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# EVALUATION OF THE AOL TIME WARNER CONSENT DECREE'S ABILITY TO PREVENT ANTITRUST HARM IN THE CABLE BROADBAND ISP MARKET

SARAH G. LOPEZ

## INTRODUCTION

The purpose of this paper is to identify the anticompetitive harm that could potentially be caused by the AOL Time Warner merger, evaluate the effectiveness of the AOL Time Warner Merger consent decree in recognizing the potential anticompetitive harms and examine how effective that consent decree has been in preventing anticompetitive harm to Internet Service Providers (ISPs) to date.

## AOL-TIME WARNER MERGER

### *AOL-Time Warner as a vertical merger*

Fundamentally, the most controversial aspects of the AOL Time Warner merger involve the vertical aspects in the merger of two industry giants.<sup>1</sup> A vertical merger is a combination of two businesses that are not competitors, but are in related businesses.<sup>2</sup> The archetype of a vertical merger is the

<sup>1</sup> See Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631, 633 (2001) (arguing that AOL-Time Warner vertical merger gives Federal Trade Commission incentives to inquire into its legality); Aaron Wigod, *The AOL-Time Warner Merger: An Analysis of the Broadband Internet Access Market*, 6 J. SMALL & EMERGING BUS. L. 349, 366 (2002) (noting that vertical mergers raise antitrust concerns regarding foreclosing industry competition); see also *AOL Time Warner Timeline*, at <http://www.aoltimewarner.com/about/timeline.html> (stating AOL Time Warner merger was completed January 11, 2001).

<sup>2</sup> See MODERN DICTIONARY FOR THE LEGAL PROFESSION (3<sup>d</sup> ed. 2001) (defining vertical merger as "acquisition of businesses engaged in different stages of production, from raw

combination of two different companies that are placed at different points of the production distribution chain of a product.<sup>3</sup> AOL represents the dominant competitor among ISPs and Time Warner is a major player in the world of media conglomerates and more importantly, in the world of cable providers.<sup>4</sup> Further investigation reveals that this merger combines two companies that have predominantly distinct business functions in the related cable broadband industry.<sup>5</sup> This distinctness of business functions in a related industry makes scrutiny of this merger under vertical considerations appropriate.

### Structure and activities of two parts of the newly merged company

#### AOL Component—ISP

Before the merger, AOL acted as an ISP to its customers by providing narrowband Internet service to its customers predominantly through dial-up service.<sup>6</sup> AOL also provided

materials to finished product, of the same or similar products. The acquiring firm's objective is to achieve greater efficiency and profit margin by combining the different production stages and eliminating intermediary cost"); Conrad M. Shumadine et al., *Antitrust and the Media*, PRAC. L. INST., Order No. G0-0087, 622 (1999) (explaining vertical mergers unite companies at different levels in the chain of distribution"); Wigod, *supra* note 1, at 366 (stating that a vertically integrated firm performs functions normally outsourced).

<sup>3</sup> See MODERN DICTIONARY FOR THE LEGAL PROFESSION, *supra* note 2 (defining vertical merger); Shumadine et al., *supra* note 2, at 338 (commenting on vertical mergers of companies as combining various levels of production); David Reiffen & Michael Vita, Comment, *Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917, 918 (1995) (discussing productivity of newly integrated companies).

<sup>4</sup> See Lisa Blumensaadt, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 COMMLAW CONSPECTUS 291, 305 (2000) (stating AOL-Time Warner conglomerate merger combines AOL (leading ISP) with Time Warner (second largest owner of cable facilities)); Sean Lindsay & A. Douglas Melamed, *Antitrust Issues in the Converging Telecommunications Industry: Mergers, Intellectual Property and Competition- Domestic and International*, PRAC. L. INST., Order No. G0-00MF, 539-40 (2001) (describing each company's activities); Wigod, *supra* note 1, at 351-52 (defining each company's businesses).

<sup>5</sup> See Blumensaadt, *supra* note 4, at 305 (noting this merger uses cable networks to deliver broadband internet service); Robert E. Litan, *Law and Policy in the Age of Internet*, 50 DUKE L.J. 1045, 1080 (2001) (illustrating each company's relations to cable and broadband markets); Rubinfeld & Singer, *supra* note 1, at 639-40 (discussing AOL dominance in broadband market and Time Warner's significant presence in cable industry).

<sup>6</sup> See Lindsay & Melamed, *supra* note 4 (stating AOL dominates narrowband ISP); Joseph P. Reid, Comment, *Content and Broadband and Service. . . O My! Will a Untitled AOL-Time Warner Become the Wicked Witch of the Web, or Pave a Yellow Brick Road?*, 26 J. LEGIS. 377, 377 (2000); Wigod, *supra* note 1, at 364 (proposing that one purpose of merger was migration of AOL narrowband dial-up service subscribers to broadband cable

broadband Internet service to its customers through DSL technology.<sup>7</sup> Originally, AOL served as an electronic community for its members.<sup>8</sup> The primary goal of the electronic community was to connect members to each other to exchange ideas on any topic of the member's choosing.<sup>9</sup> AOL developed into an ISP after advancements in technology had made its former function as an electronic community obsolete.<sup>10</sup> AOL continued to grow as an ISP by signing on new subscribers at an unparalleled pace and buying out its competition.<sup>11</sup> At the time of merger, AOL acted as a full-service ISP for 28 million customers representing 88 percent of the market.<sup>12</sup>

services offered by AOL-Time Warner).

<sup>7</sup> See *Submitted Committee Reports: Report of the Antitrust Committee*, 22 ENERGY L. J. 143, 174 (2001) (describing Federal Trade Commission's requirements post-consent order); John E. Lopatka & William H. Page, *Internet Regulation and Consumer Welfare: Innovation, Speculation, and Cable Bundling*, 52 HASTINGS L.J. 891, 903 (2001) (noting that pre-merger, AOL was Time Warner Road Runner's competitor in providing broadband DSL internet access); Rubinfeld & Singer, *supra* note 1, at 638 (discussing pre-merger AOL's provision of broadband internet access via DSL).

<sup>8</sup> See William W. Burrington, *Cable Online Services*, PRAC. L. INST., Order No. G4-3962, 399 (1996) (quoting from AOL Rules, "we hope that our AOL Rules will foster an online community where there is both free exchange of ideas and information, and respect for individual and community rights"); William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 200 (1995) (stating each online service provides medium of electronic mail exchange between individuals); Reid, *supra* note 6, at 380 (noting that AOL tried to dominate market by providing industry's best service).

<sup>9</sup> See Burrington, *supra* note 8, at 399 (quoting from AOL Rules, "we hope that our AOL Rules will foster an online community where there is both free exchange of ideas and information, and respect for individual and community rights"); Mark N. Cooper, *Inequality in the Digital Society: Why the Digital Divide Deserves All the Attention it Gets*, 20 CARDOZO ARTS AND ENT. L.J. 73, 74 (2002) (noting Information Infrastructure Task Force's ambitious goal of putting vast amounts of information at users' fingertips with communications networks, computers, databases, and consumer electronics); Reid, *supra* note 6, at 380 (discussing that members could communicate publicly with other members interactively).

<sup>10</sup> See Julian Epstein, *A Lite Touch on Broadband: Achieving the Optimal Regulatory Efficiency in the Internet*, 38 HARV. J. ON LEGIS. 37, 51 (2001) (arguing that competition with other dial-up services advanced technology and prompted AOL to merge with Time Warner to preserve its edge by preventing competition); Reid, *supra* note 6, at 381-82 (noting that invention of hypertext, the World Wide Web, and browser software reduced need for online service companies, and therefore cased AOL to redefine its focus from interactive electronic community to safe and easy Internet access); Wigod, *supra* note 1, at 360 (arguing that AOL developed into ISP and broadband transport service upon realization that consumers abandoning narrowband would eliminate its dominant market share).

<sup>11</sup> See Ilene K. Gotts & Joseph G. Krauss, *International Merger Control: Divestiture Policy for New Economy Transactions*, 15 SPG ANTITRUST 64, 64 (2001) (presenting pre-merger AOL as largest narrowband ISP and server of approximately 50 percent of residential customers); Reid, *supra* note 6, at 405 (noting AOL's "meteoritic growth" despite availability of free ISPs); *AOL Time Warner Timeline*, *supra* note 1 (stating that in 2000 AOL averaged one new customers every six seconds).

<sup>12</sup> See 16 FCC RCD 6547, 6551 (describing AOL as world's largest ISP serving five

Post-merger, the AOL component has continued to grow as a full-service ISP. As of 2002, AOL has approximately 30 million customers.<sup>13</sup> Competition for AOL is substantially the same as it was pre-merger.<sup>14</sup> As a dial-up Internet Service Provider of web access and online services such as e-mail and other interactive materials, AOL has few competitors. Prodigy and Earthlink are the major competitors providing a comparable product to AOL.<sup>15</sup> These other full-service ISPs command about 12% of the full-service market.<sup>16</sup> However, consumers also have the choice of dial-up ISPs that provide only basic Internet access.<sup>17</sup> Consumers may also opt for a company that offers full-service like AOL, but uses high-speed cable access through cable lines instead of dial-up service.<sup>18</sup>

times as many narrowband customers as its competitors); Reid, *supra* note 6, at 408 n.244 (calculating that 28 million subscribers represented 88% of market); *see also AOL Time Warner Timeline*, *supra* note 1 (reporting AOL had 28 million subscribers as of March 2001, one month before final consent decree was signed).

<sup>13</sup> See Wigod, *supra* note 1, at 352 (stating that AOL is nation's leading ISP with over 26 million subscribers); *AOL Time Warner Timeline*, *supra* note 1. *See generally* Patricia Fusco, *Top U.S. ISPs by Subscriber: Q2 2002*, at <http://www.isp-planet.com/research/rankings/usa.html> (last visited Sept. 5, 2002) (ranking AOL #1 ISP as of 2002 with 17.8% of market share and 26.5 million subscribers).

<sup>14</sup> See Reid, *supra* note 6, at 408 (listing Earthlink and Prodigy as AOL's major full-service narrowband ISP competitors). *See generally* Reuters, *Earthlink to Offer Service to AOL Time Warner Customers*, at <http://www.thestandard.com/wire/0,2231,3042,00.html> (last visited Jan. 8, 2003) (stating Earthlink is second leading ISP behind AOL); Paul Heltzel, *How Now, Prodigy?*, at <http://www.pcworld.com/news/article/0,aid,13173,00.asp> (last visited Jan. 8, 2003) (discussing Prodigy status as competitor of AOL and Earthlink).

<sup>15</sup> See Reid, *supra* note 6, at 404 (explaining that Earthlink and Prodigy are only comparable full-service ISPs to AOL). *See generally* Wigod, *supra* note 1, at 385 (explaining that Earthlink is nation's largest narrowband provider that may present competition). *But see* Fusco, *supra* note 13 (showing that United Online, carriers of Juno and NetZero, has 3.2% of market share, which is more than Prodigy (2.3%) or Earthlink (3.1%)).

<sup>16</sup> See Reid, *supra* note 6, at 408 (determining that pre-merger, Earthlink had 2.5 million subscribers representing 9% of market and Prodigy had about 1 million subscribers). *See generally* Fusco, *supra* note 13 (discussing trends in ISP market share); Bruce McGregor, *Banking On Dial-Up Migration*, at [http://www.isp-planet.com/research/2002/ars\\_020717.html](http://www.isp-planet.com/research/2002/ars_020717.html) (last visited Jan. 8, 2003) (discussing that AOL, MSN, and Earthlink are dial-up internet market leaders).

<sup>17</sup> See Reid, *supra* note 6, at 404-5 (detailing other dial-up basic service ISPs). *See generally* Director General of Telecommunications, *International Benchmarking Study of Internet Access (Dial-Up and Broadband)*, at [http://www.oftel.gov.uk/publications/research/2001/dslb1201.htm#2\\_intro](http://www.oftel.gov.uk/publications/research/2001/dslb1201.htm#2_intro) (last visited Jan. 8, 2003) (discussing consumer options for dial-up narrowband internet access); Jim Wagner, *In Search Of . . . Broadband Customers*, at [http://www.isp-planet.com/business/2002/broadband\\_search.html](http://www.isp-planet.com/business/2002/broadband_search.html) (last visited Jan. 8, 2003) (discussing how many consumers are reluctant to switch from dial-up service to broadband high speed service).

<sup>18</sup> See Reid, *supra* note 6, at 404-5 (discussing option of cable broadband access to internet); Lennard G. Kruger and Angele A. Gilroy, *IB10045: Broadband Internet Access:*

## Time Warner – Media conglomerate

Before the merger, Time Warner acted as a massive media-conglomerate, operating businesses in a variety of areas.<sup>19</sup> These areas included publishing, music, filmed entertainment, cable networks and cable systems.<sup>20</sup> Post-merger, Time Warner has continued to act as a media conglomerate. A further explanation of Time Warner's Business follows:

### Publishing

Time Warner is a major force in the publishing world. Through Time, Incorporated ("Time") the conglomerate operates its publishing group.<sup>21</sup> Time competes in both the magazine and book businesses.<sup>22</sup> Time publishes a large number of magazines

*Background and Issues*, at <http://www.cnie.org/NLE/CRSreports/science/st-49.cfm> (last visited Jan. 8, 2003) (discussing access to broadband through high speed cable lines); *Overview of Cable Modem Technology and Services*, at <http://www.cabledatcomnews.com/cm/cmic1.html> (last visited Jan. 8, 2003) (discussing ability of coaxial cable wires to provide high speed online access).

<sup>19</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (stating that Time Warner owns a wide conglomeration of entertainment and media businesses). See generally David Waterman, *Viacom-CBS Merger: CBS-Viacom and the Effects of Media Mergers: An Economic Perspective*, 52 FED. COMM. L.J. 721, 722 (2000) (stating that fewer than 10 media conglomerates, including Time Warner, dominate American media environment); *Key Facts About AOL Time Warner*, at [http://www.americanonlinetimewarner.com/corporate\\_information/overview.adp](http://www.americanonlinetimewarner.com/corporate_information/overview.adp) (last visited Sept. 5, 2002) (discussing overview of company as worlds leading media entertainment company).

<sup>20</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (explaining various businesses that Time Warner owns and operates); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 395 (1999) (discussing multiple fields of conglomerates Time Warner, Viacom, and Disney). See generally Christopher Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 221 (2002) (ranking Time Warner Cable as world's largest MSO behind AT&T).

<sup>21</sup> See Reid, *supra* note 6, at 385 (explaining corporate structure). See generally Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1103, 1203 (1993) (naming Time Warner as largest media conglomerate); *Corporate Governance Case Study: Time Warner, Inc.*, at [http://www.ragm.com/library/books/corp\\_gov/cases/cs\\_twx.html](http://www.ragm.com/library/books/corp_gov/cases/cs_twx.html) (last visited Jan. 8, 2003) (discussing relationship between Time and Warner before and after merging).

<sup>22</sup> See Reid, *supra* note 6, at 385 n.69 (discussing scope of Time's publishing business); David Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 439 (2002) (describing Time Warner as dominant in magazines, books, movies and cable). See generally James Turner, Note and Comment, *Mega Merger, Mega Problems: A Critique of the European Community's Commission on Competition's Review of the AOL-Time Warner Merger*, 17 AM. U. INT'L L. REV. 131, n.247 (2001) (stating that AOL provides links to Time Warner publications such as Entertainment Weekly).

on a diverse set of topics.<sup>23</sup> Time's magazine titles fit into both the general and inter-niche markets. Similarly, Time operates several book publishing companies that are focused on multiple genres.<sup>24</sup> In addition to traditional sales measures, Time sells its merchandise through book clubs and direct marketing efforts.<sup>25</sup> Finally, Time's publishing efforts represent a significant part of Time Warner's total business revenue.<sup>26</sup>

Post-merger, Time Warner's publishing business continues to face significant competition in both the magazine and book markets. In the magazine market, Time Warner's competition consists of other media conglomerates as well as traditional publishing companies.<sup>27</sup> The media conglomerates that Time

<sup>23</sup> See *Time Inc., Key Company Facts*, at [http://www.aoltimewarner.com/companies/time\\_inc\\_index.adp](http://www.aoltimewarner.com/companies/time_inc_index.adp) (last visited Jan. 8, 2003) (enumerating that Time publishes 33 magazines focusing on a wide variety of topics such as news, financial information, sports, entertainment, and family including publications such as Time, Life, Fortune, Money, Mutual Funds, Sports Illustrated, SI for Women, SI for Kids, Entertainment Weekly, People, Teen People, In Style, Health, and Parenting); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (mentioning some leading magazine franchises owned by Time Warner); Reid, *supra* note 6, at 385 n.69 (stating Time's magazines span a wide range of topics).

<sup>24</sup> See Reid, *supra* note 6, at 385 n.70 (noting publishing companies under Time's control are Little, Brown & Company, Warner Books, Time Life, Sunset Books, Oxmoor House, and Leisure House); see also Allen, C., *Unreported Case: Paramount Communications Inc. v. Time Inc.*, 15 DEL. J. CORP. L. 700, 709 (1990) (stating Time's businesses fall into four broad segments, one which is publication of books, including The-Book-of-the-Month Club, Little, Brown & Co., Time Life Books and others); Turner, *supra* note 22, at n.227 (2001) (stating that Warner Books and Time Life are well known Time Warner entities).

<sup>25</sup> See Douglas A. Kysar, Book Note, *Kids and Cul-de-sacs: Census 2000 and the Reproduction of Consumer Culture U.S. Census Bureau*, 87 CORNELL L. REV. 853, 885 (2002) ("Other products are geared toward consumers during particular stages of their life cycle, Time Warner, Inc., for instance, created an entire division to market magazines such as Cooking Light, Parenting, and Martha Stewart Living to baby boomers."); see also Allen, *supra* note 24, at 709 (mentioning that "Book of the Month Club" is included in one of Time's broad segments of business); Zane B. Melmed, Comment, *The Role of the Studio Lawyer in the New Media Age*, 8 UCLA ENT. L. REV. 169, 171 (2001) (mentioning Time Warner's business interests reflect publishing, focusing mainly on magazine publishing, book publishing and direct marketing); Reid, *supra* note 6, at 385 n.71-72 (stating Time Warner operates several book clubs such as "Book of the Month Club" and other smaller clubs and Time Life acts as Time Warner's direct marketing division).

<sup>26</sup> See Joel Edan Friedlander, *Corporation and Kulturkampf: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31, 46 (1996) (mentioning that Time's magazine business would contribute 20-25% of revenue of a merged Time Warner); see also, Allen, *supra* note 24, at 709 (stating Time had \$4.5 billion in gross revenue and net income of approximately \$289 million in 1988); Reid, *supra* note 6, at 385 (indicating that Time has produced 15% of Time Warner's Revenue). See generally Keith Conrad, Note, *Media Mergers: First Step in a New Shift of Antitrust Analysis?*, 49 FED. COMM. L. J. 675, 681 (1997) (mentioning Time Warner profits from D.C. Comics which controls the Batman franchise by publishing comics, selling memorabilia in 124 Warner Bros. stores, and licensing characters for products).

<sup>27</sup> See Reid, *supra* note 6, 385-86 (discussing nature of competition in magazine

Warner's titles compete against are Bertelsmann, News Corp. and Disney.<sup>28</sup> Although Bertelsmann, with its eighty magazine and ten newspaper titles, is Time Warner's most formidable competitor, News Corp. and Disney are significant competitors because of their overall strength grants them leverage in the market.<sup>29</sup> Additionally, Time Warner faces competition from traditional publishing companies such as Advanced Publications, Inc., The Washington Post Company, and the McGraw-Hill Companies, Inc.<sup>30</sup>

In the book publishing market, Time Warner similarly faces continued competition from media conglomerates.<sup>31</sup> Bertelsmann, Viacom, News Corp. and Disney all have book publishing arms.<sup>32</sup> These conglomerates tend to compete with Time Warner across the entire market.<sup>33</sup> Additionally, secondary competitors such as

publishing business); *see also* Waterman, *supra* note 19, at 532 (mentioning ten multinational media conglomerates which dominate most of American market). *See generally* Randall P. Bezanson, Article, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 907 (1998) (discussing transformation of monopoly to unrestrained media industry competition).

<sup>28</sup> *See* Reid, *supra* note 6, at 386 (indicating competitor media conglomerates in magazine publishing market); *see also* Turner, *supra* note 22, at n.248 (mentioning competition between Time Warner and Disney); Waterman, *supra* note 19, at 532 (quoting Senator Paul Wellstone regarding the small number of conglomerates dominating American mass media).

<sup>29</sup> *See* Reid, *supra* note 6, at 386-87 (indicating voracity of competitor media conglomerates); *see also* Waterman, *supra* note 19, at 532 (indicating that News Corp. and Disney are two of ten American mass media market conglomerates). *See generally* Conrad, *supra* note 26, at 676-79 (discussing Disney/ABC merger).

<sup>30</sup> *See* Bruce A. Olcott, Note, *Will They Take Away My Video Phone If I Get Lousy Ratings?: A Proposal For A "Video Common Carrier" Statute in Post-Merger Telecommunications*, 94 COLUM. L. REV. 1558, 1586 n.132 (1994) (mentioning that The Washington Post Company is multimedia company); *see also* Reid, *supra* note 6, at 386 (indicating competing publishers). *See generally* Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 857-58 (2000) (mentioning The Washington Post as one company engaged in monolithic public sphere of web publishing).

<sup>31</sup> *See* Reid, *supra* note 6, at 387 (discussing nature of competitive book publishing market). *See generally* Netanel, *supra* note 20, at 463 (indicating that Time Warner, Viacom and Disney are publishing market competitors); Waterman, *supra* note 19, at 531 (mentioning that proposed CBS-Viacom merger would create second largest media conglomerate behind Time Warner).

<sup>32</sup> *See* Daniel L. Brenner, *Owner and Content Regulation in Merging and Emerging Media*, 45 DEPAUL. L. REV. 1009, 1031 (1996) (mentioning that News Corp. owns multiple publishing houses); *see also* Reid, *supra* note 6, at 387 (Bertelsmann owns Random House, Inc., Viacom owns Simon & Schuster, Inc., News Corp. owns HarperCollins Publishers, Inc., and Disney owns Hyperion Books). *See generally* Netanel, *supra* note 20, at 463 n.275 (stating that Time Warner, Disney and Viacom are three largest media conglomerates, each having holdings in publishing).

<sup>33</sup> *See* Volker Hirsch, *EU Merger Control- The Latest Developments*, 4 D.C. L.J. INT'L L. & PRAC. 43, 58 (1995) (stating that Bertelsmann AG is second largest media company



Pearson, PLC and McGraw-Hill compete with Time, but these specialized lines of books only partially overlap with Time's product line.<sup>34</sup>

### Music

Time Warner is involved in all areas of the music industry from initial production to final distribution.<sup>35</sup> The media conglomerate operates its music businesses through the Warner Music Group.<sup>36</sup> These businesses include music publishing, recording, reproduction, packaging and distribution.<sup>37</sup> Warner Music operates two music-publishing companies that control songwriting and licensing.<sup>38</sup> It owns eight record labels as part of

behind Time Warner); *see also* Reid, *supra* note 6, at 387 (describing media conglomerates as wide-spectrum publishers); Waterman, *supra* note 19, at 532 (mentioning Time Warner, Bertelsmann, Viacom, News Corp. and Disney as five of ten multinational media conglomerates that dominate American mass media).

<sup>34</sup> *See* Reid, *supra* note 6, at 387 (explaining scope of secondary competitors' business functions); *see also* Addison-Wesley to Join British to buy Textbook Publisher for \$283 Million, CHI. TRIB., Feb. 16, 1988, at 4C (discussing specialized product line of Pearson PLC); Doreen Carvajal, *Book Publishers Seek Global Reach and Grand Scale*, N.Y. TIMES, Oct. 19, 1998, at C1 (showing sales of secondary competitors Pearson and McGraw-Hill).

<sup>35</sup> *See* Reid, *supra* note 6, at 392 (2000) (discussing scope of Time Warner's business functions in music industry); *see also* Steve Traiman, *New Commerce: Digital Branches Out-Sites + Sounds: Billboard Spotlights the Digital Music Revolution-Six Questions-Richard Parsons*, BILLBOARD, July 29, 2000 (discussing Time Warner's distribution of music); *WEA Inc. CEO David Mount Announces Retirement*, PR NEWSWIRE, July 12, 2002 (explaining WEA Inc.).

<sup>36</sup> *See* Reid, *supra* note 6, at 392-93 (2000) (indicating corporate structure with respect to Time Warner's business); *Warner Music Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/3/0,2163,103153,00.html> (last visited Jan. 8, 2003) (describing Warner Music Group's scope); *see also* Matthew Benz, *Culture Shifts at AOL Time Warner*, BILLBOARD, Dec. 8, 2001, at 4 (discussing Warner Music Group and its performance); Daniel Frankel, *Synergy Sings at the WB; Licensing Pop Music for Series and Promotion Helps Labels and Programmers*, BROADCASTING AND CABLE, July 29, 2002, at 20 (explaining Warner Music Group).

<sup>37</sup> *See* Reid, *supra* note 6, at 392-93 (2000) (discussing Warner Music's business functions); *Warner Music Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/3/0,2163,103153,00.html> (last visited Jan. 8, 2003) (describing Warner Music Group's scope); *see also* *Warner Music Group and Fullaudio to Sell Thousands of Tracks Online*, PR NEWSWIRE, July 1, 2002 (discussing Warner Music Group's companies in many different divisions); Chris Morris, *Warner Focuses Catalog Strategy*, BILLBOARD, Mar. 30, 2002, at 8 (discussing WMG's newly formed division, Warner Strategic Marketing).

<sup>38</sup> These companies include Warner/Chappell Music, Inc. and Warner Brothers Publications. Warner/Chappell Music is a global publisher controlling copyrights of over one million musical compositions. Warner Brothers Publications is a subsidiary of Warner/Chappell that produces and distributes a variety of written musical materials such as sheet music and musical instruction books. *See* Reid, *supra* note 6, at 392-93 (2000); *see also* *Warner Music Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/3/0,2163,103153,00.html> (last visited Jan. 8, 2003) (describing Warner Music Group's scope); *The Media Business: A Deal in Printed Music*, N.Y. TIMES, at D2 (noting Warner/Chappell as WMG's publishing company).

its recording business.<sup>39</sup> Its in-house media service firm controls the reproduction and packaging of the merchandise.<sup>40</sup> Finally, Warner Music ensures distribution of its products through direct sales to customers by operation of several online music stores, as well as part ownership in Columbia House, the largest club-based marketer of music.<sup>41</sup>

Warner Music Group competes in a moderately concentrated market. Currently, Warner Music is the smallest of the "Big Five" labels. The Big Five also includes Universal Music Group, Sony Music Entertainment, Inc., the EMI Group, PLC and BMG Entertainment.<sup>42</sup> In the music publishing industry, Time Warner's Warner/Chappell is the second largest music publisher, second only slightly to EMI.<sup>43</sup> EMI and Warner/Chappell's estimated combined two million titles account for about 20% of the music publishing industry's revenues.<sup>44</sup> Universal Music

<sup>39</sup> These record labels include Atlantic Recording Corporation, Elektra Entertainment Group, Inc., Reprise Records, Rhino Entertainment Company, Sire Records Group, Warner Brothers Records, Inc., Warner Brothers Classics International, and Warner Music International. See *Warner Music Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/3/0,2163,103153,00.html> (last visited Jan. 8, 2003); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000); Reid, *supra* note 6, at 392-93; see also *AOL's Dilemma: Growth could Hurt Business*, TORONTO STAR, Apr. 1, 2002, at D 01.

<sup>40</sup> Time Warner's compact discs, digital video discs, audio and video cassette tapes along with all the artistic covers, liner notes and other packaging for these products are produced by The Ivy Hill Corporation and Warner Media Services which are both divisions of WEA Incorporated, a Time Warner Company. See Reid, *supra* note 6, at 393; see also *Daily Briefing*, THE ATLANTA JOURNAL AND CONSTITUTION, July 13, 2002, at 2F; *Warner Music Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/3/0,2163,103153,00.html> (last visited Jan. 8, 2003).

<sup>41</sup> The online music stores include CD Now and Direct Audio Video Express. Time Warner and Sony co-own Columbia-House. See Reid, *supra* note 6, at 393 (2000); see also *Company News; Blackstone Buys Majority Stake in Columbia House*, N.Y. TIMES, May 15, 2002, at C4; Doug Bedell, *Pay to Play? No way; New legislation, Record Labels Are Going After File-Sharing Networks*, THE SAN DIEGO UNION-TRIBUNE, July 29, 2002, at E3.

<sup>42</sup> See *Warner Music Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/3/0,2163,103153,00.html> (last visited Jan. 8, 2003); see also Steve Alexander, *Musical Tug-of-War; Authorized, Pay-to-Play Music Sites Have Popped Up to Compete with Free Sites Sharing Pirated Tunes. But the New Sites Also are Attempting to Change the Way People Buy Music*, STAR TRIBUNE, Aug. 27, 2002, at 1D (citing big five label groups); Sathnam Sanghera, *Pressplay Opens Up Net Access*, FINANCIAL TIMES, Aug. 2, 2002, at 24 (specifying big five label groups).

<sup>43</sup> See Reid, *supra* note 6, at 394; see also James Harding, *Survey-Creative Business: The Music Publishing Business*, FINANCIAL TIMES, Mar. 20, 2001, at 28 (noting EMI Publishing as biggest music publishing company in world); Dominic Rushe, *Publishing Veteran Keeps EMI Rocking*, SUNDAY TIMES (LONDON), Jan. 6, 2002 (discussing Warner/Chappell's determination to close gap with EMI).

<sup>44</sup> See Reid, *supra* note 6, at 394; see also David Lieberman, *Musical Merger Creates Royal Flush Warner EMI would own 2 Million Tunes*, USA TODAY, Feb. 8, 2000, at 3B

slightly trails Warner/Chappell with over 700,000 titles.<sup>45</sup> Although much less concentrated than the record label market, Time Warner is one of a few powerful players in the music publishing business.<sup>46</sup>

### Filmed Entertainment

Since the merger, Time Warner also has maintained a significant presence in the filmed entertainment industry.<sup>47</sup> The two companies that represent Time Warner's filmed entertainment business are New Line Cinema and Warner Brothers.<sup>48</sup> New Line Cinema operates as a traditional film production company.<sup>49</sup> New Line's various divisions concentrate on several areas including cinema, features, home video, international, news media, television, licensing and merchandising.<sup>50</sup> Warner Brothers, however, has expanded its

(noting EMI and Warner/Chappell account for 20% of world publishing revenue); *Top40 Charts.com-EMI to get the rest of Jobete*, at <http://top40-charts.com/news.php?nid=3347> (last visited Jan. 8, 2003) (discussing EMI's revenue).

<sup>45</sup> See Reid, *supra* note 6, at 394; see also Bloomberg News, *Universal Music Group Reportedly in Talks to Buy Rondor Music*, LOS ANGELES TIMES, Mar. 28, 2000, at C5 (noting that Universal Music ranks behind Warner/Chappell). But see Brett Puley, *The Music Man*, FORBES, July 3, 2000, at 52 (describing Universal Music's rank as number one).

<sup>46</sup> See Kim Chipman, *AOL Time Warner Won't Pursue EMI Because of Regulatory Issues*, BLOOMBERG NEWS, Jan. 31, 2001, available at LEXIS, News & Business, News, Bloomberg-All Bloomberg News File (noting that music publishing industry is dominated by relatively few participants, including Time Warner).

<sup>47</sup> See Associated Press, *A Multimedia Convergence*, ST. LOUIS POST-DISPATCH, Dec. 17, 2000, at H10 (describing Time Warner as major movie studio); *Competition/Media: Commission Opens Full Investigation Into AOL/Time Warner Merger*, EUROPEAN INFORMATION SERVICE (European Report), June 21, 2000 (recognizing Time Warner as one of world's largest filmed entertainment companies).

<sup>48</sup> See Reid, *supra* note 6, at 387-88 (2000) (indicating two companies represent Time Warner's film production entities). See generally Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (indicating that Time Warner owns both companies); Anthony D'Alessandro, *The Urge to Merge: Recent Megadeals*, VARIETY, May 15, 2000, at 60 (listing Warner Brothers and New Line Cinema as portfolio companies of AOL Time Warner); Margaret Johnston, *No Surprises in AOL Time Warner Organization*, INFOWORLD DAILY NEWS, May 4, 2000 (noting that New Line Cinema and Warner Brothers are subsidiaries of AOL Time Warner).

<sup>49</sup> See Reid, *supra* note 6, at 387-88; see also *Cinema Entertainment Group (CEG) Partners With New Line Cinema; CEG Also Collaborating With Potential iTV Technology Partners*, PR NEWswire (Los Angeles), Nov. 27, 2000 (characterizing New Line Cinema as traditional film production company); *New Line Cinema Announces Interactive Partnership with garageband.com*, PR NEWswire (Los Angeles), July 17, 2000 (labeling New Line Cinema a "traditional Hollywood" studio).

<sup>50</sup> See Reid, *supra* note 6, at 387-88 (describing different divisions at New Line Cinema); see also *First-Ever Virtual Time Capsule Lets New Line Cinema Web Surfers Send Messages 30 Years Into Future*, PR NEWswire (Los Angeles), Apr. 20, 2000 (stating

functions beyond that of a traditional film production company.<sup>51</sup> Along with the production of movies and television shows, Warner Brothers also operates a chain of stores and a broadcast television network, publishes comic books and a magazine and markets and licenses its large collection of movie, television, and cartoon titles.<sup>52</sup>

Post-merger, Warner Brothers faces competition in the filmed entertainment market from other media conglomerates such as Disney, Viacom, News Corp., and Sony.<sup>53</sup> Additionally, the non-media conglomerate that owns Universal Studios is one of Warner Brother's main competitors.<sup>54</sup> These six companies combined account for almost 75% of the total box office revenue.<sup>55</sup> The media conglomerates also compete with Warner Brothers in

New Line Cinema's operations); *Put a Piece of Hollywood's History Under the Tree This Year - - FairMarket Powers New Line Cinema's Holiday Auction of Original Wardrobe Items*, BUSINESS WIRE (Los Angeles), Dec. 7, 2000 (stating New Line Cinema's operations).

<sup>51</sup> See Reid, *supra* note 6, at 387-88 (recounting Time Warner's classification of Warner Brothers as "fully integrated global entertainment company"). See generally *Warner Brothers Takes on Ex-Guinness Euro Chief*, MARKETING WEEK, Aug. 10, 2000, at 11 (noting Warner Brothers' consumer products division); *Warner Home Video Introduces Video Club Web Site With Special Offers Exclusively for Members*, BUSINESS WIRE (Burbank, CA), Feb. 8, 2000 (highlighting Warner Brothers expanding beyond traditional film company status).

<sup>52</sup> See Reid, *supra* note 6, at 388 n.99, 101, 103 (discussing Time Warner's comic book holdings, chain stores, broadcast networks and collection of entertainment titles); see also *Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement*, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (indicating Time Warner's ownership of well-known cartoon and comic characters); *Warner Brothers Takes on Ex-Guinness Euro Chief*, MARKETING WEEK, Aug. 10, 2000, at 11 (noting that Warner Brothers licenses its brands).

<sup>53</sup> See Reid, *supra* note 6, at 389. See generally *B'cast powers Dis, Viacom - Parks Also Help Mouse Compensate for Weak Studio Earnings*, HOLLYWOOD REP., Aug. 8, 2000 (stating that Disney and Viacom are media conglomerates); *Giant Media Merger Gets Nod*, THE RECORD (KITCHNER-WATERLOO), May 4, 2000, at F02 (noting that Disney, Viacom and News Corp. are all media conglomerates).

<sup>54</sup> See Reid, *supra* note 6, at 389 (identifying Universal Studio's as leading non-media conglomerate competitor); see also *Supplement Vivendi Universal Merger to Go Ahead*, LE FIGARO, Oct. 16, 2000 (recognizing that Seagram's (Universal's parent company) primary business is drinks); *Canal and Vivendi Go To Hollywood*, LIBERATION, July 13, 2000 (noting that Universal is not exclusively media owned); *All The News of the World: Canadian and French Press Comment on the Merger of Seagram and Universal Studios with Vivendi*, THE INDEPENDENT (LONDON), June 22, 2000, at 2 (recognizing that Seagram's primary business is liquor).

<sup>55</sup> See Reid, *supra* note 6, at 389 (detailing box office revenue percentages). See generally *Claude Brodesser & Dade Hayes, Par's Pair Reups: Lansing, Dolgen Ink Six-Year Studio Deals*, DAILY VARIETY, June 27, 2000, at 1 (ranking film studios according to box office revenues); *Kim Chipman, Time Warner's 'Nine Yards' is No. 1 Film at \$15.9 MLN*, BLOOMBERG NEWS, Feb. 22, 2000, available at LEXIS, News & Business, News, Bloomberg-All Bloomberg News File (detailing box office revenues of six major film studios).

the television production market. Viacom, Disney, News Corp and Sony all are involved in producing their own programming for their respective networks through various subsidiaries.<sup>56</sup> Increasingly, the conglomerates are producing their own programming rather than turning to smaller independent production companies.

### Television networks

Time Warner also owns several television networks. These networks include one broadcast network and multiple cable networks.

### Broadcast

The only broadcast network that Time Warner owns is the Warner Brothers Network ("WB").<sup>57</sup> The WB is a relatively young television network.<sup>58</sup> It provides a line of daytime and prime time programming, but is not yet carried by nearly the same amount of affiliates as the major networks.<sup>59</sup> The WB is one of six major broadcast networks.<sup>60</sup> The other five major broadcast networks

<sup>56</sup> See Reid, *supra* note 6, at 390; see also Norman Horowitz (Editorial), *Too Few Control Too Much Information For the Rest of Us*, LOS ANGELES TIMES, Jan. 3, 2000, at B5 (noting that all major studios produce their own programming); Scott D. Pierce, *Is Battle with NBC's Frasier's Revenge?*, THE DESERET NEWS (Salt Lake City), Dec. 11, 2000, at C06 (noting that Viacom, Disney, Time Warner, and News Corp. all have in-house production units).

<sup>57</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (stating that Time Warner owns WB network, its only national broadcasting network); Reid, *supra* note 6, at 388 n.102;). See generally *Warner Brothers Acquires 10% of Canal Satellite Digital*, FIN. TIMES INFORMATION, Feb. 16, 2000 (suggesting that Time Warner will be using acquisition to further broadcasting of its own programming); Michael Schneider & Josef Adalian, *New Line, WB TV Link Up*, DAILY VARIETY, June 16, 2000, at 1 (noting that Time Warner is increasingly seeking to create and produce its own network series).

<sup>58</sup> See *WB Television Network Capsule-Hoover's Online*, at <http://www.hoovers.com/co/capsule/0/0,2163,101420,00.html> (last visited Aug. 30, 2002) (characterizing WB as "upstart network that took to the airwaves in 1995"); see also Reid, *supra* note 6, at 388 n.102 (explaining that WB was founded in Jan. 1995). See generally *Bloomberg News: 2 New TV Networks to Debut as the Age of the Old Network System Ends* (Bloomberg radio broadcast), Jan. 11, 1995 (announcing WB network's debut in January 1995).

<sup>59</sup> See Reid, *supra* note 6, at 391 n.118 (discussing how WB is carried by around half the amount of broadcast affiliates that carry ABC, CBS and NBC); see also Allan Johnson, *The Winning Hand: TV Networks Place Their Bets on the Upcoming Season*, CHI. TRIB., Apr. 28, 2002, at C5 (comparing networks' performance and stating "WB is the least watched of the 6 major broadcast networks"). See generally *Stations - WB Network*, at <http://www.thewb.com/Stations/Index/0,8112,55057,00.html> (last visited Jan. 8, 2003) (listing WB network's affiliates).

<sup>60</sup> See Reid, *supra* note 6, at 388 n.102 (explaining that WB is now one of six major

are NBC, ABC, CBS, FOX and UPN. ABC, CBS, UPN and FOX are each owned by media conglomerates.<sup>61</sup> NBC is the only major network not owned by a media conglomerate.<sup>62</sup> Broadcast network competition can be divided into three tiers. The first tier consisting of ABC, CBS and NBC generally has the largest audience, and therefore generates the greatest advertising revenue. The second tier of competition is best described as an intermediate tier. FOX is the only major network that fits into this tier. This tier challenges the first tier, but also is challenged by the third tier. The third tier has a smaller audience than the second tier, and therefore has the lowest advertising revenue. WB and UPN fit into this third tier.

### Cable

Time Warner controls numerous cable networks.<sup>63</sup> These networks can be divided into three basic divisions.<sup>64</sup> They are the TBS entertainment group, the CNN News Group, and the Home

broadcast networks); *see also* Johnson, *supra* note 59 (referring to WB network as one of "the 6 major broadcast networks"). *See generally Bloomberg News: Disney's New ABC Lineup Rates Poorly, Report Says* (Bloomberg radio broadcast), May 31, 2002 (grading six major broadcast networks, including WB, against each other).

<sup>61</sup> Disney owns ABC, Viacom owns CBS and UPN, and News Corp. owns FOX. *See ABC, Inc. Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/0/0,2163,10290,00.html> (last visited Jan. 8, 2003) (describing ABC's scope); *The Facts*, at <http://www.viacom.com/thefacts.tin> (last visited Jan. 8, 2003) (listing facets of Viacom); *Fox Entertainment Group-Corporate profile*, at <http://www.newscorp.com/feg/index.html> (last visited Jan. 8, 2003) (providing FOX corporate profile).

<sup>62</sup> *See* Lawrie Mifflin, *Making a Media Giant: the Overview; Viacom to Buy CBS, Forming 2D Largest Media company*, NY TIMES, Sept. 8, 1999, at A1 (stating NBC is lone major broadcast network without a major production studio); *Corporate Info*, at [http://www.nbc.com/nbc/header/Corporate\\_Info.shtml](http://www.nbc.com/nbc/header/Corporate_Info.shtml) (last visited Jan. 8, 2003) (stating General Electric owns NBC); *see also* Tom Lowry & Diane Brady, *At GE New Pride in the Peacock*, BUS. WK., Nov. 19, 2001, at 79 (discussing how GE dismissed its willingness to sell NBC to interested media conglomerates).

<sup>63</sup> *See* Reid, *supra* note 6, at 391 (describing Time Warner's "collection of cable networks"); *see also* Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (explaining that Time Warner owns several leading television networks such as HBO, Cinemax, CNN, TNT, TBS Superstation, Turner Classic Movies, and Cartoon Network); Heather M. Goodchild, *AOL Time Warner Inc. Standard & Poor's -Corp. Ratings*, at [http://www.standardpoor.com/Forum/RatingsAnalysis/CorporateFinance/Articles/011901\\_aol.htm](http://www.standardpoor.com/Forum/RatingsAnalysis/CorporateFinance/Articles/011901_aol.htm) (last visited Jan. 18, 2001) (summarizing cable networks owned by Time Warner in its business description).

<sup>64</sup> *See* Reid, *supra* note 6, at 395 (indicating three divisions of cable networks are owned by Time Warner); *see also* Goodchild, *supra* note 63 (discussing Time Warner's cable networks in its business profile under cable networks). *But see AOL Time Warner-Companies*, at <http://www.aoltimewarner.com/companies/index.adp> (last visited Jan. 8, 2003) (listing two cable network divisions not three under its Entertainment and Networks Group because CNN is listed under Turner Broadcasting System not separately).

Box Office group.<sup>65</sup> The TBS Entertainment group includes ten different cable networks targeting both specific and general audiences.<sup>66</sup> TBS Entertainment also operates a variety of sports franchises, organizations and competitions that it features on its networks.<sup>67</sup> The CNN News Group consists of thirteen networks.<sup>68</sup> These networks all focus on either generalized or specialized news reporting.<sup>69</sup> Finally, the Home Box Office Group consists of ten premium networks showing feature movies and some original programming.<sup>70</sup>

Networks in each of these three divisions face significant competition. The TBS entertainment group directly competes

<sup>65</sup> Reid, *supra* note 6, at 395 (explaining Time Warner owns TBS group and CNN group outright, but only controls HBO group through limited partnership); *see also Turner Broadcasting System, Inc. Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/4/0,2163,12404,00.html> (last visited Jan. 8, 2003) (explaining Turner Broadcasting System Inc., along with its cable networks including CNN, is now subsidiary of AOL Time Warner); *Home Box Office Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/8/0,2163,104038,00.html> (last visited Jan. 8, 2003) (noting that HBO is unit of Time Warner Entertainment).

<sup>66</sup> *See* Reid, *supra* note 6, at 395 (citing Cartoon Network as example of network targeting narrow audience while Turner Network Television targets broader audience); *see also AOL Time Warner - Companies - Turner Broadcasting*, at [http://www.aoltime Warner.com/companies/turner\\_broadcasting\\_index.adp](http://www.aoltime Warner.com/companies/turner_broadcasting_index.adp) (last visited Jan. 8, 2003) (outlining Turner Broadcasting's networks and commenting on their scope). *See generally Turner Broadcasting System, Inc. Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/4/0,2163,12404,00.html> (last visited Jan. 8, 2003) (noting Turner Broadcasting System's "array of cable TV networks").

<sup>67</sup> *See* Reid *supra* note 6, at 396 n.162-63 (discussing TBS's additional business activities); *Turner Broadcasting System, Inc. Profile - Hoover's Online*, at <http://www.hoovers.com/premium/profile/4/0,2147,12404,00.html> (last visited Jan. 8, 2003) (commenting on TBS's ownership of baseball's Atlanta Braves, basketball's Atlanta Hawks, hockey's Atlanta Thrashers, and Goodwill Games); *see also AOL Time Warner - Companies - Turner Broadcasting*, at [http://www.aoltime Warner.com/companies/turner\\_broadcasting\\_index.adp](http://www.aoltime Warner.com/companies/turner_broadcasting_index.adp) (last visited Jan. 8, 2003) (highlighting all company activities).

<sup>68</sup> *See* Reid *supra* note 6, at 396 (2000) (describing scope of CNN's thirteen networks); *see also CNN News Group Capsule - Hoover's Online*, at <http://www.hoovers.com/co/capsule/6/0,2163,104096,00.html> (last visited Jan. 8, 2003) (stating CNN News Group operates 13 news bureaus in U.S. and 43 worldwide). *See generally AOL Time Warner - Walter Isaacson*, at [http://www.aoltime Warner.com/corporate\\_information/bio/IsaacsonWalte.adp](http://www.aoltime Warner.com/corporate_information/bio/IsaacsonWalte.adp) (last visited Jan. 8, 2003) (listing CNN networks Isaacson supervises as CNN News Group chairman).

<sup>69</sup> *See* Reid *supra* note 6 (describing focus of additional networks); *see also* Dan Calvo, *CNN News Group Picks Time Exec for CEO*, LOS ANGELES TIMES, July 10, 2001, at 6-3 (listing various news channels under CNN News Group); *CNN's homepage*, at <http://www.cnn.com/CNN/Programs/> (last visited Jan. 8, 2003) (listing of its programs and channels).

<sup>70</sup> *See* Reid *supra* note 6, at 397-98 (describing composition of networks in Home Box Office group); *see also HBO's homepage*, at <http://www.hbo.com> (last visited Jan. 8, 2003) (listing channels and programs); *Home Box Office Group Capsule*, at <http://www.hoovers.com/co/capsule/8/0,2163,104038,00.html> (last visited Jan. 8, 2003) (describing HBO's scope).

with networks with similar formats such as the USA network and the FX network.<sup>71</sup> Similarly, the HBO group must directly compete with other premium movie networks such as Showtime, the Movie Channel and the Starz Encore Group networks.<sup>72</sup> Additionally, the CNN News Group directly competes with other cable news networks such as Fox News networks, CNBC and MSNBC.<sup>73</sup> However, certain programming may create competition between network divisions. For example, if a TBS network programs a professional basketball game, it will compete with networks out of its division such as Fox Sports or one of the four ESPN networks.<sup>74</sup> Finally, cable networks increasingly are formidable competitors for broadcast networks due to increasing cable subscribership and more programming innovation.<sup>75</sup>

### Cable System

Time Warner owns a significant amount of the cable systems market.<sup>76</sup> Time Warner provides over 12 million customers

<sup>71</sup> See Reid *supra* note 6, at 397-98. See generally Bernard Weinraub, *Police Show Has Humans, Not Heroes! In FX's Hit "The Shield," Means Justify Ends*, N.Y. TIMES, Apr. 3, 2002, at E1 (discussing FX's strategy in competing with TBS and USA); *TBS Superstation claims Top Theatrical Movies for Summer 2000*, BUSINESS WIRE, INC., Sept. 5, 2000 (listing networks in competition with TBS during that year).

<sup>72</sup> See Reid *supra* note 6, at 397. See generally Karen Anderson Prikios, *Starz Shoots for Just That; Network Logged 30 Million New Subs in 2000*, BROADCASTING AND CABLE, March 19, 2001, at 70 (discussing Starz business strategy offering all movie channel service to compete with HBO and Showtime); *Premium Network Snapshot; Prime Numbers*, CABLE WORLD, Jan. 14, 2002, at 22 (listing premium cable network viewer subscriber trends).

<sup>73</sup> See Reid *supra* note 6, at 397; see also *Fox News Channel Beats Rival CNN in Viewership For the First Time*, CHI. TRIB., Jan. 30, 2002, at 2 (discussing rivalry between cable news channels). See generally *CNN To Cut 10% of Jobs in Restructuring Effort*, LOS ANGELES TIMES, Jan. 18, 2001, at C6 (discussing CNN's attempt at reorganizing within network to deal with cable news network competition).

<sup>74</sup> See Reid *supra* note 6, at 397; see also *TV listings on TV Guide*, at <http://www.tvguide.com> (last visited Sept. 19, 2002) (listing television schedule). See generally Bernard Weinraub, *As Games Rivet TV Networks, Cable Upstarts Sail Into Drama; FX, MTV, and Others Add Original Films and Series*, N.Y. TIMES, Aug. 3, 2000, at E1 (arguing smaller specific cable channels are opening up their programming to compete for viewership with generalized cable channels).

<sup>75</sup> See Reid *supra* note 6, at 398; see also Allison Romano, *Nibbling Away at Broadcast; Cable Grows to 46.0 Audience Share as Broadcast Nets Slip to 50.1*, BROADCASTING AND CABLE, June 3, 2002, at 11 (noting that original programming aided in cable's strong showing in ratings against broadcast networks). See generally Gary Levin, *Cable Keeps Coming Strong*, USA TODAY, July 17, 1998, at 2E (proposing diverse programming is required to draw viewers to cable networks from broadcast networks).

<sup>76</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000) (indicating that Time Warner has a 15% of the overall multi-channel video program distribution market); Reid, *supra* note 6, at 408 n.257 (indicating that Time Warner owns 20% of the cable market);



service in the United States through Time Warner Cable.<sup>77</sup> Along with providing traditional cable television service, Time Warner can also provide broadband Internet access through its cable system.<sup>78</sup> Broadband access is provided through cable modem technology.<sup>79</sup> Currently cable modem technology is one of two primary ways to provide residential customers with broadband.<sup>80</sup> Additionally, three other technologies are available to deliver broadband access. The first alternate technology is an Integrated Service Digital Network (ISDN).<sup>81</sup> ISDN has been available longer than Cable Internet or DSL services. It works by dividing

*see also MTV Signs Agreement with Time Warner*, N.Y. TIMES, August 16, 2000, at C6 (labeling Time Warner Inc. as "nation's No. 2 cable service provider"); *Time Warner Cable Signs Pact with NBC*, N.Y. TIMES, May 18, 2000, at C10 (noting Time Warner is nation's second largest cable service provider).

<sup>77</sup> See Reid, *supra* note 6 at n.185; see also STANDARD AND POOR'S CORPORATE DESCRIPTIONS PLUS NEWS, AOL Time Warner, Inc., Aug. 10, 2002 (listing AOL Time Warner's total customers); *Time Warner Cable Signs Pact with NBC*, N.Y. TIMES, May 18, 2000, at C10 (noting Time Warner's United States clientele).

<sup>78</sup> See Reid *supra* note 6, at 400; see also *AOL Time Warner - Companies - Time Warner Cable*, at [http://www.aoltimewarner.com/companies/time\\_warner\\_cable\\_index.adp](http://www.aoltimewarner.com/companies/time_warner_cable_index.adp) (last visited Jan. 8, 2003) (providing a description of its services). See generally Tobi Elkin, *AOL Time Warner Banks on Broadband Future*, ADVERTISING AGE, Feb. 11, 2002, at 3 (discussing AOL Time Warner's broadband efforts).

<sup>79</sup> Cable modem technology utilizes existing coaxial cable wires for the transport of broadband at high speeds. See Reid *supra* note 6, at 399-400; see also *Cable Datacom News*, at <http://www.cabledatacomnews.com/cm/cmic1.html> (last visited Jan. 8, 2003) (offering description of cable modem technology and its various services). See generally *Building Broadband From the Ground Up*, BROADBAND NETWORKING NEWS, July 2, 2002 (noting how broadband can be provided through cable modem technology or digital subscriber line "DSL").

<sup>80</sup> DSL service is the other major way residential customers are provided with broadband. DSL service uses phone wires already in home, and requires system of switches within the local phone company's network that allows for transfer of greater bandwidth over existing lines. The distance between the customer's home and telephone company's switch greatly affects quality of connection. The farther distance between two, slower speed. Because of this limitation, certain DSL technologies are only available to customers within designated distance of local telephone switch. See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003); see also Steven A. Augustino, *The Cable Open Access Debate: The Case for a Wholesale Market*, 8 GEO. MASON L. REV. 653, 660 (2000). See generally Federal Communications Commission, *FCC Consumer Facts*, at <http://www.fcc.gov/cgb/consumerfacts/dsl2.html> (last visited Jan. 8, 2003).

<sup>81</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (introducing ISDN technology as one of four types of broadband access). See generally *The Evolution of Digital Communication*, at <http://www.eicon.com/isdn/whtpap1.htm> (last visited Jan. 8, 2003) (providing general history of ISDN technology which was designed in 1970's to transport digital services across telephony infrastructure based on copper wiring); <http://www.nationalisdnouncil.com/isdnassistance/introduction.htm> (last visited Jan. 8, 2003) (describing ISDN as switched, end-to-end network that allows for simultaneous transmission of voice, data and video information through two types of connections catering to residences and businesses).

existing telephone wires into channels to handle more information.<sup>82</sup> ISDN is faster than typical phone modems, but is still a dial-up service.<sup>83</sup> With ISDN however, it is necessary to dial into the service provider and wait to log-in each time a customer wishes to access the Internet.<sup>84</sup> The second alternate technology for providing broadband access is Satellite Internet.<sup>85</sup> Satellite Internet service comes in two types.<sup>86</sup> One type first uses satellites to send information from the Internet to the customer's computer, and then uses the customer's phone line to

<sup>82</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access); see also *The Evolution of Digital Communication*, at <http://www.eicon.com/isdn/whtpap1.htm> (last visited Jan. 8, 2003) (diagramming how ISDN link divides telephone wire to support transmission of various data communications devices at one time). See generally Catherine Arcabascio, Article, *The Use of Video-Conferencing Technology in Legal Education: A Practical Guide*, 6 VA. J.L. & TECH. 5 (2001) (describing process by which ISDN technology uses circuit-switching devices to allow different types of data transmittal along different channels).

<sup>83</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access); see also *The Evolution of Digital Communication*, at <http://www.eicon.com/isdn/whtpap1.htm> (last visited Jan. 8, 2003) (noting that ISDN networks make connections more quickly by transporting digital information from one site to another without passing through any intermediaries such as modems); <http://www.idzone.com/5minguide.htm> (last visited Sept. 3, 2002) (stating that ISDN calls typically dial and connect in 1 to 3 seconds).

<sup>84</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Aug. 27, 2002) (clarifying how ISDN connection is made); see also John Gilroy, *Ask the Computer Guy*, THE WASHINGTON POST, Nov. 23, 1998, at F25 (stating that ISDN is essentially dial-up service that requires user to connect each time he uses system). See generally Nicole M. Payne, Note, *AT&T v. City of Portland – A Decision Without Resolution: The Ongoing Debate Over Open Access to Broadband Internet Technology*, 37 WILLAMETTE L. REV. 717, 719, 723-24 (contrasting speed of broadband technology to slower speed of dial-up access offered through telephone connections).

<sup>85</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (introducing satellite internet as one of four types of broadband access); see also Kathryn A. Tongue, Notes & Comments, *Municipal Entry Into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 NW. U. L. REV. 1099, 1104 (2001) (stating that wireless technology such as satellite internet is second broadband option). See generally *Satellite Internet – What is it?*, at <http://www.speedguide.net/editorials/satellite.shtml> (last visited Jan. 8, 2003) (providing general understanding of theory and operational issue of satellite internet connections).

<sup>86</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access). See generally *Satellite Internet Connection*, at [http://searchnetworking.techtarget.com/sDefinition/0,,sid7\\_gci528672,00.html](http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci528672,00.html) (last visited Jan. 8, 2003) (indicating that there exist both two-way satellite connections and also satellite-return connections); *Satellite Internet – What is it?*, at <http://www.speedguide.net/editorials/satellite.shtml> (last visited Jan. 8, 2003) (stating that there currently exist two primary options for satellite internet access).

send information to the Internet.<sup>87</sup> The other type of satellite Internet access uses the satellite for communicating both to and from the Internet.<sup>88</sup> Satellite access is available in a wide area provided your satellite dish can point at the satellite without interference from buildings or trees.<sup>89</sup> This technology is an especially good choice if you live in a remote area not served by cable companies.<sup>90</sup> However consumers have yet to broadly accept satellite as a viable alternative for broadband Internet access.<sup>91</sup> The third alternate technology providing broadband access is wireless technology. Wireless technology is capable of providing last mile access, however, consumers do not view it as

<sup>87</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access); see also Leda Mouallem, Comment, *Oh No, Grandma Has a Computer: How Internet Fraud Will Take the Place of Telemarketing Fraud Targeting the Elderly*, 42 SANTA CLARA L. REV. 659, 674 (2002) (explaining connection method by which analog modem sends information from computer for satellite receipt, satellite then beams information back to computer). See generally Tongue, *supra* note 85, at 1105 (2001) (commenting that while satellites receive data very quickly, transmittal speed is slowed when users must use phone line to upload information).

<sup>88</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access); see also *Satellite Internet - What is it?*, at <http://www.speedguide.net/editorials/satellite.shtml> (last visited Jan. 8, 2003) (identifying two true two-way satellite systems, Hughes and Gilat/Microsoft, that process requests and response entirely via satellite). See generally Starband, *How It Works*, <http://www.starband.com/howitworks/index.htm> (last visiting Jan. 8, 2003) (describing two-way satellite system that provides internet connect without telephone lines, relying solely on satellite connections).

<sup>89</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access); see also Payne, *supra* note 84, at 725 (explaining that for satellite Internet service to function properly, residence must meet exposure requirement of clear line of sight to southern sky); Katie Hafner, *No Cable? No D.S.L? Try Satellite*, N.Y. TIMES, Nov. 23, 2000, at G3 (noting that satellite dish needs only clear line of sight to an orbiting satellite to function).

<sup>90</sup> See *What is Broadband?*, at [http://commerce.motorola.com/consumer/QWhtml/bband\\_help.html](http://commerce.motorola.com/consumer/QWhtml/bband_help.html) (last visited Jan. 8, 2003) (describing different types of broadband internet access). But see Hafner, *supra* note 89 (warning that satellite systems suffer from rain fade, meaning that heavy rainfall and wet snow interfere with signal). See generally Tongue, *supra* note 85, at 1105 (quoting FCC to predict satellite systems may be most effective method for serving remote locations where telecommunication infrastructure is poor or nonexistent).

<sup>91</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed Reg. at 79861 (discussing satellite access as an alternative to cable or DSL); Rubinfeld and Singer, *supra* note 1, at 652 (noting reasons satellite not viable alternative to broadband internet access); Priscilla Awde, *Two-way bet on new role: Satellite Networks: Although unlikely to become a mass market, satellite broadband can at least find a niche*, FINANCIAL TIMES (LONDON), March 20, 2002, at 3 (commenting satellites unlikely to compete head-on with terrestrial broadband networks).

a viable alternative.<sup>92</sup>

As a traditional cable provider, Time Warner competes with other traditional cable providers and with satellite cable providers in providing cable television programming.<sup>93</sup> Currently, Time Warner is the second largest traditional cable provider after AT&T.<sup>94</sup> Time Warner Cable ended 2001 with 12.8 million basic cable subscribers.<sup>95</sup> Although there are multiple traditional cable providers, consumers generally do not have a choice between them.<sup>96</sup> Instead, the municipality determines what traditional cable provider will service the area.<sup>97</sup> Effectively the traditional cable provider has a monopoly over traditional cable

<sup>92</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed Reg. at 79861 (December 20, 2000) (discussing wireless broadband access); Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819, 830 (2000) (commenting high speed wireless is not sufficient to constrain any market power garnered by cable modem providers); Stephen Phillips, *A Proven Technology Retains Wide appeal: Broadband Fixed Wireless: There Is Plenty Of Mileage In A Technology Used By Millions of Consumers* FINANCIAL TIMES (LONDON), March 20, 2002, at 2 (noting problems and technology needed to overcome wireless technology's chief limitations).

<sup>93</sup> See Reid *supra* note 6, at n190-95 (describing total competitive market in which cable television operates); see also Jennifer Beauprez, *Merger of AT&T, Comcast advances Shareholders OK \$47 billion deal*, DENVER POST, July 11, 2002, at C1 (reporting competition to Time Warner by traditional cable companies through merger); Jube Shiver Jr., *DirectTV's Access to Cable Shows to Stay*, LOS ANGELES TIMES, June 14, 2002, at Part 3, 3 (discussing competition to major cable providers by satellite service providers).

<sup>94</sup> See Alec Klein and Christopher Stern, *AT&T, AOL Talk About Merger of Cable Units*, WASHINGTON POST, July 26, 2001, at E1 (indicating AT&T is leading provider of cable service with 13.5 million subscribers); *A Clash of Online Titans*, N.Y. TIMES, December 22, 2001, at A32 (stating AOL Time Warner is second largest cable operator); see also Jim Rutenburg and Geraldine Fabrikant, *Dream Prize Draws Closer For Murdoch*, N.Y. TIMES, May 7, 2001, at C1 (listing AT&T and Time Warner Cable as top two cable providers).

<sup>95</sup> See AOL TIME WARNER, 2001 ANNUAL REPORT 8 (2001) (indicating Time Warner Cable's 12.8 million subscribers); see also AOL TIME WARNER, 2001 FACT BOOK 18 (2001) (stating Time Warner Cable has more than 12.7 million subscribers); Reshma Kapadia, *AT&T Comcast Deal Throws Curve At Time*, PITTSBURGH POST-GAZETTE, December 21, 2001 at D4 (noting Time Warner's Cable system has about 12.6 million subscribers).

<sup>96</sup> See Reid, *supra* note 6, at 407 (explaining geographic regions are served by only one traditional cable provider); see also Robert C. Fellmeth, Editorial, *The Internet Gateway Should be Wide Open; Los Angeles: No One Corporation Should Be Allowed To Determine What Kind of Access We Have*, LOS ANGELES TIMES, June 8, 2000, at B13 (commenting consumers in Los Angeles and most of the nation no longer have a choice among cable providers); Seth Schiesel, *In Cable TV, Programmers Provide a Balance of Power*, N.Y. TIMES, July 16, 2001, at C6 (noting even smallest cable companies generally have monopoly on providing cable television service within its local area).

<sup>97</sup> See Wire or Radio Communication, Cable Communications: Use of Cable Channels And Cable Ownership Restrictions, 47 U.S.C. § 533 (2002) (discussing local governments' franchising authority); Wire or Radio Communication, Cable Communication: Development Of Competitive Markets, 47 U.S.C. § 253(c) (2002) (stating municipalities' authority to manage public rights-of-way). See generally Tongue, *supra* note 85, at 1112-13 (commenting on three major advantages municipalities enjoy over private cable providers).

systems service in a given geographic region.<sup>98</sup> However in some areas satellite providers represent significant competition for the traditional cable provider.<sup>99</sup> Currently satellite television controls 18% of the multi-channel video programming distribution market.<sup>100</sup>

Time Warner's cable systems also compete in a second product market by providing access to Internet broadband service.<sup>101</sup> Pre-merger, Time Warner, through its majority interest in Road Runner, acted as the second largest broadband ISP in the United States because of Time Warner's extensive cable holdings.<sup>102</sup> Time Warner Cable had approximately 1.9 million high-speed Internet customers at the end of 2001, more than doubling the year-end 2000 total of 946,000.<sup>103</sup> Time Warner's competition

<sup>98</sup> See Reid, *supra* note 6 at, 407 (explaining geographic regions are served by only one traditional cable provider); see also Louis Aguilar, *Deal Critics: Consumers Would Pay More, Get Less*, DENVER POST, July 10, 2001, at C3 (commenting on monopoly of major cable companies); Schiesel, *supra* note 96, at C6 (noting even smallest cable companies generally have monopoly on providing cable television service within its local area).

<sup>99</sup> See *Hearing Of The Telecommunications And The Internet Subcommittee of the House Energy and Commerce Committee: The Status of Competition in the Multi-Channel Video Program Distribution Market*, FEDERAL NEWS SERVICE, Dec. 4, 2001 (discussing competition in the direct broadcast satellite and cable television market); see also Amy Harmon and Jennifer Lee, *Deal Bolsters Satellites as Cable TV Competitors*, N.Y. TIMES, December 17, 2001, at A16 (stating "[s]atellite will erode market share of cable on a global basis because it is easier to implement); Jube Shiver Jr., *Telecom Talk; Hidden Asset For AT&T If It Buys TCI: Loyalty*, LOS ANGELES TIMES, July 6, 1998, at D3 (noting only significant competition cable TV operators face is from direct-broadcast satellite).

<sup>100</sup> See *Hearing of the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee, The Status of Competition in the Multi-Channel Video Program Distribution Market*, FEDERAL NEWS SERVICE, Dec. 4, 2001 (indicating that cable has approximately 80% of multi-channel video program distribution market); Lee Hawkins Jr., *Battle For TV Viewers Heats Up; Time Warner Knocking On Doors To Win Back Satellite Customers*, MILWAUKEE JOURNAL SENTINEL, September 9, 2001, at 1D (stating satellite's twenty percent market share); Shiver Jr. *supra* note 93, at 3 (noting satellite service providers control about twenty percent of market).

<sup>101</sup> See AOL TIME WARNER, 2001 ANNUAL REPORT 8 (2001) (describing Time Warner Cable's broadband services); AOL TIME WARNER, 2002 FACT BOOK 21 (2002) (stating Time Warner Cable is largest provider of cable modem service in U.S.); see also Lawrence Fisher, *Microsoft and Compaq to Buy 10% Stakes in Road Runner*, N.Y. TIMES, June 16 1988, at D4 (disclosing Time Warner's share of ownership in Road Runner).

<sup>102</sup> See *Submitted Committee Reports*, *supra* note 7, at 173 (defining Time Warner's pre-merger position in the cable broadband ISP market). See generally, TIME WARNER INC., 2000 ANNUAL REPORT 36 (describing creation of Road Runner); Fisher, *supra* note 101, at D4 (disclosing Time Warner's share of ownership in Road Runner).

<sup>103</sup> For more information please see the Time Warner Cable web page. *Time Warner Cable*, [http://www.aoltimewarner.com/companies/time\\_warner\\_cable\\_index.adp](http://www.aoltimewarner.com/companies/time_warner_cable_index.adp) (last visited Jan. 8, 2003). As of May 2002, Time Warner Cable has obtained 2.2 million high-speed Internet customers, making them the second largest cable operator. Harry Berkowitz, *Cheaper, High-Speed Option?; Web Users in Area May Have to Wait*, N. Y. NEWSDAY, May 7, 2002, at A52. The AOL-Time Warner merger allowed the company to

comes from both rival traditional cable providers as well as DSL providers.<sup>104</sup>

### CONCERN FOR ANTITRUST VIOLATIONS WITH THE AOL-TIME WARNER MERGER

#### *Concern that ISPs will be denied open access of broadband*

The single greatest antitrust concern in approving the AOL Time Warner merger was that AOL's rival ISPs would be denied open access.

#### Defining Open Access

Concern for open access is basically a concern that an ISP will not be able to provide its internet services to customers because customers will be foreclosed from choosing an AOL competitor if they opt for internet access through Time Warner cable systems.

#### Importance of open access to rival ISPs

Open access to Time Warner's cable system is essential for AOL's rival ISPs. Time Warner has the second largest cable holdings in the United States. As technological advances continue to be made, broadband access to the Internet becomes increasingly essential. Because the only two significant technologies currently available for the delivery of broadband services to residential customers are cable systems and DSL lines, the foreclosure of competition in a substantial percentage of one of those technologies would likely devastate competition as a whole in the ISP market.

#### AOL-Time Warner's historical position supporting open access

Open access is a concern that was first asserted by AOL during

dominant the high-speed internet access market. Rosemary C. Harold, *Cable Open Access: Exorcising the Ghosts of "Legacy" Regulation*, 28 N. KY. L. REV. 721, 761 (2001).

<sup>104</sup> See Reid, *supra* note 6 at n.189 (explaining the mechanics of DSL lines); see also Rubinfeld & Singer, *supra* note 1, at 648 (concluding that the AOL Time Warner Merger will leave other internet providers at disadvantage). See generally Wigod, *supra* note 1, at 373, 384 (discussing the extent of competition that AOL Time Warner will receive from DSL and other cable providers).

the AT&T – TCI merger in the context of DSL technology.<sup>105</sup> During that merger AOL raised concerns that it would be denied the capability of providing its product to customers. AOL was concerned that AOL Time Warner continues to publicly support a policy of open access in the post-merger environment.<sup>106</sup> AOL Time Warner advocates consumer choice in cable broadband ISPs.<sup>107</sup>

*Potential violations of Antitrust Laws if open access is denied*

If AOL-Time Warner is allowed to deny open access to AOL's rival ISPs, it will foreclose a significant amount of competition in

<sup>105</sup> See Thomas A. Piraino, *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 860-61 (2000) (discussing that in 1998, AOL launched a national campaign to persuade local governments to make open access to AT&T's cable systems required); see also Christopher K. Ridder, *Berkeley Technology Law Journal Annual Review of Law and Technology IV: Telecommunications AT&T Corp. v. City of Portland*, 15 BERKELEY TECH. L.J. 397, 399-400 (2000) (noting that AT&T and TCI both rejected the notion of open access as a condition to their merger). See generally Lawrence A. Sullivan, *Is Competition Policy Possible in Hightech Markets?: An Inquiry into Antitrust, Intellectual Property, and Broadband Regulation as Applied to "The New Economy"*, 52 CASE W. RES. L. REV. 41, 84 (2001) (explaining that since the AT&T/TCI merger the notion of open access has come to the forefront as significant issue for discussion among the large internet providers).

<sup>106</sup> For more information please refer to the AOL Time Warner Website. *Time Warner Cable*, available at [http://www.aoltimewarner.com/companies/time\\_warner\\_cable\\_index.adp](http://www.aoltimewarner.com/companies/time_warner_cable_index.adp) (last visited Jan. 8, 2003). There are many academics, politicians and municipalities, which demand open access as a requirement for AOL Time Warner. James B. Speta, *Symposium Overview: Part II: Unbundling and Open Access Policies: The Vertical Dimension of Cable Open Access*, 71 U. COLO. L. REV. 975, 978 (2000). The policy debate over open access central during the AOL Time Warner merger has resolved itself to allow for some form of open access to other outside ISPs. Barbara S. Esbin & Gary S. Lutzker, *Poles, Holes, and Cable Open Access: Where the Global Information Superhighway Meets the Local Right of Way*, 10 CATH. U. COMMLAW. CONSPECTUS 23, 56-57 (2001).

<sup>107</sup> On its web page AOL Time Warner states its policy concerning consumer choice of ISPs. AOL Time Warner asserts:

AOL Time Warner is committed to providing consumers with a choice among multiple ISPs on its cable systems. We have taken the lead in the cable industry in responding to consumer demand for choice and innovation in high-speed Internet services. And we are proud that our actions have helped to create a marketplace impetus for building the architecture and business models needed to make cable an open, competitive platform for advanced entertainment, Internet and communications services. In so doing, AOL Time Warner has changed the terms of the "open access" debate — and expanded consumer choice.

[http://www.aoltimewarner.com/corporate\\_citizenship/public\\_policy/04\\_isp.adp](http://www.aoltimewarner.com/corporate_citizenship/public_policy/04_isp.adp) (last visited Jan. 8, 2003).

AOL Time Warner agreed to allow its subscribers a choice of ISPs in December 2000. See Esbin & Lutzker, *supra* note 106, at 56-57. This article purports an alternate idea besides simply allowing a choice of ISPs, but instead encouraging a market that could freely support outside ISPs. See generally, Augustino, *supra* note 80, at 657 (2000).

the ISP market. When competition is foreclosed in a market by the actions of one of the competitors in that market, the possibility of an antitrust violation becomes a reality. Specifically, the most significant antitrust violation that would likely occur post-merger is attempted monopolization, a violation of Section 2 of the Sherman Act.<sup>108</sup> Any attempted monopolization violation consists of three components.<sup>109</sup> The first is that the company must control a significant percentage of the relevant market in order to have a dangerous probability of success in achieving monopoly power.<sup>110</sup> Typically, companies need to control at least 50% of the relevant market before they become subject to scrutiny.<sup>111</sup> However, this market share is just a guideline and there have been instances when companies with a lesser market share have qualified for an attempted monopolization violation.<sup>112</sup> The second component of an

<sup>108</sup> Section 2 of the Sherman Act states:

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C.S. § 2 (2002).

The Supreme Court explained that the "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." *Otter Tail Power Co. v. United States*, 210 U.S. 366, 377 (1973).

<sup>109</sup> See *MATTHEW BENDER & COMPANY, INC., ANTITRUST LAWS AND TRADE REGULATION*, § 26.01 (2d ed. 2002) (explaining Section 2 of the Sherman Act); see also *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458 (1993) (affirming that the claim of 'attempt to monopolize' requires proof of three established standards). See generally *Lesig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964) (noting that specific intent, anticompetitive conduct, and dangerous probability of success are the three requirements for attempting to monopolize).

<sup>110</sup> See *BENDER & COMPANY, INC.* *supra* note 109 at n.6 (outlining elements for a cause of action for attempted monopolization); see also *Swift v. United States*, 196 U.S. 375, 396 (1905) (explaining that the connection between specific intent and dangerous probability as requirements for violating the Sherman Act, § 2); see also *Lorain Journal Co. v. United States*, 342 U.S. 143, 153-54 (1951) (affirming that 'dangerous probability of success' is component of 'attempt to monopolize,' violation of §2 of the Sherman Act).

<sup>111</sup> See *BENDER & COMPANY, INC.*, *supra* note 109, at n.51 (discussing the various circuits approach to market share); see also *Conceptual Eng'g Ass'n v. Aelectronic Bonding*, 714 F. Supp. 1262, 1270 (D.R.I. 1989) (clarifying that when a company has almost 100% control of sales and manufacturing there is no doubt that there is a dangerous probability of success). *But see* *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 26-28 (1984) (noting that 30% of the market share is insufficient for a showing of dangerous probability of success).

<sup>112</sup> See *BENDER & COMPANY, INC.*, *supra* note 109, at n.53 (stating it is possible to have an attempted monopolization violation if there is 30 -50 % market share with additional factors present that states "a share of less than fifty percent generally



attempted monopolization violation is that the company must engage in anti-competitive acts.<sup>113</sup> Additionally, in some circumstances these anti-competitive acts can rise to the level of violations on their own under Section 1 of the Sherman Act<sup>114</sup> or other anti-trust laws, regardless of whether the company has the requisite market power to qualify for an attempted monopolization violation. The third component is that there must be a specific intent to achieve a monopoly in an attempted monopolization case.<sup>115</sup> However, because specific intent can be inferred from the defendant's anticompetitive conduct, it is not difficult to establish.

A combined AOL Time Warner presents a significant risk of inflicting antitrust harm on its competitors in the cable broadband access ISP market. Its tendency toward monopoly makes the potential for an antitrust violation particularly significant. The most obvious potential violation is an attempted monopolization violation under a theory of leveraging. Leveraging is when either a monopoly or a competitor tending toward monopoly illegally uses its monopoly power in one market and tries to extend it to a second market. Leveraging occurs when the dominant competitor in one market performs certain anti-competitive acts in order to further its position towards

required for actual monopolization may support a claim for attempted monopolization if other factors. . . are present") (citing *Domed Stadium Hotel, Inc. v. Holiday Inns*, 732 F.2d 480, 490 (5th Cir. 1984)); see also *Broadway Delivery Corp. v. United Parcel Serv. of Am.*, 651 F.2d 122, 129 (2d Cir. 1981) (explaining that market share is not dispositive of monopoly, but rather is just guideline for the trier of fact).

<sup>113</sup> See *Tops Mkts. v. Quality Mkts.*, 142 F.3d 90, 99-100 (2d Cir. 1998) (discussing the defendant's anticompetitive conduct in establishing claim for attempted monopolization); *BENDER & COMPANY, INC.*, *supra* note 109, at n.5; see also *Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 365, 474-76 (5th Cir. 2000) (explaining anticompetitive conduct in terms of being predatory or exclusionary to competition on the merits).

<sup>114</sup> See 15 U.S.C.S. § 1 (2002) (prohibiting the formation of monopolies); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (noting that "[a] combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent."); see also *United States v. Aluminum Co. of Am.*, 148 F.3d 416, 427 (1945) (finding that Congress does not allow the courts to examine whether company has been fair in establishing trusts; rather they banned all trusts in order to avoid constant scrutiny by the courts).

<sup>115</sup> See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993) (stating that acts that appear to be an attempt to monopolize are insufficient without the requisite intent); *Tops Markets* 142 F.3d at 101 (holding "a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt"); see also Brenda Glaser-Abrams, Comment: *Hospital Privileges for Nurse Midwives: An Examination Under Antitrust Law*, 33 AM. U.L. REV. 959, 969 (1984) (discussing the court's ability to infer an intent to monopolize).

monopoly in the second market.<sup>116</sup> In this case the concern is that AOL Time Warner could potentially use the market dominance it has gained in the cable systems provider market to create dominance in the broadband cable access ISP market through unlawful anticompetitive acts. These unlawful anti-competitive acts include tying, monopolistic refusals to deal, predatory pricing, and new product introduction. These unlawful anti-competitive acts however can also independently give rise to liability under Section 2.

As a cable system provider, Time Warner's market power surpasses the requisite threshold for a potential attempted monopolization offense. At first glance it seems that Time Warner Cable's 20% market share of the national cable provider market is inadequate to qualify the conglomerate for an attempted monopolization offense. However, with a more precise determination of the relevant market, market power can be accurately determined. This determination of market power reveals Time Warner Cable's actual monopoly position. Defining market power first requires that the relevant product market be determined. The most accurate relevant product market is a cable systems service provider that can accommodate broadband.<sup>117</sup> This product market includes traditional cable

<sup>116</sup> When leveraging results in monopoly power or comes dangerously close to achieving such power in the second market there is no doubt that leveraging results in a Section 2 violation. See *BENDER AND COMPANY, INC.*, *supra* note 109, at n.171. If a business is attempting to expand to other areas in order to secure a monopoly, it will be considered a violation of section two of the Sherman Act. *Eastman Kodak Co. v. Image Technical Servs.* 504 U.S. 451, 469 (1992). Owning the sole business in a particular area is not a sign of a monopoly but attempting to grow to become a monopoly would violate the Sherman Act. *United States v. Griffith*, 334 U.S. 100, 106 (1948). There is however, some controversy on whether a leveraging offense exists when an entity just uses its monopoly power to gain a competitive advantage in the second market. See *BENDER AND COMPANY, INC.*, *supra* note 109, at n.172. Two circuits have held that mere use of monopoly power to gain competitive advantage in the second market is sufficient for a Section 2 violation. See *Kerasotes Michigan Theaters, Inc. v. Nat'l Amusements, Inc.*, 854 F.2d 135, 137 (6<sup>th</sup> Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989); *Berkley Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2<sup>nd</sup> Cir. 1979), *cert. denied*. 444 U.S. 1093 (1980).

<sup>117</sup> Although an argument can be made to include DSL in the determination of the product market, it is not preferred. See Lopatka and Page, *supra* note 7, at 898. Although DSL also can provide Internet access with broadband accommodation capabilities, there are significant enough differences in the technologies to make the products sufficiently distinct to not assign them to the same product market. See Reid, *supra* note 6, at 189. However, even if DSL is included in the relevant product market, the potential for an attempted monopolization offense does not dissipate. There are many localities where DSL is not yet available because the locality is situated too far away from the DSL access point. For these localities the traditional cable system is the only technology providing Internet access with broadband accommodation capabilities. *Id.* Therefore, because the geographic market is essentially local, there will inevitably be markets in which cable

service providers only. Secondly, the geographic market must also be defined.<sup>118</sup> The cable systems service provider market is uniquely local, because customers are bound to the cable system provider that has been designated for their locality. Therefore in certain localities, Time Warner has a virtual monopoly in the market of cable systems with broadband accommodation capabilities.

Next, there must be a determination whether a dangerous probability exists that any anti-competitive acts by Time Warner Cable would have the dangerous probability of creating a monopoly in the cable broadband ISP market. The typical standard for this requirement in an attempted monopolization violation is whether AOL Time Warner's affiliated ISPs command at least 50% of the relevant market.<sup>119</sup> In the ISP dial-up market AOL is the overwhelming leader in the market. Having over 30 million worldwide customers, no other full service or bare bones dial-up ISP can begin to compare to AOL's market power.<sup>120</sup> In consideration of AOL's market dominance in the dial-up ISP market, there is a significant probability that AOL will be able to extend that dominance into the high-speed cable Internet access market as its customer's upgrade their Internet access from dial-up. It is not unreasonable to forecast that AOL alone would quickly become the dominant competitor in the cable

system provider will still have near monopoly market power. Wigod, *supra* note 1, at 367.

<sup>118</sup> The relevant product market should not include satellite cable providers because currently they do not accommodate broadband internet access in any significant percentage. See Reid, *supra* note 6, at n. 194. A proper determination of the market should include substitute goods in the geographic area, however this concept is difficult to apply. Nancy Whitmore, *Congress, the U.S. Supreme Court and Must Carry Policy: A Flawed Economic Analysis*, 6 COMM. L. & POL'Y 175, 207 (2001). If the scope of the market grows in size, it is less likely a monopoly will be found. Glenn T. Inanaga, Note: *Narrowing Broadband Choices: AT&T's Monopoly Over the Future of the Internet*, 10 S. CAL. INTERDISC. L.J. 133, 149 (2000).

<sup>119</sup> See BENDER & COMPANY, INC. *supra* note 109, at n.41 (stating that in general courts find dangerous probability of success where defendant possesses 50% of the market or more and courts have rarely found dangerous probability of success when defendant had 30% or less of the market); see also *MRO Communications, Inc. v. AT & T*, 1999 U.S. App. LEXIS 32522, \*3 (9th Cir. 1999) (finding that AT&T's hold over fifty percent of the market was some evidence of monopoly); *Bailey v. Allgas*, 284 F.3d 1237, 1250 (11th Cir. 2002) (holding that market share must be more than fifty percent in order to constitute monopoly).

<sup>120</sup> See *AOL Time Warner Timeline*, *supra* note 1 (indicating that AOL has over 30 million worldwide customers as of 2002); see also Michelle J. Kane, *Article: VI. Business Law: 1. Electronic Commerce: b) Internet Service Provider Liability: Blumenthal v. Drudge*, 14 BERKELEY TECH L.J. 483, 484 (1999) (concluding that AOL is the largest ISP in the world); Steven Syre, *Weighing Strategies for Expensing Stock Options*, BOSTON GLOBE, August 25, 2002, at E1 (stating AOL is an industry leader).

Internet access ISP market if free to do so, irrespective of its ties to Time Warner Cable. Additionally Road Runner is positioned to have significant strength as a cable ISP.<sup>121</sup> With the advantage of having a virtual monopoly in the certain cable markets, AOL Time Warner could turn its two dominant competitors in the cable ISP market into dominators of the market. It is reasonable to forecast between AOL and Road Runner that AOL Time Warner would control at least 50% of the cable internet access ISP market because of AOL's potential due to its complete dominance of the narrowband ISP market and Road Runner's current position as the second largest cable broadband ISP. At this point, any anti-competitive acts by either Time Warner Cable or the affiliated ISPs that would tend to foreclose competition and extend the affiliated ISPs dominance could be considered an act of attempted monopolization and would be detrimental to competition and harmful to consumers.

The first of the possible anti-competitive acts that may occur as a result of the merger is AOL Time Warner would refuse to deal with unaffiliated ISPs. Time Warner Cable could take the position that it will not open its system to non-affiliated ISPs. This is a clear violation of Section 2.<sup>122</sup> Although in general circumstances a company can refuse to deal with another company at will, when an essential facility is involved, the owner of that facility does not have that same latitude.<sup>123</sup> An essential

<sup>121</sup> See *About Time Warner Cable*, *supra* note 93 (indicating that Road Runner had 1.9 million customers at the end of 2001); see also Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 92 (1999) (stating the Road Runner offers customers a high speed connection opportunity); Tom Burton, *This is the Year of the Broadband*, SYDNEY MORNING HERALD, February 16, 2000, at 26 (arguing that Road Runner is one of the industry leaders in broadband providers).

<sup>122</sup> See *Ottetail Power*, 410 U.S. at 377 (arguing that closing the market to competitors or using monopoly status to eliminate competition violates section two of the Sherman Act); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951) (holding that conspiring to not accept advertisements from anyone dealing with competitor station would violate sections one and two of the Sherman Act); Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741, 771 (2000) (arguing that rejections to dealing which are one-sided violates section two of the Sherman Act).

<sup>123</sup> See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 599 (1985) (characterizing a ski facility as an "essential facility" thus the refusal to deal with a competitor was monopolistic); *William v. Heartland Hosp.*, East, 34 F.3d 605, 612-13 (8<sup>th</sup> Cir. 1994) (stating "those in possession of facilities which cannot practically be duplicated to share those facilities with their competitors"); see also Maureen O'Rourke, Article: *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 609-10 (2001) (arguing the Sherman Act places limits on monopolies who run an essential facility).

facility is an asset controlled by a monopolist.<sup>124</sup> This asset is usually a tangible asset.<sup>125</sup> Access to this facility is required in order to be a potential competitor in a second market.<sup>126</sup> It is not sufficient that the facility is merely helpful in a competitor's effort to compete in a second market.<sup>127</sup> There are typically four situations in which the essential facilities doctrine is applicable. These are in cases of the following: "(1) natural monopolies; (2) facilities whose duplication is forbidden by law; (3) publicly subsidized facilities that cannot practicably be built privately; and (4) the sole facility in the relevant geographic market, i.e., 'the only facility in town.'"<sup>128</sup> Cable systems can be considered an essential facility because ISPs cannot deliver their product Time Warner cable customers seeking cable broadband access unless

<sup>124</sup> See BENDER & COMPANY, INC. *supra* note 109, at n.133; see also Massachusetts Sch. of Law at Andover v. Am. Bar Ass'n, 107 F.3d 1026, 1041 (3d Cir. 1997) (describing three requirements a plaintiff must meet in order to have their essential facilities claim go forward); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983) (describing essential facilities doctrine to state that controlling such a facility is dangerous because the monopoly may expand).

<sup>125</sup> See BENDER & COMPANY, INC. *supra* note 109, at n.133 (discussing businesses that have been found to be a tangible asset); see also Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 44 (7th Cir. 1996) (holding that the essential facilities doctrine did not apply to this particular tangible asset because the complained of behavior was simply competition in the market); Am. Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 862 (E.D. VA. 1999) (stating essential facilities argument failed with respect to AOL because they were not in competition with the plaintiff).

<sup>126</sup> See Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2nd Cir. 1990) (finding that the rationale of providing a competitor access to an essential facility is based upon the possible prevention of a monopoly further expanding to another market); McKenzie v. Mercy Hosp. of Independence, 854 F.2d 365, 368-69 (10th Cir. 1988) (reiterating the essential facilities doctrine and the purpose behind the doctrine); MATHEW BENDER & COMPANY, INC. *supra* note 109, at n.135 (interpreting case law to state that in order for a facility to be considered essential, the access to the facility must be crucial to the ability to compete in the market).

<sup>127</sup> See MATHEW BENDER & COMPANY, INC. *supra* note 109, at nn.138-139 (noting that there will not be a finding of an essential facility if equivalent facilities exist or the benefits of access can be obtained through other means); see also AT&T Corp. v. Iowa Util. Bd. 525 U.S. 366, 391 (1999) (focusing on feasibility as a guideline for determining essential facilities). See generally Abbot B. Lipsky, Jr., *Essential Facilities*, 51 STAN L. REV. 1187 (1999) (elucidating the doctrine of essential facilities).

<sup>128</sup> MATHEW BENDER & CO., *supra* note 109 at n.140 (citing David L. Alderidge Co v. Microsoft Corp., 995 F. Supp. 728, 754 (S.D. Tex. 1998) for proposition that essential facilities doctrine only applies in four situations); see also *Bender and Co. III*, *supra* note 119, at n.130 (indicating that the essential facilities doctrine has been raised with respect to the following facilities: airports, buildings, electric generation plants, electric transmission lines, hospitals and health care facilities, magazines, mountains, newspapers and news services, patented devices, piers, pipelines for oil and gas, radio broadcast networks, railroad terminals and tracks, refineries, sport franchises, storage tanks, telephone facilities, telephone directories and listings, television networks, television programming); Richard J. Wegener, *Termination and Refusal to Deal*, SF 74 ABA CONTINUING LEGAL EDUC. ALI-ABA COURSE OF STUDY 397, 399-400 (2001) (tracing the development of essential facilities doctrine).

they have use of the Time Warner's cable system. Refusal to give access to an essential facility is a classic example of a monopolistic refusal to deal.<sup>129</sup> This refusal to deal will have a dangerous probability of resulting in AOL Time Warner affiliated market dominance in the ISP market.

Additionally the same anticompetitive harm caused by a refusal to deal could be pursued under Section 1 of the Sherman Act under a group boycott theory. A group boycott involves a vertical restraint of trade. In a group boycott, a competitor conspires to cut off either a sources of supply or customers for its rival.<sup>130</sup> In this case an affiliated cable broadband ISP could conspire to cut off a source of customers for unaffiliated ISPs by denying them access to the cable system or in the alternative denying them advertising opportunities on cable systems.

There is also a specific historical risk that AOL Time Warner, if left unrestricted, would engage in a monopolistic refusal to deal. Before the merger became effective, Time Warner was engaged in contract negotiations with the ABC networks to continue carrying these networks on its cable system.<sup>131</sup> Negotiations were unsuccessful and instead of temporarily extending ABC's contract during the negotiation process, Time Warner decided to black out the transmission of all ABC networks during sweeps week.<sup>132</sup> Time Warner, controlling the

<sup>129</sup> See *Lorain Journal v. United States*, 342 U.S. 143, 149-50 (1951) (holding that because the town's only newspaper was essential facility it could not refuse to accept advertisements on the sole basis that those advertisers had taken ads on the competitor radio station); see also *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585 (1985) (holding that the refusal to deal with smaller rival to offer a multi-day multi-mountain ski pass violated Section of the Sherman Act because the ticket could be characterized as essential facility necessary for competition); *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 858 (6<sup>th</sup> Cir. 1979) (identifying the "bottleneck theory" as applicable in instance where "indispensable facility" is in the control of competing interest).

<sup>130</sup> *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (aligning group boycotts with the idea of willing refusal to deal, and identifying the traditional rule that group boycotts are per se illegal). See *Wegener, supra* note 128, 408-09 (indicating the traditional rule is that group boycott is per se illegal). But see *Rothery Storage and Van Co. v. Atlas Van Lines, Inc.* 792 F.2d 210, 215-16 (1986) (rejecting the notion of per se illegality in favor of the rule of reason).

<sup>131</sup> Contract negotiations had been on going for over five months and several temporary extensions had been given to ABC so that the expiration of the former contract with Time Warner Cable would allow ABC to continue to be carried during these negotiations. See *Reid, supra* note 6, at n.319. Contract negotiations were extended by one month. *Time Warner-ABC Cable Dispute Extended*, NY TIMES, April 1, 2000, at C16; *Bill Carter, Time Warner and Disney Agree to End Dispute About Cable*, N.Y. TIMES, May 19, 2000, at C1.

<sup>132</sup> See *Reid, supra* note 6, at n.327 (identifying key period for broadcasters,

essential facility of the cable system, refused to deal with ABC at a critical time in which lack of access could particularly damage the company.<sup>133</sup> The refusal to deal only lasted thirty-nine hours and was ended right before the FCC had a chance to rule in ABC's favor.<sup>134</sup> However, Time Warner demonstrated that when it flexed its monopoly power in the cable systems it was a force to be reckoned with.

Another possible anticompetitive act would be predatory pricing. Predatory pricing occurs when "a business rival has priced its product in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."<sup>135</sup> An affiliated ISP could charge below cost prices to customers because it is being subsidized by higher rates charged by Time Warner Cable and thereby force rival ISPs out of business. Once rivals are forced out of business the affiliated ISPs could raise prices. Courts demand a showing of two pre-requisites before making a finding a predatory pricing violation under section 2 of the Sherman Act.<sup>136</sup> First pricing of the product must be below some

potentially causing great losses for ABC); *see also* Jim Rutenburg, *ABC Goes Off Cable Systems in Key Markets*, NY TIMES, May 1, 2000, at A1 (explaining the events leading up to the blackout); Tim Jones, *Time Warner Turns ABC Back On; Deal Ends 1-Day Blackout on Cable System*, CHI. TRIB., May 3, 2000, at Bus. 1 (detailing the resolution and subsequent return of ABC to Time Warner's cable system).

<sup>133</sup> *See* Reid, *supra* note 6, at n.328 (asserting that black out was particularly damaging because it denied ABC of valuable sweeps ratings in several of the country's largest media markets). *See generally* Rutenburg, *supra* note 132, at A1 (providing account of blackout); Jones, *supra* note 132 at Bus. 1 (outlining circumstances surrounding blackout).

<sup>134</sup> *See* Reid, *supra* note 6, at n.332 (detailing duration of blackout); *see also* Dan Lerner, *Watchdog Rebukes Time Warner*, FIN. TIMES (LONDON), May 4, 2000 at 5 (reporting FCC's harsh response to blackout); Sally Hofmeister, *Time Warner Erred in ABC Action, FCC Says*, LOS ANGELES TIMES, May 4, 2000 at C1 (discussing FCC's statement finding Time Warner officially at fault in blackout).

<sup>135</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). *See* Ann K. Wooster, *Primary-Line Price Discrimination Under § 2(A) of the Clayton Act, as Amended by the Robinson-Patman Price Discrimination Act (15 U.S.C.A. § 13(A))*, 171 A.L.R. FED. 581, § 2 (a)(2001) (arguing intent to retard or eliminate competition is the essence of a violation of both the Robinson-Patman Price Discrimination Act and section 2 of the Sherman Act). *See generally* *Monopolizing Trade A Felony; Penalty* 15 U.S.C.A. §§ 2, 13(a), 13(b) (highlighting relevant provisions of Robinson-Patman Act and Sherman Act).

<sup>136</sup> *See* *Brown & Williamson*, 509 U.S. at 222 (discussing required elements for predatory pricing violation); *see also* *Int'l Air Indus., Inc. v. Am. Excelsior Co.* 517 F.2d 714, at 723 (5<sup>th</sup> Cir. 1975) (describing predatory pricing to be, "hav[ing]... sacrificed present revenues for the purpose of driving... out of the market with the hope of recouping the losses through subsequent higher prices"). *See generally* *Discrimination In Price, Services or Facilities* 15 U.S.C.A. § 13(a) (outlining elements and requirements for predatory pricing violations).

reasonable measure of cost.<sup>137</sup> Second there must be a reasonable prospect of recouping short-term losses.<sup>138</sup> If these prerequisites are met, a Section 2 Sherman Act violation will be found if there is a dangerous probability of actual monopolization of the relevant market.<sup>139</sup> However, even if a showing of potential monopolization is not made, substantial harm may still be inflicted upon competition to question the motives of merger and effectiveness of the consent decree.<sup>140</sup> The recognition of potential harm to competition warranting governmental intervention even before there is a risk of monopoly in some markets suggests that predatory pricing can cause significant harm in all markets before there exists a dangerous potential for monopolization of that market. This potential for harm caused by predatory pricing in the pre-monopolized market is an important consideration in

<sup>137</sup> *Brown & Williamson*, 509 U.S. at 222 (holding that plaintiff seeking to establish competitive injury resulting from rivals' low price must prove that prices complained of are below an appropriate measure of cost); *see also* *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986) (stating short term goal of eliminating competitors); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986) (examining which cost is relevant in determining is applicable with regard to predatory pricing).

<sup>138</sup> *See Brown & Williamson* 509 U.S. at 224 (indicating that there must be a dangerous probability of a competitor recouping its investment in below-cost prices in order to satisfy the second prerequisite of a predatory pricing violation under Section 2 of the Sherman Act); *Cargill, Inc.* 479 U.S. at 117 (inferring increased prices as a result of reducing competition); *Matsushita*, 475 U.S. at 588-89 (explaining that the predator must have a reasonable expectation of recovering more in monopoly profits than in the losses suffered).

<sup>139</sup> *Brown & Williamson*, 509 U.S. at 222 (noting that there is only Section 2 Sherman Act violation when there is actual probability of monopolization); *Spectrum Sports, Inc.*, 506 U.S. at 455 (interpreting Section 2 of Sherman Act as condemning predatory pricing when it poses "dangerous probability of actual monopolization"); *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007, 1008 (1985) (opining that Section 2 of Sherman Act intended to regulate unilateral conduct, as opposed to concerted action, by outlawing monopolization and attempted monopolization).

<sup>140</sup> Specifically, the Robinson-Patman Act recognizes that there may be harm caused to competition justifying governmental intervention, even if there is no risk of monopolization when predatory pricing involves commodities. *See* 15 U.S.C. §13(a); *Brown & Williamson*, 509 U.S. at 219-20. The act provides:

It shall be unlawful for any person engaged in commerce. . . to discriminate in price between different purchasers of commodities of like grade and quality. . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of business, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . .

15 U.S.C. §13(a). *But see* *St. Louis Convention & Visitors Commission v. NFL*, 154 F.3d 851, 861 (8th Cir. 1998). The Court held that it was necessary to analyze whether harm to competition resulting from restraint of trade outweighs any pro-competitive effects when "the anticompetitive impact of a restraint is less clear or the restraint is necessary for a product to exist at all."



evaluating the overall effectiveness of the consent decree. In this case, the subsidy from Time Warner Cable, in addition to AOL Time Warner's potential for becoming a monopolist in the broadband Internet provider market provides the means of recouping any short-term losses incurred by pricing Internet broadband service below cost. Predatory pricing could potentially result in significant harm to competition in the Internet broadband service market.

Another possible attempted monopolization offense would be the bundling of the cable service product and cable broadband access ISP product. This offense could also fall under Section 1 of the Sherman Act under the theory of being an illegal vertical restraint of trade.<sup>141</sup> If Time Warner Cable decided to provide its customers with a cable broadband access ISP for "free" foreclosure of competition in the cable ISP market would result. Bundling, or tying, as it is otherwise known, has traditionally been a per se violation of the antitrust laws.<sup>142</sup> However, technological tying has recently been subject to a rule-of-reason analysis.<sup>143</sup> This type of bundling might qualify under a

<sup>141</sup> Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. §§ 1-7; *see also* U.S. v. Paramount Pictures, 334 U.S. 131, 174 (1948) (explaining that vertical integration violates Sherman Act if it is "a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs"). *Compare* 15 U.S.C.A. § 1 *with* U.S. v. New York Great Atlantic & Pacific Tea Co., 67 F. Supp. 626, 642 (1946) (finding that integration, be it vertical or horizontal, is not per se unlawful).

<sup>142</sup> *See* N. Pac. Ry v. U.S., 356 U.S. 1, 5-7 (1958) (holding that tying arrangement whereby sale of tying product is conditioned on either sale of tied product or agreement that buyer will not buy tied product from any other supplier is per se unreasonable and unlawful under Sherman Act whenever seller has sufficient economic power with respect to tying product to substantially restrain free competition in the market for tied product, and "a not insubstantial amount" of interstate commerce is affected); *Int'l Salt v. U.S.* 332 U.S. 392, 396 (1947) (holding that it was unreasonable per se to foreclose competitors from any substantial market by tying arrangements). *See also* Ramsey Hanna, Comment, *Missing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STAN. L. REV. 401, 411 (1994) (noting that "[t]ying arrangements are presumed to harm competition because they deprive buyers of the opportunity to consider other suppliers of the tied product, and thus prevent those other producers from competing on equal terms.") (*citing* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-15 (1984)).

<sup>143</sup> *See* U.S. v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001) (remanding case for

technological tying analysis, as it involves highly innovative technological advances that may have significant efficiencies that make a traditional per se analysis unwarranted.<sup>144</sup> Nonetheless, any claims that Time Warner Cable would provide an ISP service for “free” are unjustified. In order to cover the costs of the “free” ISP, Time Warner Cable would simply elevate the price of cable service. Time Warner Cable would exploit its monopoly power in the cable systems market in order to pay for the ISP. If a consumer were to receive a cable ISP automatically with their Time Warner Cable Service, it is highly unlikely that he or she would spend additional money for a rival cable ISPs service, even if the rival’s product is better or would otherwise be less expensive than the bundled ISPs product. Consequently, competition in the cable broadband ISP market will be foreclosed.

### *Consent decree signed as remedy to potential Antitrust problems*

#### Provisions of the consent decree

The consent decree signed by AOL-Time Warner attempted to address the obvious antitrust concerns raised by the merger. Two major concerns were ensuring open access for rival ISPs to customers who already used Time Warner cable systems for internet access and ensuring that Time Warner’s introduction of its cable internet access service was contingent on Time Warner permitting the establishment of a competitive ISP market.

evaluation of Microsoft’s tying arrangement under rule of reason analysis); *see also* Nell I. Brown and James R. Burns, *Antitrust Violations*, 37 AM. CRIM. L. REV. 163, 170, Spring 2000 (noting that court utilizing rule of reason analysis will consider entire context of agreement in deciding whether its “anticompetitive effects pose an unreasonable restraint on free trade.”); Stefan Stremersch and Gerard J. Tellis, *Strategic Bundling of Products and Prices: A New Synthesis for Marketing*, 66 J. MKTG. 55, (2002) (under rule of reason analysis, it is not enough for tying product to have market power; there must also be “a substantial threat of the bundling firm acquiring additional market power over at least one of the products that are bundled with the tying product”); *A Loss of Trust*, ECONOMIST, July 7, 2001 (rule of reason analysis considers possible benefits to the consumer).

<sup>144</sup> *See Microsoft Corp.*, 253 F.3d at 94 (claiming that individual inquiry into costs of bundling in platform software markets cannot be considered unnecessary because one cannot claim comfortably that this bundling has so little redeeming virtue and that there would be so very little loss to society from its ban); Keith N. Hylton and Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001) (explaining that most circuits find that technological tying is permissible as long as it does not strive to hamper competition); *see also* Alan J. Meese, *Monopoly bundling in cyberspace: how many products does Microsoft sell?*, 44 ANTITRUST BULL. 65, March 22, 1999 (referring to technological tying as form of immunity).

The consent decree requires the merged AOL/ Time Warner to provide rival ISPs with access to its cable systems. In twenty of Time Warner's largest cable divisions as identified by the FTC,<sup>145</sup> AOL Time Warner cannot even begin to promote an affiliated ISP until Earthlink is available or promotes its services to Time Warner subscribers in the designated area.<sup>146</sup> An affiliated cable broadband ISP is defined as a cable broadband ISP that is affiliated with AOL Time Warner, excluding Road Runner.<sup>147</sup> Although Road Runner is not subject to the consent decree, it is required to remain independent from AOL pursuant to a December 2000 Order to Hold Separate.<sup>148</sup> When AOL Time Warner is finally permitted to begin promoting an affiliated cable broadband ISP and make its services available in the area, it must enter into an alternative cable broadband ISP service agreement with at least two non-affiliated ISPs.<sup>149</sup> These

<sup>145</sup> The twenty designated divisions are the following: New York City, Tampa Bay, Central Florida, Houston, Raleigh/Fayetteville, Western Ohio, Northern Ohio, Charlotte, Los Angeles, Milwaukee, Greensboro, Hawaii, Cincinnati, San Antonio, Syracuse, Kansas City, South Carolina, Columbus, Rochester, Albany, and any other cable division with 300,000 subscribers or more that is controlled by Time Warner Cable. Federal Trade Commission, *In the Matter of America Online, Inc. and Time Warner Inc.* (FTC) (April 17, 2001) available at <http://www.ftc.gov/os/caselist/c3989.htm> (last visited Jan. 8, 2003); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000). Time Warner owns and manages thirty-nine divisions serving 12.9 million subscribers, ninety-two percent of which are in clusters of 100,000 people or more; see also Time Warner Cable Key Company Facts, available at [http://www.aoltimewarner.com/companies/time\\_warner\\_cable\\_index.adp](http://www.aoltimewarner.com/companies/time_warner_cable_index.adp) (last visited Jan. 8, 2003).

<sup>146</sup> See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79, 861, 79,862 (Dec. 20, 2000); *Submitted Committee Reports supra* note 9, at 174; see also Kevin Murphy, *AT&T Comcast Says Customers Will Have ISP "Choice,"* Computerwire, (April 2, 2002) (stating that Earthlink also finalized deal with AT&T Broadband in March 2002, for service to its customers in Boston and Seattle).

<sup>147</sup> Federal Trade Commission, *In the Matter of America Online, Inc. and Time Warner Inc.*, No. C-3989 (FTC April 17, 2001), p. 3 available at <http://www.ftc.gov/os/caselist/c3989.htm> (last visited Jan. 8, 2003). Road Runner, a broadband service provider, is offered to consumers primarily through Time Warner Cable, but selected independent cable operators also provide the service. Road Runner, available at <http://www.rr.com/rdrun> (last visited Jan. 8, 2003).

<sup>148</sup> See Order to Hold Separate, *In the Matter of America Online, Inc. and Time Warner Inc.*, No. C-3989 (FTC Dec. 14, 2000) available at <http://www.ftc.gov/os/caselist/c3989.htm> (last visited August 28, 2002) (prohibiting Road Runner and AOL from engaging in cross-promotional or marketing activities, making available cross links to other entities services, making reference to other's services, using one company's subscriber list to promote other company's services or products, making formats of two companies products resemble each other and hiring other company's employees).

<sup>149</sup> See Decision and Order, *In the Matter of America Online, Inc. and Time Warner Inc.*, *supra* note 147; Analysis to Aid Public Comment on America Online, Inc. and Time

agreements must be entered into within ninety days of AOL Time Warner offering its affiliated cable broadband ISP service.<sup>150</sup>

These non-affiliated ISPs and Time Warner Cable's agreements with them must receive prior approval from the FTC.<sup>151</sup> If Time Warner fails to enter such agreements with non-affiliated ISPs the FTC will have the right to appoint a trustee who will have the power to enter these agreements on Time Warner Cable's behalf.<sup>152</sup> These agreements made by the trustee with the non-affiliated ISPs will also need prior FTC approval before becoming effective.<sup>153</sup> Agreements with unaffiliated ISPs must be on similar terms to either the Earthlink agreement or any agreement that AOL has with an unaffiliated cable system to provide AOL's cable broadband service over that non-affiliated system.<sup>154</sup>

Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861 (Dec. 20, 2000); *Submitted Committee Reports: Report of the Antitrust Committee supra* note 9 at 174; AOL TimeWarner Factbook 2002, p. 8, available at [http://www.aoltimewarner.com/investors/annual\\_reports/pdf/factbook2002.pdf](http://www.aoltimewarner.com/investors/annual_reports/pdf/factbook2002.pdf) (last visited August 27, 2002) (explaining that AOL's High Speed Broadband service, which covers approximately 80% of households in top 100 U.S. markets, is currently available through Time Warner Cable, as well as DSL partnerships with Verizon, SBC, Qwest and Bellsouth).

<sup>150</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147; Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000); *Submitted Committee Reports: Report of the Antitrust Committee supra* note 9, at 174.

<sup>151</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (establishing FTC's command and control over merger provisions and contingencies); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 n.2 (Dec. 20, 2000) (noting that these non-affiliated cable systems are identified as: Adelphia, AT&T, Cablevision, Charter, Comcast and Cox); *Submitted Committee Reports: Report of the Antitrust Committee supra* note 7, at 174 (explaining that one goal of merger is to comply with anti-trust laws).

<sup>152</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (noting the extensive interference ability retained by the FTC); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000)(specifying that if contracted non-affiliated ISP's end their agreements, AOL Time Warner must contract with new non-affiliated ISPs); *FTC Approves AOL/Time Warner Merger with Conditions*, (FTC December 14, 2000) available at <http://www.ftc.gov/opa/2000/12/aol.htm> (last visited August 30, 2002) (suggesting difficulty in evading conditions set out by FTC).

<sup>153</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (explaining that required approval benefits both parties entering said agreements); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (noting that FTC applies system of checks and balances to itself as well); *FTC Approves AOL/Time Warner Merger with Conditions, supra* note 152 (stating that marked delays that may ensue from implementing said conditions are not concerns).

<sup>154</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner

The consent decree creates the strictest restraints for AOL Time Warner in only the twenty designated areas. In all other cable divisions, AOL/ Time Warner has the freedom to promote and offer its affiliated cable broadband ISP service at any time.<sup>155</sup> However, within ninety days of offering the affiliated ISP service in the given division, AOL Time Warner must enter into an alternative cable broadband ISP service agreement with at least three non-affiliated ISPs.<sup>156</sup> These agreements must receive prior approval from the FTC. If Time Warner fails to enter such agreements with non-affiliated ISPs, the FTC will have the right to appoint a trustee who will have the power to enter these agreements on Time Warner Cable's behalf.<sup>157</sup> These agreements made by the trustee with the non-affiliated ISPs will also need prior FTC approval before becoming effective.<sup>158</sup> Agreements with non-affiliated ISPs must be on similar terms to either the Earthlink agreement or any agreement that AOL has with a non-

Inc., *supra* note 147 (commenting on importance of Earthlink agreement, which establishes a competing unaffiliated ISP in the market before AOL Time Warner introduces its service); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (noting that first step of merger was to complete deal with Earthlink before any further agreements with other ISP's could be approached); *FTC Approves AOL/Time Warner Merger with Conditions*, *supra* note 152 (suggesting existing cable agreements are reasonable standards upon which to base subsequent ISP agreements).

<sup>155</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (discussing limitations on interfering character of consent agreement within twenty designated areas); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 at n.1 (Dec. 20, 2000) (stating that 20 designated divisions are those with three hundred thousand or more subscribers); *Submitted Committee Reports: supra* note 9, at 174 (noting certain geographic areas have been designated for strict regulation).

<sup>156</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (arguing that business progress is to be pro-actively shared with entire industry); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (explaining that this is distinct from AOL Time Warner requirement with regard to the six cable systems); *Submitted Committee Reports supra* note 9, at 174 (noting attempt to delineate market share will be carried out without regard to company cooperation).

<sup>157</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (noting extensive interference ability retained by FTC); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (explaining command and control exercisable by FTC for extended duration); *FTC Approves AOL/Time Warner Merger with Conditions*, *supra* note 152 (suggesting difficulty in evading conditions set out by FTC).

<sup>158</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (explaining that required approval benefits both parties entering agreements); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (noting that FTC applies system of checks and balances to itself as well); *FTC Approves AOL/Time Warner Merger with Conditions*, *supra* note 152 (noting marked delay that may ensue from implementing said conditions).

affiliated cable system to provide AOL's cable broadband service over that non-affiliated system.<sup>159</sup>

The consent decree also attempts to ensure further protection against foreclosure of competition in the cable broadband ISP market by imposing additional requirements on AOL Time Warner. The first of these requirements is that AOL Time Warner can restrict access to its system based on cable broadband capacity constraints, other cable broadband technical limitations, or other cable broadband business considerations, but it cannot restrict on the basis of affiliation or the potential negative competitive impact to an ISP affiliated with AOL Time Warner.<sup>160</sup> A second requirement of the consent decree is the mandatory inclusion of a most favored nation clause in all alternative cable broadband service agreements submitted to the FTC for approval.<sup>161</sup> This most favored nation clause will generally ensure that unaffiliated ISPs get the same advantage that any affiliated ISP gets. Consequently, if the affiliated ISP secures a cable broadband ISP service agreement with a non-affiliated cable company, AOL Time Warner must file that agreement with the Monitor Trustee appointed by the FTC and the unaffiliated ISPs that have service agreements with AOL

<sup>159</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (commenting on importance of Earthlink agreement, which establishes a competing unaffiliated ISP in the market before AOL Time Warner introduces its service); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (clarifying that consistency in agreements promotes fairness and regulation); *FTC Approves AOL/Time Warner Merger with Conditions*, *supra* note 152 (suggesting existing cable agreements are reasonable equity standards upon which to base subsequent ISP agreements).

<sup>160</sup> Decision making processes are to be based on technical restraints rather than self-interested business judgments. See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147. AOL Time Warner has significant business interests in its affiliates and thus is impeded by this mandate. See Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,863 (Dec. 20, 2000). An example of a restriction based on valid technical restraints includes restrictions based on cable broadband capacity limitations. See Reid, *supra* note 6, at 174. Additionally AOL Time Warner can restrict access based on other cable broadband business considerations, as long as restriction is not motivated by protecting the AOL Time Warner affiliated ISP. *Id.*

<sup>161</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (explaining that beneficial protections for affiliates will be extended to unaffiliated ISP's as well); America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 FR at 79862 (stating that monitor trustees will be appointed to enforce these requirements); *FTC Approves AOL/Time Warner Merger with Conditions*, *supra* note 150 (noting consent decree continues to impede AOL's right to autonomic business judgment).

Time Warner must be notified within five days of the securing of the agreement.<sup>162</sup> Those non-affiliated ISPs then have thirty days to switch the terms of their agreement with Time Warner to the same terms that AOL secured with the non-affiliated cable company.<sup>163</sup> In addition to the inclusion of the most favored nation clause, Time Warner Cable must include a clause in non-affiliated ISP contracts seeking FTC approval that provides if Time Warner Cable extends different levels of service to any affiliated ISP, it must also extend the same levels of service to any non-affiliated ISP.<sup>164</sup> Before the FTC approves an agreement with a non-affiliated ISP, it must include a clause providing that all cable broadband disputes regarding compliance with rates, terms and conditions of that agreement shall be submitted to binding arbitration at the option of the non-affiliated ISP. This provision is likely included to prevent potential financial crippling the smaller non-affiliated ISPs by Time Warner through expensive and lengthy litigation proceedings. Additionally, it is unlikely that these smaller unaffiliated ISPs have the power to negotiate a binding arbitration clause themselves. An agreement must also include a clause requiring that Time Warner must provide non-affiliated ISPs with any network flow monitoring data or usage accounting if it makes

<sup>162</sup> See Decision and Order, In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147 (noting that ISP's will be given option to alter their agreements to mimic cable companies' agreements); Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79861, 79862 (Dec. 20, 2000) (suggesting that FTC is seeking complete transparency in all AOL Time Warner ISP transactions); *FTC Approves AOL/Time Warner Merger with Conditions*, *supra* note 150 (explaining consistency of conditions, not only between cable and ISP providers but also across unaffiliated and affiliated boundaries).

<sup>163</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (requiring that agreements which involve non-affiliated ISPs be aligned with those of AOL); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (explaining that terms of agreements must be comparable). See generally Daniel Brenner, *Satellite vs. Cable: Video Distribution in the New Age*, 645 PRAC. L. INST. 491, 533 (March 2001) (discussing that non-affiliated ISPs are given opportunity to secure terms exact to affiliated ones).

<sup>164</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (stating that Time Warner include a term giving non-affiliated ISPs similar treatment to affiliated ones); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (identifying various requirements of agreements entered into with ISPs). See generally Teri Rucker, *Telecom: Fans, Foes Of AT&T, Comcast Merger Debate Consumer; Benefits*, NATIONAL JOURNAL'S TECHNOLOGY DAILY (April 23, 2002) available at <http://www.nationaljournal.com> (last visited Jan. 8, 2003) (discussing service levels required by agreement).

them available for an affiliated ISP.<sup>165</sup> Additionally, Time Warner must include a clause in non-affiliated ISP contracts seeking FTC approval providing that if requested cable companies must offer the same point of connection to non-affiliated ISPs as it does to affiliated ISPs.<sup>166</sup> Non-affiliated are ensured the opportunity for the same point of connection so that Time Warner cannot discriminate against non-affiliated ISPs by assigning them a lower performing connection point than AOL is assigned.<sup>167</sup> Time Warner is also obligated to immediately renew any contracts with non-affiliated ISP if they terminated before the term of the Consent Order has expired.<sup>168</sup> If the term of the original contract was at least three years the option to renew must be at least two years.<sup>169</sup>

<sup>165</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (requiring Time Warner to provide network flow data available to both affiliated and non-affiliated ISPs); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,862 (Dec. 20, 2000) (explaining Time Warner's responsibility with network flow data); Lindsay & Melamaed, *supra* note 4, at 542 (revealing that Time Warner must make network flow monitoring data available to non-affiliated ISPs if it makes such information available to affiliated ones).

<sup>166</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (identifying what is required regarding point of connection for non-affiliated ISPs); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,863 (Dec. 20, 2000) (explaining that non-affiliated ISPs are entitled identical point of connection if requested). See generally Wigod, *supra* note 1, at 365 (noting that FTC approval must be sought in non-affiliated ISP agreements).

<sup>167</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (providing that service levels must be offered consistently to both affiliated and non-affiliated ISPs); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,863 (Dec. 20, 2000) (noting that offering identical points of connection to non-affiliated ISPs will lower likelihood of discrimination); Brenner, *supra* note 163, at 533 (stating that requiring alike points of connection to non-affiliated ISPs will alleviate instances of discrimination).

<sup>168</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (requiring Time Warner to renew contracts with non-affiliated ISPs if such agreements expire prior to consent agreement); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,863 (Dec. 20, 2000) (revealing Time Warner's obligation where a non-affiliated ISP contract terminates before consent agreement). See generally Lindsay & Melamed, *supra* note 4, at 543 (noting Time Warner's obligation should a non-affiliated ISP have a contract that expires prior to consent order).

<sup>169</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (asserting that subsequent agreement must be for a minimum of two years if original at least three); see also Analysis to Aid Public Comment on America Online, Inc. and Time Warner Inc. Proposed Consent Agreement, 65 Fed. Reg. 79,861, 79,863 (Dec. 20, 2000) (providing that new agreement terms for those that expire must be for minimum of two years); Lindsay & Melamed, *supra* note 4, at 543 (stating that terms of subsequent agreement must be for minimum of two years if original one was for at least three).



The consent decree also addresses the concern of maintaining competition in the broadband access market at large, not just in the cable broadband access market. Fearing that AOL Time Warner's position in the two broadband access technologies would foreclose competition in the larger broadband access market, the FTC mandated that AOL Time Warner offer DSL services in those markets where Time Warner Cable holdings are located and affiliated cable broadband ISP service or Road Runner is available.<sup>170</sup> AOL Time Warner must offer DSL service at price, terms and conditions the same or comparable to those at which it offers DSL in markets in which neither an affiliated cable broadband ISP service or Road Runner is available.<sup>171</sup> Time Warner must also market and promote DSL services to subscribers in markets in which Time Warner Cable holdings are located and affiliated cable broadband ISP service or Road Runner Service is available in a similar manner and at a similar level as they market and promote DSL services to subscribers in which neither affiliated cable broadband ISP service nor Road Runner is available.<sup>172</sup> At the time of the consent decree this provision was thought to oblige AOL to continue to offer its service over DSL lines so that competition with Road Runner would continue.<sup>173</sup> However a second interpretation of this provision has emerged. This interpretation seems to imply that

<sup>170</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (requiring Time Warner offer DSL services in areas where cable holdings are located and broadband is marketed). See generally Brenner, *supra* note 163, at 532 (noting that this agreement binds Time Warner to market and offer DSL services); Joseph Kattan, *Broadband and Mandatory Access*, 1236 PRAC. L. INST. 269, 276-277 (2001) (discussing the FTC's views on proposed merger).

<sup>171</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 9 (setting comparable pricing schemes in markets where multiple services exist). See generally Lopatka and Page, *supra* note 7, at 904-05 (discussing marketing efforts that must be made); Brenner, *supra* note 163, at 534 (stating that pricing remain consistent in various markets where multiple service types are available).

<sup>172</sup> See Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 145 at 9 (indicating that Time Warner would continue to offer DSL and Roadrunner in certain markets); see also Brenner, *supra* note 163, at 534 (noting that Time Warner is obligated to market and promote products in a similar manner regardless of product availability). See generally Lopatka and Page, *supra* note 7, at 904-05 (explaining required promotions of broadband services).

<sup>173</sup> See Ted Hearn, *AOL Time Warner Hit in DSL Ad Flap*, MULTICHANNEL NEWS, June 18, 2001, at 30 (explaining the widely believed interpretation of the provision). See generally Kevin J. Arquit, *Mergers and Acquisitions: United States Government Antitrust Analysis and Enforcement* (pt. 3 of 5), 1251 PRAC. L. INST. 317, 432 (May 10-11, 2001) (describing potential competitive nature following merger); Lopatka & Page, *supra* note 7, at 912 (discussing the necessity for the preservation of competition).

Time Warner Cable must provide the same advertising opportunities to ISPs providing DSL broadband access in markets where these ISPs compete with AOL Time Warner cable broadband ISPs as they do when these DSL ISPs don't compete with AOL Time Warner. This interpretation of the provision would attempt to prevent the occurrence of either a group boycott or attempted monopolization through a refusal to deal. The consent decree also prohibits AOL Time Warner from interfering with the unaffiliated ISPs ability to provide its service to its customers.<sup>174</sup> The consent decree prohibits AOL Time Warner from tampering with the content on the bandwidth utilized by non-affiliated ISPs.<sup>175</sup> Similarly, AOL Time Warner is prohibited from interfering with a subscriber's use of interactive signals, triggers, or other content provided by non-affiliated ISPs.<sup>176</sup>

#### POST – MERGER EFFECTIVENESS OF THE CONSENT DECREE FOR PREVENTING ANTITRUST HARM

##### *Evaluation of AOL-Time Warner's abidance to consent decree*

##### Problems with holding off entering broadband market until there is sufficient competition

The first possible problem is that AOL Time Warner may try to designate ISPs that are not truly non-affiliated in a veiled attempt to comply with the consent decree. AOL Time Warner's

<sup>174</sup> Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 11 (noting rules involving bandwidth); see Stephen Labaton, *An Unlikely Policeman for Mergers*, N.Y. TIMES, Dec. 16, 2001, at C1 (commenting that most analysts expect AOL Time Warner to abide by the agreement because of business incentives built into agreement); Stephen Labaton, *Media Megadeal: The Overview*, N.Y. TIMES, Dec. 15, 2001, at A1 [hereinafter *Megadeal*] (providing overview of stringent conditions imposed by consent decree and the issues that were considered during the months of negotiations leading up to the agreement).

<sup>175</sup> See In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 11; see also Labaton, *supra* note 172, at C1 (contemplating whether similar restrictions will be placed upon other cable companies); *Megadeal*, *supra* note 172, at A1 (noting that while restrictions were imposed, regulators did not acquire any new authority to resolve complaints).

<sup>176</sup> Decision and Order In the Matter of America Online, Inc. and Time Warner Inc., *supra* note 147, at 11 (discussing rules which regulate AOL's interference with non-affiliated ISP's); see Labaton, *supra* note 172, at C1 (reporting on speculations as to whether the agreement will be enforced), *Megadeal*, *supra* note 172, at A1 (reviewing the non-interference restriction contained within the consent decree).

attempt to designate High Speed Access Corp. (HSA) as a non-affiliated ISP providing service using Time Warner Cable's infrastructure was highly criticized because "HSA" has too many ties with AOL Time Warner to designate it as independent.<sup>177</sup> Overall however this is not an overly significant problem because ultimate approval for the service agreement between Time Warner Cable and an unaffiliated cable broadband ISP rests with the FTC. If the FTC does not think that the ISP sufficiently qualifies as an unaffiliated ISP because its ties are too great with AOL Time Warner, then the contract will not be approved. The consent agreement will likely sufficiently manage the risk that real competition will not develop in the cable broadband ISP market because the "competitors" are not truly independent. However, the fact that AOL Time Warner would "push the envelope" so early on does serve to support the reality of the monopolization risk.

### Controversy on the meaning of open access

#### Denial of ability for rival ISPs to advertise broadband service

The consent decree has failed to accurately assess how AOL Time Warner can draw upon resources other than just its cable holdings to thwart competition in the cable broadband access ISP market. AOL Time Warner has been accused of running ads for affiliated cable broadband ISPs and DSL providers, but denying unaffiliated cable ISPs and DSL providers access to advertising time.<sup>178</sup> For example, several small ISPs that placed ads on Time

<sup>177</sup> See Jennifer Jones, *Consumer Groups Cry Foul over AOL Time Warner ISP Flap*, INFOWORLD DAILY NEWS, July 31, 2001, at 1 (listing Center for Digital Democracy, Media Access Project, and Consumers Union as among those groups concerned with the links between HAS and AOL Time Warner); see also Alec Klein, *Advocacy Group Calls for Investigation of AOL Contract*, N.Y. TIMES, May 15, 2001, at E5 (reporting on the Center for Digital Democracy's concerns that High Speed Access is not truly an independent ISP because of its business ties with AOL); Alec Klein, *AOL Time Warner Loses U.S.-Mandated Net Access Partner*, WASH. POST, Sept. 5, 2001, at E5 (observing that these concerns ultimately went away without further inquiry as High Speed Access Corp. pulled out of its deal with AOL Time Warner citing a lack of funding as the problem, and reporting that critics of the proposed deal characterized this turn of events as a reprieve for AOL Time Warner).

<sup>178</sup> See Transcript for CNN, June 8, 2001 Media Competition (discussing with Gene Kimmelman of Consumers Union concerns that AOL Time Warner is blocking competition by refusing to run ads for internet competitors); see also Erik Wemple, *Price Isn't Right for Consumer Groups*, CABLE WORLD, July 2, 2001, at 27 (commenting that cable companies have exhibited anticompetitive practices by refusing to run ads for small

Warner networks before the merger have not been able to place advertisements for their DSL service with those same networks after the merger with AOL.<sup>179</sup> Time Warner's senior vice president for corporate affairs claims that this is not a company wide practice and that advertising decisions are made individually in each market.<sup>180</sup> However, in a letter to the FTC AOL Time Warner stated that there was nothing wrong with Time Warner Cable's decision to reject TV ads from competing DSL ISPs.<sup>181</sup> Furthermore, AOL Time Warner commented "[t]here's nothing in our agreement with the government that touches on this issue."<sup>182</sup> However, as interpreted by various consumer groups the consent decree clearly states that Time Warner Cable has a responsibility to market unaffiliated DSL services.<sup>183</sup> It seems clear on the face of the consent decree that Time Warner Cable must market and promote DSL service in markets in which an affiliated cable broadband ISP or Road Runner is available in the same manner as it does where neither

ISPs and DSL services); *cf.* Jube Shiver, Jr., *Broadband Firms Can Close Their Networks*, L.A. TIMES, Mar. 15, 2002, at Part 3, page 1 (noting that the FCC recently voted not to place other cable companies under the same restrictions as AOL Time Warner but instead classified broadband as unregulated service, thereby allowing cable operators to deny independent ISPs access to their cable networks).

<sup>179</sup> See Erik Wemple, *Cable Giants Hit Over ISP Ad Policies*, CABLE WORLD, June 11, 2001, at 1 (suggesting that six such situations have occurred); see also Lee Bergquist, *AOL Time Warner Accused of Retaliation*, MILWAUKEE J. SENTINEL, Feb. 15, 2002, at 2D (reporting on request that two regional ISPs made to the FTC to investigate AOL Time Warner's policy of denying advertising to independent ISPs in local cable markets); Jennifer Davies, *Cable Firms Bar Rival DSL Ads from Airing*, SAN DIEGO UNION-TRIBUNE, June 9, 2001, at C1 (considering arguments from both sides and describing widespread nature of this practice by cable firms).

<sup>180</sup> See Wemple, *supra* note 179 (indicating Time Warner's denial that rejection of competitor ISPs is not company policy); see also Financial Section, WASH. POST, June 14, 2001, at E2 (quoting AOL Time Warner CEO Gerald Levin's comments that the denial of advertising is not an issue); Davies, *supra* note 179 at C1 (identifying two other San Diego market cable providers in addition to Time Warner Cable as refusing to promote DSL services).

<sup>181</sup> See Robert MacMillan, *DSL Ad Ban Reflects Industry Practice – AOL Time Warner*, NEWSBYTES, June 14, 2001, at 1; see also Financial Section, WASH. POST, *supra* note 180 at E2 (quoting Levin's comments that all advertisers get to choose the ads that they will run); Davies, *supra* note 179 at C1 (citing Cox Communications vice president assertion that choosing not to run ads is standard business practice).

<sup>182</sup> See MacMillan, *supra* note 181 (quoting statements of Luftman); see also Financial Section, WASH. POST, *supra* note 180, at E2 (explaining that AOL Time Warner has, in particular, come under attacks alleging that its advertising policies violate the terms of its merger agreement).

<sup>183</sup> Macmillan, *supra* note 181 (reporting that response letter from Consumer Union, Consumer Federation of America, Media Access Project and Center for Digital Democracy said, "[t]his refusal appears to be a violation of both the letter and spirit of the consent decree.").

affiliated ISP nor Road Runner is available. Therefore it would seem if Time Warner Cable allows advertising for an unaffiliated DSL ISP in a market where AOL Time Warner does not have an affiliated cable broadband competitor, then it must allow an unaffiliated DSL ISP advertise in any market.

Another issue in the open access is who is entitled to it. The consent decree only requires that Time Warner Cable provide open access to three national cable broadband ISPs in order to carry an affiliated cable broadband ISP. The consent decree makes no provision that Time Warner must provide open access to regional unaffiliated cable broadband ISPs. As a result an entire of segment of competition can be potentially denied access. For example, a small Texas based ISP faced Time Warner Cable's refusal to negotiate for over a year.<sup>184</sup> An AOL Time Warner spokesperson claimed that they were focusing on a smooth rollout of its Earthlink program next month, and the remaining two ISPs shortly thereafter."<sup>185</sup> Furthermore she added, "It's not realistic for us to be involved in simultaneous and active negotiations with every ISP that expresses interest or with which we've had discussions. We've been in conversations with them and invited them to come back in a few months time."<sup>186</sup> It seems all too convenient that negotiations can occur on Time Warner's Cable's schedule. The longer that Time Warner Cable stalls the entry of regional unaffiliated cable broadband ISP, the greater the market share AOL Time Warner can achieve in the cable broadband ISP market. Even if the Texas ISPs' complaint does not fall on deaf ears at the FTC, much damage will already be done because regional competitors will be denied the opportunity to start on what is the closest thing to a level playing field as will

<sup>184</sup> See Brian Krebs, *Texas.net: AOL TW Won't Play Ball With Small ISPs*, NEWSBYTES, August 9, 2001 (citing Texas.net President's rationale for filing a complaint with the FCC); see also Bergquist, *supra* note 179 (reporting that regional ISPs' requested FTC investigation not only of AOL Time Warner's advertising policy, but of the denial of access issues as well). *But see* Alec Klein, *AOL Signs Up 3 More Internet Providers to Use Cable System*, WASH. POST, Oct. 6, 2001, at E8 (explaining that the FCC dismissed a formal complaint alleging that AOL Time Warner did not negotiate in good faith with small Texas ISP which was denied access).

<sup>185</sup> Krebs, *supra* note 184 (quoting Kathy McKiernan); see also Kathy Brister, *Atlanta Tech*, ATLANTA J. CONSTITUTION, Jan. 9, 2002, at 5D (reporting that EarthLink began offering service to AOL Time Warner customers in September 2001; commenting, however, that there may be difficulties for EarthLink if AOL Time Warner offers discounts of affiliated ISPs); Klein, *supra* note 184, at E8 (explaining that AOL Time Warner has reached agreements with EarthLink and Juno Online Services).

<sup>186</sup> Krebs, *supra* note 184 (quoting Kathy McKiernan).

ever be seen again. Regional competitors will only be allowed to begin after affiliated ISPs and larger national unaffiliated ISPs have had an opportunity to establish a reputation in the locality. To date, that is exactly what seems to be happening. AOL Time Warner has only moved to get FTC approval for unaffiliated cable broadband ISPs with national coverage.<sup>187</sup> Regional competitors face an uphill battle.

### *Changing Industry conditions and how that effects open access to ISPs*

#### AT&T's sale of some cable holdings

Currently the broader cable market is undergoing changes that also impact whether the consent decree adequately fosters competition in the cable broadband ISP market. The most significant change is with AT&T, which are Time Warner Cable's fiercest competitor and the largest provider of cable service in the United States. AT&T is in the process of dividing itself into four companies.<sup>188</sup> AT&T's cable and broadband holdings will be spun off to AT&T Broadband.<sup>189</sup> Simultaneously, AT&T Broadband will merge with Comcast Corporation forming AT&T Comcast

<sup>187</sup> See Donald Clark, *Letter Approving AOL Time Warner's Motion to Approve Unaffiliated ISPs*, February 26, 2002 available at <http://www.ftc.gov/os/2002/02/aolltr.htm> (last visited Jan. 8, 2003) (approving West Central Ohio Internet Link, LLC, Local Net Corp., Global Systems, Inc., Big Net Holdings, Inc., and Digital Communications Networks Inc. as unaffiliated ISPs); Donald Clark, *Letter Approving AOL Time Warner's Motion to Approve Unaffiliated ISPs*, December 21, 2001 available at <http://www.ftc.gov/os/2001/12/aolltr.htm> (last visited Jan. 8, 2003) (approving New York Connect.Net, Ltd., Internet Junction Corp., Inter.net US. Ltd., and STIC.NET as unaffiliated ISPs); see also *AOL Time Warner Faces FCC Complaint Over Alleged Discrimination Vs. Local ISPs*, AFX NEWS LTD., Aug. 9, 2001, at General; Company News Section (reporting that FCC commission found potential harm to regional and local ISPs as against national ISPs).

<sup>188</sup> See News Release, *AT&T Broadband To Merge With Comcast In \$72 Billion Transaction*, Dec. 19, 2001, available at <http://www.att.com/news/item/0,1847,4135,00.html> (last visited Jan. 8, 2003), see also John Dix, *The Last Telecom Cowboy*, NETWORK WORLD, July 1, 2002, at 30 (stating AT&T will be divided into four companies); Christopher Stern, *Comcast Bids to Merge With AT&T*, THE WASHINGTON POST, July 9, 2001, at A04 (saying AT&T has plans to divide into four companies).

<sup>189</sup> See News Release, *supra* note 186 (releasing that AT&T will spin off AT&T broadband); see also Alan Clendenning, *AT&T Merging Cable Business With Comcast*, THE RECORD (Bergen County, N.J.), Dec. 20, 2001, at b01 (informing AT&T will spin off its cable division); Kris Hudson, *2 AT&T Units To Get Big Debt Portion Assignments Target Cable*, THE DENVER POST, May 15, 2001, at C01 (describing AT&T Broadband as the surviving entity after the consumer and business divisions spin off from the cable division).

Corp.<sup>190</sup> The merger is expected to occur sometime late in 2002 pending regulatory approval.<sup>191</sup> Comcast is a leading Cable Service Provider in the United States.<sup>192</sup> AT&T Comcast Corp will serve 22 million subscribers making it the largest cable service provider in the nation.<sup>193</sup> This further consolidation of the cable service provider market similarly threatens the potential for foreclosure of competition in the cable broadband ISP market. It would seem likely that the AOL Time Warner Consent decree would serve as the likely model for the AT&T Broadband and Comcast Merger. Under this scheme only three unaffiliated ISPs would need to be granted access before an AT&T Comcast ISP could start offering service. An AOL Time Warner affiliated ISP or Road Runner will likely be granted access as the AT&T Comcast unaffiliated ISPs. As a result, the same few ISPs will continue to gain dominance in the cable broadband ISP market. Vigorous competition may never develop. Additionally there will be an increase risk of collusion, or conscious parallelism amongst the cable broadband ISPs. If there are few competitors in the ISP market then prices will likely remain higher than they would otherwise be if there were more competitors. This could be caused by some affirmative collusion of the competitors through

<sup>190</sup> See News Release, *supra* note 188 (enlightening that AT&T's merger with Comcast will create AT&T Comcast Corp.); see also *AT&T's Cable TV, Comcast to Merge; \$72 Billion Dollar Deal Ends Bidding War, Creates Colossus*, CHI. TRIB., Dec. 20, 2001, at business section pg. 1 (articulating that the AT&T and Comcast deal will result in AT&T Comcast Corp.); Kevin Murphy, *AT&T Broadband and Comcast Merge in \$120bn Deal*, COMPUTERWIRE, Dec. 20, 2001, at Network Briefing Daily; Top Stories (noting that AT&T will merge with Comcast to form AT&T Comcast Corp.).

<sup>191</sup> See News Release, *supra* note 188 (telling that the AT&T Comcast transaction will occur in late 2002); see also *AT&T's Cable TV, Comcast to Merge; \$72 Billion Dollar Deal Ends Bidding War, Creates Colossus*, *supra* note 190, at business section pg. 1 (commenting that the AT&T-Comcast deal will be completed in 2002); Noi Mahoney, *Comcast: Rate Hike Tied to Upgrades*, THE CAPITAL (Annapolis, Md.), Jan. 22, 2002, at A1 (hypothesizing that Comcast's buying of AT&T's broadband will occur sometime in 2002 pending regulatory approval).

<sup>192</sup> See News Release, *supra* note 188; see also *Community Connect Inc. Raises \$15 Million in Third-Round Financing*, PR NEWswire, Apr. 12, 2000 at Financial News Section (proclaiming Comcast to be the third largest cable service provider); *Narrowing the Lines of Communication?*, THE WASHINGTON POST, Feb. 24, 2002, at H02 (informing that Comcast is one of the country's biggest cable companies).

<sup>193</sup> See News Release, *supra* note 188 (relaying that AT&T Comcast Corp. will be one of the most powerful communications, media and entertainment companies in the world); see also *Comcast Shareholders Approve Merger With AT&T Broadband - Spokesman*, AFX EUROPEAN FOCUS, July 10, 2002, at Company News Section (announcing AT&T Comcast Corp. will be the largest cable operator in the U.S.); Akweli Parker, *Comcast Reports \$210 Million Losses*, PHILA. INQUIRER, Aug. 2, 2002, at Business and Financial News Section (proclaiming Comcast's acquisition of AT&T would create the nation's leading cable TV company).

price fixing. Additionally the higher prices could be a result of conscious parallelism. Conscious parallelism is when competitors behave uniformly as to pricing without any collusion.<sup>194</sup> For example if AOL Time Warner raises prices, Road Runner and the AT&T Comcast affiliated ISP could also raise their prices because they know they won't lose customers to their competition because of the price increase. Although this is not illegal, the harm to consumers still remains real. As a result the AOL Time Warner consent decree did not adequately take into account the possibility of changing market conditions to adequately foster competition, and it also has created a precedent that will serve to aggravate the potential for a competitive cable broadband ISP market.

### *Claimed Successes by AOL Time Warner*

Time Warner Cable continued to roll out its multiple ISP initiative by offering Earthlink service on its network, while the AOL High-Speed Broadband service was made available on Time Warner Cable systems in 20 major markets.<sup>195</sup> The FTC also recently approved the addition of several more ISPs to Time Warner Cable's systems.<sup>196</sup> AOL Time Warner is acting fairly swiftly to sign up unaffiliated ISPs. But, this is the easy part of compliance with the consent decree. Until AOL Time Warner satisfies this requirement, it cannot offer its own service. It remains to be seen if AOL Time Warner intends to offer more than three unaffiliated ISPs in each geographic market it serves. It also remains to be seen if AOL Time Warner will continue to

<sup>194</sup> See *Theatre Enterprises v. Paramount Film Distribution Corp.*, 346 U.S. 537, 541 (1954) (holding that conscious parallelism, a pattern of uniform conduct, by itself does not constitute concerted action); see also *Brooke Group Ltd., v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (defining conscious parallelism); *Blomkest Fertilizer, Inc., v. Potash Corporation of Saskatchewan*, 203 F.3d 1028, 1032 (8th. Cir. 2000) (quoting *Brooke Group's* definition of conscious parallelism).

<sup>195</sup> See About Time Warner Cable, *supra* note 97; Tobi Elkin, *supra* note 78, at 3 (reporting Time Warner Cable offers broadband through Earthlink and AOL broadband to be serviced to 20 Time Warner Cable Markets); see also Jennifer Jones & Heather Harreld, *AOL - TW Merger to Proceed*, INFO WORLD, Dec. 18, 2000 at 10 (writing that Earthlink is available via Time Warner Cable).

<sup>196</sup> See About Time Warner Cable, *supra* note 97; see also *Application For Approval of a Non-Affiliated ISP, Alternative Cable Broadband ISP Service Agreement*, STATES NEWS SERVICES, Mar. 17, 2002 (disseminating that the FTC approved more applications for AOL Time Warner); Dick Kelsey, *Five ISPs Approved to Use AOLTW Cable Lines*, NEWSBYTES, Feb. 27, 2002 (announcing five more FTC approvals for ISPs to use Time Warner's cable systems).



stall in giving access to regional ISP competitors. Most importantly it remains to be seen if unaffiliated ISPs will receive the same quality of service as affiliated ISPs will receive. Therefore, it seems much too early in the game for AOL Time Warner to sing its own praises for voluntary compliance with the consent decree.

### CONCLUSION

In evaluating the effectiveness of the consent decree in preventing anticompetitive harm two considerations must be made. The first is how well the consent decree identified and made provisions for foreseeable anticompetitive harm. Generally the consent decree has identified and made provisions to effectively deter potential harm. The consent decree seems especially effective in preventing certain foreseeable bad acts of Time Warner Cable. Most importantly seems to ensure non-affiliated ISPs the same point of connection as affiliated ISPs. Additionally specific directives of non-interference with the content of a non-affiliated ISPs bandwidth content are similarly important. The FTC however has failed to recognize and provide for several potential but foreseeable harms. The first problem is that the consent decree does not provide any clear standards for defining when an ISP is affiliated and when it is non-affiliated. Without such standards, the classification is left entirely to the discretion of the FTC. Although there needs to be no suggestion of potential impropriety on the FTC's behalf, without these standards it cannot be assured that classifications standards will be consistent aimed at preventing antitrust harm. Similarly, without these clear guidelines a greater amount of ISPs with a questionable classification will be presented for status as an unaffiliated ISP. Even if the FTC sufficiently prevents questionable ISPs from attaining non-affiliated classification, the FTC's resources will be needlessly taxed because of the failure to create clearer standards. A second problem with the consent decree is that it did not adequately define the concept of open access and has created the potential for anticompetitive abuses. With respect to the provision requiring that AOL Time Warner continue to market DSL at the same level that it does in areas where it has cable holdings as where it has no cable holdings, it

is unclear if this means that AOL Time Warner must allow competitor DSL ISPs to advertise on its networks. A broader interpretation of this provision requiring advertising access to DSL competitors would be most effective in preventing anticompetitive harm. Additionally the consent decree is problematic because it provides no protection for regional competitors. Without some type of protection that would ensure regional competitors early entrance into the cable broadband ISP market, an entire segment of the competitive market is being foreclosed. The final problem is that the consent decree considers potential anticompetitive harm caused by the AOL Time Warner merger in a static environment. The consent decree makes no provision for the implications of further consolidation in the cable market or the cable broadband ISP market. With further consolidation of the market the potential for the creation of an oligopoly is increased while still satisfying the demands of the consent decree. AT&T Comcast, Earthlink and AOL Time Warner, Roadrunner could become the only viable competitors in the ISP market. With few sellers the opportunity for harm caused by either collusion or conscious parallelism is increased.

The second consideration in evaluating the effectiveness of the consent decree is to consider how well is anticompetitive harm being prevented by the consent decree. Ultimately, the effectiveness of the consent decree cannot be fully gauged because AOL Time Warner affiliated cable broadband ISPs have not had the opportunity to unleash their might on any grand scale at this point. Time Warner cable has just started to sign up the unaffiliated ISPs needed for it to begin to offer its own service. The success of the consent decree will likely come down to the level of enforcement the FTC pursues. If the FTC is vigorous in promoting open and equal access to all cable broadband ISPs that reasonably qualify for it, the consent decree will prove adequate to promote a competitive market. However, in this authors opinion there only seems to be gray skies ahead.

