission presumably retains substantial jurisdiction over cable—including areas such as cross-ownership, reply time under the fairness or equal opportunities doctrine, equal employment opportunity, and the like—as long as it steers clear of any type of access scheme.

Second, *Midwest II* may contract the Commission's jurisdiction substantially, by allowing only *Southwestern*-type regulation to protect television broadcasting. This assumes that the Court meant not only to invoke section 153(h), but also to reduce the *Midwest I* plurality's expansive opinion. If this is the case, the Commission presumably would have jurisdiction only to impose rules such as limitations on distant signals and requirements of nonduplication by programming on distant signals.[41] This approach seems to depart from the D.C. Circuit Court's holding in *Home Box Office, Inc. v. FCC*.[42] The court there held that the Commission's jurisdiction did not include economic protection of broadcasters through "anti-siphoning" restrictions on cable systems' use of movies, sports, and series programming.

This interpretation also raises the further question as to whether the Commission would have jurisdiction to protect other new media —such as STV, MDS, or DBS—against competition from cable. To the extent that *Southwestern* turned just on protection of broadcasters, STV and DBS might have some type of claim for protection as broadcasters; to the extent that the "reasonably ancillary" test contemplated a preferred position only for media with mass audiences, however, it probably would not apply to STV or DBS pay operations.

Third, the Court may have meant not only to apply section 153(h), but also to cut back "reasonably ancillary" jurisdiction.

39. *Id.* 699-700.
40. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
41. 47 C.F.R. §§ 76.57-.61, 76.92-.94 (1979).
42. 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

If this is the case, the Commission obviously would be unable to impose either access schemes or requirements unrelated to protection of broadcast television—such as prohibitions on cross-ownership or employment discrimination.

Finally, with the aid of 20-20 hindsight, it appears that other jurisdictional bases may exist for FCC regulation of cable—*i.e.*, the FCC's jurisdiction over microwave relays and earth stations used by cable systems. Indeed, in its very first assertion of jurisdiction over cable, the Commission relied upon cable systems' use of microwave relay facilities; it required cable operators to comply with signal carriage and exclusivity rules as a condition of receiving microwave relay licenses[43] under Title III. This approach had been upheld by the D.C. Circuit Court in *Carter Mountain Transmission Co. v. FCC*,[44] which sustained the Commission's exercise of its jurisdiction against both statutory and first amendment claims. Ironically, comparatively few cable television systems made use of microwave relays at that time. Almost all sizeable cable systems today, however, use either microwave relays or receive-only earth stations to receive distant signals or pay programming. Microwave relays require a Title III license, as did earth stations until recently.[45] Regardless of the result in *Midwest II*, the Commission may be able to use its Title III jurisdiction over microwave relays and its dormant jurisdiction over earth stations to impose conditions upon cable systems which use them.

C. *Jurisdiction Over Subscription Television*

STV is another method of transmitting programs to viewers on a pay basis. Under the present regulations, stations operating on frequencies listed in the television Table of Assignments may use some airtime for pay programming, as long as they also broadcast the FCC's minimum percentages of non-pay programming required by the Rules.[46] Since almost all VHF allocations already are in use,[47] STV operators de facto are required to apply for UHF licenses or acquire stations already licensed to UHF broadcasters. STV thus differs from both MDS and DBS, since it is receivable in the viewer's home on an ordinary all-channel television set, without any need for a converter to translate MDS's 2.1 GHz or DBS's 12 GHz signals

43. First Report and Order, 38 F.C.C.2d 683 (1965).
44. 321 F.2d 359 (D.C. Cir. 1963).
45. Report and Order, 74 F.C.C.2d 205 (1979).
46. 47 C.F.R. § 73.643 (1980).
47. As of the time of this writing, all assignments for VHF stations were either in use or granted. BROADCASTING, Nov. 12, 1979, at 87.

into a VHF television signal which a conventional set can receive. Precisely because STV signals can be received on a conventional television set, however, STV operators "scramble" their programming before transmission and supply a "descrambler" to subscribers in order to exclude any "free riders." Most STV programming consists of movies or sports, and is quite similar to "premium" service provided by pay cable operators.[48]

Precisely because STV is a broadcast use within Title III of the Communications Act, the Commission has the same jurisdiction over it as over any other type of broadcaster. As early as 1962, the D.C. Circuit Court once again upheld the Commission's jurisdiction over experimental STV broadcasts by a Hartford, Connecticut station; it noted, however, that in a permanent system of STV stations, claims of adverse economic impact possibly might be relevant.[49] After the Commission finally adopted rules authorizing the licensing of STV stations in 1968, the D.C. Circuit Court once again upheld the Commission's jurisdiction against arguments that STV did not fall within the Communications Act and that the Commission had acted arbitrarily. In *National Association of Theatre Owners v. FCC (NATO)*,[50] the court indicated, however, that the Commission might have—and be required—to exert ratemaking authority over STV, even though STV was a Title III operation. Then-Judge Burger noted that "if and when the premises of its regulatory approach change, the Commission can and should consider the [ratemaking] issues involved."[51] To the extent that ratemaking involves exclusively carrier-type regulation, and to the extent that *Midwest II* prohibits any carrier-type regulation of broadcasters, the *NATO* holding may no longer be relevant. Nevertheless, the Commission may need to face at some point the question as to whether it has, and should exercise, jurisdiction over STV rates.

Finally, STV's status as a Title III broadcaster may raise some questions as to the Commission's jurisdiction over it vis-a-vis cable, MDS, and DBS. The Commission arguably might have jurisdiction to protect STV against economic impact from cable under even a very narrow "reasonably ancillary" test. On the other hand, the

48. For a complete discussion of economic, technical, and engineering aspects of STV, *see* K. Glen, Report on Subscription Television, App. to NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS (Jan. 1980) [hereinafter cited as Subscription Television]. *See also* text accompanying note 18 *supra*.

49. Connecticut Committee Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir. 1962).

50. 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

51. *Id.* at 203.

relationship between STV and DBS would be less clear if DBS also were regulated as a Title III broadcaster. Although STV and DBS obviously use different types of technology, both might be broadcasters. The FCC might have a duty to deny a license to either an STV or a DBS operator if a new station would have sufficient economic impact upon an existing station to deny the public of significant service.[52] To a lesser extent, the Commission might even need to consider the economic impact on broadcasters of licensing DBS as a common carrier.[53] Indeed, there is at least limited doctrinal support for holding that cable systems are entitled to protection from electrical interference caused by broadcasters.[54]

D. *Jurisdiction Over Multipoint Distribution Service*

MDS systems operate on one of two channels available at 2150-2162 MHz, much higher frequencies than STV stations on UHF bands. Like cable, STV and DBS, MDS can distribute pay programming. Unlike STV, it does not operate on frequencies which can be received by conventional television sets; as a result, MDS viewers require a converter to translate signals from 2150-2162 MHz to an appropriate VHF channel.[55] MDS is regulated by the FCC as a common carrier under Title II of the Act.[56] The Commission has not imposed upon MDS, however, a full range of common carrier obligations; instead, the only two significant carrier-type requirements are that the MDS operator not be "substantially involved" in program production, and that the MDS system not supply more than fifty percent of its services to entities "affiliated with or related to" it.[57]

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52. *E.g.*, Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958). For an excellent discussion of the Commission's economic impact doctrine, see Mayer, *Sanders Brothers Revisited: Protection of Broadcasters from the Consequences of Economic Competition*, 49 Ky. L.J. 370 (1961).

53. *E.g.*, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 362 (D.C. Cir. 1963).

54. H&B Communications Corp. v. FCC, 420 F.2d 638 (D.C. Cir. 1969).

55. For a complete discussion of the economic, technical, and legal aspects of MDS, *see* K. Glen, Report on Multipoint Distribution Service, App. to NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS (Jan. 1980) [hereinafter cited as Multipoint Distribution Service].

56. 47 C.F.R. § 21.900 (1979) provides that "[a]uthorizations for stations in this [MDS] service will be granted to existing and proposed communications common carriers." The Commission apparently made no conscious decision to regulate MDS as a carrier rather than as a broadcaster or other pure Title III use; it seemed to assume that MDS was a carrier because it would use frequencies previously assigned to carriers. Report and Order, 29 RAD. REG. 2d (P&F) 382 (1974).

57. 47 C.F.R. § 21.903(b)(1), (2) (1979).

To a very real extent, the Commission's MDS jurisdiction is a mirror image of its STV jurisdiction. Just as the Commission has authority over STV under Title III, it can impose any type of traditional common carrier regulation on MDS under Title II. The only real outer limit of the Commission's authority would involve whether or not it had properly classified MDS as a carrier in the first place; there may be at least some limited authority for this argument.[58]

E. *Jurisdiction Over Direct Broadcast Satellites*

Direct broadcast satellites move in a geosynchronous orbit around the earth, allowing them to stay in the same place in space in relation to the earth.[59] They thus provide the functional equivalent of an antenna 22,300 miles in space. Depending upon its antenna configuration and its power, a direct broadcast satellite can cover an area ranging in size from one time zone in the United States to almost half of the earth.[60] Since spaces for satellites in the geosynchronous orbit are limited, it still is not clear how many DBS signals might be available in the United States on either a national or a regional basis. Although only time and technology will tell, it seems safe to assume that at least three or four DBS signals could be available in any part of the nation.[61]

Most DBS services probably will be oriented, at least at the beginning, toward pay programming for several reasons. First, the necessity of a separate converter in order to receive DBS programs on a conventional television set makes it easy to ration—and thus charge for—DBS programming. Second, in the only firm proposal to date, COMSAT has proposed a system of pay programming.[62] Third, national and international copyright considerations may require limitations on the scope of DBS tranmissions.[63]

Perhaps the most important fact about DBS is simply that it does not exist at the present time, and probably will not exist for a number of years. Since DBS has not developed into a de facto broadcaster or carrier, the Commission has a comparatively free

58. *See* text accompanying notes 66-79 *infra*.
59. *See* New York Law School Communications Clinic, *The Development of Video Technology*, 25 N.Y.L.S. L. Rev. 789 (1980) [hereinafter cited as *Technology*].
60. *See Technology, supra* note 59, at 810.
61. *See* Rice, *Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options*, 25 N.Y.L.S. L. Rev. 813 (1980) [hereinafter cited as *Direct Broadcast Satellites*].
62. *See Direct Broadcast Satellites, supra* note 61, at 812.
63. E. Samuels, *Copyright and the New Communications Technologies*, 25 N.Y.L.S. L. Rev. 905 (1980) [hereinafter cited as *Copyright*].

hand in deciding which regulatory regime to impose. In very basic terms, the Commission probably has the discretion to regulate DBS as a common carrier, a broadcaster or even a hybrid of the two. A communications entity's status depends largely upon how it actually operates, of course, and at this point DBS is not in operation.

At the outset, it is important to note that the Commission unquestionably has some form of jurisdiction over DBS. Regardless of how it operates, DBS clearly will use over-the-air radio frequency transmissions. As a result, a DBS operation would involve "the transmission of energy or communications or signals by radio" in interstate commerce.[64] This transmission would invoke Title III jurisdiction of one kind or another.[65] The real question before the Commission then would be whether to regulate DBS as a broadcaster under Title III, a carrier under Title II and Title III, or a non-broadcast non-carrier under Title III.

1. Regulation as a Common Carrier

One approach would be to view DBS simply as a point-to-multipoint common carrier. The status of DBS as a carrier would hinge on whether DBS operators control just the hardware, or both the hardware and the software. The basic test would be whether DBS operators hold out—or are required to hold out—their facilities for non-discriminatory use by the public or any reasonable class of the public. In light of the difficulty of predicting future directions for DBS development, this is very much a gray area of the law.[66]

As at least one commentator has noted,[67] characterization of DBS as a point-to-multipoint carrier at least potentially could fit traditional definitions of common carriage. After all, the vagueness of the concept is reflected in the Commission's rules, which define a "communication common carrier" as "any person engaged in rendering communication service for hire to the public."[68] The District of Columbia Circuit Court, however, recently has added a substantial gloss to the definitions in both the Communications Act and the rules.

64. 47 U.S.C. § 301 (1976).
65. *See* text accompanying note 6 *supra*.
66. For a consideration of the ITU's differences between "fixed" and "broadcast," *see* H. Akima, P.M. McManamon & P.I. Wells, Fixed Satellite and Broadcasting-Satellite Service Considerations for 1979 GWARC Planning 19-20 (1978).
67. G. Skall & K. Shaefer, Direct International and Domestic Broadcasting by Satellite—A Myth or Potential Reality 9-10 (1978).
68. 47 C.F.R. § 21.2 (1979).

In *National Association of Regulatory Utility Commissioners v. FCC (NARUC I)*,[69] the District of Columbia Circuit Court considered whether or not the Commission could assign frequencies for communications entities to provide services to third parties, but not regulate them as common carriers. At issue was the Commission's allocation of UHF frequencies to "specialized mobile radio systems" (SMRS), which then could render limited service to specified categories of third parties. SMRS operators were private, for-profit entities, but were not regulated as carriers. The court held that the Commission had classified SMRSs properly as non-carriers. In defining the notion of common carriage, the court noted that:

> Whether the common carrier concept is invoked to support strict tort liability or as a justifying basis for regulation, it appears that the critical point is the quasi-public character of the activity involved . . . . What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently . . . ." This does not mean that a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.[70]

The court specifically did not pass on the issue of whether the Commission's Title II powers were "mandatory or discretionary"[71] —*i.e.*, whether the Commission deliberately could classify a de facto carrier as a non-carrier or vice versa.

Just a few months after *NARUC I*, the District of Columbia Circuit Court had an opportunity to reflect upon this test in a similarly captioned case, *National Association of Regulatory Utility Commissioners v. FCC (NARUC II)*.[72] In *NARUC II*, the court undertook to expand its definition of a common carrier to include "the requirement formulated by the FCC and with particular ap-

69. 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).
70. *Id.* at 641 (footnotes omitted).
71. *Id.* at 640 n.48.
72. 533 F.2d 601 (D.C. Cir. 1976).

plicability to the communications field, that the system be such that customers 'transmit intelligence of their own design and choosing.' "[73] In reality, this second test seems to add very little to the definition of a common carrier; a communications entity hardly is "available to the public" if it does not allow its customers to control their messages.

Under the District of Columbia Circuit Court's analyses in both *NARUC I* and *NARUC II*, a communications entity can be either a de jure or a de facto carrier. As the court noted in *NARUC I*, "we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the entity's] operations to expect an indifferent holding out to the eligible user public."[74]

It is less than clear whether this gives the Commission broad discretion in deciding whether to classify an entity such as a DBS system as a carrier or a broadcaster. In *NARUC I*, the court noted that "a particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[75] Moreover, *Midwest II*[76] seems to hold that the Commission may not impose carrier-type requirements upon a communications entity which functions as a broadcaster. These positions would indicate that the Commission may not transform a de facto non-carrier into a de jure carrier. On the other hand, *NARUC I* also gave at least some weight to de jure factors in terms of "legal compulsion."[77] And more than a decade before the NARUC cases, the District of Columbia Circuit Court had held that the Commission had substantial discretion in deciding whether to classify cable television as a common carrier. In *Philadelphia Television Broadcasting Company v. FCC*,[78] the court noted that "the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective" of diversity—a position which the Ninth Circuit later endorsed.[79]

It is thus unclear whether the Commission would have the discretion to regulate DBS as a common carrier. Since DBS operations are not likely to be in place for a number of years, however, the Commission probably has a free hand to turn DBS oper-

73. *Id.* at 609 (footnote omitted).
74. 525 F.2d at 642.
75. *Id.* at 624 (footnote omitted).
76. *See* text accompanying note 30 *supra.*
77. 525 F.2d at 642.
78. 359 F.2d 282, 284 (D.C. Cir. 1966).
79. ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975) (held that the Commission had not abused its discretion in refusing to classify cable systems as common carriers).

ations into de jure common carriers at this still comparatively early stage. Although the Commission presumably could not force a broadcasting operation to fit the mold of a carrier, DBS has yet to develop in any discernable direction.

2. Regulation as a Broadcaster

Just as a DBS operation might take the form of point-to-multipoint communications and resemble a common carrier, a single entity might control both the software as well as the hardware, and thus resemble a broadcaster. As noted above, the use by DBS of the radio spectrum clearly would bring it within some type of Title III jurisdiction. If DBS were not an over-the-air common carrier under both Title II and Title III, it might be either a broadcaster or a non-carrier non-broadcast spectrum use under Title III. As discussed before, the District of Columbia Circuit Court in *National Association of Theatre Owners* held that STV stations were broadcast operations under Title III of the Act.[80] Since DBS and STV have the same potential audiences and differ only in the frequencies used, there should be little difficulty in classifying a DBS operation as a broadcast station as long as it has the necessary control over programming.

There does not appear to be any case law on the distinction between a broadcaster and a non-broadcaster non-carrier spectrum use under Title III. By analogy to *Midwest II,* however, the definition would appear to be functional in nature; after all, the Court there focused on cable systems' program content control in holding that they were as exempt as broadcasters from carrier-type regulation.[81] Under this type of analysis, the status of DBS presumably would depend upon the extent to which it developed—or, perhaps, was allowed to develop—control over programming decisions.

3. Regulation as a Hybrid

Finally, the Commission presumably could regulate DBS as a non-broadcaster non-carrier spectrum use under Title III, unless DBS had developed into a de facto broadcaster or carrier in the absence of regulation. This status would make DBS analogous to the SMRS operators in *NARUC I.*[82]

The main question as to this regulatory approach would be the extent to which the Commission could impose "hybrid" re-

80. *See* text accompanying note 50 *supra.*
81. *See* text accompanying note 35 *supra.*
82. *See* text accompanying note 68 *supra.*

quirements on DBS—*i.e.*, a combination of broadcaster and carrier obligations. For example, the Commission might decide to require a DBS operator to provide some channels on a common carrier basis and to allow it to program others itself—a situation somewhat akin to the 50/50 rule for MDS.[83]

NARUC I certainly indicates that the Commission may allow a non-broadcaster non-carrier spectrum use under Title III to have some attributes of a carrier; it does not make clear, however, whether the Commission may impose a mixture of broadcaster and carrier obligations. *Midwest II* seems to hold that the Commission may not impose carrier-type regulations upon a de facto broadcaster; it does not address, however, the question of whether the Commission may either impose broadcaster-style obligations on a carrier or use a mixture of broadcaster-type and carrier-type regulations. Under both cases, the actual functioning of the medium in question seems significant and perhaps even determinative. Once again, this reinforces the theory that the Commission would have a freer hand in choosing a jurisdictional regulatory scheme now than after DBS has developed.

F. *Conclusion*

The Commission has a wide variety of present and potential jurisdictional bases over cable, STV, MDS, and DBS. MDS is subject to Title II; STV is subject to Title III; cable television is subject to "reasonably ancillary" jurisdiction; and DBS might be subject to any of three different jurisdictional bases. There does not seem to be any compelling policy reason for these distinctions; they appear to be historical accidents rather than historical inevitabilities.

Particularly in light of the current pressure for some type of "rewrite" of the Communications Act, the Commission might wish to seek new legislation to provide a cohesive approach to regulation of new technologies. All of the currently pending bills would reduce the Commission's jurisdiction over cable television, except as to narrowly and perhaps idiosyncratically defined exceptions.[84] STV apparently would fare the same as other television broadcasters, with no Commission jurisdiction to regulate its pay features separately.[85] MDS might be almost completely beyond the Commission's jurisdiction, to the extent that it has been deemed to be

83. *See* text accompanying note 57 *supra*.
84. S. 611, 96th Cong., 1st Sess. § 332 (1979) would allow the Commission to regulate cable only in order to protect broadcasting from economic harm. *See also* H.R. 3333, 96th Cong., 1st Sess. § 321(b)(1) (1979).
85. *E.g.*, S. 622, 96th Cong., 1st Sess. § 335 (1979).

subject to the ordinary play of "marketplace" forces.[86] And DBS would be regulable either as a common carrier—to the extent that the Commission retained its traditional common carrier jurisdiction —or as a broadcaster.[87]

As discussed above, the Commission has not attempted to base its jurisdiction over cable, STV or MDS on any internally consistent, logical construct. The formulations in currently pending legislative proposals, however, do not seem to fare much better.

III. ANTITRUST

A. *Introduction*

The goal of the antitrust laws is to prohibit conduct which directly or indirectly forecloses entry into and competition within any type of economic "market."[88] Courts and agencies thus rely to a large extent upon economic evidence in enforcing the antitrust laws. Precisely because of the often vague nature of this data,[89] the courts' decisions in antitrust cases are somewhat ad hoc in nature. Nevertheless, by way of generalization, it is possible to identify three main categories of antitrust violations: horizontal agreements, vertical agreements, and structural restraints.

Because horizontal agreements commonly involve agreements among competitors to create a protected market for themselves, they usually are classified as "per se" violations. Under this mode of analysis, proof of an agreement alone is sufficient to establish a violation of the antitrust laws, without proof of any economic effect.[90] Vertical agreements and structural restraints, on the other hand, do not necessarily foreclose entry and may have valid business purposes. As a result, they usually are subject to a "rule of reason" rather than a "per se" analysis, and require a showing that a defendant's conduct had an anticompetitive impact and lacked any business justification.[91]

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86. S. 611, 96th Cong., 1st Sess., § 301 *et seq.* (1979); S. 622 96th Cong., 1st Sess., § 331 *et seq.* (1979); H.R. 3333, 96th Cong., 1st Sess., § 451 *et seq.* (1979).

87. S. 611, 96th Cong., 1st Sess., § 201 *et seq.* (1979); S. 622, 96th Cong., 1st Sess., § 201 *et seq.* (1979); H.R. 3333, 96th Cong., 1st Sess., § 311 *et seq.* (1979).

88. For a discussion of problems in defining a "market," *see* notes 92-106 and accompanying text *infra*.

89. *See generally* L. SULLIVAN, ANTITRUST 7-8 (1977) [hereinafter cited as SULLIVAN].

90. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972), where the Court, faced with an agreement among food retailers to respect certain territorial rights allocated by Topco, stated: "We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation. . . ." *Id.* at 608. *See generally* SULLIVAN, *supra* note 89, at 7-8.

91. SULLIVAN, *supra* note 89, at 182-86.

This discussion will review these three general categories of violations as applied to cable television, subscription television (STV), multipoint distribution service (MDS), and direct broadcast satellites (DBS). It will conclude by discussing procedural options in dividing responsibility for enforcement of the antitrust laws between the courts and the Federal Communications Commission.

B. *Market Definition*

Since the antitrust laws are concerned primarily with market foreclosure, the first step in any analysis is to define a relevant economic market. In essence, the task involves consideration of two separate types of markets: first, a product market, and second, a geographic market.

Defining a product market is important for two reasons. First, the more products included in a product market, the larger it becomes—and thus the smaller any individual firm's share becomes. Second, definition of the product market naturally tends to influence the definition of the geographic market by impacting on the determination as to the relevant products, and thus on the area of effective competition among separate firms.

As the Supreme Court has recognized, however, there is no clear or simple test for deciding what products to include within a single product market.[92] The basic notion is functional interchangeability of products, as viewed by potential buyers. Theoretical or technical interchangeability is generally irrelevant if buyers do not view products as acceptable substitutes for each other.[93] Since the test of a product market thus focuses on buyers' perceptions and understandings, it naturally includes highly subjective determinations. To date, there has been virtually no judicial attempt to define product markets for the communications media. Several cases have involved monopolization claims against cable television operators, on the ground that they had attempted to prevent other companies from securing cable television franchises in the same area.[94] Since most of these actions were dismissed without trial on varying grounds,[95] the opinions on appeal are not par-

92. United States v. Aluminum Co. of America, 377 U.S. 271, 275-76 (1964).
93. *See, e.g.,* E.I. du Pont de Nemours & Co. v. United States, 351 U.S. 377, 380 (1956).
94. *See, e.g.,* Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570 (4th Cir. 1976); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972).
95. *E.g.,* Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570 (4th Cir. 1976) (claim barred by statute of limitations); Metro Cable Co. v. CATV of

ticularly enlightening; they seem to assume that there was a relevant product market, but do not bother to define it.[96]

As Professor Bennett has pointed out, however, the relevant product markets for the television media might take a number of different forms.[97] In looking at cable, STV, MDS, or DBS, a court might hold the relevant product market to be any or all of the following: all types of entertainment; all conventional radio and television stations; all television stations; all methods for transmitting pay programming; or just one method for transmitting pay programming. This analysis naturally considers only pay programming; if any or all of these new media had significant advertiser support, all other advertising media—from billboards to local daily newspapers—might be included in the relevant product market. The Commission basically has not been forced to face these issues to date.[98] The Supreme Court's opinion in *FCC v. National Citizens Committee for Broadcasting*[99] avoided the issue by holding only that the Commission had significant administrative discretion in passing on questions of concentration of control; as a result, the Commission was not required to order divestiture of locally cross-owned newspapers and broadcast stations.[100]

At the very least, the product market presumably would include all methods for delivering real-time video programming[101] to a viewer. If cable, STV, MDS, and DBS evolved solely into methods of delivering "pay" programming, only these media would

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Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) (no cause of action under the Sherman Act for defendant licensee to make political contributions and misrepresentations for the purpose of eliminating cable television competitor where these actions are legitimate efforts to influence legislative decisionmaking).

96. Although the *Lamb* case went to trial and the jury identified the relevant line of commerce or product market as "dissemination of news," 461 F.2d at 510, the court assumed that the relevant product market was cable television, exclusive of other technologies for dissemination. *See also* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975).

97. Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 Nw. U.L. Rev. 159 (1971).

98. *See, e.g.*, Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970), where the court deferred to the FCC on the question of undue concentration of control of mass communication media. The court held that FCC investigations into multiple ownership and resulting concentration were more appropriate than a judicial hearing, because rulemaking proceedings are more thorough and all interested parties can participate. *Id.* at 560.

The FCC rules on multiple ownership are contained in 47 C.F.R. § 73.35 (1980) (standard broadcast stations); 47 C.F.R. § 73.240 (1980) (FM broadcast stations); 47 C.F.R. § 73.636 (1980) (television broadcast stations).

99. 436 U.S. 775 (1978).

100. *Id.* at 810.

101. "Real time video" programming refers to programs which are transmitted without any modification in the rate of data transfer.

be relevant. Conventional advertiser-supported television also might be relevant, however, if cable, STV, MDS, and DBS did offer advertiser-supported programming.[102] In addition, a court might conclude that pay and advertiser-supported television compete for the same consumers. Under this analysis, conventional television would be part of the same product market as cable, STV, MDS, and DBS; some consideration also might need to be given to videotape recorders and videodisc players, which offer similar programming.[103]

As noted above, the choice of a product market plays a large role in determining the relevant geographic market. The geographic market usually is the area in which a firm sells in active and reasonably equal competition with other firms.[104] As with product markets, however, the Supreme Court has used an ad hoc approach in defining geographic markets. For example, it has held that the relevant geographic market in a section 7[105] case might be a state, a three-state area, or the whole country. The Court did not attempt to single out any one of the three, and held merely that a merger would have sufficiently anticompetitive impacts in all three areas to violate section 7.[106]

Thus, there are a number of possible geographic markets for a cable system, STV station, MDS operation or DBS system. For example, a DBS operation covering the Eastern Standard Time Zone might be in the same geographic market not only as other DBS operations in that time zone, but also as all cable, MDS, and STV operations within the area.

As a result, any cable system, STV station, MDS operation, or DBS operation would have only a comparatively small share of any relevant product and geographic market. To find a substantial market share, it probably would be necessary to constrict the product market artificially by excluding other media delivering virtually the same programming, and to define the geographic market as only the area served by the operation with the smallest geographical area, *i.e.*, one cable television system's service area.

Once the relevant product and geographic markets are established, the next step in any antitrust analysis would be to inquire

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102. *See* 47 C.F.R. 73.658 (1979).

103. Recent Trends in Cable Television, *supra* note 18, at 91-103.

104. *See, e.g.*, Merger Guidelines of Dep't of Justice, [1976] 1 TRADE REG. REP. (CCH) ¶ 4510.

105. A "section 7" case is the common terminology for litigation arising from a violation of the Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1976)).

106. United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

into possible anticompetitive practices. As indicated above, this involves consideration of the three aforementioned practices: horizontal agreements, vertical agreements, and structural considerations.

C. *Horizontal Agreements*

As noted above, horizontal agreements among competitors generally are illegal per se—*i.e.*, without any proof of actual market foreclosure—because they have the inherent effect of either driving out present competitors or preventing potential competitors from entering a market.[107] The classic example of per se illegality is price-fixing,[108] as it forecloses competition among competitors. The courts thus have held it illegal per se since the early days of antitrust enforcement.[109] Division of sales territories by competitors is usually also illegal per se, since it gives each seller a protected monopoly area in which it does not face price or non-price competition.[110]

On the one hand, outright collusion as to price or non-price terms may be unlikely among cable, STV, MDS, or DBS operators on a national, regional, or local level. After all, the prices and services are highly visible by the very fact that these firms market

107. *See* note 90 and accompanying text *supra.*

108. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1939). The *Socony* Court said:

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity.

Id. at 223-24.

109. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 (1897), where the Court invalidated an agreement among several companies entered into for the purpose "of maintaining reasonable rates to be received by each company executing the agreement." *Id.* at 310.

110. *See, e.g.*, United States v. Sealy, Inc., 388 U.S. 350 (1967). In *Sealy*, the Court was faced with an agreement whereby the holders of the "Sealy" trademark licensed the use of the name by manufacturers of sleeping products and also allocated exclusive territorial marketing rights between the licensees. The Court, in invalidating this agreement, wrote that such agreements are "unlawful under §1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness." *Id.* at 357-58.

them to the public at large and file rates with federal, state, or local regulatory agencies. Any attempt to set rates or services artificially thus should be fairly easy to detect. Indeed, the experience to date with cable television indicates that there are very substantial variations in both price and non-price terms. For example, a 1979 study of the price of both "basic" and "premium" cable television service showed that prices for both services varied as much as one hundred percent from system to system.[111] To a certain extent, of course, this might reflect differences in the systems' costs, which vary greatly between urban and rural areas. It also might reflect fears that competitors would apply for franchises upon their expiration.

On the other hand, while outright collusion among competitors may be unlikely, the very visibility of the rate and service structure of these media might encourage competitors to set their prices and services at roughly the same level in the same geographic area. Whether this goes under "conscious parallelism"[112] or another rubric, some type of leveling effect may be not only inevitable, but also virtually impossible to detect.

Competing manufacturers and operators also might attempt to impose uniform technical standards for equipment. This might foreclose the wholesale or retail market for some equipment suppliers, if the standards required use of a product or process which was not generally available because of patent protection of necessary production equipment. Technical standards also might make a home viewer's equipment incompatible with signals from a potentially competitive programming source.[113] Indeed, in the field of DBS, one competitor, the American Telephone and Telegraph Company (AT&T), has pressed for uniform equipment standards for some time.[114]

The difficulty with equipment standardization, of course, is that its goal may be either to stifle competition or to promote efficiency.

111. Paul Kagan Assocs., Inc., Census as of December 31, 1978 of Pay-Cable Systems Operational on September 30, 1978 (1979) (unpublished estimates available from Paul Kagan Associates, Inc., Carmel, Cal.).

112. *Compare* Theatre Enterprises, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537, 541 (1954) ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.") *with* American Tobacco Co. v. United States, 328 U.S. 781 (1946) ("It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns").

113. This result would be most likely, of course, if a vertically integrated firm, as discussed at notes 132-52 and accompanying text *infra,* had both equipment manufacturing and program distribution capability.

114. Inquiry Relating to the Preparations for the 1977 World Administrative Radio Conference of the International Telecommunication Union for the Planning of the Broadcasting-Satellite Service in the 11.7-12.2 GHz Band, 60 F.C.C.2d 700 (1976).

In general, the courts have been fairly unsympathetic to standardization of professional services, even where it arguably is related to safety measures.[115] Similarly, in recent years the Commission has attempted to promote interconnection of competitors' equipment into the AT&T network.[116] Thus, in 1975, the Commission prohibited AT&T from requiring its prior approval of interconnection equipment, and instead adopted a simple requirement of "registration" with the FCC.[117]

Because the consumer markets for cable, STV and MDS have been, until recently, relatively small, there has been a natural tendency for only a limited number of major manufacturers to offer equipment in these fields. There probably has been little temptation to use standardization as an exclusionary device. Should the new technologies grow in the future, however, there might be some impetus from major manufacturers for equipment standardization. The Commission thus might wish to take affirmative steps to keep these markets open for low-cost equipment and thereby encourage new entry.

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115. *See, e.g.,* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). The Society argued that the restraint on competitive bidding for engineering services contained in its canons was justified under a rule of reason analysis since competitive bidding "would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequential risk to public safety and health." *Id.* at 693.

The Court rejected this analysis: "[T]he Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Id.* at 688. Under the rule of reason the restraint is evaluated in terms of the particular circumstances of the industry. If the restraint is found to be anticompetitive, arguments that competition is not in the public interest are foreclosed. "Subject to exceptions defined by statute, that policy decision has been made by the Congress." *Id.* at 692.

For the classic definition of the rule of reason, *see* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), where Justice Brandeis discussed the operation of the rule in the following manner:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting that particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

116. COMPETITION VS. REGULATION: THE CASE OF THE MASS MEDIA 99-138 (M. Botein & S. Robb eds. 1978).

117. First Report and Order, 56 F.C.C.2d 593, 616-29 (1975).

There may also be some cause for concern about either geographical or product market division among competitors in at least some of these developing industries. To a very real extent, of course, some amount of non-collusive territorial exclusivity is inherent in some of these new media. For example, the economics of cable television usually prohibit "overwiring,"[118] and virtually all cable franchises accordingly are either de facto or de jure exclusive.[119] Similarly, the Commission's rules did not allow operation of more than one STV station to a "community" until very recently,[120] and the MDS rules allocate only two MDS channels per market.[121] In the case of cable, STV, or MDS, economic, technological, or legal requirements may require and thus justify varying degrees of geographic exclusivity. On the other hand, more than one DBS operation probably could serve either the entire nation or at least different regions of it.[122] There thus would be comparatively little justification for market division in the DBS field. There are at least two possible ways, however, in which DBS operators might impose exclusivity. First, competing DBS operators might agree that each one of them would provide all DBS service for a particular geographic area, such as a time zone. Second, they might agree that each one of them would have a different national "format"[123] to appeal to a different national audience.

Competitors also might agree to boycott potential new entrants into their field. For example, several antitrust cases have involved claims by a cable television operator that other cable television operators in the same part of the country had agreed to put pressure upon third parties to insure that the plaintiff could not receive a cable television franchise from a local government.[124] Since most of

118. *See* R. POSNER, CABLE TELEVISION AND THE PROBLEM OF LOCAL MONOPOLY (1970). While Posner believes that cable service at the local level is a natural monopoly, and that it is "unlikely that two or more cable companies could economically serve the same subscriber at once," *id.* at 1, the immediate cause of territorial exclusivity "lies not in the economics of cable television but in the fact that a cable company must obtain a municipal franchise in order to be permitted to serve any part of the community." *Id.* at 4.

119. L. JOHNSON & M. BOTEIN, CABLE TELEVISION: THE PROCESS OF FRANCHISING 29-30 (1973).

120. Report and Order, 73 F.C.C.2d 805 (1979).

121. 47 C.F.R. § 21.901 (1979). This rule confines the frequencies for MDS to a 2150-2162 MHz band. This band is subdivided into channel 1, 2150-2156 MHz, and channel 2, 2156-2162 MHz, or 2A, 2156-2160 MHz. *Id.*

122. *See Direct Broadcast Satellites, supra* note 61, at 812.

123. *See* WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), *cert. granted,* 445 U.S. 914 (1980).

124. See, *e.g.*, Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570 (4th Cir. 1976); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1972), *cert. denied,* 409 U.S. 1001 (1972).

these cases were dismissed on procedural grounds, however, they do not provide any coherent principles.[125] The boycott problem would be particularly dangerous, of course, if the boycotting group controlled an essential means of entry into a market—for example, all available DBS channels for the nation or any region. Here, the traditional "essential facility"[126] doctrine might require them to share an otherwise scarce resource with potential competitors.[127]

Finally, a horizontal combination might have enough "monopsony"[128] power vis-a-vis potential sellers of programming that it could artificially depress prices.[129] Indeed, private antitrust litigation against the three commercial television networks suggests that the networks may have exercised precisely this type of control over prices paid to independent producers.[130] At this stage, it still is unclear whether the advent of cable, STV, MDS, and DBS will increase the total "secular demand" for different types of television programming.[131] If they increase the demand, there probably is little danger of monopsony; if they decrease it, there would be a need for monitoring.

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125. *See* note 95 *supra*.

126. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 125 (1977).

> A firm which holds a lawful monopoly by virtue of ownership of a unique resource is guilty of monopolization if it exploits that resource in ways which exclude or disadvantage customers arbitarily or invidiously. For the purpose of assuring reasonable access, this rule treats scarce resource or natural advantage monopolies the way regulatory law treats a public utility.

Id.

127. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

Another approach to this problem, of course, would be to regulate DBS as a common carrier. *See* notes 66-79 and accompanying text, *supra; Direct Broadcast Satellites, supra* note 61, at 850.

128. R. POSNER, ANTITRUST 91 (1974).

> Monopoly is the term used to describe the situation where there is only one seller of a product, monopsony where there is only one buyer. Just as the seller has an incentive to limit output in order to increase his price and profits, so the buyer has an incentive to limit his purchases in order to reduce his input costs and thereby increase his profits.

Id.

129. *See, e.g.*, National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965).

130. *Cf.* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated on grounds of primary jurisdiction*, 609 F.2d 355 (9th Cir. 1979) (networks held to possess sufficient market power to dictate contents of shows produced by independent producers under the "family viewing hour" doctrine).

131. R. PARK, CABLE TELEVISION AND UHF BROADCASTING 25-28 (1971). Secular demand refers to audience size for any particular medium, which may be increased by a variety of factors, including population growth and increase of personal income. Park finds it impossible to project confidently any particular growth rate for secular demand. *Id.* The impact of cable, STV, MDS, and DBS on the growth rate of secular demand for television programming is likewise uncertain.

D. *Vertical Arrangements*

A vertical arrangement involves an attempt by a seller—usually of a unique or patented product or service—to impose price or other restraints upon buyers. These restrictions often limit a buyer's options as to the source or price of a product or service, and thus foreclose competing sellers' access to buyers. Unlike the usual horizontal agreements as to price and territorial terms, however, some vertical restraints serve useful business purposes;[132] as a result, not all vertical restraints are illegal per se under the antitrust laws.

Several types of vertical restraints may emerge with the development of cable, MDS, STV, and DBS, for two reasons. First, the new technologies require a wide range of products and services—from program production to equipment manufacturing—in order to function. Second, many of the firms in these industries are vertically integrated,[133] thus creating an incentive to use market power in the one area to control a market in another area.

Perhaps the most common type of vertical restraint—and perhaps also the most likely to develop in these new technologies—is a tying agreement. A tying agreement is essentially an arrangement under which a seller refuses to sell a "tying" product or service unless the buyer also agrees to purchase another, less attractive, "tied" product or service.[134] A tying arrangement is thus an effective way of utilizing dominance in one market to establish market power in another.

Obviously, a tying arrangement is not effective unless the tying product is sufficiently necessary to a buyer—usually because of a patent or a unique process— to coerce a buyer into purchasing the tied product.[135] Tying arrangements have generally been held to be

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132. *See* text accompanying note 141 *infra.*

133. *See* text accompanying note 167 *infra.*

134. *See, e.g.,* International Business Machs. Corp. v. United States, 298 U.S. 131 (1936). IBM was enjoined from leasing tabulating machines upon the condition that the lessees use IBM's tabulating cards exclusively. *Id.* at 132. This tying arrangement was held to be a violation of section 3 of the Clayton Act, 15 U.S.C. § 14 (1970): "We rest [our decision] on the language of § 3 of the Clayton Act which expressly makes tying clauses unlawful, whether the machine leased is 'patented or unpatented.'" *Id.* at 137.

135. R. POSNER, ANTITRUST 612 (1974).

> The Supreme Court in tie-in cases has proceeded on the theory that tying agreements are a method by which a firm having a monopoly (presumably lawful) of one product . . . obtains a second, distinct monopoly of a good used in conjunction with the first product . . . [T]he monopoly of the first product enables the producer to make a credible threat to impose substantial costs on the purchaser by refusing to sell the product to him unless the purchaser agrees to buy the second product as well.

Id.

per se violations of the antitrust laws, because they foreclose competing sellers' access to buyers without any business justification.[136]

At this comparatively early stage in their development, the economics of cable, STV, MDS, and DBS have not sorted themselves out sufficiently to allow very accurate predictions about tying arrangements. Nevertheless, there appear to be a variety of possibilities. For example, sale of receiving equipment and of program material might be tied in any number of different ways. A manufacturer of a particularly useful or patented piece of receiving equipment might be able to require a broadcaster or viewer to buy its programming as well.[137] Conversely, the owner of highly attractive

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136. *See* International Salt Co. v. United States, 392 U.S. 392 (1947). In this case the lease of patented salt machines was tied to the requirement that lessees purchase salt products to be used in the machines from the International Salt Company. *Id.* at 394-96. This activity was a per se violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and § 3 of the Clayton Act, 15 U.S.C. § 14 (1976). The Court in *International Salt Co.* stated that "it is unreasonable per se, to foreclose competitors from any substantial market." 392 U.S. at 396.

137. *Cf.* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (*per curiam*) (rule of reason analysis rather than per se rule normally applied to tying arrangements).

The defendant, Jerrold, was a manufacturer of master antenna equipment and related products used to boost weak signals in fringe areas and transmit them via cable to multiple television receivers. 187 F. Supp. at 549. The complaint alleged, *inter alia*, that Jerrold contracted to sell and made sales of its equipment upon unlawful conditions in violation of § 3 of the Clayton Act, 15 U.S.C. § 14 (3) (1976) and § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). 187 F. Supp. at 548-49. Four separate tying arrangements were alleged.

The sale of the initial system was tied to a service contract "which provided for technical services with respect to the layout, installation and operation of the system." *Id.* at 552. The tying of sales to service was alleged by the Government to be a violation of § 1 of the Sherman Act and unreasonable per se. Jerrold's position as a sales leader (75% of the cable systems sold between 1950 and 1954) and the great demand for its equipment, due to the superiority of its design, placed Jerrold "in a strategic position and gave it the leverage necessary to persuade customers to agree to its service contracts." *Id.* at 555. While this leverage constituted economic power sufficient to invoke the per se rule, the court felt that the unique factual circumstances of the case made a rule of reason analysis applicable. *Id.* Jerrold was marketing an innovative and unproven technology, had limited production capacity, and Jerrold's success as well as that of the entire industry depended upon the quality of the initial systems. The service contract tie-ins of the initial Jerrold systems, designed to insure the quality of the product delivered to the subscribers thus were reasonable. "The court's conclusion is based primarily on the fact that the tie-in was instituted in the launching of a new business with a highly uncertain future." *Id.* at 557. The service contract tying arrangement became unreasonable, however, as the growth and success of the cable industry eliminated the special circumstances that were present at its inception. *Id.* at 558.

The second tying arrangement involved Jerrold's marketing of all of its products as complete systems and the refusal to sell component parts for use in non-Jerrold systems. *Id.* at 558. This was alleged to be a violation of § 3 of the Clayton Act. *Id.* In particular, Jerrold tied the sale of its "headend" equipment, used in the initial reception of the television signal, to the sale of its down-line amplifiers, used in the process of delivering the signal from the receiving station to the subscribers. The copyrighted programming might be able to require a broadcaster or viewer to buy its equipment in order to receive its programming.[138] Similarly, if the number of available satellites and frequencies is as limited as some observers have suggested, DBS operators might be able to tie use of their facilities to purchase of both their receiving equipment and their programming.[139]

A second type of vertical restraint, closely related to tying arrangements, is an exclusive dealing agreement, often in the form of a requirements contract. Sellers of particularly attractive—and, once again, often patented—products sometimes are able to require buyers to purchase all of their supplies of a particular product or

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Jerrold headend was technologically innovative and provided the superiority of the Jerrold system, but was responsible for only a modest proportion of the profits. The down-line amplifiers, which were not technologically superior to those of Jerrold's competitors, provided a substantial portion of the profit to be realized from the sale of a cable system. This tying arrangement was found to be reasonable for the same reasons as the service contract arrangement, and similarly became unreasonable with the development and success of the industry. *Id.* at 560-61.

Jerrold tied the initial sale of cable equipment to a contract provision granting it veto power over the subsequent incorporation of non-Jerrold equipment into the system. This arrangement did not unduly restrict competition and was held to be acceptable under the rule of reason approach employed by the court. "The veto provisions were necessary to protect Jerrold in view of its maintenance obligations under the contracts and its financial interest in the success of the systems." *Id.* at 562.

Finally, the sales of the Jerrold systems were tied to the purchasers' agreement that all equipment necessary for the incorporation of additional channels into the local cable system would be purchased from Jerrold. These provisions were held to constitute unlawful tying in violation of § 1 of the Sherman Act and § 3 of the Clayton Act. The absolute prohibition of competitive equipment was unjustifiable. Jerrold's veto power over the use of non-Jerrold equipment provided it adequate protection as to the quality and compatability of competitive equipment to be added to the systems, making this absolute ban on the use of certain types of competitive equipment unnecessary. Also, the circumstances justifying the first two tie-ins at the birth of the cable industry did not apply to the contemplated sales of additional equipment which might not occur, if ever, until years after the installation of the initial Jerrold systems. *Id.* at 562.

138. *See, e.g.,* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 505 n.2 (1969). In *Fortner,* the Court stated, "the proper focus of concern is whether the seller has the power to raise prices or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *Id.* at 504. After remand the case was again before the Supreme Court. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). In reversing the district court decision in favor of the customer, the Court indicated that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Id.* at 620. In explaining the relevant inquiry the Court stated, "the unique character of the tying product has provided critical support for the finding of illegality in prior cases." *Id.* at 619. A patent monopoly or copyright monopoly gives rise to a presumption of economic power in the market for tying products. *Id.*

139. Common carrier regulation of DBS would ban this type of an arrangement as an "unjust or unreasonable discrimination in charges, practices, classifications, regulations facilities, or services." 47 U.S.C. § 202(a) (1976). Thus, this legislation would preclude any antitrust issue regarding the arrangement.

service from them. Like tying arrangements, exclusive dealing agreements require that a seller have market dominance in a particular product and may be a means of expanding market dominance.[140] Unlike tying arrangements, however, exclusive dealing agreements may be viewed as being a mutual convenience for sellers and buyers—for example, in insuring a continuous supply of necessary products or services.[141] Thus, they generally are not illegal per se.[142]

As in the situation with tying arrangements, the economics of cable, STV, MDS, and DBS still are not yet sufficiently developed and defined to pinpoint potential antitrust violations. Nevertheless, some speculation is possible. For example, a DBS operator might attempt to exploit the potential scarcity of DBS channels to require programmers to buy all of their DBS transmission services from it. The validity of this type of arrangement naturally would depend upon whether it represented coercion by the DBS operator or whether it amounted to a mutually advantageous arrangement between the DBS operator and the programmer.[143]

A third type of relevant vertical restraint would be a monopolist's refusal to deal. This essentially involves a refusal by a seller to deal with a buyer if the buyer also purchases a product or service from one of the seller's competitors.[144] Like tying arrangements and exclusive dealing agreements, a refusal to deal is a means of transferring market power from one area to another. It requires, however, that the seller possess not merely market dominance, but effective monopoly power,[145] a degree of market control which often is difficult to prove.[146]

A vertically integrated cable, STV, MDS, or DBS operator thus might have an incentive to prevent its customers from dealing with

140. *See* text accompanying note 135 *supra.*

141. *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306-07 (1949).

142. *See* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333 (1961).

143. *Id.* at 334; Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306 (1949).

144. Boycotts involving collusive activity by competitors are also subject to scrutiny under the antitrust laws. *See* Fashion Originators' Guild v. FTC, 312 U.S. 457, 461 (1941), wherein it was held that a combination (the Guild) of manufacturers of women's garments and manufacturers of the textiles used in making these garments which "purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members" violated § 14(3) of the Clayton Act.

145. *See, e.g.,* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (newspaper publisher's refusal to accept advertisements from advertisers who advertised over competing radio station held to violate § 2 of the Sherman Act where newspaper publisher had substantial monopoly power in the market for dissemination of news and advertising).

146. *See* text accompanying note 106 *supra.*

its competitors. As noted above,[147] it is less than clear whether the relevant market would be just DBS, DBS and STV, or DBS, STV and a wide variety of other media. For example, a DBS operator might refuse to sell time to a programmer who also bought time on STV stations. If the market were just DBS, the DBS operator might have sufficient monopoly power. If the market were all video media, however, a DBS operator presumably would not.[148]

Finally, a seller might attempt to impose resale price maintenance upon its buyers by setting minimum prices for them to sell a product or service. The seller's goal in this situation is either to assist its buyers by preventing price competition among them or to elevate prices in the face of comparatively inelastic demand.[149] Resale price maintenance is a per se violation of the antitrust laws.[150]

At this point, it is somewhat difficult to envision situations in which a cable, STV, MDS, or DBS operator might have an incentive to impose resale price maintenance. In theory, a program producer might attempt to impose resale price maintenance in order to help cable, STV, MDS and DBS operators prevent competition, by allowing them to sell its programming at approximately the same price. Experience to date, however, does not indicate the presence of these practices. As noted above, there is little price uniformity among cable television operators for either "basic" or "premium" services.[151] Moreover, cable, STV and MDS operators in the same market seem to charge different prices for essentially the same programming.[152] Nevertheless, at some point in the future these industries might have incentives to set minimum prices for programming and encourage a system of resale price maintenance by program suppliers.

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147. *See* text accompanying notes 92-106 *supra.*

148. Indeed, evidence of substantial market power appears to be a predicate to a finding that a particular refusal to deal violates § 2 of the Sherman Act. *See, e.g.,* Lorain Journal Co. v. United States, 345 U.S. 143 (1951); Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D. Mass. 1959), *aff'd in part and rev'd in part,* 284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

149. *See* R. POSNER, *supra* note 135, at 234-37.

150. Albrecht v. Herald Co., 390 U.S. 145 (1961). Prior to 1975, the Sherman Act included enabling legislation which allowed the states to enact "fair trade" laws authorizing resale price maintenance. 15 U.S.C. § 1 (1976). This federal exemption was repealed in 1975. Act of December 12, 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified at 15 U.S.C. § 1 (1976)). Today the per se rule is applicable to all agreements whereby a seller dictates the resale prices of the buyer.

151. *See* text accompanying note 111 *supra.*

152. *Compare* Paul Kagan Assocs., Inc., Census as of December 31, 1978 of Pay-Cable Systems Operational on September 30, 1978 (1979) (unpublished estimates available from Paul Kagan Associates, Inc., Carmel, CA) *with* Subscription Television, *supra* note 48 and Multipoint Distribution Service, *supra* note 55.

In addition, a supplier might come under pressure to create uniform prices as to other inputs—such as equipment—in the future.

Until the economic relationships between cable, STV, MDS and DBS become considerably clearer, it thus is impossible to predict particular types of vertical restraints. A number of different trends, however, certainly are quite possible. On the one hand, the Commission must take these into account in establishing a new regulatory scheme. On the other hand, the present antitrust laws may be adequate to deal with these potential vertical restraints.

E. *Structural Considerations*

Section 2 of the Sherman Act makes it illegal to "monopolize or attempt to monopolize or combine or conspire . . . to monopolize" interstate commerce[153] and section 7 of the Clayton Act prohibits any merger or acquisition "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[154] These are the main provisions of the antitrust laws aimed at structural considerations. In short, section 2 requires a showing of substantial market dominance and overtly anticompetitive acts by the defendant,[155] while section 7 requires only a showing of undue concentration of economic power.[156]

Both section 2 and section 7 thus rest upon the concept of "monopoly," which in turn requires reference to the relevant market in order to determine a firm's share of the market. As noted above, there are two relevant markets: first, a product market; and, second, a geographic market.[157]

Under section 2, a cable system's, STV station's, MDS operation's or DBS system's market share probably would be significantly below the fifty or sixty percent which appears to be a rough threshold figure established by the courts.[158] In addition, under section 2

153. 15 U.S.C. § 2 (1976).

154. *Id.* § 18 (1976) (originally enacted as Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914)).

155. SULLIVAN, *supra* note 89, at 94-105.

156. *Id.* at 592-99.

157. *See* text accompanying notes 92-106 *supra.*

158. A brief look at decisions on this point reveals that the level of the market share considered to constitute monopoly power is a matter of degree. There appears to be unanimity at high percentages. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87% share held by Grinnell and its affiliates supported an inference of monopoly power); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90% market share clearly monopolistic).

However, there is some doubt and disagreement in the middle range. *See, e.g.,* United States v. United States Steel Corp., 251 U.S. 417, 425 (1920) (50% control the courts traditionally have required a plaintiff to show not only that a defendant dominates a relevant market, but also that it has achieved its high market share through coercive, predatory, or otherwise anticompetitive practices.[159] In general, "internal expansion" by a firm is insufficient in itself to violate section 2.[160] Most regulated firms obviously are intelligent enough today to avoid any overtly anticompetitive behavior. As a result, the possibility of a section 2 violation by any one of the new media seems remote at best, because they probably will lack both the market shares and the anticompetitive practices.

The scope of section 7, however, is considerably broader than that of section 2. There is no requirement that a defendant commit any coercive, predatory or otherwise anticompetitive acts; in theory, the only issue is whether a particular merger or acquisition would "tend to create a monopoly." As a result, the Supreme Court has invalidated horizontal and vertical mergers which would have resulted in a firm that controlled as little as 2.3 percent of a national product market.[161] It thus is conceivable that mergers of cable systems, STV stations, MDS operations or DBS systems would violate section 7.

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did not constitute monopoly power); Amplex of Maryland, Inc. v. Outboard Marine Corp., 380 F.2d 112, 114 (4th Cir. 1967) (60% constituted monopoly power); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (doubtful whether 60% would constitute monopoly power but 33% certainly would not).

Thus, market share is not necessarily a reliable determinant of monopoly power. One commentator has suggested that the use of such a specific yardstick avoids the complex factors which underlie the determination of monopolistic power, including the very determination of the appropriate market itself. SULLIVAN, *supra* note 89, at 74-77. *See* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343 n.1 (D. Mass. 1953) (while 75% market share was significant, finding of monopoly power was based on factors other than pure influence from market share).

159. *See, e.g.*, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 75-77 (1911); United States v. American Tobacco Co., 221 U.S. 106, 181-84 (1911).

160. *See, e.g.*, United States v. United States Steel Corp., 281 U.S. 417, 421 (1920); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 10-11 (1911); United Banana Co. v. United Fruit Co., 245 F. Supp. 161, 169 (1965) (quoting Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 10-11 (1911)). However, the court in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), while recognizing size to be a factor, stated that size alone in terms of aggregated capital, power or volume of business was not conclusory in establishing a § 7 violation. *Id.* at 428-29.

161. *See* United States v. Pabst Brewing Co., 384 U.S. 546, 551-52 (1966) (although the merger yielded combined sales of only 4.49% of the national market, the Court also examined the effect achieved in the smaller, more localized markets, *i.e.*, combined sales of 23.95% for the Wisconsin market and 11.32% for the tri-state market); Brown Shoe Co. v. United States, 370 U.S. 294, 539-54 (1962) (the Court indicated that one of the reasons for invalidating a merger which yielded approximately 5% of the national sales market was the effect of the combination on smaller city markets).

Since horizontal mergers or acquisitions receive stricter scrutiny under section 7 than vertical mergers or acquisitions,[162] any attempt to acquire or merge with an existing competitor in the same service might be illegal—even if the resulting corporation had only a limited share of the market.[163] For example, a regional DBS system might have only five or ten percent of the national market for pay programming; a merger with another regional DBS system with a similar amount of the national market, however, might give the resulting corporation too much control of the regional DBS market under section 7.

On the other hand, vertical mergers or acquisitions generally receive more sympathetic treatment from the courts, because they oftentimes do not eliminate any competition between existing firms.[164] As a result, the courts generally require a showing of fairly substantial economic concentration before invalidating a vertical merger or acquisition.[165]

For a variety of reasons, it seems reasonable to expect a high degree of vertical integration in cable, STV, MDS and DBS operations. Substantial economic incentives probably exist for vertical integration, simply because all of these media operate as buyers and sellers in a number of different markets simultaneously. Unlike conventional television broadcasting, all four media need not only to buy programming and operate transmitters, but also to provide converters, specialized receivers and repair service for viewers. Indeed, the experience to date indicates that a number of firms already have embarked upon vigorous programs of vertical integration. For example, the major suppliers of pay programming are also major operators of cable systems.[166]

This tendency is even more marked in the field of satellite communications. Perhaps the most striking illustration of this is the RCA Corporation. RCA American Communications, Inc. owns satellites and earth stations which provide, *inter alia,* transmission of pay cable television programming throughout the United States. RCA also owns the National Broadcasting Company (NBC) as well as its "owned and operated" stations; and RCA manufactures television

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162. The Court has, on occasion, approved vertical acquisitions resulting in substantially larger market shares. *See, e.g.,* United States v. General Dynamics Corp., 415 U.S. 786 (1974).
163. *See* note 107 and accompanying text *supra.*
164. Department of Justice, Merger Guidelines ¶ 11, *reprinted in* [1968] 1 TRADE REG. REP. (CCH) ¶ 4510.
165. *See* note 169 *infra.*
166. *See* Subscription Television, *supra* note 48.

transmitters, television receivers and home video recorders.[167] If RCA acquired programming and some cable television systems, it would have complete vertical integration from program production through home viewing.

To the extent that significant vertical integration continues to occur in the fields of cable, STV, MDS and DBS, section 7 might be applicable. Assuming that a merger or acquisition gave the resulting corporation sufficient market power, a variety of other factors might show a section 7 violation. First, a vertical or "conglomerate" merger in these fields might create significant barriers to entry for potential competitors.[168] For example, a DBS operator's acquisition of a manufacturer of earth stations might exclude a potentially competitive manufacturer because of the high capital costs of beginning manufacturing operations and potential consumer preferences for the product of an existing DBS operator. Second, if an acquiring firm were an industrial giant like RCA, it might be held to have overly "deep pockets" to subsidize its new operations against present or potential competitors.[169] Third, vertical integration might allow an acquiring firm to obtain the advantage of "reciprocal dealings," by encouraging its sellers to give a buying preference to an acquired company.[170] For example, a cable television operator might be able

167. NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, STRUCTURE AND BUSINESS ACTIVITIES OF THE PARENT CORPORATIONS OF THE MAJOR COMMERCIAL TELEVISION NETWORKS (preliminary draft Oct. 1979) (copy on file at the offices of New York Law School Law Review).

168. *See, e.g.*, FTC v. Proctor & Gamble Co., 386 U.S. 568, 579 (1967). Clorox Chemical Co. was the leading manufacturer of household bleach producing approximately 48% of the national market. It essentially shared 80% of this market with five other firms, the remaining 20% of the market going to 200 small producers. *Id.* at 571. The FTC found that when the defendant, a major manufacturer of household products, acquired Clorox it might have substantially lessened competition in violation of § 7 of the Clayton Act. The basis for the FTC's conclusion was that defendant's "huge assets and advertising advantages . . . would dissuade new entrants and discourage active competition from the firms already in the industry due to fear of retaliation by [the defendant]." *Id.* at 572-75.

169. *See, e.g.*, Reynolds Metals Co. v. FTC, 309 F.2d 223, 229-30 (D.C. Cir. 1962). In this case, the court noted that Reynolds was the largest producer of aluminum foil and that it was one of many manufacturers of foil who sold large quantities to intermediaries known in the trade as "converters." *Id.* at 225. These converters colored and decorated the foil for specialty users (*e.g.*, florists, candy manufacturers, etc.). One of these converters, Arrow Brands, Inc., was acquired by Reynolds, but the FTC found, with the court of appeals affirming, that such a combination would violate § 7 of the Clayton Act. One of the primary considerations in finding a violation was the enormous financial support that Reynolds could provide Arrow. With such support from the "rich parent," Arrow would have the ability to sell its products below cost and thereby "undercut and ravage the less affluent competition." *Id.* at 229-30.

170. *See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). The defendant was a substantial purchaser of products from food processors, who in turn used dehydrated spices in the preparation of their products. When the de-

to apply pressure to a satellite common carrier to buy earth station equipment from the cable operator's manufacturing subsidiary. Finally, vertical integration naturally increases the risk that a firm will be able to "capture" a customer which otherwise might have done business with a competitor.[171] Vertically integrated cable television companies thus might require their operating systems to take their premium service only from their programming subsidiaries.[172]

As a result, section 2 and section 7 clearly have a role to play in regulating the conduct of cable, STV, MDS and DBS. Indeed, the District of Columbia Circuit Court of Appeals recently held that the Commission was required to consider the potential anticompetitive aspects of any merger which it approved under Title II of the Communications Act.[173]

F. *Primary Jurisdiction Under the Antitrust Laws*

In analyzing the potential applicability of the antitrust laws to these new media, the final question is the extent to which either private parties or the Justice Department would be required to litigate their claims before the Commission rather than the courts. Traditional doctrines of exclusive jurisdiction, agency immunization, or primary jurisdiction could, arguably, bar access to the courts. As indicated below, however, it is difficult to predict the application of these doctrines. To a very real extent, there are as many theories of jurisdiction as there are commentators.[174]

"Primary" jurisdiction, in a broad sense, seems to include at least three major sub-doctrines: exclusive jurisdiction, primary jurisdiction and agency immunization. When exclusive jurisdiction over a matter is conferred upon a regulatory agency such as the FCC, the courts are left with no jurisdiction in the particular area—except for a limited amount of judicial review of the agency's judgments in certain situations.[175] On the other hand, primary jurisdiction gives

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fendant acquired a manufacturer of such spices, the potential for creating reciprocal agreements became significant. *Id.* at 595-600.

171. *See* United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586 (1957). In this case, DuPont, one of a few manufacturers of auto paint, purchased a sizeable percentage of stock in General Motors Corp. The Court found that DuPont used its ownership of GM shares to insure that the automaker filled its paint requirements from DuPont. *Id.* at 606.

172. Recent Trends in Cable Television, *supra* note 18, at 30-32.

173. United States v. FCC, 44 RAD. REG. 2d (P&F) 59 (1978).

174. *See generally* Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867 (1976).

175. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). A reviewing court may set aside an agency decision when the court cannot conscientiously find that the evidence supporting the decision is substantial, when viewing the record in its entirety. *Id.* at 488.

the agency an initial opportunity to consider a legal issue or to find facts, but reserves for a court the ultimate power to render a judgment. Agency immunization, in the antitrust context, is the power of a regulatory agency to exempt an entire industry from being subject to antitrust laws. Thus, agency immunization is even more absolute a power than the agency's exercise of exclusive jurisdiction, as the entire scope of the exemption may be determined by the agency.

For example, a cable, STV, MDS, or DBS operator might have an incentive to tie programming to use of its receiving equipment. If the programming were attractive enough, this type of arrangement would be a per se violation of the antitrust laws.[176] Nevertheless, the only remedy might be before the Commission rather than the courts, on a theory of exclusive jurisdiction, primary jurisdiction, or agency immunization.

1. An Overview of the Doctrines

The original statement of exclusive jurisdiction came in the context of protecting ICC tariffs from scattergun collateral attacks in state courts.[177] Primary exclusive jurisdiction thus developed for purposes far different from its most common application today as a defense in an antitrust action.

The putative parent of the doctrine is *Texas & Pacific Railway v. Abilene Cotton Oil Co.*,[178] where the Court held that a shipper could not sue in state court to recover overcharges from a railroad, but instead had to commence a proceeding before the ICC. The Court reasoned that individual recoveries would permit de facto rebates to some shippers and encourage collusive lawsuits to give rebates, thus creating a lack of "uniformity" in rates.[179]

The easiest cases of agency immunization, naturally, are those in which the status of an agency's immunization power is clear. When a court finds that an agency could not conceivably immunize a violation of the antitrust laws, the court need not consider whether the agency must pass on the conduct.[180] Conversely, many industries operate under express statutory exemptions from the antitrust laws.[181] The existence of an exemption thus creates a legal situation

176. *See* text accompanying note 136 *supra*.
177. *See* note 178 and accompanying text *infra*.
178. 204 U.S. 426 (1907).
179. *Id.* at 440-46.
180. *See, e.g.*, Maryland and Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 461-64 (1960).
181. For a comprehensive list of industries operating under express statutory exemption from the antitrust laws, *see* Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741, 767-88 app. (1963).

very similar to exclusive jurisdiction; the jurisdiction of the courts is effectively destroyed and all control of the industry is vested in an agency.[182] The situation becomes infinitely more complicated, however, where the scope of an exemption is unclear. A decision in favor of immunization power has a powerful impact upon the parties to a lawsuit. Immunization may effectively destroy a plaintiff's cause of action. If it has the requisite power, the agency often will immunize the conduct, and the courts have long recognized the outcome-determinative effect of agency immunization.[183]

Primary jurisdiction in the most narrow sense exists only where there is concurrent jurisdiction between a court and an agency. In this situation, the question is which tribunal will proceed first, rather than which tribunal will proceed.[184] To be sure, primary jurisdiction has some impact upon the outcome of a case; after all, if an agency uses its "expertise" to find facts, review under the substantial evidence rule will restrict the reviewing court's role greatly.[185] In an exclusive jurisdiction situation, the court's only role is to subject the agency decision to very limited substantive review; in a primary jurisdiction situation, the court retains jurisdiction over the case and uses the agency decision as just one component in its own decision.[186] The plaintiff thus retains its right to a judicial remedy, subject only to a possibly binding decision from the relevant agency.[187]

182. *See, e.g.*, 47 U.S.C. §§ 221(a), 222(c)(1) (1968) (upon FCC approval of telephone and telegraph carrier consolidation or merger, the laws making them unlawful shall not apply). For further examples of statutes which exempt industries regulated by administrative agencies from the antitrust laws see Note, *Antitrust Immunity in the Communications Industries*, 44 VA. L. REV. 1131, n.l (1958).

183. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). Here the Court recognized "that the practical effect of applying the doctrine of primary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision or even to preclude such enforcement entirely." *Id.* at 353-54 (citation omitted).

184. *See* von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929, 931-32 (1954).

185. *See, e.g.*, Far East Conference v. United States, 342 U.S. 570 (1952). In *Far East Conference* the Court said:

> [A] principle, now firmly established, [is] that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined.

Id. at 574.

186. *See, e.g.*, Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973). In *Ricci*, the Court said that "where the regulating regime is administered by an agency, the antitrust court will stay its hand to permit institution of administrative proceedings if they are 'likely to make a meaningful contribution to the resolution of this law suit.'" *Id.* at 306.

187. *Id.* at 307-08. The *Ricci* Court said that "if it is found that the [agency] has merely followed and enforced its own rules, the antitrust court will be in a

2. Application of the Primary Jurisdiction Doctrines to Cable, STV, MDS and DBS

Application of the primary jurisdiction doctrines thus depends to a very real extent upon the type of regulatory scheme which an agency imposes upon a firm. As noted above, Congress' intent to vest primary or exclusive jurisdiction in an agency is highly determinative.[188] The Commission has available to it a variety of present or potential jurisdictional bases for cable, STV, MDS and DBS.[189] The result is that a different doctrine of primary jurisdiction may apply to each medium. As noted above, cable, STV, MDS or DBS operators might have an incentive to tie sales of programming to use of receiving equipment.[190] The same type of action under the same antitrust theory thus might or might not fall within the Commission's primary or exclusive jurisdiction.

For example, an antitrust suit against a cable television operator for tying "premium" service to use of its converter probably would not be subject to any primary jurisdiction doctrine, since the Commission imposes an increasingly limited scope of regulation upon cable television. The Commission apparently lacks any type of "pervasive regulatory scheme" sufficient to give it exclusive jurisdiction;[191] it seems doubtful even whether the Commission has enough "expertise" in the area to require a "referral."[192] In the event that the Commission did impose very specific requirements, of course, it might have either primary or exclusive jurisdiction; if such close regulation existed, an agreement by a number of cable operators

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position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the [agency] permits." *Id.*

188. *See* text accompanying note 180 *supra.*

189. *See* text accompanying notes 1-17 *supra.*

190. *See* text accompanying note 176 *supra.*

191. *See* United States v. Radio Corp. of America, 358 U.S. 334, 350 (1959). This case arose when the Radio Corporation of America (RCA) received FCC approval for an exchange of its Cleveland television station for one owned by the Westinghouse Broadcasting Company in Philadelphia. The Government, alleging a conspiracy on the part of RCA to acquire stations in five of the eight largest market areas, brought suit pursuant to the antitrust laws. *Id.* at 335-36. RCA contended that FCC approval of the exchange barred an independent action by the Government challenging it under the antitrust laws. *Id.* The Supreme Court, holding that with regard to television broadcasters the doctrine of primary jurisdiction does not apply, rejected RCA's contention. *Id.* at 350.

192. *Id.* at 350 n.18. Here the Court, referring to a memorandum written by the FCC disavowing either the power or the desire to foreclose the Government from antitrust actions, said: "Since, as Mr. Justice Brandeis observed the doctrine of primary jurisdiction rests in part upon the need for the skill of a 'body of experts,' it would be odd to impose the doctrine when the experts deny the relevance of their skill." *Id.*

not to carry a particular station's signal as required by the Commission[193] might invoke primary jurisdiction or a referral.

Although there appears to be an informal practice in some state courts of contacting the Commission for general advice about litigation involving cable television systems,[194] this would not require a prohibition on proceedings in a federal district court. Indeed, to the extent that any type of primary jurisdiction over cable television exists at all, it may rest with the state agencies which regulate cable systems on a fairly close basis. At least some lower federal courts have chosen in antitrust cases to defer to state regulatory commissions as a matter of discretion, in order to benefit from their day-to-day dealings with regulated firms.[195]

It is less clear whether the Commission would have primary or exclusive jurisdiction over STV in an action involving this type of tying agreement. The Commission and the courts have viewed STV as a type of broadcasting under Title III of the Act;[196] and the Court has held that no primary or exclusive jurisdiction generally exists as to broadcast stations under Title III, since the Commission does not exercise "pervasive" jurisdiction over them. In *United States v. Radio Corp. of America*,[197] the Court refused to apply a doctrine of primary or exclusive jurisdiction to defeat a Justice Department action for an injunction against NBC's acquisition of an additional television station.[198] The Court distinguished cases involving common carriers, noting that "there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears."[199] Unless the Commission chose or was compelled to regulate STV and its rates more closely, there would appear to be no jurisdictional bar to an antitrust action in a federal district court.[200] In a situation such as litigation over an STV operator's tying arrangement, the Commission particu-

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193. 47 C.F.R. §§ 76.55-76.63 (1979).

194. Interview with members of the Office of General Counsel, FCC, in Washington, D.C. (Oct. 21, 1974).

195. *See, e.g.*, Industrial Communications Syss., Inc. v. Pacific Tel. & Tel. Co., 505 F.2d 152 (9th Cir. 1974). The court said: "In the present case, the PUC's [California Public Utilities Commission] review of the nature of the market, the quality of present radiotelephone utility service, the competitive impact of defendant's entry into the market, and various other issues would be an invaluable aid to the district court." *Id.* at 157 (citation omitted).

196. *See* text accompanying notes 48-54 *supra.*

197. 358 U.S. 334 (1959). *See* note 191 and accompanying text *supra.*

198. 358 U.S. at 346-52.

199. *Id.* at 350.

200. *See* text accompanying notes 48-54 *supra.*

larly would seem to lack primary or exclusive jurisdiction, due to the fact that it has chosen not to regulate ownership of STV decoders.

A lawsuit against an MDS operator for a tying arrangement might invoke primary or exclusive jurisdiction, however, because the Commission regulates MDS as a common carrier.[201] As noted above, the basic doctrine of primary jurisdiction arose in the context of common carrier regulation and the Court's concern for maintaining uniform federal regulation.[202] In general, the Court has held that Congress made a deliberate decision in favor of regulation and against competition in the field of common carriers. In *FCC v. RCA Communications, Inc.*,[203] the Court held that the Commission had erred in authorizing a new international wire service solely to increase competition.[204] The Court noted that antitrust considerations were not controlling on the Commission's regulation of common carriers,[205] stating:

> The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiably favors competition in communications. . . . Whatever the reasons, they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance on safeguarding the public interest.[206]

Since this decision and the general trend of litigation in the transportation or common carrier industries tends to focus mainly upon rate regulation, it may be possible to argue that agency immunization and exclusive jurisdiction do not apply to MDS, since the Commission does not regulate its rates; the weight of this argument, however is unclear. To the extent that an action involves conduct which the Commission does not regulate under an MDS tariff, however, exclusive jurisdiction or immunity might not exist;[207] the relevant conduct might be viewed as falling solely within the Commis-

201. 47 C.F.R. § 21.900 (1978). *See also* Report and Order, 29 RAD. REG. 2d (P&F) 382 (1974).
202. *See* text accompanying note 179 *supra*.
203. 346 U.S. 86 (1953).
204. *Id.* at 95.
205. *Id.* at 93.
206. *Id.*
207. *See, e.g.*, Sound, Inc. v. American Tel. & Tel. Co., [1979] 2 Trade Cas. ¶ 62,974 (S.D. Iowa Sept. 28, 1979).

sion's general Title III jurisdiction over uses of the over-the-air radio spectrum.[208]

Finally, the status of DBS will remain unclear until the DBS industry develops and its economic as well as regulatory characteristics become visible. The Commission probably has discretion to regulate DBS as a broadcaster, common carrier or combination thereof.[209] If it opts for loose regulation, presumably there would be no primary or exclusive jurisdiction to bar an antitrust suit against a DBS system. On the other hand, if it opts for close regulation through tariffs, there could be a substantial argument for primary or exclusive jurisdiction as to matters covered by a tariff.

The upshot of the prior discussion is simply that the Commission largely controls its own destiny in this area. It can structure its regulations either to encourage or discourage antitrust suits brought by private parties or the Justice Department. As the Court has noted time and time again,[210] the antitrust and regulatory regimes are often mutually exclusive. At this still comparatively early stage in the regulation of cable, STV, MDS and DBS, the Commission should thus give some consideration to which regime it wishes to have govern.

VII. Conclusion

The potential exists for many types of anticompetitive behavior by cable, STV, MDS and DBS operators. To a large extent, traditional antitrust enforcement mechanisms will police these practices. The Commission thus can leave consideration of many of the previously discussed anticompetitive practices to litigation brought by private parties, the Department of Justice and the Federal Trade Commission. If the Commission decides to rely upon traditional antitrust litigation, however, it should be careful to structure its regulations in order not to bar access to the federal courts under theories of primary jurisdiction.

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208. 47 U.S.C. § 301 (1976). *See* text accompanying notes 2-8 *supra.*

209. *See* text accompanying notes 63-83 *supra.*

210. *See, e.g.,* Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); National Broadcasting Co. v. United States, 319 U.S. 190 (1942).