

# Is There Competition Anywhere in TV Everywhere?

BY THOMAS R. SHERAN

TV Everywhere is an authentication system developed by Comcast and Time Warner that allows an individual Multichannel Video Programming Distributor (“MVPD”) subscriber<sup>1</sup> to access on demand via the Internet (and, eventually, via cell phone) the same level of video service that is afforded under his/her MVPD subscription—at no cost other than the subscription fee for the MVPD service. The authentication system functions as a gatekeeper to ensure that the user is an authorized MVPD subscriber and to limit his/her online access to the programming that is provided in his/her MVPD subscription.<sup>2</sup> The TV Everywhere service is made available over the Internet, but the MVPD subscriber doesn’t have to subscribe to his/her MVPD’s broadband access service—i.e., the authentication system works even if a household has its MVPD subscription with one company and its ISP subscription with a different company. Most major MVPDs (cable, satellite and telephone) have agreed to participate in the TV Everywhere initiative, but each participating MVPD will offer its own TV Everywhere service to its own MVPD subscribers. The availability of programming for distribution online through these TV Everywhere services is subject to participation by the programmers that provide the participating MVPD with the programming that’s included in the MVPD’s underlying subscription service. Many large programmers have indicated that they plan to participate but the nature and extent of that participation is not clear at this point in time.

TV Everywhere uses Internet technology to provide MVPD subscribers with added flexibility as to when, where and what they chose to view. For programmers, TV Everywhere offers a relatively secure online distribution vehicle that conforms to the public’s changing viewing habits. The TV Everywhere initiative has, however, been controversial. Critics fear that major video programmers (e.g., the big TV networks) will agree to exclusive contracts with the participating MVPDs—depriving independent video distributors of access to the high value programming they need to compete in the evolving market for online video. It is also said that, because some of TV Everywhere’s sponsoring MVPDs are also ISPs, strong network neutrality rules will be needed to prevent them from operating their ISP services in ways that favor their own services at the expense of independent online video distributors. Some critics even claim that by jointly adopting the TV Everywhere authentication system the MVPDs have colluded among themselves and with a small number of large programmers to divide markets and protect the supra-competitive profits that they allegedly derive from the established (and lucrative) MVPD business model.

In order to evaluate the critics’ concerns about TV Everywhere’s anticompetitive effects, it is necessary to reach some basic understanding about the communication “products” that are likely to be impacted. Most analysts consider the market for video content (a national market comprised of firms that produce/aggregate video programming) to be separate from the market for video programming distribution services (a traditionally local market that, until recently, was comprised of cable and satellite TV companies). Those who think TV Everywhere poses a threat to competition envision an evolving market for video programming distribution services in which traditional MVPD services have begun to compete with video distribution via Internet Web sites (online video). It is difficult to evaluate the economic viability of this view of the market because of uncertainties created by a fluid regulatory picture<sup>3</sup> and by the rapid pace at which communications technology is changing.<sup>4</sup> With that caveat, what follows is a general discussion of the competitive concerns that TV Everywhere has raised, and some basic antitrust principles that might be applied to those concerns.

## GEOGRAPHIC MARKET ALLOCATION OR PRO-COMPETITIVE COLLABORATION?

While the market for MVPD over proprietary cable systems is a local market (due to cable franchise regulation), the market for online video is as borderless as the world wide Internet. Under the TV Everywhere format, each participating cable TV company offers

online TV to its own cable TV subscriber base without adding to the cable TV fee, but doesn’t offer either free or subscription online TV service to anyone who does not subscribe to its cable TV service. That means that TV Everywhere’s Cable company participants (Comcast, Time Warner Cable and Cox) will not use their online TV offerings to penetrate one another’s cable franchise territories. Some critics would characterize this arrangement as an illicit market allocation agreement—allocating to each participating cable company geographic market for online video that matches the service area of its cable franchise. Others would say that TV Everywhere is a logical and economically justified use of technology to extend the cable companies’ successful video distribution model into the online space.

## APPLICABLE ANTITRUST LAW

For antitrust purposes, concerted activity among market participants is treated differently than unilateral activity. A single firm acting unilaterally can distort competition only if it possesses market power in a relevant market. But firms that individually lack market power can distort markets (restrain competition) by acting in concert with other similarly situated market participants. Section 1 of the Sherman Antitrust Act 1 (“Sherman 1”) deals with such concerted action by proscribing “contracts,” “combinations,” or “conspiracies” in restraint of trade.

### Rule of Per Se Illegality

A contract, combination or conspiracy is illegal under Sherman 1 only if it results in an “unreasonable” restraint of trade. The judicially fashioned “rule-of-reason” is the “accepted standard” for testing whether a trade restraint is “unreasonable.” *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 2712 (2007). To apply the rule-of-reason, courts must identify a “relevant market” and evaluate the competitive effects of the restraint within that relevant market. This is a costly, fact-intensive inquiry with much dependence on input from economists. Courts have, however, identified certain concerted activities (including market allocation agreements) that always or almost always result in unreasonable anticompetitive effects. Conspiracies to engage in these activities are illegal *per se*—i.e., they are condemned without an elaborate investiga-

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tion into the existence of market power or the potential for efficiencies or other benefits. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (“certain agreements, such as horizontal price fixing and *market allocation*, are thought so inherently anticompetitive that each is illegal *per se* [under Sherman 1] without inquiry into the harm it has actually caused.”). The *per se* rule is of critical importance because a plaintiff who asserts a *per se* claim is relieved of the burden of proving harm to competition; and just as importantly, the defendants are barred from offering proof of efficiencies or other benefits that would tend to justify their actions. E.g., *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (condemning a professional association rule against competitive bidding and rejecting attempts to prove social benefits).

### **Is There a Market Allocation?**

A market allocation agreement between competitors is deemed *per se* illegal because the competitors basically agree to refrain from competing with one another in some segment of the market in which they would normally participate. This can be accomplished by dividing the market into segments based on product classifications, customer classifications, or geographic areas. The fact that competition in the market for a product is differentiated along product or geographic lines does not, however, mean there has been an illicit conspiracy to restrain trade—i.e., there must also be evidence that the market allocation was the product of concerted action on the part of competitors or potential competitors.

### **Is There Evidence of a Conspiracy?**

The terms “contract,” “combination” and “conspiracy” all denote concerted action—i.e., there must be evidence of an agreement, or at least “a conscious commitment to a common scheme designed to achieve an unlawful purpose.” *Monsanto Company v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). This can be established by direct evidence (i.e. testimony from witness-participants or documents that record the agreement)—but such evidence is rarely available. A price fixing agreement can also be proved with circumstantial evidence, but such evidence is often ambiguous—i.e., it is consistent with concerted action

or conspiracy but not necessarily inconsistent with independent (ergo permissible) conduct. In a 1986 case, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court raised the bar for plaintiffs relying on circumstantial evidence to prove conspiracy—by requiring evidence that “tends to exclude the possibility” that the defendants were acting independently.

Parallel conduct does not, by itself, exclude the possibility of independent action even if the parallel conduct is intentional. *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 227 (1993) (“conscious parallelism” can occur when firms in concentrated markets, “recognize their shared economic interests and their interdependence with respect to price and output decisions”). In addition to parallel conduct there must be some “plus factor” tending to show express collusion. *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 360 (3d Cir. 2004) (“Existence of these ‘plus factors’ tends to ensure that courts punish ‘concerted action’—an actual agreement—instead of ‘unilateral independent conduct of competitors.’”). Summary judgments have routinely been granted in the absence of such plus factors. See, e.g., *Williamson Oil Company Inc. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003); *Blomkast Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000) (granting summary judgment even though there was some evidence of an explicit agreement). The Supreme Court recently moved the point of potential dismissal forward from the summary judgment stage to the pleading stage. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966 (2007) (“When allegations of parallel conduct are set out in order to make out a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action”).

### **Parallel Conduct by Cable Cos.**

The cable companies participating in the TV Everywhere initiative have all apparently decided that their respective TV Everywhere online video services will only be offered to persons who subscribe to their cable TV service—all of whom reside within the service area covered by the pertinent cable franchise. While this entails “parallel conduct” it doesn’t necessarily show that the cable companies reached an “agreement.” In a somewhat analogous context, the Supreme Court held that a parallel refusal by several local telephone exchange carriers (“ILECs”) to enter each others’ formerly “protected” territories would not support the inference that they had entered into an agreement. *Bell Atlantic Corp. v. Twombly*, *supra*. The Twombly plaintiffs were telephone subscribers who accused the defendant ILECs of conspiring to refrain from entering one another’s service areas, and to make it difficult for competing local exchange carriers (“CLECs”) to enter their service areas and compete for plaintiffs’ business. The Court held that the parallel conduct that plaintiffs attributed to the ILECs (e.g., forbearing from competition, overcharging for wholesale service, disrupting CLEC customer billing) did not “suggest” the existence of an “agreement” because it was in the ILECs’ independent self interest to engage in the parallel conduct.

### **Conduct Against Economic Interest?**

It has been suggested that if the decision to limit TV Everywhere to cable TV subscribers had been made by each individual cable TV company without the benefit of collusion, the decision to do so would be contrary to the decision maker’s economic self-interest. In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), the Supreme Court found evidence of an agreement among eight motion picture distributors each of whom responded affirmatively to a large exhibitor’s detailed invitation to fix admission prices. The Court found that a price fixing agreement had been reached because (1) each distributor knew that all of the other distributors had been invited to engage in the illegal arrangement, and (2) an affirmative response by any one distributor would have been irrational (i.e., contrary to economic self-interest) unless the distributor had reason to believe that the others would do the same thing. Subsequent court decisions “firmly established that actions that are contrary to an actor’s economic interest constitute a plus factor that is sufficient to satisfy a price fixing plaintiff’s burden in opposing a summary judgment.” *Williams Oil Company, Inc. v. Phillip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2000). The problem with finding this “plus factor” to show the existence of an agreement to allocate the market for online TV is that there seem to be valid reasons why each cable

TV participant would do so even in the absence of a conspiracy. See, *Bell Atlantic Corp. v. Twombly*, *supra*. Additional information would be needed to evaluate the persuasiveness of this alleged “plus factor.”

### **Pro-Competitive Collaboration?**

Even if TV Everywhere’s cable TV participants can be shown to have “agreed” to refrain from using TV Everywhere to invade one another’s franchise territories, the arrangement will be deemed *per se* illegal *only* if it imposes a “naked” restraint on competition. Their agreement will not be deemed to impose a naked restraint on competition if it is a necessary component of a larger pro-competitive arrangement that serves a legitimate business purpose unrelated to the suppression of competition. The competitive effects of such an “ancillary” market allocation agreement will likely be judged under the more forgiving rule-of-reason. In *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 24 (1979), the Supreme Court held that blanket licenses of copyrighted music by different composers should be judged under the rule-of-reason because, although the blanket licenses involved a kind of price fixing, they also made it possible for the composers to mass market their compositions. See also, *NCAA v. Board of Regents*, 468 U.S. 85, 117–20 (1984) (rule-of-reason rather than the *per se* rule applied to the NCAA’s restrictions on member institutions’ ability to compete by entering into separate contracts to televise their games).<sup>5</sup>

It’s been reported that the TV Everywhere initiative entails some significant integration of the MVPDs’ resources in order to coordinate the operation of TV Everywhere—including the “authentication” technology. There may be other ways in which the TV Everywhere initiative can be said to enhance efficiencies and promote the consumer benefits that come with online video distribution. If so, an agreement to allocate markets might be judged under a less restrictive standard than the *per se* rule—provided the agreement to allocate markets is necessary to achieve TV Everywhere’s claimed benefits.

### **ANTICOMPETITIVE “TYING” OR EFFICIENCY ENHANCING PRODUCT INTEGRATION?**

A tying arrangement occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer’s agreement to take a second product or service. The combined purchase must be coerced from the buyer’s standpoint—i.e., the buyer must be forced to forgo his/her free choice with respect to his/her purchase of the second product.

One of the charges that have been made is that the MVPDs participating in TV Everywhere will, in effect, tie their MVPD subscription service to their new online video service. The MVPDs allegedly implement this tying arrangement by refusing to make a “free standing” offer of online access to the pertinent programming. As a result, if I’m in a Comcast service area and subscribe to a Comcast cable TV package, I will automatically be authorized to access Comcast’s Fancast Xfinity online TV service without added cost. I can use my Fancast Xfinity service to access online the same TV programming that I’m able to view on my TV under my Comcast cable TV subscription. When I visit the Fancast Xfinity Web site, the TV Everywhere authentication technology is able to identify me as a Comcast cable TV subscriber and verify that I have the “right” under my cable TV subscription to view a specific package of video programming. The cable TV subscription is said to be “tied” to the online TV service because Comcast won’t permit me to access the programming online unless I subscribe to the cable TV service—i.e., I can’t subscribe to the Fancast Xfinity service *in lieu* of the cable TV subscription. I could retain my free Fancast Xfinity service and subscribe to a broadband Internet access service from a competing broadband service provider (if there is one—e.g., the local telephone company’s broadband DSL service). And I could then use this separately-sourced broadband access service to access TV programming that is made available at the Fancast Xfinity Web site—but that’s because I have a Comcast cable TV subscription.

### **APPLICABLE ANTITRUST LAW**

Based on some older Supreme Court decisions, most lower courts have considered tying agreements to be *per se* illegal. See *International Salt Co. v. United States* 332 U.S. 392, 396 (1947). (“[I]t is unreasonable, *per se*, to foreclose competitors from any substantial market”); *Standard Oil Co. v. United States*, 337 U.S. 293, 305–06 (1949) (“[t]ying agreements serve hardly any purpose beyond the suppression of competition”).

But if conduct is truly *per se* illegal it isn’t necessary to define a market or prove anticompetitive impact within the market (i.e., these elements of a Sherman 1 violation are conclusively presumed). In its more recent tying cases, the Supreme Court has confirmed the continuing role of *per se* analysis, but emphasized the need to show market power in the tying product. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 9, 16–18 (1984) (retaining *per se* treatment for “certain tying arrangements” but requiring consideration of market power); see also *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (“[W]hile the Court has spoken of a *per se* rule against tying arrangements, it has also recognized that tying may have precompetitive justifications that make it inappropriate to condemn without considerable market analysis.”); *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1292 (2006) (stating that an allegation of illegal tying must be supported by proof of market power, rather than a presumption of market power based on a patent).

A modern formulation of the *per se* rule against tying requires a purchase/sale/license transaction in which (1) there are two separate products or services—one “tying” and one “tied,” (2) the buyer’s purchase of the tying product is conditioned on his purchase of the tied product, (3) the seller’s economic power in the market for the tying product is sufficient to enable it to restrain trade in the market for the tied product, and (4) there is an effect on a not insubstantial amount of interstate commerce in the tied product. Even with the forgoing limitations at least one appellate court has held that *per se* analysis should not be applied to tying arrangements in high tech industries that are experiencing rapid technology change. *United States v. Microsoft Corp.*, 253 F.3d 34 (C.A.D.C. 2001) (holding that Microsoft’s conduct in tying its Internet Explorer web browser to its dominant PC operating system software should be judged under the rule-of-reason rather than the *per se* rule).

### **Two Separate Products?**

The initial question will be whether the TV Everywhere subscription model entails two separate products—or whether cable

TV and online TV/video are one product (e.g., “video to the home”) being delivered to subscribers in two different ways. In a report submitted to the FCC in connection with its pending regulatory review of the Comcast/NBC merger, Comcast’s economists have opined that cable TV and online TV are compatible products (not substitutes); but that doesn’t mean that they aren’t two separate products. See *Jefferson Parish*, *supra* (holding that anesthesiology services and in-patient surgical services are two different products notwithstanding the general absence of a market for one without the other). The traditional test for product differentiation turns, not on whether the products are compatible with or dependent upon one another, but on whether consumers perceive them to be separate products and whether they are typically supplied by different vendors. *Jefferson Parish*, *supra*, 466 U.S. at 22. The pivotal question may be: Do consumers perceive video programming that is received via traditional cable and satellite systems as “separate product” from video that is accessed over the Internet?

### **Market Power in the Tied Product?**

To establish the coercion element of a tying claim it will be necessary to show that TV Everywhere’s participants have market power in the market for the tying product (online video services). It’s unlikely that any of the individual MVPDs or programmers who are participating in the TV Everywhere initiative enjoys market power in the online video market. A collaboration between TV Everywhere’s sponsoring MVPDs and the participating programmers could create market power in the online video market but the necessary collaboration hasn’t yet materialized—i.e., it does not appear that the programmers participating in the TV Everywhere initiative have been willing to enter into exclusive programming agreements with respect to their “must have” programs. According to the Congressional Research Service: “The large programmers and the large MVPDs have a substantial commonality of interests, but the programmers may seek to respond to shifts in demand in ways that are not equally favorable to MVPDs.” *The Proposed Comcast-NBC Universal Combination: How it Might Effect Competition in the Video Market*, Feb. 2, 2010, at p. 15 (herein “CRS Report”).

### **Bundling vs. Tying**

In *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962), the Supreme Court found that the practice of licensing feature films to television stations only in blocks (or “bundles”) containing films the stations did not want to license constituted unlawful tying in violation of Section 1 of the Sherman Act. However, the practice of offering a “package” of service does not, by itself, entail “tying” in the antitrust sense of that term. In addition to “forcing” the combined purchase there must be an adverse effect on competition in the market for the tied product (in this case MVPD services). As the Supreme Court explained in its *Jefferson Parish* decision, the fact that “a purchaser is ‘forced’ to buy a product he would not have otherwise bought even from another seller” does not imply an “adverse impact on competition.” To prevail on a tying claim, a plaintiff must show an exclusionary effect—i.e., that the consumer’s desire to purchase a substitute for the tied product has been thwarted. This begs the question: Does the refusal to offer TV Everywhere’s online service *in lieu of* the sponsoring MVPD’s subscription service thwart a subscriber’s desire to purchase a substitute product (i.e., a different MVPD subscription service)—or does it merely force the subscriber to buy something (the MVPD subscription) that he/she doesn’t want?

### **Per se Illegality vs. Rule-of-Reason**

If the forgoing elements of tying are found to exist, some courts might treat the transaction as *per se* illegal. But others may follow the reasoning of the D.C. Circuit in the landmark *Microsoft* antitrust case—where the pace of change in a complex technological product market caused the court to question whether it could say with certainty that the tying of Microsoft’s Internet Explorer browser to its Windows OS software was patently anticompetitive. MVPD and online video webcasting are highly technical communications services that are undergoing rapid technological change. According to the Congressional Research Service:

With or without the Comcast-NBCU combination [discussed *infra*], the video market is in a state of flux. Significant technology-induced structural changes on both the supply side and the demand side of the market are fragmenting audiences, affecting the level of revenues generated, and shifting the flow of those revenues among industry players. Long-standing business models of both content providers and distributors are being challenged.

CRS Report at p. 2–3. Given the rapid pace and complexity of change in the video market there is good reason to expect that TV Everywhere’s integration of online video services into the MVPD package of services will be judged under the rule-of-reason—which would mean that the participating MVPDs will have an opportunity to show that the efficiencies and/or consumer benefits of the arrangement outweigh its anticompetitive effects.

### **MONOPOLIZATION AND CONSPIRACY TO MONOPOLIZE**

Section 2 of the Sherman Act proscribes “monopolization” and attempts to monopolize. Unlike Section 1 of the Sherman Act, Section 2 (“Sherman 2”) is only directed at firms that have acquired or have a dangerous probability of acquiring “market power” in a relevant product market. Sherman 2 prohibits firms that possess such market power from engaging in certain *unilateral* conduct, namely: exclusionary or predatory conduct that tends to reduce competition and is devoid of pro-competitive justification. These proscriptions normally do not mean that a monopolist must deal with its competitors in order to avoid excluding them. But in certain narrowly defined situations where a monopolist controls a facility that is essential to competition the courts have developed a controversial Sherman 2 theory (called the “essential facilities” doctrine) under which the monopolist can be compelled to share that facility with its competitors.

In a January 2010 report that was submitted to federal antitrust enforcement agencies on behalf of the consumer group FreePress, the author, Professor Marvin Ammori of the University of Nebraska Law School, recommended: “The antitrust authorities should investigate the local markets for cable TV distribution, determine whether cable operators are local monopolists, and [if so] determine that TV Everywhere and content-lockout (even as unilateral conduct) are exclusionary violations of section 2 of the Sherman Act.”

M. Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV*, at p. 38. (available at [www.FreePress.net](http://www.FreePress.net).) This again raises the question: To what extent do MVPDs actually own or control access to the programming that independent distributors need in order to compete in the online video market? Third party programmers seem to be not interested in distributing their “must have” programming through exclusive distribution arrangements with MVPDs.<sup>6</sup> There may be some local markets in which *vertically integrated* MVPDs control access to “essential” video content (e.g., regional sports channels) but in those markets consideration must be given to the FCC’s program access mandates.<sup>7</sup> Courts will be reluctant to impose an *antitrust* duty to share valuable programming if the MVPDs already have a *regulatory* duty to do so.<sup>8</sup> The FCC’s program access rules prevent an MVPD from excluding its traditional competitors (other MVPDs) from access to satellite-delivered video programming in which the MVPD has an ownership interest. The rules have not been applied to terrestrially delivered programming but the FCC has recently acted to close that loophole. More importantly, the program access rules do not insure that online video distributors (as distinguished from competing MVPDs) will be afforded access to programming controlled by a vertically-integrated MVPD. An “essential facilities” claim may still have “legs” as long as this regulatory gap remains open.

### COMPETITIVE EFFECT OF THE COMCAST-NBC UNIVERSAL MERGER

Comcast is the largest distributor of cable TV and video in the United States. Its proposed acquisition of NBC Universal (“NBCU”), a major producer and aggregator of video content, is currently under regulatory review by the FCC. Comcast has described the transaction as follows:

Comcast and General Electric (GE) have signed a definitive agreement to form a joint venture that will be 51% owned by Comcast, 49% owned by GE, and managed by Comcast. The joint venture will consist of the NBCU businesses (currently primarily owned by GE) and Comcast’s cable networks, regional sports networks, and certain digital properties and unconsolidated investments. Comcast’s cable systems will remain separate, but both the cable systems and the joint venture will be managed by Comcast. GE will be entitled to cause the joint venture to redeem one-half of GE’s interest after three and a half years and the remaining interest after seven years and Comcast has certain rights to purchase GE’s interest in the venture at specified times.

See *Comcast and GE to Create Leading Entertainment Company*, Comcast Investor Relations, December 3, 2009. It is widely believed that the merger will be approved by the FCC, as well as by the Department of Justice, albeit subject to conditions designed to avoid/limit the merger’s perceived anticompetitive effects. The main competitive concern is that unless suitable conditions are imposed, Comcast will be able to use its vertically integrated position in programming and cable distribution to deny rival distributors access to programming or to raise the cost of that programming. NBCU’s part ownership of Hulu.com raises a subset of issues that directly implicate TV Everywhere.

### APPLICABLE ANTITRUST LAW

Section 7 of the Clayton Act prohibits a firm from acquiring the stock or assets of another firm where the effect of the acquisition “may be substantially to lessen competition, or to tend to create a monopoly” in any line of commerce. The prohibition includes vertical and conglomerate transactions as well as horizontal mergers. There are only a few full blown court decisions that interpret and apply Section 7 in merger cases—which means that the meaning of Section 7 must be gleaned from enforcement agency guidelines, consent orders, and (in for the communications industry) regulatory actions by the FCC—occasionally supplemented by a lower court decision.

#### Market Concentration

The basic purpose of antitrust merger law is to prevent mergers or acquisitions whose probable anticompetitive consequences outweigh their likely economic benefits. Mergers can increase concentration in a relevant market to such an extent that the merged firm will acquire the market power needed to raise prices above competitive levels. This is

more likely to occur in the case of a horizontal merger because a horizontal merger, by definition, eliminates at least one of two or more competing firms. A reduction in competition (or a corresponding increase in market concentration) is far less likely to occur in the case of a vertical merger. And vertical mergers can often result in efficiencies (scale economies, reduced transaction costs, and technological integration) that can provide the transaction with an economic justification that is lacking in horizontal merger cases.

Comcast’s acquisition of NBCU is widely perceived as an upstream vertical merger in which a distributor (Comcast) will acquire a supply of programming (NBCU). The MVPD market and the vertically related programming market are both said to be concentrated. While Comcast and NBCU each have substantial shares in their respective markets, there may be no obvious increase in concentration in either market if both companies continue to operate as they did before the merger. There may, however, be other horizontal and vertical effects on competition.

#### Horizontal Competitive Effects

If it is determined that Comcast’s TV Everywhere initiative competes with Hulu.com (an NBCU-supported joint venture) in the market for online video, the proposed Comcast/NBCU merger might be viewed as having a *horizontal* effect on competition in the market for online video. The merger’s *structural* impact on this market will be difficult to measure, but structural effects (e.g., increased concentration) may not be the determining factor. Heavy reliance on structural criteria presumes a precision in delineating relevant markets (and measuring market power) that is often unattainable. There is a growing recognition that qualitative considerations can provide better indicators of a merger’s anticompetitive effects. In their new *Merger Guidelines* (issued in April of this year), the federal antitrust enforcement agencies itemize a number of “qualitative effects” that they will analyze when evaluating mergers. One such effect is the impact that a transaction has on certain types of suppliers or customers against whom the merged entity would be able to discriminate. The *Guidelines* also emphasize “coordinated effects”—which can occur when a transaction encourages

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explicit or implicit cooperation by the remaining market participants.

### **Vertical Foreclosure Effects**

In its February 2010 report to Congress, the Congressional Research Service expresses concern about the vertical foreclosure effects of Comcast's acquisition of NBCU—which owns “NBC Nightly News,” “30 Rock,” and a number of other popular TV programs. The Report's opening line reads:

The proposed combination of Comcast, the largest distributor of video services in the United States, and NBC Universal (NBCU), a major producer and aggregator of video content, would create a huge, vertically integrated entity with potentially enormous negotiating power.

The CRS Report goes on to observe:

Perhaps the greatest danger that a vertically integrated company poses to a non-integrated competitor is to deny the competitor access to must-have programming that it owns or controls. Lack of access could even foreclose competitors from the market. Inferior or more expensive access to that programming also could place non-integrated rivals at a competitive disadvantage.

The FCC's program access rules, mentioned above, were enacted because of Congress' concern that vertically integrated MVPDs might withhold popular sports channels that they owned from competing MVPDs. The latest extension of the exclusivity ban is due to expire in 2012. If the Comcast/NBCU transaction is allowed to proceed, Comcast has said it would follow the FCC ban when negotiating access by competing MVPDs. The CRS Report notes that if the FCC wants to ensure that its new program access rules apply to Comcast's terrestrially delivered regional sports networks, it should include them as conditions for the license transfer. CRS Report, at p. 20. Even with this condition, independent online video distributors (as distinguished from competing MVPDs) would not be assured access to the NBCU programming controlled by Comcast.

### **Exclusive Dealing and TV Everywhere**

As noted above, it's not yet clear whether third-party programmers who

chose to participate in TV Everywhere will find it in their interest to make their programming available exclusively to TV Everywhere's sponsoring MVPDs. Some have suggested that the Comcast/NBCU merger could tip the scale in favor of exclusive arrangements. The CRS Report describes the situation as follows:

One can expect that, given Comcast's commitment to TV Everywhere, an affiliated NBCU would also be committed to TV Everywhere. Perhaps more significantly, would the NBCU executives be more likely to support an exclusive relationship with the Internet services of the MVPDs participating in TV Everywhere—at the expense of relationships with independent Internet and over the top video service providers—than if NBCU were unaffiliated? And if so, would a decision by NBCU to only provide programming exclusively to the Internet services of the MVPDs participating in TV Everywhere place pressure on other programmers to follow suit or would one or more major programmers see it as an opportunity to forge favorable distribution relationships with new Internet and over the top video distribution services, thereby reaching the consumers who reject the current MVPD business model?

CRS Report, *supra*, at p. 22. Some experts have suggested that, as a condition to approving the transaction, the FCC should require that Comcast share *any* programming it controls with competitors in the online video market (as well as with competing MVPDs). If potential vertical foreclosure effects can justify such mandatory program sharing as a transaction-specific condition in the case of the Comcast/NBCU merger, it would also seem to justify an extension of the FCC's program access rules so that online video programmers (as well as MVPDs) are included in the non-exclusivity ban. That way Comcast would not be the only integrated MVPD that is required to share its programming with online distributors. ♦

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### **ENDNOTES**

1. Section 76.1000(e) of the FCC's rules defines a multichannel video programming distributor (“MVPD”) as: “[A]n entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.”

2. The TV Everywhere authentication technology appears to be modeled on the HLR/VLR authentication and switching system that is used to permit roaming between cell phone networks. However, in the case of mobile roaming the authentication technology permits consumers to use their cell phones outside of their provider's network. With TV Everywhere the Web site providing the online service can be accessed by anyone who has a PC with a standard Internet browser, and the authentication technology is used to control the content made available to Web site visitors after they have gained access to the Web site.

3. MVPDs are subject to regulation by the FCC and (in the case of cable companies) by local governments whose franchise requirements tend to create entry barriers. Firms that provide video and TV programming over the Internet aren't yet subject to regulation. The FCC initially deregulated broadband and its decision to do so was upheld by the Supreme Court in 1995. But the regulatory landscape changed in 2005 when the FCC promulgated its “Net Neutrality” Policy. More recently (March of this year) the FCC launched a much bolder National Broadband Plan designed to promote broadband access throughout the country. The vitality of these initiatives was placed in doubt in April of this year when the D.C. Circuit Court of Appeals ruled that the FCC did not even have the authority needed to enforce its Net Neutrality Policy. *Comcast v. FCC*, 600 F.3d 642 (C.A.D.C. 2010) (holding that the FCC lacked “ancillary authority” to regulate Comcast's broadband Internet access service under Title I of the Communications Act). One month later FCC Chairman Julius Genachowski announced a new plan to claim jurisdiction over the *transmission* component of broadband Internet by reclassifying it as a regulated “telecommunications” service under Title II of the Communications Act. This proposal was described as a “third way” that falls midway between regulation under Title I of the Communications Act (which has meant no regulation), and the full panoply of regulations applied to common carriers under Title II. The ISPs (including TV Everywhere's sponsoring MVPDs) have expressed concern that a policy based on regulatory forbearance will eventu-

ally give way to broader regulation under Title II.

4. New and emerging technologies are changing the way in which video is communicated (e.g., linear programming vs. video on demand); the ways in which consumers receive and consume video (e.g., dedicated set-top boxes vs. mobile devices), and the business models used to make a profit in both the programming and distribution of video (e.g., subscriber-based models vs. YouTube and Vuze). See discussion of “Per Se Rule vs. Rule-of-Reason” at p. 35, *infra*.

5. Building on *Broadcast Music*, *supra*, and other Supreme Court precedents, in April 2000, the Department of Justice and Federal Trade Commission issued a set of guidelines dealing with “efficiency enhancing integrations.” See, *Antitrust Guidelines for Collaborations Among Competitors* (hereinafter “Guidelines.”) A competitor collaboration (most often a joint venture) will be considered “efficiency enhancing” if it achieves a cost savings or other benefit to consumers by expanding output, reducing prices, or enhancing quality, service or innovation. To achieve economic “integration” the participating competitors must contribute

significant capital, technology, or other complimentary assets to the venture. If a restraint that would otherwise be considered *per se* illegal is “causally related to and reasonably necessary to achieve pro-competitive benefits from” an efficiency enhancing integration, the reasonableness of the restraint will be evaluated under the rule-of-reason. Guidelines, § 3.2. However, in the case of “suspect” agreements (including those that entail price fixing or market allocation) the Guidelines envision a process of shifting presumptions that resembles a “Quick Look” analysis. Guidelines, at § 1.2 and 3.3.

6. The high production/low distribution cost of video programming generally means that programmers’ profits are maximized by obtaining as wide a distribution as possible. However, there are certain products (e.g., high-demand regional Sports Networks) for which exclusive distribution arrangement may be profitable—provided the distributor is willing to pay an increased fee to offset the loss of revenue due to reduced distribution. Such an arrangement is more likely in the context of a vertical merger that integrates the programmer and

a distributor (such as the Comcast/NBCU merger discussed below).

7. The original ten-year term of this exclusive dealing ban was extended by the FCC for five-year intervals in 2002 and again in 2007. The last extension was challenged by Comcast and Cable Vision, but the FCC’s decision was upheld by a divided court of appeals in March of this year. *Cablevision Systems Corp. v. FCC*, No.07-1425 (D.C. Cir. Mar. 12, 2010) (noting in dicta that the extended ban does not purport to restrict Cable companies from entering exclusive supply arrangements with third party programmer).

8. In *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004) the Supreme Court refused to impose on firms having monopolies in local telephone markets (the incumbent local exchange carriers or “ILECs”) an antitrust duty to provide competing local exchange carriers (“CLECs”) with wholesale telephone transport service because, pursuant to the 1996 Telecommunications Act, the ILECS were already under a regulatory duty to deal with the CLECs.