

THE DEATH OF MEDIA REGULATION IN THE AGE OF THE INTERNET

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INTRODUCTION

The preservation of a vibrant, diversified media has been a cornerstone of U.S. policy for decades. Since the birth of broadcast television, Congress and the Federal Communications Commission (FCC or “Commission”) have created a large body of regulations specific to electronic communications media. Among other aims, these regulations have sought to prevent the concentration of control over the media—a goal that expresses non-economic as well as economic concerns.¹ The Supreme Court upheld these regulations in landmark decisions such as *Red Lion Broadcasting Co. v. FCC*² and *Turner Broadcasting System, Inc. v. FCC*,³ despite the First Amendment’s general mandate that the government not interfere with the freedom of speech or the freedom of the press.⁴

Enter the Internet—the latest electronic medium for delivering content. At first glance, it seems that the Internet needs no help in promoting diversity and decentralization. The World Wide Web dramatically reduces publishing costs: “With a computer, a modem and a telephone line, every person can become a publisher.”⁵ Indeed, it sometimes seems that every person who has wanted to publish on the

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1. For instance, when the Federal Communications Commission decides between applicants vying for a broadcast license, diversity of control is an important factor in its decision. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) [hereinafter FCC Policy Statement]. These and other regulations as well as the normative concerns motivating them will be discussed in Parts I and II of this Note.

2. 395 U.S. 367 (1969).

3. 512 U.S. 622 (1994).

4. “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend I.

5. Howard Rheingold, *Networking Brings Power to the People*, DAILY TELEGRAPH (London), May 11, 1994, at 16, available at 1994 WL 11325314.

Internet *has* published. For instance, a recent survey of the Web placed the number of Web sites at over 93 million.⁶

However, legal and economic trends explored in this Note suggest that this trend may reverse itself over the long term. On the economic front, the incentives driving Internet media companies generally favor aggregation over disaggregation—as do those driving other electronic media companies. But, as this Note demonstrates, the regulatory landscape in which the Internet will develop is vastly different from the one that nurtured broadcast and cable television. Instead of providing a check on economic forces, regulations will largely open the door to them. This is because the rationales used by the Supreme Court in upholding electronic media regulations are largely inapplicable in the context of the Internet. This Note explores the reasons behind, and the potential consequences of, the slide into obsolescence of a half-century of regulatory oversight promoting diversification of control and diversity of expression in electronic media.

Part I summarizes the normative underpinnings of a communications policy promoting media diversification. By way of a survey of the rules established by the FCC, Part II demonstrates how this policy animates broadcast and cable regulation. Part III demarcates the constitutional boundaries of these regulations, and it indicates how these limitations restrict their applicability to the Internet. Part IV highlights the need for regulation by discussing some of the economic incentives that are likely to apply to Internet companies.

I

THE IMPORTANCE OF MEDIA DIVERSIFICATION

As a general matter, diversification is better than concentration in any industry. By charging higher than the competitive rate of return, monopolists produce a “dead weight loss,” reducing social welfare.⁷ But, in the communications industries, the importance of diversification goes beyond concerns about sound economics to concerns about a well-functioning democracy and personal autonomy.

Diversification of control in the communications industry is important for several reasons. First, diversification of control promotes diversity of expression, the pursuit of which is essential to realizing the values of the First Amendment. As the FCC recently noted, “For

6. Internet Software Consortium, Internet Domain Survey (July 2000), at <http://www.isc.org/ds/WWW-200007/index.html>.

7. Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity. These goals are separate and distinct, yet also related. . . . Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles."⁸ The FCC's rules relying on this view, such as those that promote minority ownership of broadcast stations, have generally been approved by Congress and upheld by the Supreme Court.⁹ Moreover, the connection between diversity of expression and ownership was given Constitutional *gravitas* by the Court decades ago. Justice Oliver Wendell Holmes articulated the view that a marketplace of competing ideas is essential in the quest for truth. In his dissent in *Abrams v. United States*, Holmes stated that our Constitution is predicated on the theory that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁰ In 1945, in *Associated Press v. United States*, the Court further stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹¹ Diversity of expression is also one of the ingredients of a properly functioning democracy. Exposure to different ideas allows the citizenry to make informed choices and to check ill-informed ones made

8. Federal Communications Commission Biennial Review of Broadcast Ownership Rules, 65 Fed. Reg. 43333, 43334 (July 13, 2000). Although some economists, such as Peter O. Steiner in *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952), have concluded that monopolies may, in certain communications media, actually contribute to diversity of expression, empirical data exposed by Matthew L. Spitzer in *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 345 (1991), suggests that Steiner's model may have ignored certain facts, such as the reality that the tastes of minority owners as well as certain advantages which they enjoy (like lower monitoring costs) may make them more likely to produce programming catered to minority groups. This in turn increases the diversity of expression overall. Additionally, distributions of viewer preferences may also determine whether or not monopolies are preferential to competition. See THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 88-92 (2nd ed. 1998).

9. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 563 (1990) ("[T]he FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."); see also *id.* at 569 (endorsing Commission's conclusion that there is empirical "nexus between minority ownership and programming diversity"). Congress itself expressed this preference for competition and diversity in the Telecommunications Act of 1996. See 47 U.S.C. § 521(4), (6) (1994) ("The purposes of this subchapter are to . . . assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public . . . [and to] promote competition in cable communications . . .").

10. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

11. 326 U.S. 1, 20 (1945).

by its representatives.¹² The beneficiaries of a policy promoting diversity of expression, then, are not just the individual groups whose views might be aired; “rather, the benefits redound to all members of the viewing and listening audience.”¹³

Beyond its role in promoting diversity of expression and advancing First Amendment values, disaggregation of the media industry is also important for individual self-governance and personal autonomy. As Professor Yochai Benkler explains, an individual’s options in life are at least partially constrained by his or her view of the world.¹⁴ And since a world view is, in turn, limited by the information one receives, any entity that controls information used by others to make choices wields tremendous power over them.¹⁵ According to Professor Benkler, if a certain class of persons (“Class A”) can control the information received by a second class (“Class B”),

Class A can manipulate the information environment of Class B in order to make it more likely that they will choose to behave in ways that make room for, or facilitate, the life choices of Class A persons. . . . Members of Class A are more self-governing than members of Class B, and they are so partly by exercising dominion over members of Class B.”¹⁶

This insight points to the heart of the difference between communications products and other goods: the former directly affect the way we form opinions of the world around us. There is, then, an inherent danger in a communications medium dominated by one or a few corporations that control or own vast amounts of information. Even though such entities may purport to represent diverse viewpoints, over time they may be able to steer individuals’ tastes and preferences to their own benefit.¹⁷

12. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 34 (1982) (“The reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter.”); see also *Craig v. Harney*, 331 U.S. 367, 383 (1947) (Murphy, J., concurring) (“A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty.”).

13. *Metro Broad., Inc.*, 497 U.S. at 568.

14. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 381-84 (1999).

15. *Id.* at 383 (arguing that to extent efforts by persons to control informational environment of another are successful, “the choices of the information controller, rather than those of the information recipient, constrain the life of the recipient”).

16. *Id.* at 383-84.

17. See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 322 (1997) (arguing that “the market creates opportunities for manipulative or ideologically distorted content”). This view may find support in Justice Brandeis’ First Amendment jurisprudence. In *Whitney v. California*, 274 U.S. 357 (1927), Brandeis

For these reasons, the promotion of the goals of diversification of control and diversity of content in media should remain important driving forces in any set of rules governing the communications industry. Indeed, these values have long been a part of U.S. communications policy, dating to the birth of broadcast television, and are manifested in FCC regulations.

II

PRESERVING DIVERSIFICATION IN “TRADITIONAL” ELECTRONIC MEDIA

Electronic media display strong tendencies toward aggregation. These tendencies stem partially from the fact that a producer’s marginal costs of providing information through electronic media are generally low or zero, whereas the sunk costs of providing information are large. While it costs a great deal to set up a news or entertainment service and to deliver it to one user, to provide the same content to successive users is cheap or nearly costless.¹⁸ In this scenario—one in which marginal costs are declining—pricing at the competitive levels does not allow for the recovery of sunk costs, and competition among producers generally results in the survival of a dominant firm that can set its price above marginal cost.¹⁹ Alternatively, information producers can differentiate their products and exert at least some degree of market power—a condition known as “monopolistic competition.”²⁰ In this case, producers can charge above marginal cost for their product and recover fixed costs.²¹ Either outcome favors an equilibrium

in his concurrence clarified the connection between personal autonomy and freedom of expression in the context of freedom from governmental interference, tracing it back to notions held by the Founding Fathers:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Id. at 375.

18. Baker, *supra* note 17, at 317.

19. EDWIN MANSFIELD, *PRINCIPLES OF MICROECONOMICS* 189 (7th ed. 1992).

20. *Id.* at 226.

21. CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 24-25 (1999) (positing that dominant firm and differentiated product models are “[the] only two sustainable structures for an information market”).

state in which information producers operate as monopolists, even if they have diminished market power.

Given this effect, one might well wonder why we do not see just a few electronic media companies dominating their respective industries.²² The relative state of disaggregation is no accident—it is directly due to the fact that the traditional electronic media companies have been, almost since their inception, regulated heavily by Congress and federal agencies. In some cases, the regulations have directly countered the tendency to concentrate distribution. In others, these regulations have acted as *de facto* drivers of diversity of ownership even when that was not their principal motivation.

The birth of broadcast industry regulation can be traced to the perceived scarcity of the medium that was used for transmission.²³ The scarcity was thought to create a tragedy of the commons—the “tragedy” being that with more than one person using the same or nearby frequencies, the cacophonous interference would ensure that nobody was heard.²⁴ In response, Congress passed the Radio Act of 1927, giving the Federal Radio Commission the power to allocate frequencies through licensing by applying the “public interest, convenience, or necessity” standard.²⁵ Over the years, the FCC, the Federal Radio Commission’s successor, promulgated many regulations using this standard,²⁶ and several of these regulations have prevented the formation of media monopolies either directly or indirectly. For instance, in deciding between applicants vying for a broadcast license, the Commission has stated that one of the values driving its decision is the desirability of “a maximum diffusion of control of the media of

22. See, e.g., *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1046 (7th Cir. 1992) (noting that competition in broadcasting actually increased in 1980s by addition of Fox network as well as increase in number of independent television stations since 1970).

23. KRATTENMAKER, *supra* note 8, at 11 (“[N]ot everyone who wanted to use the airwaves could do so. In that sense, spectrum was scarce.”).

24. See *id.* at 9 (noting that that in period immediately preceding regulation, chaos reigned as multitude of companies vied for same slice of spectrum).

25. Radio Act of 1927, Pub. L. No. 632, § 9, 44 Stat. 1162, 1166 (codified as amended in scattered sections of 47 U.S.C.). In the Communications Act of 1934, Congress put regulation of the broadcast spectrum and of the interstate portions of the telephone and telegraph companies within the purview of the FCC. Communications Act of 1934, Pub. L. No. 416, 66 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.). Over the years, Congress has amended the Communications Act several times. See KRATTENMAKER, *supra* note 8, at 22 & n.92.

26. The FCC’s regulations are most relevant to the argument concerning disaggregation presented here. Congress is the chief source of many of the regulations and recently passed an extensive set of amendments to the Communications Act, directly affecting ownership rules in the Telecommunications Act of 1996. See KRATTENMAKER, *supra* note 8, at 22-23, 320.

mass communications.”²⁷ Even more to the point, the FCC’s regulations have limited the number of broadcast licenses that can be controlled directly or indirectly by one firm,²⁸ and they have restricted the number of different media outlets controlled by one firm in a media market.²⁹ For instance, in the context of a merger, the FCC allows an entity to control two television stations in a single market only if at least one of the stations is not among the top four stations in the market and at least eight “independently owned and operating full-power commercial and noncommercial TV stations would remain” in the market after the transaction is completed.³⁰ All of these regulations have countered aggregation incentives.³¹ Other FCC rules have dealt with diversity of content rather than diversification of ownership. For instance, until the 1980s, the FCC enforced the “fairness doctrine,” which compelled licensed broadcasters to provide balanced coverage of public issues, thereby allowing diverse voices access to the airwaves.³²

On the cable side, Congress’s and the FCC’s regulatory initiatives have been much less restrictive and have been motivated to a large extent by the goal of protecting the broadcast industry against wipeout by the cable industry (which was originally thought to have the ability to overwhelm broadcasters by importing distant signals).³³ For instance, the Cable Television Consumer Protection and Competition Act of 1992³⁴ forced cable systems to establish a tier of basic services consisting of retransmitted broadcast channels.³⁵ Under the auspices of the same statute, the FCC promulgated the so-called “must-carry” rules, forcing owners of cable systems to carry local

27. FCC Policy Statement, *supra* note 1, at 394.

28. Multiple Ownership, 47 C.F.R. § 73.3555 (2000).

29. *See, e.g.*, Cross-Ownership, 47 C.F.R. § 76.501(a) (2000) (restricting common ownership of broadcasters and cable systems).

30. 47 C.F.R. § 73.3555(b)(2).

31. For instance, when Westinghouse acquired CBS, it was forced to divest some stations. *See Westinghouse Completes CBS Acquisition*, N.Y. TIMES, Nov. 25, 1995, at A47. The FCC recently proposed easing restrictive ownership rules and allowing media companies to own two stations in a market. *See Stephen Labaton, U.S. Seeks to Ease Some Restrictions on Broadcasters*, N.Y. TIMES, May 31, 2000, at A1.

32. *See* Ark. AFL-CIO v. FCC, 11 F.3d 1430, 1433-34 (8th Cir. 1993) (summarizing history of fairness doctrine); *see also infra* notes 42-43 and accompanying text.

33. *See, e.g.*, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 361 (D.C. Cir. 1963) (noting that FCC’s reason for denying license to cable television operator was that granting such license “would result in the ‘demise’ of the local television station”).

34. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.).

35. KRATTENMAKER, *supra* note 8, at 534.

broadcast stations.³⁶ The FCC also sought to curb the ability of cable companies to control the programming transmitted on the cable medium. In 1993, the FCC adopted a forty percent limit on the number of channels that “can be occupied on a vertically integrated cable system by video programmers in which the cable operator has an attributable interest.”³⁷ The benefit of these rules was that the cable companies’ control over the medium used for distribution of content was significantly reduced, and the Commission was able to ensure that in any geographic market consumers had access to a diverse set of programmers and programming.³⁸

Clearly then, preserving diversity of ownership and control has long played a major role in U.S. communications policy, either as a primary or secondary motivation behind many of the FCC’s regulations. These regulations have therefore fulfilled several important objectives, including realizing the intent of the First Amendment.³⁹ Yet, even as the First Amendment permeates the FCC’s regulations, it also limits the sphere in which the agency can legitimately act, as the Supreme Court’s jurisprudence on the constitutional limits of electronic media regulation demonstrates.

III THE CONSTITUTIONAL BOUNDARIES OF MEDIA REGULATION

The Supreme Court considers media regulation an extremely serious matter, often perceiving it as an encroachment on the First Amendment’s mandate that government not interfere with speech.⁴⁰

36. Signal Carriage Obligations, 47 C.F.R. § 76.56 (1998). The pro-competitive, anti-aggregation stance of the Commission is evident in its rationale. It promulgated the rules “to protect our system of television allocations and promote competition in local markets.” In the matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C. Rcd 2965 (1993), 1993 F.C.C. LEXIS 1835.

37. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits, 8 F.C.C. Rcd 8565, 8567 (1993), 1993 F.C.C. LEXIS 5406.

38. Driving the Commission were concerns expressed by Congress that “cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems.” Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460-61. The rules were promulgated in the name of “a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.” *Id.* at § 2(a)(6).

39. “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend I.

40. See *infra* notes 56-59 and accompanying text.

Still, the Court has given the FCC a limited amount of room to promulgate regulations in the spheres of broadcast and cable television, thereby creating exceptions under specific rationales. In order to consider whether the same rationales apply to the context of the Internet, the reasoning used by the Court to uphold the FCC's regulations in the face of First Amendment challenges must be analyzed.

The Supreme Court dealt directly with the interaction between broadcast regulation and the First Amendment in its 1969 decision, *Red Lion Broadcasting Co. v. FCC*.⁴¹ At issue were FCC regulations encompassed under the rubric of the fairness doctrine. This doctrine mandated that broadcasters present competing views of public issues.⁴² When broadcasting political editorials or attacks, the subject of such coverage was to be given the chance to reply on the air—at the broadcaster's expense if sponsorship was not available.⁴³ The general requirement, that broadcasters present competing views, has roots in the early history of broadcasting; the more specific requirement, that subjects be given a chance to respond, was imposed by the FCC after 1967.⁴⁴ In enacting this requirement, the FCC acted under the authority of a congressional statute that required broadcasters “to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”⁴⁵ Broadcasters, however, challenged the fairness doctrine and the statute as contrary to the First Amendment.⁴⁶ In a unanimous opinion, the Court held that that the regulations at issue “enhance rather than abridge the freedoms of speech and press protected by the First Amendment” and were thus “valid and constitutional.”⁴⁷

The Court acknowledged that because the electromagnetic spectrum could be used for speech, it “is clearly a medium affected by a First Amendment interest.”⁴⁸ However, the First Amendment did not prohibit the government regulations at issue, as the medium itself had a peculiar quality: When two people used the airwaves to speak or communicate at the same or nearby frequencies, neither could be

41. 395 U.S. 367 (1969).

42. *Id.* at 377-78.

43. *Id.* at 377. The rules mandated by the doctrine have since been repealed. *See In re Complaint of Syracuse Peace Council*, 2 F.C.C. Rcd 5043 (1987), 1987 FCC LEXIS 3349.

44. *Red Lion Broad. Co.*, 395 U.S. at 370-71.

45. Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1(4), 73 Stat. 557 (amending Communications Act of 1934, § 315(a), 66 Stat. 717).

46. *Red Lion Broad. Co.*, 395 U.S. at 386.

47. *Id.* at 375.

48. *Id.* at 386.

heard because of interference.⁴⁹ This interference created a situation in which “only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.”⁵⁰ Because interference made the availability of the medium for communication unusually scarce, regulation of the airwaves was necessary: “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an *unabridgeable* First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”⁵¹ It was the scarcity inherent in the medium, and the fact that “chaos [had] ensued” in the absence of regulation, that prompted Congress and the FCC to act in the first place.⁵² Under these conditions, the broadcaster was simply a proxy or fiduciary for the community and therefore had obligations “to present those views and voices which are representative of his [or her] community.”⁵³ A broadcaster had no constitutional right to “monopolize a radio frequency to the exclusion of his [or her] fellow citizens.”⁵⁴ Thus, the regulations at issue were justified.

While it was clear that these theoretical pillars, scarcity and interference, upheld the fairness doctrine and its attendant regulations, at one point in the opinion the Court suggested that the First Amendment rights at stake were those of the viewing public, not of the broadcasters. The consequence of this assertion meant that the fairness doctrine was actually required rather than being merely constitutionally acceptable:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial That right may not constitutionally be abridged either by Congress or by the FCC.⁵⁵

49. *Id.* at 387-88.

50. *Id.* at 388.

51. *Id.* (emphasis added).

52. *Id.*

53. *Id.* at 389.

54. *Id.*

55. *Id.* at 390 (citations omitted).

In later decisions, however, the Court retreated from this view, claiming scarcity drove the *Red Lion* decision. For example, in *Consolidated Edison v. Public Service Commission of New York*, the Court struck down, on First Amendment grounds, a state regulation that prohibited a utility from including political material promoting nuclear energy in its billing envelopes.⁵⁶ The Court specifically distinguished *Red Lion* on two grounds. First, “it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second . . . [u]nlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a ‘cacophony of competing voices.’”⁵⁷ Furthermore, in the context of mass media not inflicted with the problem of scarcity and interference, the Court has been extremely wary of regulation. For example, in *Miami Herald Publishing v. Tornillo*, in which a political candidate demanded access to a newspaper that enjoyed a near monopoly in the city of Miami,⁵⁸ the Court held that a statute mandating “right of reply” access for political candidates in newspapers in order to respond to criticism brought about “a confrontation with the express provisions of the First Amendment.”⁵⁹

While broadcast regulations rely on scarcity of the electromagnetic spectrum, cable regulations are dependent on the amount of control exerted by the cable operators on the content to which their viewers have access. The defining case, *Turner Broadcasting System v. FCC* (“*Turner I*”), resolved the constitutionality of provisions of the Cable Television Consumer Protection and Competition Act of 1992 that forced cable television operators to carry local broadcast television stations.⁶⁰ These must-carry regulations were included in the statute to counter the fact that the “physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, [were] endangering the ability of over-the-air broadcast television stations to compete for a viewing audience.”⁶¹ Cable programmers and operators challenged the constitutionality of the regulations,⁶² but the Court, after a remand, upheld the must-carry regulations in *Turner Broadcasting System v. FCC* (“*Turner II*”).⁶³

56. 447 U.S. 530, 544 (1980).

57. *Id.* at 543.

58. 418 U.S. 241, 244 (1974).

59. *Id.* at 254.

60. 512 U.S. 622, 630 (1994) [hereinafter *Turner I*].

61. *Id.* at 632-33.

62. *Id.* at 636.

63. 520 U.S. 180, 185 (1997) [hereinafter *Turner II*].

The *Turner I* majority prefaced its opinion, as did the Court in *Red Lion*, by acknowledging the First Amendment interests at stake: “Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”⁶⁴ The Court then rejected the contention that government regulation of cable television should be accorded the same deference as the regulation of broadcast. Referring to the absence of scarcity of the medium, the Court stated that broadcast cases did not apply “because cable television does not suffer from the inherent limitations that characterize the broadcast medium.”⁶⁵ On the other hand, the regulations were not to be rejected as they were in *Miami Herald*. The distinction, according to the Court, lay in the degree of control exerted by the cable operator:

[W]hen a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.

. . . When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator *bottleneck, or gatekeeper, control* over most (if not all) of the television programming that is channeled into the subscriber’s home.⁶⁶

The reason that the Court thought this level of control harmful was that cable operators enjoyed “monopoly power” in their markets.⁶⁷ These two factors, along with the fact that the regulations were deemed to be content-neutral,⁶⁸ made the difference for the *Turner I* majority. The First Amendment, the Court noted, “does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.”⁶⁹ Because of the level of control exerted by the cable companies, the Court upheld the regulations, subject to an inquiry on remand by the lower court into whether the three interests asserted by the government—“(1) preserving the benefits of free, over-the-air, local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for televi-

64. *Turner I*, 512 U.S. at 636.

65. *Id.* at 639.

66. *Id.* at 656 (emphasis added).

67. *Id.* at 661.

68. *Id.* at 647 (“The design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech.”).

69. *Id.* at 657.

sion programming”⁷⁰—were in fact being furthered by the must-carry provisions and that the statute was narrowly tailored to achieve its objectives;⁷¹ the usual test for regulations in the area of speech.⁷² In *Turner II*, the Court answered “both questions in the affirmative, and conclude[d] [that] the must-carry provisions are consistent with the First Amendment.”⁷³

By clarifying the circumstances under which the electronic media can be regulated consistently with the Constitution, the *Red Lion* and *Turner I* and *II* decisions provide a useful gauge of whether, and to what extent, the First Amendment allows regulation of the Internet.

As used in this Note, the word “Internet” has a specific meaning—one that encompasses the long-term characteristics of the medium. It stands for a broadband electronic network that can deliver content (e.g. motion pictures, audio, images, and text) to an individual at his or her behest. The Internet is different from other communications media in that, theoretically at least, individuals have the option of seeking content from a potentially infinite number of sources, although their ability to do so may be constrained through particular Internet access providers. This concept is important to consider when discussing the legal regime that may be imposed on Internet media companies in light of the *Red Lion* and *Turner I* and *II* decisions.

In the context of the Internet, neither of the predicates of *Red Lion*—interference and scarcity—apply. First, regarding interference, the Court in *Red Lion* stated:

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening But the reach of radio signals is incompa-

70. *Id.* at 662.

71. *Id.* at 664-68.

72. *See* *United States v. O’Brien*, 391 U.S. 367, 377 (1968). This case held that: [G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

73. *Turner II*, 520 U.S. 180, 185 (1997). *But see* Benkler, *supra* note 14, at 374 (arguing that Court allowed regulation not on basis of physical control that cable companies exerted but to “alleviate the effects of a technological or economic reality that prevents ‘diverse and antagonistic sources’ from producing information and disseminating it widely”).

rably greater than the range of the human voice and the problem of interference is a massive reality.⁷⁴

The Court likened radio interference to a “cacophony of competing voices, none of which could be clearly and predictably heard.”⁷⁵ These sentences make clear that, in the Court’s view, the problem of interference is the inability of one speaker to communicate at the same time as another speaker. For the Internet, this problem would be tantamount to the inability to use the medium when others are using it. However, corporations and individuals do have the ability to publish simultaneously on the Web.⁷⁶ Second, just as interference is not a factor where the Internet is concerned, scarcity is also absent as there is no drastic imbalance in the number of individuals who want to publish on the Web and space on the Web available for publishing.⁷⁷

One can get a sense of how the Court is likely to treat the issue of scarcity on the Internet from its decision in *Reno v. ACLU*.⁷⁸ In that case, the ACLU issued a challenge to provisions in the 1996 Telecommunications Act that banned “indecent” and “patently offensive” content on the Internet—collectively known as the Communications Decency Act (CDA).⁷⁹ Like the rules promoting the fairness doctrine at stake in *Red Lion*, these regulations were content based. A seven-justice majority affirmed the district court’s decision striking down the law on First Amendment grounds.⁸⁰ In its decision, the Court rejected outright the notion that conditions in broadcasting and the Internet were similar enough to warrant deference to Internet regulations:

[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone

74. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-88 (1969).

75. *Id.* at 376. One could call the Internet publishing cacophonous for arguments sake. Nevertheless, it is a cacophony in which individual voices published on individual Web sites are able to be heard clearly.

76. *See supra* text accompanying note 6.

77. *Red Lion Broad. Co.*, 395 U.S. at 388 (characterizing scarcity as state in which there are “substantially more individuals who want to broadcast than there are frequencies to allocate”).

78. 521 U.S. 844 (1997).

79. *Id.* at 859 (discussing provisions of Communications Decency Act, 47 U.S.C. § 223 (1994 & Supp. IV 1999)).

80. *Id.* at 885.

line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.⁸¹

The Court, then, based largely on the lack of scarcity in the new medium, found little similarity between the Internet and broadcast television for First Amendment purposes. As *Red Lion* makes clear, once scarcity is rejected as a preexisting condition, the Court is likely to be hostile to content-based regulation.⁸²

Access-based regulations of the kind that were at stake in *Turner I* and *II* are also unlikely to be upheld when applied to the Internet given recent technological developments. In *Turner I* and *II*, the Court upheld the regulations because the cable operators exerted a great degree of control over access to the medium.⁸³ To a limited extent, the level of control that Internet access companies have over the content that their customers receive is reminiscent of the power of cable companies at the time that the *Turner I* and *II* cases were decided.⁸⁴ However, the difference is in the competitive landscape. Unlike the market for access to content through cable companies at issue in *Turner I* and *II*, access to Internet content is vibrant and competitive. Access to the Internet can be provided by cable television companies, telephone companies, as well as by wireless providers and satellite-television providers.⁸⁵ If a consumer finds access to content blocked by one Internet access provider, he or she can always turn to one of its competitors. The absence of competition in the cable industry was clearly important to the *Turner I* decision,⁸⁶ and its presence in the Internet access industry will likely quash any notion that an Internet access provider exerts bottleneck control over the content a user sees on the Internet. Without this form of control, the prerequi-

81. *Id.* at 870.

82. *See supra* text accompanying notes 54-59.

83. *See supra* text accompanying notes 65-66.

84. *See, e.g.*, Paul Krugman, Editorial, *Mergers Most Foul?*, N.Y. TIMES, Jan. 14, 2001, Week in Review, at 17 (highlighting fears of consumer groups that merger between Internet access company, AOL, and Time Warner was “really about forcing cable customers to use AOL for Internet access and forcing AOL subscribers to download Time Warner content”).

85. *See* John Edwards, *The Promise of a Wireless World: Broadband Wireless Struggles to Get Off the Gound and Remain There*, UPSIDE, July 2000, at 176; Sheila Galatowitsch, *Wireless Broadband: Friend or Foe?*, CABLE WORLD, May 8, 2000, at 68, 70.

86. *See supra* text accompanying notes 66-67.

sites for regulation required by the Constitution as specified in *Turner I* do not exist.⁸⁷

The Supreme Court, then, is unlikely to allow either content- or access-based regulations of the type that were considered in *Red Lion* and *Turner I* and *II* in the Internet space. The next Part explores the potential consequences to the development of the Internet of these constitutional restrictions.

IV

INTERNET MEDIA COMPANIES' ECONOMIC INCENTIVES

This Note began with the premise that a communications policy promoting both diversification of ownership and diversity of content satisfied important non-economic concerns—namely democratic governance and personal autonomy.⁸⁸ Since regulatory initiatives that promoted these concerns for many years are unlikely to pass constitutional scrutiny in the context of the Internet, it is worth exploring how Internet media companies will act in the absence of these ground rules. This Part explores the economic incentives that are likely to apply to Internet media companies in the freedom of the marketplace. This discussion is followed by a survey of the actual behavior of a few Internet media companies in this environment. The analysis must naturally be speculative given the novelty of the medium. However, this exploration can serve as an early indicator of whether or not the values that have informed U.S. communications policy for decades will remain standing.

The most important economic force that applies to all electronic media companies, including those that operate on the Internet, has already been discussed. Because of the high sunk costs and low marginal costs of distributing information electronically, there is a strong tendency for dominant, monopolistic media companies to emerge.⁸⁹ Other forces acting on Internet media companies—some of which are

87. Perhaps representative of how the Court viewed the regulations, Justice Breyer in his *Turner II* concurrence acknowledged that the regulation at stake extract[ed] a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This “price” amounts to a “suppression of speech.”

Turner Broad. Sys. v. FCC, 520 U.S. 180, 226 (1997) (citation omitted).

88. See *supra* notes 8-17 and accompanying text.

89. See *supra* notes 19-21 and accompanying text.

also shared to varying degrees by companies in broadcast and cable television—are explored in this Part.

As in broadcasting, much of the content on the Internet is available for free with the costs being recovered through advertising. But when compared with the Internet, broadcasting is an inferior medium for delivering advertising. After all, broadcasters cannot gather feedback from users as to their preferences except over the long term through ratings; they cannot deliver content *when* users want to see it (hence necessitating a whole industry geared towards “time-shifting” through syndication and video cassette rentals), nor can they customize content.⁹⁰

The Internet does not suffer from these limitations. Its key attribute is that it operates as a one-to-one medium, allowing content to be customized for each single user.⁹¹ As one marketer put it:

The Internet is more like the telephone than the television: It allows an individual one-on-one dialogue that’s a great opportunity for us. It’s the truest relationship marketing tool we’ve ever had.

Suddenly we have a new tool to facilitate unique dialogues for different individuals based on if they are prospects, active shoppers or owners. . . .

. . . Traditional media—TV, print—all have a mass feel to them. The Internet allows the customer to take more control over the information they need and enables us to provide that information in a form that’s convenient to them. It delivers the detail of print and direct mail with the added potential of a unique connection with each individual.⁹²

This quality, combined with the fact that the medium is interactive, allows for Internet advertising potentially far more potent than broadcasting. For instance, a multimedia “show” on the Internet can lead to an advertisement, which in turn can lead to a purchase.⁹³ Furthermore, the medium allows providers to gather feedback about the suc-

90. See Michael Lewis, *Boom Box*, N.Y. TIMES, Aug 13, 2000, Magazine, at 36, 41 (describing limitations of television advertising).

91. See Debra Aho Williamson, *Web Searching for a Yardstick*, ADVERTISING AGE, Oct. 9, 1995, at 21, 22 (“[C]ounting users and visits is only the first step. Knowing how many people access their site and where they come from, marketers can begin to do sophisticated mapping and targeting, providing content more appropriate for each individual user.”).

92. *Building on Tradition: Blue-Chips Share Hopes and Pitfalls of Moving into Interactive Future*, ADVERTISING AGE, Apr. 17, 2000, at 72, 74 (statement by David Rooney, Director, CRM, DaimlerChrysler).

93. See Richard Linnett, *Pressing Forward: Primedia’s Tom Rogers Is Shaping a New Kind of Media Company*, ADVERTISING AGE, Apr. 17, 2000, at 90, 92 (containing interview with Tom Rogers, CEO of Primedia, magazine publishing company, who argues that e-commerce needs to be accompanied by content).

cess of advertising and e-commerce solicitations, allowing them to be customized for individual users.⁹⁴ Finally, a user's profile can be continuously updated based on his or her consumption of content—what is known today as “clickstream analysis.”⁹⁵

In this environment, the focus shifts from delivering content and advertisements for the masses to highly customized content and e-commerce advertisements for the individual.⁹⁶ Whether concentration or decentralization results depends on several factors, including the value attached to complete user profiles, transaction costs encountered in dealing with advertisers, and the importance of specialized expertise in delivering content.

Value of User Profiles: In a world in which customization is important, content-rich Internet media companies—those that exert control over a large arsenal of content—have at least one distinct advantage in this marketplace over others in a first approximation analysis: They are able to cater continuously to users and therefore build more complete and dynamic consumer profiles based on media consumption habits. In turn, they are likely to tailor advertising more effectively and therefore to extract more value from a piece of content than it would be worth on its own. In other words, the whole bundle, which provides complete user profiles, is potentially worth more than the sum of its parts, which, individually, merely provide pieces of a profile.⁹⁷ In this scenario, the increased value of user profiles may create an incentive for content sites to merge or for companies to control greater amounts of content.

Risk Pooling: Creating content requires investment and entails a certain amount of risk. Just as a television show may not be a hit, some Internet content may fail to live up to its expected advertising or e-commerce potential and not cover its costs. Internet media companies may guard against such risks by aggregating or creating various

94. See, e.g., Nicole Sperling, *Start-ups Try to Close Loop in Measuring Effectiveness*, ADVERTISING AGE, Nov. 9, 1998, at 72 (discussing new software programs that aim to measure effectiveness of electronic solicitations).

95. See Sebastian Rupley, *The New WWWorld of Retail*, PC MAG., Aug. 2000, at 6, 10.

96. See *Building on Tradition*, *supra* note 92, at 82 (“Overall, marketing will get more effective and more efficient—and more relevant—to consumers by learning to use the Internet to target better. I expect we’ll see more integration of marketing information within lifestyle and more targeted content sites.”) (statement by David Rooney, Director, CRM, DaimlerChrysler).

97. See generally Jeff Sweat, *The Well-Rounded Consumer: Companies Must Strive for a Complete View of Their Customers as the Relationship Shifts from Commerce to Collaboration*, INFO. WEEK, Apr. 10, 2000, at 44 (discussing importance of complete consumer profiles).

types of content. Conversely, companies that do not guard against such risk can be expected to be more prone to failure.⁹⁸ This factor, which favors aggregation, is likely to become increasingly important due to the rising cost of producing content as Internet media companies embrace higher production values.⁹⁹

Transaction Costs: A large content bundler (such as AOL Time Warner) offers a large marketer (such as Sears) the ability to purchase several customized e-commerce solicitations or advertisements in a single, efficient transaction. By comparison, in the absence of a large content bundler, Sears would have to negotiate individual contracts with single-content Internet media companies—a more expensive proposition on first approximation. Similar effects have been observed in broadcast television favoring networks with a full slate of programs.¹⁰⁰

Importance of Expertise: Since the narrow targeting of individuals is key to success in this medium, it is also possible that Internet media companies will splinter into niches specializing in particular areas and become valued for their expertise.¹⁰¹ This factor, then, seems at first glance to suggest that the free market itself may value, or at least allow, decentralization. However, since the end goal remains the development of complete user profiles, these highly specialized companies may be forced to develop partnerships with other Web sites in order to compete with larger content sites. This partnership structure is, in fact, what Internet “advertising networks,” such as DoubleClick, which distribute advertising dollars to independent content sites, provide. By collecting information from a user as she travels (by “clicking through” or whatever other means emerge in the future) across independently owned and controlled Web sites and de-

98. This is already evident in notable dot-com failures. See Matt Hicks, *Lights, Camera, Broadband: Video, Other Features Vie for Bandwidth*, EWEEK, Jan. 22, 2001, at 49, 51 (noting that “[m]any [electronic media companies] have been undone in part because of high production costs”).

99. The significance of this factor can be gauged by its effect on the broadcast television industry. Facing risks in program production, production studios sought to syndicate rights to television networks but were restricted by FCC rules. The result was the formation of large Hollywood studios, since these were the only “companies large enough to bear the . . . risk” resulting from the FCC’s policies. *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1047 (7th Cir. 1992).

100. See STANLEY M. BESEN ET AL., *MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC* 4-19 (1984).

101. See, e.g., A.O. Scott, *It’s the ‘Serious’ Season, and Other Myths*, N.Y. TIMES, Sept. 10, 2000, Arts & Leisure, at 41 (noting that Internet has “contributed to the fragmentation of audiences, and the triumph of niche marketing”).

livering customized advertising, DoubleClick provides the benefits of content aggregation without requiring it.¹⁰²

But DoubleClick may not survive in competition with content-rich media companies. Unlike the latter, an advertising network such as DoubleClick cannot harvest the economies of scope derived from synergy between different media products. These economies result from more efficient use of existing resources or by subtle (or not-so-subtle) cross promotion between different media properties that allow better retention of traffic.¹⁰³ Second, even though DoubleClick's approach appears to support disaggregation, it may in fact promote aggregation. An advertising network's compensation structure may render it a *de facto* media company, giving it control over the type of content that gets produced and distributed over the Internet. If this should occur, it would amount to nothing less than aggregation through the back door.¹⁰⁴

These examples indicate that tendencies favoring both aggregation and disaggregation exist in the Internet space. It is impossible *a priori* to weigh the factors and decide their net effect, but even though the long-term characteristics of Internet media companies have yet to emerge, the behavior of some companies today signals that aggregation forces may prevail. In anticipation of exploiting commercial opportunities on the Internet, media companies seem to be tripping over themselves to merge. For instance, the breadth of content owned by Time Warner partially drove AOL to acquire it.¹⁰⁵ Similarly, the abil-

102. Randall Rothenberg, *An Advertising Power, but Just What Does Doubleclick Do?*, N.Y. TIMES, Sept. 22, 1999, at G14.

103. One example of economies of scope in a news operation is reporters for different kinds of media sharing stories and ideas. This was precisely behind the Tribune Company's announcement in March 2000 that it was acquiring Times Mirror—both content companies. See David Barboza, *A New Approach to Old Media: Tribune Company Feeds Content to Diverse Outlets*, N.Y. TIMES, Mar. 14, 2000, at C1 (“[T]he company wants a world-class news gathering organization in which newspaper, television and Internet reporters share information and real estate and even cross into one another's space.”); see also Leslie Kaufman, *The Sock Puppet that Roared: Internet Synergy or a Conflict of Interest?*, N.Y. TIMES, Mar. 27, 2000, at C1 (demonstrating hazards and potential of cross-promotion).

104. See Rothenberg, *supra* note 102.

[T]he ad-serving companies, with their ability to collect consumer data from across a wide range of sites and advertisers, can *potentially become more powerful than the media and ad agencies for whom they work*. DoubleClick's executives recoil from such suppositions and assert that they will never compete with their clients. But [an analyst] said, “That's just a line.”

Id. at G14 (emphasis added).

105. Nick Wingfield & Glenn R. Simpson, *With So Much Subscriber Data, AOL Walks a Cautious Line on Privacy*, WALL ST. J., Mar. 15, 2000, at B1 (“AOL could

ity to create user profiles from a treasure trove of content motivated the merger between CBS and Viacom.¹⁰⁶

Perhaps even more probative of future trends is the behavior of Internet media companies that currently exist. These examples also suggest that aggregation will be hard to resist as the medium develops. For example, Lycos, founded in June 1995,¹⁰⁷ described its objective in its first annual report as establishing “its Internet navigational products as a branded media service that is the most widely used place to find information in the world.”¹⁰⁸ While the company had created a certain amount of content in-house—such as city guides, a telephone and email directory, and road maps¹⁰⁹—its objective remained cataloging the Web.

By the following year, Lycos’s strategy had evolved. It still marketed itself to consumers as the premier catalog of the Internet, but the company also said that it generated cash through activities such as “selling advertisements and sponsorships on its services” and “leveraging [its] high volume of traffic into an electronic commerce platform on which advertisers and online merchants reach their targeted audiences.”¹¹⁰ These sources of income are contingent on retaining users and narrowly gauging their preferences. Apparently, Lycos accomplished this through building content and by aggregation. The following year, the company described itself as a “global Internet Network” and one of the leading “online media services.”¹¹¹ Its strategy was now to “increase user loyalty and retention through the availability of personalized offerings” and maintain its position as “one of the most popular destinations on the Web.”¹¹²

At the same time, the company was changing “from a technology focus to a mass market media company.”¹¹³ Its acquisitions since inception form a long list of technology and content companies, includ-

gain another rich source of data when it completes its proposed acquisition of Time Warner Inc. The media giant has information on the reading and listening habits of the 65 million households that receive its books, magazines and CDs.”)

106. Jennifer L. Rewick, *Mixing Viacom, CBS Web Interests May Be Tricky*, WALL ST. J., Sept. 8, 1999, at A8.

107. LYCOS INC., 1996 FORM 10-K ANNUAL REPORT 18 (1996), available at <http://www.freedgar.com>.

108. *Id.* at 2.

109. *Id.*

110. LYCOS INC., 1997 FORM 10-K ANNUAL REPORT 2 (1997), available at <http://www.freedgar.com>.

111. LYCOS INC., 1998 FORM 10-K ANNUAL REPORT i (1998), available at <http://www.freedgar.com>.

112. *Id.* at 1.

113. *Id.* at 16.

ing, among others, Tripod (a homepage-publishing enabler), WiseWire (personalization technology), Guestworld (technology for cataloguing web site visitors), WhoWhere? (directory database), Angelfire (homepage publishing technology), Sonique (MP3 player technology and music site), HotWired (daily technology news), Wired News (technology news), and Quote.com (a stock quote provider and a portfolio tracking service).¹¹⁴ Having made these acquisitions, the company was fully engaged in harvesting the economies of scope discussed above.¹¹⁵ It “recirculat[ed] traffic” by directing users who visited one Web site to another within its family.¹¹⁶ For instance, when Lycos acquired a rival search engine, Hotbot, only 10% of Hotbot’s audience overlapped with that of Lycos. That figure later jumped to 67%.¹¹⁷

Lycos is not an exception. Its bigger cousin, Yahoo, which started out in 1995 as a Web directory, displayed similar traits.¹¹⁸ By 1997, the company had become a content media company with partnerships with a variety of content providers, including Ziff-Davis, Rogers Communications, Reuters, Granite Broadcasting, Sporting News, ESPN SportsTicker, E! Online, MSNBC, MTV, and the Motley Fool.¹¹⁹

While these two companies do not comprise a statistically significant sample, Yahoo and Lycos are considered two of the most successful Internet media companies.¹²⁰ Their behavior suggests that a strategy of growing ever larger through content aggregation in order to attract advertising dollars is required for the economic survival of Internet media companies. If these and other Internet companies were subject to the rules governing broadcast and cable television, regulators could counter the economic incentives at play, or at least temper

114. *Id.* at 2; LYCOS INC., 1999 FORM 10-K ANNUAL REPORT 1-2 (1999), available at <http://www.freedgar.com>.

115. *See supra* note 103 and accompanying text.

116. Sarah Lai Stirland, *The House that Lycos Builds*, REDHERRING.COM (Feb. 17, 2000), available at <http://www.redherring.com/investor/2000/0217/inv-lycos021700.html>.

117. *Id.*

118. YAHOO! INC., 1996 ANNUAL REPORT 18 (1997) (on file with the *New York University Journal of Legislation and Public Policy*).

119. YAHOO! INC., 1997 FORM 10K ANNUAL REPORT 5 (1998), available at <http://www.freedgar.com>.

120. According to Jupiter Media Metrix, a media research company, Yahoo and Lycos ranked third and fourth respectively in terms of the number of unique visitors they attracted in January 2001. They were surpassed only by Microsoft and AOL. Press Release, Jupiter Media Metrix, Jupiter Media Metrix Announces U.S. Top 50 Web and Digital Media Properties for January 2001 (Feb. 13, 2001), available at <http://www.jupitercommunications.com/company/pressrelease.jsp?doc=pr010213>.

their effects, so that the non-economic goals relating to democratic governance and personal autonomy could be achieved.

Specifically, the regulations at stake in the *Red Lion* and *Turner I* and *II* decisions could be used to ensure diversification of ownership and a diversity of voices on the Internet. Under the fairness doctrine, regulatory agencies could force Web directories and Internet search engines to list Web sites using objective criteria, thereby ensuring that users are directed to content sites based not on commercial relationships between sites and search engines, but on their utility to the user.¹²¹ A combination of the fairness doctrine and must-carry regulations could be used to compel embedding links (since linking is clearly a form of access on the Internet) to content sites with opposing or different points of view if controversial or political subjects are addressed at news content sites or if public figures are attacked. One can also imagine regulations compelling commercial sites to fund an independent news outlet, an Internet equivalent of today's Public Broadcasting System, in the public interest. However, because the *Red Lion* and the *Turner I* and *II* decisions interpreting the Constitution leave little room for the FCC or Congress to act either by promulgating content- or access-based regulations, none of these regulatory initiatives are likely to succeed.

CONCLUSION

Traditional electronic media regulation, which formerly acted to prevent concentration, may not be able to play this role as media companies migrate onto the Internet. In the past, we have relied, for better or for worse, on the presence of such regulations to serve as a check on the power of electronic media companies and to preserve independent and diverse voices. Now, we may be unable to do so, particularly as the Internet becomes increasingly important as a medium for delivering content.

Some might suggest that in the absence of the regulatory regime discussed herein, antitrust law may adequately govern the concentration and market power of media companies.¹²² However, the guiding principles of the two regimes are entirely different. The FCC uses the

121. The payment required to be indexed in search engines is an issue of increasing concern. See, e.g., Elizabeth Stone, *Helping Webmasters Land in Search Engines' Nets*, N.Y. TIMES, Mar. 23, 2000, at G6 (noting that "jumping the line [to be listed] does not come cheap").

122. See, e.g., *Trust and Antitrust*, ECONOMIST, Oct 7, 2000, at 79, 80 (noting that antitrust activity is increasing as industries such as telecommunications and energy get deregulated).

public interest standard, and this standard has allowed the agency to fulfill non-economic values in setting its rules. Antitrust regulators, on the other hand, take their cue from market power, and their actions are likely to be limited to a narrow set of circumstances. For instance, whereas the FCC has been able to directly regulate the size of media companies, antitrust law, as the Supreme Court has noted, “does not make mere size an offence or the existence of unexercised power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible.”¹²³ As has been noted, in the communications media, control alone matters as increasing control of content may give corporations the power to “exercis[e] dominion” over others.¹²⁴

The nation, then, may be on the verge of embarking on a communications policy that is vastly different from the one that governed electronic media for much of the last half century. Given the importance of the values at stake, namely democratic governance and personal autonomy, a public discussion about the potential changes is urgently needed. Regulators will not be able to impose content and access restrictions on private media companies, but other avenues may exist. Congress and the FCC may pursue, for example, publicly-funded sources of content. Without a public dialogue and some form of media regulation, it is likely that the aggregation of Internet media companies will continue unabated, thereby threatening important values that our society has long cherished.

123. *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920).

124. *See supra* text accompanying note 18.