Entertainment Law and Media Regulation

Eli M. Noam, *Managing Media and Digital Organizations*, https://doi.org/10.1007/978-3-319-71288-8_8

8.1 Introduction: Non-market Competition

8.1.1 The Reality of Non-market Competition

This chapter deals with the governmental rules under which media and communications companies operate. But perhaps more importantly it discusses how media companies manage the legal and regulatory environment for competitive advantage. What are the tools? What are the techniques? And how must these functions be budgeted and run?

These governmental rules differ from country to country. We will cover general models and strategies from around the world. We will also use examples from other countries, but most illustrations will be American.

When firms compete with each other, they do so in the marketplace but also in a "non-market" sphere. Competition in a market encourages companies to lower prices, innovate products, and improve quality. In contrast, non-market competition is rivalry not for customers but for favorable treatment by governments, courts, standards committees, industry associations, and advocacy groups. Non-market strategies are actions that influence regulation, legislation, and standards as part of competing with rivals.[1] Non-market strategies have become increasingly important even though they usually do not generate revenues directly. The more government affects firms' opportunities, the more important non-market strategies become.[2] Thus, for companies and their managers, performance depends on how effectively they deal with governments and the public at large. Yet managers are typically not trained to navigate the non-market environment.

Dealing with government is not limited to established firms in traditional media industries. Innovator firms in the tech sector do so too. Originally, internet pioneers held a libertarian attitude, favoring a hands-off role for government. In that spirit, in 1994 several of its early thought leaders issued a ringing "Charter for Internet Liberties" that proclaimed, among other things: "Government, leave us alone, we did not call you, we don't need you." But soon this perspective faded as those engaged in the internet, whether commercial or non-profit, developed a long wishlist for the US government (and similarly in other countries) to protect, subsidize, and exempt their activities and companies:[3]

- extend (or reduce) copyright protections;
- restrict class-action shareholder lawsuits against venture capitalists;
- ease restrictions on encryption software;
- loosen export-controls on hi-performance computers and encryption software;
- stop the mergers of Comcast with Time Warner Cable, and of AT&T with DirecTV, to reduce their market power;
- promote transparency with regard to the "last mile," the connection between ISPs and consumers, and to points of interconnection in the telecommunication backhaul;
- prevent regulations that restrict data use in order to protect user privacy;
- prevent legal requirements of censorship of controversial speech and sexually explicit materials.

8.1.2 Case Discussion

Non-market Competition: Comcast Versus Google Overview

Comcast is the world's largest US cable operator, with almost 35% of US cable users subscribing to its Xfinity branded service. Its cable franchise territories include much of the Mid-Atlantic, Bay area, Seattle, Chicago, and Florida regions, plus big territories between the two coasts. It also owns NBC Universal, one of the major producers and distributors of TV and film programs (Universal) and operator of multiple broadcast and cable channels (NBC). Comcast has also moved into the voice telecom (VoIP) and broadband ISP market, where it is the platform over which online providers such as Google (and its YouTube subsidiary) reach their customers and users.

Google is the world's largest search and advertising placement company. It owns YouTube, which offers video content, with an increasing number of specially produced exclusive programs. Its service uses the infrastructure platforms of ISPs, of which Comcast is the largest in the USA. But Google has also aggressively entered the infrastructure and ISP market itself, by building local fiber-to-home market, first in Kansas City and then in several other cities. On these networks, it offers broadband at 1 gigabit per second, as well as video channels and phone service.

Google and Comcast compete in both the market and non-market spheres. Google must obtain licenses from the Federal Communications Commission (FCC) and local or state franchise permits in order to offer video and telecom services, and conform to their regulations and conditions, for example in digging up streets. Comcast is trying to prevent or at least slow down Google's ability to become a video and ISP platform provider. Google, on the other hand, is seeking protection by the FCC and state utility commissions to provide its content services over the Comcast network without being disadvantaged by Comcast discriminating against it through pricing and technical quality. While the two companies are rivals, they also share common goals such as low taxes, protection of IP, and weak anti-trust enforcement.

Google's regulatory issues are numerous and worldwide. They include:

1 Holburn, Guy L.F. and Richard G. Vanden Bergh. "Policy and process: A game-theoretic framework for the design of non-market strategy." In *The New Institutionalism in Strategic Management (Advances in Strategic Management, Volume 19)*. Eds. Paul Ingram and Brian S. Silverman. (Emerald Group Publishing Limited, 2002): 33–66.

2 Baron, David P. "The Nonmarket Strategy System." *MIT Sloan Management Review* 37, no. 1 (Fall 1995): 73–85.

3 Birnbaum, Jeffrey H. "Washington & the Web." *Fortune.* October 11, 1999. Last accessed June 17, 2017. ► http://archive.fortune.com/magazines/fortune/fortune_archive/1999/10/11/267047/index.htm.

- antitrust and market power issues in Brussels and Washington;
- merger issues in Washington;
- copyright issues, especially with book and newspaper publishers;
- privacy legislation in many countries, in particular Europe;
- censorship and compliance with national content rules around the world;
- potential liability for hate speech, violence, and explicit materials on YouTube;
- tax issues in the USA and Europe.

Comcast's issues are similarly varied, and include:

- TV station ownership restrictions
- content restrictions on broadcast TV
- copyrights and piracy
- foreign cultural quotas
- price regulation for cable service
- access by cable and TV channels and payments to cable platforms
- local and state franchising regulation of cable operations.

Comcast and Google must decide how much to "invest" in their regulatory activities and in measuring their "productivity," and in how to "market" their interests most effectively to governmental bodies and the public. How should Comcast and Google conduct and manage their non-market competition? How much should Comcast and Google "budget" for regulatory policy, the political process, and public relations (PR)? How should they "produce" positive outcomes?

8.1.3 The Relationship of Government and Media

Government, law, and litigation have always played a major role in media. In 1455, Johannes Gutenberg invented movable print and immediately became the subject of several lawsuits. Most of what we know about Gutenberg actually comes from the record of the several court cases in which he was embroiled. Soon the Catholic Church began to regulate printing and publishing. In 1501, Pope Alexander issued a bull (decree) that required the licensing of such activity. In 1559, the Vatican created the *Index Expurgatorius* with a list of banned books. Other countries, such as England and France, also tried to control print. In 1637, the Star Chamber in England limited the number of printers to two and required approval by the official publications and censor. Newspapers had to be licensed. In France, over 800 authors, printers, and book dealers had been imprisoned in the Bastille before the 1789 revolution. Under Napoleon, printers required a license, and newspapers were strictly censored.

The 19th century witnessed media inventions followed by governmental interventions. After the Morse telegraph emerged in the 1840s, the government postal monopolies in most countries took control of the new medium. Private operators were banned (in Germany) or nationalized (in Britain). In 1876, Alexander Graham Bell's telephone immediately triggered major lawsuits over patents. Here, too, most governments quickly assumed ownership. In the 1900s, after Guglielmo Marconi invented wireless communications, many countries established state control over this new invention and banned private telegraphy and broadcasting.

There are many roles that governments play in media and IT:

- allocating frequencies, including for broadcasting and mobile devices;
- regulating prices of phone and cable companies;
- granting and protecting of patents and copyrights;
- applying anti-monopoly and ownership controls;
- funding and supporting technical innovations;
- creating and enforcing obscenity and privacy laws;
- establishing network interconnection and connectivity rules;
- censoring certain content such as hate speech;
- creating advertising rules;
- setting an enforcing a system of unionization and collective bargaining;
- financing of public service television;
- setting of technology standards;
- allocating orbital slots for satellites;
- providing tax incentives for various types of investments;
- setting and negotiating tariffs and other rules affecting trade;
- regulating financial securities, stock markets, and brokers;
- adjudicating disputes in the courts;
- setting immigration rules;
- procuring technology equipment, and services as an early and major customer;
- regulating mergers, market structure and companies' competitive behavior;
- supporting and protecting diversity in media content and ownership;
- supporting the arts, creation, and national culture;
- supporting or owning telecom networks and services for low income and rural areas;
- supporting or running public service television;
- taxing cable TV and telecom networks, and, in some countries, TV viewing.

Government has also played an important role in the creation of many technology innovations. These include:

- computers;
- semiconductors;
- communications satellites;
- the internet;
- mobile technology;
- packet switching data transmission;
- spread spectrum;
- microwave transmission.

Why, generally, is government involved in an industry? There are three major reasons: the protection of the public interest, the protection of powerful private interests, and bureaucratic

and political self-interest. Regulation usually exists as a mix of all three.

What are the reasons for government intervention in the media and media technology sphere, which go further than they do in almost any other sector?

Media are important, essential, influential, and often controversial. They affect culture, politics, commerce, and technology. They also exhibit certain fundamental economic characteristics, which may result in a media system societal shortcomings in terms of ownership concentration and viewpoint diversity. At the same time, free speech guarantees enshrined in a nation's constitution give content media substantial protections from governmental regulation in a way that no other industry or activity does. However, that special status applies only to the content of media and its creation, not to regular media business activities such as mergers, pricing, technical infrastructure, consumer protection, health effects, and employment conditions.

As noted, the nature of media is such that there is a high fixed cost for initial creation of content and of distribution networks but a low marginal cost to duplicate content or add network users. This leads to economies of scale, which, together with the positive "network effects" that users have on each other, favor the emergence of large firms with market power. It also creates an economic incentive to price discriminate in order to offset a high fixed cost. The low marginal cost also incentivizes piracy, leads to price wars, and creates market instability. The government's role as an economic regulator is to reduce some of these tendencies.

But media issues go vastly further than business and economics; they include politics, culture, national identity, and societal roles. Contrasting with the realm of the market is the public sphere. This concept was popularized by the German sociologist Jürgen Habermas. The public sphere is "the space within which ideas, opinions, and views freely circulate."[4] Media is central to the public sphere, making public discourse possible. In this sphere, people are not just consumers but citizens. Under the public sphere concept, government is needed to assure a diverse and responsible media. This implies that government has no self-interest, which is a strong assumption.

There has been a general trend toward deregulation, and advances in technology have made many markets more competitive. And yet the role of government in the digital economy has been rising. There have been a number of factors and constituencies.

- demand by the internet community itself for regulatory actions, such as net neutrality protections;
- the emergence of digital activism, for issues such as privacy;
- protection of the losers in the digital economy: traditional firms under pressure, employment that is outmigrating to offshore locations, and a rising volatility of the economy;
- fundamental economics of digital activities, such as economies of scale and network effects, which favor large firm size and market power;
- demands for support of R&D, innovation, and investment;
- societal values such as child protection;
- consumer protection in activities on the new platforms.

All of this suggests that government will continue to play a major role in the new media environment, as it has done in the "old media" environment.

8.2 The Legal and Public Affairs Functions in Media Firms

Corresponding with the multifaceted role of government, the legal and public affairs functions in media firms have become increasingly important and complex, and they require significant management responsibility. Start-ups are rarely able to be able to afford the legal talent internally, even as they might have the greatest need in the early stages of their business life. A typical organizational chart for this function in a large company is illustrated in Fig. 8.1.

Public affairs departments manage regulatory affairs, legislative affairs, and press relations, and Public Relations (PR). The legal activities of a company deal with contracts, transactions, Intellectual Property (IP), employment, compliance issues, tort liability, advertising, competitor behavior, and real estate. Legal departments also create corporate entities, distribution agreements, license acquisitions, and labor agreements. They screen content for libel and rights infringement, protect trademarks, initiate legal action and defend against such actions by others.

The left-side branch of this chart may be thought of as dealing with "private law," mostly commercial-type transactions, while the right branch deals with "public law," mostly involving government.[5]

Entertainment law is a collection of sub-specialties that apply to media activities. It is an umbrella term that incorporates several legal specializations. Law schools often offer a set of courses in entertainment law and IP law. There are several loosely defined and overlapping areas of legal specialization that are directly relevant to media and communication—the legal fields of contracts, patents, copyrights and trademarks, constitution, administrative process, regulation, public utilities, employment and labor, libel, advertising and fair-trade practices, anti-trust, corporations and partnerships, securities, and taxation.

Entertainment lawyers can be part of an artist's team of agents, assistants, and personal managers. They can function

4 Croteau, David and William Hoynes. *The Business of Media: Corporate Media and the Public Interest*. (Pine Forge Press, 2001), 13–38.

5 Public and private law in media are not clearly demarcated and often overlap. Public regulatory issues can be fought through private litigation of one company against another, for example in the anti-trust field. The court decisions in private lawsuits then often become precedents for similar cases in the future and hence become something resembling laws and regulations. Conversely, public law proceedings lead to regulations that directly affect commercial transactions.

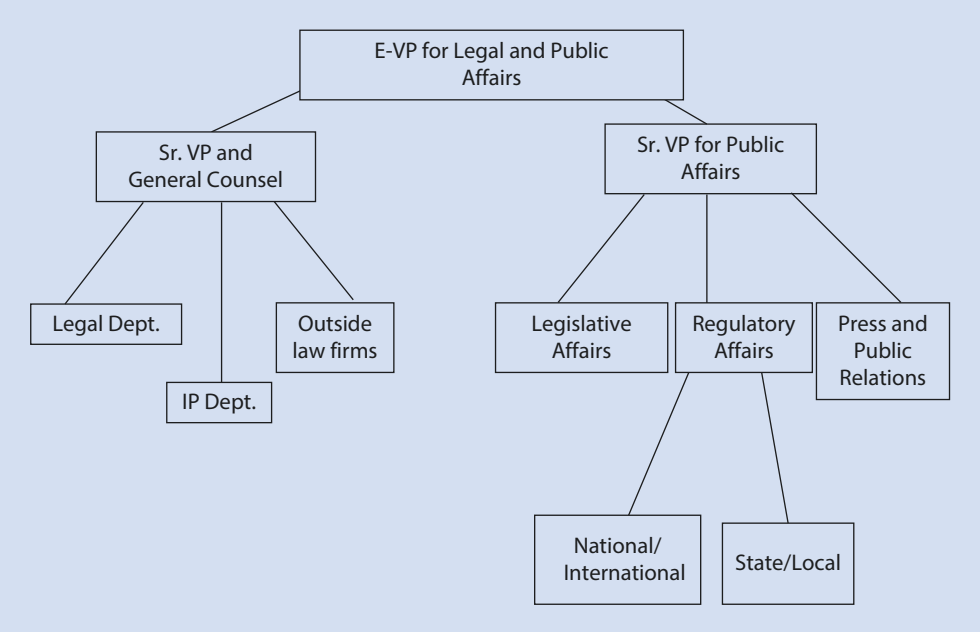


Fig. 8.1 Organizational chart of a corporate legal and public affairs function

primarily as attorneys in a traditional legal setting but also act as promoters, agents, and counselors, depending on the circumstances. In the theater world, entertainment lawyers help secure rights to perform plays and help in renting performance spaces. For television media, they negotiate rights to music, programs, and advertising.[6] In the film and music sector, they deal with financial transactions, copyrights, and contracts with the talent. For online media, they are involved in trademark infringement, database protection, privacy protection, and cyber-security. Film projects tend to have a production counsel. Even for an independent film, the costs of preparing and negotiating agreements range between $10,000–30,000 or higher. There also is a significant tax angle to media deals and this becomes an important part of the lawyering responsibility.

Like entertainment law, publishing law is not a discrete legal field but rather a combination of traditional areas of intellectual property (IP), contracts, torts, and free speech constitutional law.[7] It involves literary option agreements, writers guild registration, rights acquisition to life stories, and so on. Whether in entertainment or publishing, the two sides in transactions are usually media companies and creatives, and lawyers tend to work for one side or the other. At times, however, the talent and the media firms work together.

IP law is a distinct area, involving the acquisition, protection, and licensing of patents, copyrights, trademarks, and trade secrets. Some top IP firms are boutiques that only do IP-related work.

Among the legal specializations in the media field, patent attorneys are the most clearly defined, and they require special certification by the national patent offices of different countries.[8] Such patent lawyers, in additional to a legal qualification, must also have backgrounds or degrees in technology.[9] IP law is discussed in more detail in ► Chap. 6 Financing Media, Information, and Communication.

8.2.1 General Counsel: Head of Legal Department

The general counsel (GC) or in-house counsel, is the head of an organization's internal legal department and monitors the outside lawyers. The legal department sees itself as the sword, the shield, and the conscience of a company. It is also an often-sprawling bureaucracy requiring management, budgeting, and performance measures. In the past, it was not essential for the general counsel to have management skills because it was assumed that legal ability was more important. More recently the internal law department may employ several hundred attorneys and staff, and the general counsel also acts as a manager. She must control cost and quality of internal and external legal services, oversee lawyers serving in various business units, and supervise the training of other lawyers and employees in their compliance with legal and regulatory requirements.

In 2016, the 100-highest paid general counsels in the USA earned at least $1.4 million plus stock options and bonuses. Google's Chief Legal Officer David Drummond

6 Henslee, William D. *Entertainment Law Careers*. (Chicago: American Bar Association, 1998), 11.
7 Note that this meaning of IP is different from the acronym for internet protocol.
8 United States Patent and Trademark Office. "Office of Enrollment Discipline." Last accessed June 17, 2017. ► https://www.uspto.gov/about-us/organizational-offices/office-general-counsel/office-enrollment-and-discipline-oed.
9 Without the latter qualifications they may be "Patent agents" as non-lawyers. United States Patent and Trademark Office. "General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the United States Patent and Trademark Office." Last accessed June 17, 2017. ► https://www.uspto.gov/sites/default/files/OED_GRB.pdf.

earned $664,367 in 2016. Comcast's Arthur Block's salary in 2010 was reported as $4.23 million.

8.2.1.1 Compliance Management

A company is liable when an employee commits a violation while acting within the scope of employment and for the company's benefit. Therefore, the firm must ensure that its employees are not going to get it in trouble, whether by ignorance of the law or by recklessness and negligence. To ensure that laws and regulations are followed is called "compliance," and this is a process that must be managed. Clear violations are relatively easy to define in terms of institutions and employees. The problems are the gray zones that are subject to interpretation and depend on circumstances and patterns. To deal with this process requires the setting up of a corporate compliance program with a senior manager in charge, typically from the GC's office, the HR department, and so on. Lower-level managers must be familiarized with the code of acceptable behavior and an oversight system established. Staff, in turn, must be trained, sometimes through programs, and the company must develop mechanisms for corrective action.

Special compliance management problems exist for companies that operate globally. There are different regulations in different countries, and the company has to make policies to ensure that they are complying with a variety of regulations, even across countries, and at times when they are contradictory.[10]

In the USA, compliance management is especially important in the securities area. The Sarbanes-Oxley Act (2002) requires companies to ensure employee compliance with securities law and accounting principles. Section 302 of this law requires the chief executive officer (CEO) and chief financial officer of publicly traded companies to certify that the company has established and maintained an effective system of internal control.[11]

The list of legal restrictions can be quite long. The firm must decide how to best address the most serious issues and generate compliance. This includes employee incentives, monitoring, and control. Establishing and managing a compliance program costs money.[12] There is a management question about the lengths a firm will go to in order to comply. Over-compliance is a risk-avoidance behavior and is costly in terms of direct and indirect cost. Conversely, under-compliance imposes costs by causing fines, delays, and negative publicity. Uncertainty about what it is exactly that must be done or not done will slow down decisions and raise costs. There are different perspectives on this question. The "Law and Economics" school of thought in legal scholarship postulates that "sometimes" it is cost effective to violate a contract or more generally, the law. The question is one of both ethics and economics. Is knowingly violating a legal rule a moral issue or simply a cost of doing business, like paying an occasional parking ticket which might be cheaper than seeking a parking garage? This is known as an "efficient breach" of the law. Many others condemn such a perspective as cynical, unethical, and anti-social. A violation of a business regulation requires a sufficient moral reason, and profit and productivity goals are not enough. Flagrant violations undermine the social fabric. Officially, the legal profession claims to support the moral view. In practice, however, a policy of efficient breach is often followed.

To deal with regulations, an active compliance industry has arisen to help firms set up efficient programs to cope with mandates. These specialized consultancies and operators were helped, in the USA, by the passage of the Federal Sentencing Guidelines. These identify, as a mitigating factor in the sentencing of companies and top managers found guilty for a corporate violation, the existence of a legal compliance program. Prior to the Guidelines, about 40% of the largest 500 US companies had compliance programs; after the Guidelines were issued, this number shot up to 100%.[13]

8.2.2 Outside Counsel

The general counsel is also responsible for hiring independently practicing lawyers. Firms hire such outside counsel to benefit from specialization, personal contacts, and economies of scale. Outsourcing to outside counsel is used for specialized and complex matters such as anti-trust battles or proxy fights, but also for routine matters such as bill collection or lease agreements. Some outside law firms are hired to deal with governments and legal systems of other countries. The percentage of legal matters assigned to outside counsel by major US companies is for litigation 69%; for labor and employment 55%; for IP 52%; but for tax only 17%.[14]

It takes time and money to manage outside professionals. The external counsel may have less incentive to keep costs low and may strive for an expensive perfectionism. In addition, outsiders may be less knowledgeable about the business and the deal itself than the company's in-house attorneys are.[15] There are also cost disadvantages to going outside. In 2015, corporate staff lawyers made about $150,000 in salary, plus benefits, which translates into roughly $80 an hour, plus overheads. Outside lawyers are more expensive. In 2015, the rate for top firms' partners was between $300 and $600, but often much more, and the rate billed for associates' time was $200–350 per hour. In other words, external lawyers are often three times as expensive on an hourly basis.

10 Rikhardsson, Pall et al. "Business Process Risk Management, Compliance and Internal Control: A Research Agenda." Presented at the Proceedings Second Asia/Pacific Research Symposium on Accounting Information Systems. University of Melbourne. 2006. ► https://ideas.repec.org/p/hhb/aarbma/2006-005.html

11 Cannon, David M. and Glenn A. Growe. "SOA Compliance: Will IT Sabotage Your Efforts?" *The Journal of Corporate Accounting & Finance* 15, no. 5 (July/August 2004): 31–37.

12 Ostas, Daniel T. "Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy." *American Business Law Journal* 46, no. 4 (Winter 2009): 487–529.

13 Ostas, Daniel T. "Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy." *American Business Law Journal* 46, no. 4 (Winter 2009): 487–529.

14 "ACC 2011 Census Report" *Association of Corporate Counsel* Mar 27 2012 ► http://www.acc.com/legalresources/resource.cfm?show=1306363.

15 Sheldon, Michael. "Pros and Cons of In-House Counsel." *The Hartford*. Last accessed June 17, 2017. ► https://www.thehartford.com/business-playbook/in-depth/in-house-counsel-pros-cons.

Entertainment law firms are usually based in major media centers and capital cities. There are two kinds of entertainment law firms: those that represent the entertainment companies, which are generally national law firms, and those that represent the talent, which are generally boutique or "plaintiff" law firms. The Beverly Hills Bar Association alone includes about 1250 entertainment lawyers as members, with the tone set by a few influential boutique firms and the entertainment law departments of several major firms.[16] It is typical for a company, media or otherwise, to use several different firms for its legal needs. This is because different firms have different specialties and cost structures.

Outside counsel use several billing arrangements. They may have an hourly charge or a contingency fee, a flat fee (which is becoming more popular), or they settle on an alternative fee arrangement such as being paid with equity stock in the client company. Large law firms that represent media companies are less flexible with fees than small firms representing the artists. They typically have hourly rates. When lawyers manage several aspects of the client's career, they might take their fee as a percentage of a client's income, typically 5%.

Legal work has been increasingly sent offshore in order to reduce the cost of the lengthy and expensive research. The hourly fee of a New York lawyer is in the range of $750 (and in most cities around $400), whereas a similar level of experience might cost only $30 in India.[17] In 2007 the offshore legal business was $60 to $80 million, which would have paid for about 1000 lawyers including their overheads, but by 2015 the number of lawyers and legal assistants in India performing work for US clients was estimated at 80,000.[18]

8.2.3 Case Discussion

Comcast Versus Google: Legal Representation

Google uses many law firms in America and in other countries. Its main corporate law firms include Cooley LLP, which has 750 lawyers, and Wilson Sonsini Goodrich & Rosati, which has 670 lawyers.[19] Other law firms that work for Google are:

- Potter Anderson & Corroon (91 lawyers), for corporate reorganization;
- Cleary Gottlieb, Allen & Overy (1200 lawyers) for EU representation;
- Quinn Emanuel Urquart & Sullivan (700 lawyers) for IP.

Comcast similarly employs large law firms. They include:

- Davis Polk & Wardwell, its main law firm for FCC-related case, with 740 lawyers and a New York City base;
- Ballard Spahr Andrews & Ingersoll (500 lawyers, headquarters in Philadelphia);
- Dechert (1000 lawyers, headquarters in Philadelphia).

In addition, both companies are represented in numerous state and local law firms that specialize in their state's regulatory environment or can deal with local real estate matters such as tower siting or rights of way. Altogether, each company can field thousands of highly qualified lawyers who are ready to do legal battle at any time. Their deployment is co-ordinated and led by the companies' GC's office.

8.2.4 Litigation Management

8.2.4.1 How to Control the Costs of Outside Counsel

Outside counsel can be effective but costly. There are several ways in which a company can try to control costs:

- require a budget in advance;
- pursue alternative fee arrangements, such as flat fee or contingency payments;
- create competition between several firms for its legal work;
- maintain tight control of the billed time;
- increase the size and quality of its own law department;
- Outsource work to low-cost countries such as India.[20]

How should a company determine how much to spend on legal expenses? First, we will address litigation. Statistically, the typical US company with a size of $1 billion plus in annual revenues faces 556 lawsuits per year, ranging from employment disputes and consumer injuries to copyright violations and contract performances. It spends more than $12 million per year on litigation alone. It spends another $19.8 million on settlement payments and adverse judgments.[21] It also spends, on average, millions on insurance against tort liability and incurs major internal transaction costs in avoiding situations that lead to litigation, including taking less risk in designing products or in developing and releasing them.

Litigation management means that a company needs to actively decide how to set budgets for individual cases and whether to initiate, settle, or fight. It must require law firms (whether inside or outside) to plan for the various stages of a case, with an itemized budget of expected cost. Outside law firms tend to resist setting a litigation budget because it may

16 Parisi, Paula. "Power Lawyers." *The Hollywood Reporter*. July 26, 2005.
17 Bach, Pete. "Outsourcing has its Boundaries." *The Post-Crescent*. January 2, 2007. Last accessed June 17, 2017. ► http://sinobpo.blogspot.com/2007/01/outsourcing-has-its-boundaries.html.
18 Naha, Abdul Latheef. "It's India for legal services." *The Hindu*. Last updated July 25, 2011. ► http://www.thehindu.com/todays-paper/tp-features/tp-educationplus/its-india-for-legal-services/article2266364.ece.
19 The Legal 500. "United States>Litigation." Last accessed April 2, 2017. ► http://www.legal500.com/c/us/litigation.
20 Vosper, Robert. "Size Matters: The Hazards, Rewards and Challenges of Managing a Large Legal Department." *Corporate Legal Times* 13, no. 139 (June 2003): 53.
21 Reason, Tim. "U.S. Companies Spending a Fortune in Court." *CFO*. October 12, 2006. Last accessed June 17, 2017. ► http://ww2.cfo.com/risk-compliance/2006/10/u-s-companies-spending-a-fortune-in-court/.

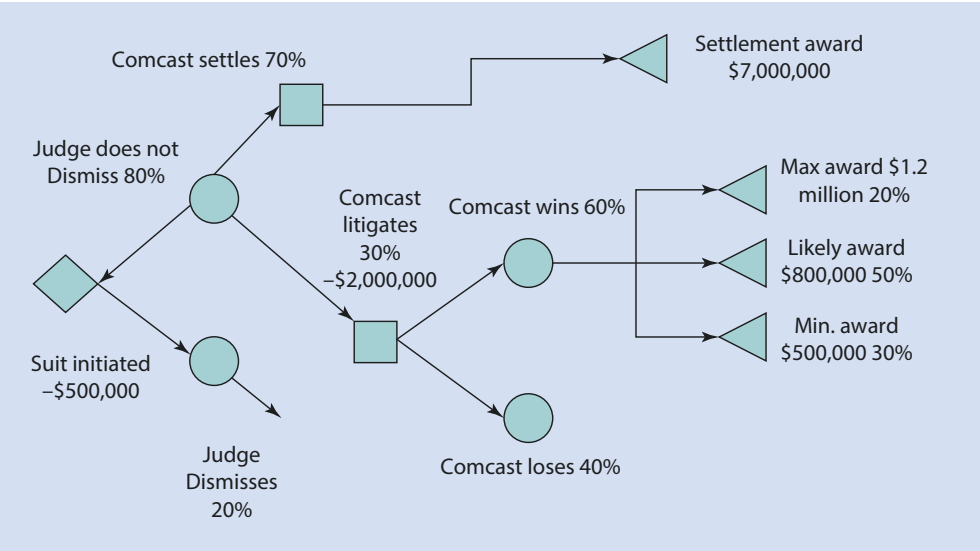


Fig. 8.2 Decision tree for decision to litigate

constrain them and because cases are often unpredictable. But the client company must consider how it can win a case at a reasonable cost, what the potential benefits are, and how risky the case is. Since 90% of cases settle and never make it to trial,[22] it is important for managers to define a settlement range at all stages of litigation. Settlements help to achieve litigation goals within a reasonable budget. Settlement strategies are an important part of risk-management. The best time for settlements to occur is during the outset of a case, or at the close of discovery when all the facts are known before trial preparation.[23]

In order to determine its strategy, a company may arrange the various options and probabilities in a "decision tree,"[24] as depicted in Fig. 8.2. After identifying uncertainties, lawyers should provide numerical risk assessments for each possible outcome. All final outcomes, on the right side, have financial consequences, such as penalties and legal expenses. Multiplying the probabilities with the monetary values of each outcome generates the expected value.[25] The sum of all the expected values is the value of the entire case. Decision trees are useful, but become cumbersome if too many variables and stages are involved.

How does one know the probabilities and magnitudes of outcomes for this methodology and, similarly, others? It is here that a company's lawyers need to provide reasonable estimates based on their experience, the outcome of similar cases, and other facts. These estimates must be realistic, neither painting a rosy picture in order to entice a potential client nor too gloomy in order to make the lawyer's subsequent achievement look good.

It should be noted that legal experts tend to be reluctant to estimate probabilities. "It all depends" will often be said, and it is the manager's responsibility and challenge to coax out these estimates. The willingness and the track record of lawyers in providing realistic estimates should be factors in retaining them. Their ability to judge costs and likelihoods is just as important to a company as their skill in writing legal briefs.

Case Discussion

Should Comcast Sue Google?

Suppose Comcast considers suing Google, accusing it of anti-trust behavior in the ad service market. How can Comcast estimate the expected value of the case? Comcast might create a decision tree outlining the costs and expected benefits from the suit and probabilities of outcome.

Assume the following hypothetical numbers. If Comcast brings the lawsuit, its upfront costs will be $500,000. The judge, with an 80% probability, will not dismiss the case. It is then up to Comcast if it settles (a 70% likelihood) or fights back (30%). If the latter is the case, it will cost it $2 million, with four possible outcomes: a total loss (40% probability), or a win (60%) where there are three possible outcomes with equal probability: a high win, a more realistic one, or a minimal one.

Q: Should Comcast sue?

The expected value of the case for Comcast is: (−500,000) +(0.2)(0)+(0.8)[(.7)(7,000,000) + (.3){−2,000,000 + .4(0) + (0.6)[(0.2)(12,000,000) + (0.5)(8000,000) + (0.3)(5000,000)]}] = $4,240,200

Comcast should bring the case, because its expected value, after subtracting the cost of bringing the case, is $4.24 million. But if the probability of winning drops from 60% to 30%, and if the expense rises from $2 million to $4 million, then the expected value is negative $-0.13. The case then should not be brought by Comcast.

22 Forrest, Kirk G. "In Litigation, Consider Outcome and Cost." *Business Insurance* 30, no. 37 (September 1996): 20.

23 Fogel, Richard A. "Settlement Negotiations and Strategy." *Risk Management* 50, no. 2 (February 2003): 18.

24 Poltorak, Alexander and Paul J. Lerner. "Introducing litigation risk analysis." *Managing Intellectual Property* no. 109 (May 2001): 47.

25 A conceptually better approach would be the "real options" approach to a decision process of stepwise investment. See Chapter 4 Technology Management. However, the practical application is no easy task.

8.2.4.2 How to Analyze Dynamic Spending?

The decision tree approach is a static analysis, with static probabilities and set costs and rewards. However, the real question is often an incremental one: how much to invest in a case to improve the odds, and how to respond to one's rival's corresponding efforts.

The optimization solution of any non-market spending by Firm A is to invest until marginal cost equals marginal benefits. This requires an estimation of the probability of success with several levels of investment by the firm, given an estimated level of spending by the opposing firm.

To conclude: managers need to manage their legal activities as a business function and to use litigation as a strategic tool, both defensively and offensively. As business tools these activities are subject to the regular analyses of net present value (NPV), return on investment (ROI), cost benefit, option value, brand management, and so on, and the general managers should not cede overall decision-making to the lawyers or specialists.

Case Discussion

Marginal Analysis: Comcast Versus Google

Google will have to consider the impact of its spending. Assume that the value to Google of success of a particular case is $1,000,000, and also assume that its competitor Comcast spends $100,000 on that case.

For each investment by Google in the case, there is a certain result in terms of probability of outcome and its expected value (Table 8.1).

How much should Google spend? The answer is between $300,000 and $400,000. In that range, the incremental spending ($100,000) achieves a result worth between $30,000 and $150,000 (right-most column). If Google spent more it would not achieve enough of a difference to justify the added cost; and if it spent less, it could have bought an extra expected value for less than the cost.

However, this presumes that Comcast's own legal spending is static at $100,000. Yet it is more likely that Comcast would respond to Google's spending by upping the ante itself. If, for example, it was to raise its own investment in the case to $200,000, there would be a different optimal spending number for Google, in turn.

Thus, for every investment level by Comcast there is an optimal spending level—a "reaction function" — by Google. In Fig. 8.3, this is shown schematically by the line denoted "Google optimal spending as a function of Comcast's." The more Comcast spends, the higher Google's optimal spending point must become. Comcast, too, will also do the same calculation for Google's spending level, and thereby set its own "reaction function" of optimal spending.

Comcast and Google will raise each other's spending until some equilibrium point E is reached. In other response configurations, there may be no such equilibrium point E, and Comcast and Google may try to outspend each other in an "arms race" to the top, continuously increasing their spending. That is possible when the expectations of probabilities and rewards differ widely. But it is more likely that both sides will then conduct a cost-benefit analysis for the spending and consider settlement parameters based on the decision calculus discussed previously.

Table 8.1 Cost benefit of investment in litigation

Investment by Google in $	Δ Investment	Probability of success for Google (est.)	Expected value *E*(V) of outcome	Δ*E*(V)
0	0	0.20	200,000	
100,000	100,000	0.50	500,000	300,000
200,000	100,000	0.65	650,000	150,000
300,000	100,000	0.80	800,000	150,000
400,000	100,000	0.83	830,000	30,000
500,000	100,000	0.86	860,000	30,000
1,000,000	100,000	0.88	880,000	20,000

8.3 Influencing Government and the Public

We now move from private litigation law to public regulatory law and policy. There can be three basic responses by a company to public policy:[26]

1. passive reaction—take policy as given and static;
2. anticipation—factor potential changes in government policy into planning;
3. shaping—pro-active effort to achieve specific policy objectives.

To anticipate changes, companies often have staff functions in their strategy group to identify and track such policy developments and incorporate them into the firm's plans. Often such early warning comes from a firm's outside lobbyist and lawyers, its internal public communications group, and from trade associations.

26 Hillman, Amy and Michael A. Hitt. "Corporate Political Strategy Formulation: A Model of Approach, Participation, and Strategy Decisions." *Academy of Management Review* 24, no. 4 (October 1999): 825–842.

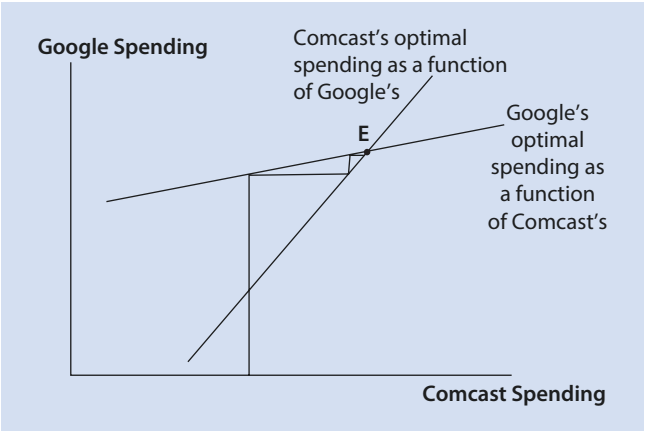


Fig. 8.3 Two-company reaction curve for optimal investment in litigation

8.3.1 Lobbying

The third type of response, that of shaping the policy, requires the greatest effort but offers the prospect of greatest impact. Robert Galvin, the head of the wireless firm Motorola for more than three decades, described his company's non-market strategies as "writing the rules of the game" to shape Motorola's market environment.[27] Here, "lobbying" is the major tool. Basic lobbying techniques include:[28]

- direct lobbying of policy makers;
- coalition-building;
- generating grassroot lobbying;
- political finance;
- public communications and advocacy efforts;
- impacting key government personnel appointments.

Trade associations and small firms often co-ordinate collective action, while larger or stronger firms generally prefer individual action. Small firms prefer collective action because they have neither the resources nor the connections that larger firms have.

When choosing a political strategy, companies must make three decisions on how to proceed:[29]

- *Transactional versus Relational.* The transactional approach is issue by issue as they come up, and involves short-term relationships with policy-makers. This may describe the situation of large diversified firms with many diverse policy interests. In contrast, the relational approach involves the development of long-term relationships with policy-makers and an investment in co-operation and trust. A relational strategy works better for more focused firms who have a major stake in the way their industry is regulated, such as telecom firms or cable companies.
- *Individual versus Collective.* A company works on the case on its own or in alliance with the industry through trade associations or other stakeholder coalitions. The individual strategy may work better for large companies that have deep pockets and have a major stake. A collective strategy may be better for controversial issues because it reduces the company's negative exposure. Creating a broad coalition may also get better results, and may be more affordable for smaller firms.
- *Informational versus Financial versus Constituent-Based.* A constituent-based strategy aims to create pressure on policymakers by generating voter support. It might work best in the early and more general stages of a regulatory debate. Then, to generate access, a financial strategy with campaign contributions may generate a sympathetic hearing. For the phase in which specific rules are written, an informational strategy might work best, including briefing policy-makers, commissioning reports, and shaping media coverage.

Lobbying targets are usually legislators and their staff, officials and staff of regulatory agencies, and government decision-makers at the local, state, national, and international levels.

A company must deal with several organizational issues in organizing its lobbying function:[30]

- how to choose the right person;
- whether lobbyists should be in house or retained;
- how much should be spent on lobbying.

Effective lobbyists are politically sophisticated, experienced, and persuasive. They must be able to network and create coalitions and connections. They must be capable to function as advisors, advocates, intelligence collectors, policy analysts, political campaigners, alliance builders, negotiators, collection agents, publicists, courtiers, party hosts, unpaid assistants, and fundraisers.[31]

One question is whether a lobbyist should be the company's employee or a hired independent professional. For a long-term, repetitive, or continuing issue it is better to use an in-house lobbyist. However, for short-term or unique issues, retaining a lobbying firm is more cost effective. They typically charge by hour or day, with an upfront retainer payment for a basic service level.

Companies must consider how much to spend (Table 8.2). For example, in 2014, the television, music, and movie industries in the USA reported spending $115 million on lobbying in total.[32] How do we know the figures? In the USA, companies and trade associations must report them, and all lobbyists must register and report their clients. Many other countries have weaker disclosure requirements.

27 Baron, David P. "The Nonmarket Strategy System." *Sloan Management Review* 37, no. 1 (Fall 1995): 73–85.
28 Mack, Charles S. *Business, Politics, and the Practice of Government Relations*. Westport: Quorum Books, 1997.
29 Hillman, Amy and Michael A. Hitt. "Corporate Political Strategy Formulation: A Model of Approach, Participation, and Strategy Decisions." *Academy of Management Review* 24, no. 4 (October 1999): 825–842.
30 Mack, Charles S. *Business, Politics, and the Practice of Government Relations*. Westport: Quorum Books, 1997.
31 Watkins, Michael, Mickey Edwards, and Usha Thakrar. *Winning the Influence Game: What Every Business Leader Should Know About Government*. New York: John Wiley & Sons, Inc., 2001.
32 OpenSecrets. "TV/Movies/Music: Lobbying, 2016." Last accessed June 17, 2017. ▶ https://www.opensecrets.org/industries/lobbying.php?cycle=2016&ind=B02.

Table 8.2 Lobbying expenses by major media and information sector organizations ($ million, 2016)

Total TV/movies/music sector[a]	**$60.2**
National Association of Broadcasters	$16.4
National Amusements Inc. (Viacom)	$8.4
21st Century Fox	$5.4
Recording Industry Association of America	$4.4
iHeartMedia	$4.4
Time Warner	$2.9
Motion Picture Association of America	$2.6
Sony Corp.	$2.0
Vivendi	$1.8
Broadcasting Media Partners	$1.0
Total Internet and computer sector[b]	**$58.2**
Alphabet Inc. (Google)	$15.4
Amazon.com	$11.4
Facebook Inc.	$8.7
Yahoo! Inc.	$2.5
eBay Inc.	$2.2
Pandora Media	$1.3
SalesForce.com	$1.3
Internet Association	$1.2
Alibaba Group	$1.0
Spotify USA	$1.0
Total telecommunications sector[c]	**$64**
Comcast	$14.3
NCTA (cable TV association)	$13.4
CTIA (mobile telecom association)	$11.0
Deutsche Telekom	$8.0
Charter	$7.2
Cox	$3.6
SoftBank	$2.3
DISH	$1.8
Harbinger Capital Partners[d]	$1.5
Motorola	$1.5

[a]OpenSecrets. "Industry Profile: Summary, 2016." Last accessed June 17, 2017. ► https://www.opensecrets.org/lobby/indusclient.php?id=B02&year=2016
[b]OpenSecrets. "Industry Profile: Summary, 2017." Last accessed June 17, 2017. ► https://www.opensecrets.org/lobby/indusclient.php?id=B02
[c]OpenSecrets. "Telecom Services Industry Profile: Summary, 2016." Last accessed June 17, 2017. ► https://www.opensecrets.org/lobby/indusclient.php?id=B09&year=2016
[d]Harbinger is a private equity company whose holdings include Ligado Networks, SkyTerra, and Lightsquared

8.3.1.1 Case Discussion

Lobbying

Comcast maintains 128 federal lobbyists on its payroll, 105 of whom are former governmental officials, including six former members of Congress.[33] In 2013, Comcast had the seventh largest lobbying expenditure of a US company or organization, spending $18.8 million.[34] It was one of the largest financial supporters of Barack Obama's presidential runs. One of Comcast's vice presidents raised over $2.2 million between 2007 and 2012 for Obama's campaign and for the Democratic National Committee.[35] In those years, the company greatly expanded through a series of mergers steered through government approval.[36] In 2015 it increased its lobbying budget by 50%, to $18.5 million. In that same year, Google spent $22 million on lobbying.

In addition to direct lobbying, Comcast controls the and NBC Universal Political Action Committee (PAC), which is among the largest PACs in the USA. It raised over $3.7 million in 2011/2 for various candidates.[37] Comcast is also a major backer of the National Cable and Telecommunications Association (NCTA) PAC, which raised $2.6 million. NCTA represents Comcast, as well as other cable companies, and in 2013 was the fifth largest lobbying organization in the USA, spending nearly $20 million.[38]

While the majority of its lobbying is at the federal level, Comcast also backs lobbying on a local level. Regional organizations, such as the Tennessee Cable Telecommunications Association and the Broadband Communications Association of Washington PAC, receive funding from Comcast to represent their interests in local

33 Celniker, Jared and Russ Choma. "Net Neutrality." *OpenSecrets.* April 2015. Last accessed June 17, 2017. ► https://www.opensecrets.org/news/issues/net_neutrality/.
34 OpenSecrets. "Lobbying Top Spenders: 2013." Last accessed June 17, 2017. ► https://www.opensecrets.org/lobby/top.php?showYear=2013&indexType=s.
35 New York Times. "Obama's Top Fund-Raisers." September 13, 2012. Last accessed June 17, 2017. ► http://www.nytimes.com/interactive/2012/09/13/us/politics/obamas-top-fund-raisers.html.
Sink, Justin. "Comcast, Time Warner Execs Have Been Big Obama Supporters." *The Hill.* February 13, 2014. Last accessed June 17, 2017. ► http://thehill.com/policy/technology/198350-comcast-time-warner-execs-have-been-big-obama-supporters.
36 Lipton, Eric. "Comcast Recruits Its Beneficiaries to Lobby for Time Warner Deal." *New York Times.* April 5, 2015. Last accessed February 17, 2017. ► https://www.nytimes.com/2015/04/06/business/media/comcast-recruits-its-beneficiaries-to-lobby-for-time-warner-deal.html.
37 Federal Election Commission. "Top 50 Corporate PACs by Receipts January 1, 2011-December 31, 2012." Last accessed June 17, 2017. ► http://classic.fec.gov/press/summaries/2012/tables/pac/PAC5a_2011_12m.pdf.
38 Proportionally, Comcast's share would have been about $6 million. NCTA data from OpenSecrets. "Lobbying Top Spenders: 2013." Last accessed June 17, 2017. ► https://www.opensecrets.org/lobby/top.php?showYear=2013&indexType=s.

and state government.[39] In the past decade, cable companies, including Comcast, have lobbied state governments, with varying degrees of success, to restrict or ban cities from offering municipal broadband service.[40] By 2014, such restrictions were passed in 20 states.[41] At that point the FCC intervened and preempted the states by permitting municipal broadband. That issue went to the courts, which overturned the FCC.

Comcast's outside-hired lobbyists and consultants included at least 12 US firms. Examples:[42]

- Tony Podesta, former counsel to Senator Ted Kennedy and brother and partner of President Clinton's chief-of-staff and Hillary Clinton's campaign manager John Podesta. (Democrat);
- Ed Gillespie, former Republican Party chairman;
- Alfonse M. D'Amato, former New York Senator (Republican);
- Rudolph W. Giuliani, former New York Mayor (Republican);
- Jack Quinn, former White House Counsel under President Clinton (Democrat).

It should be noted that use of these actions is unlawful for a large corporation in the USA.

Facing Comcast in the net neutrality debate, the greatest lobbying effort came from Google, which spent $16.8 million on lobbying in 2014 alone. It was the ninth largest spender on federal lobbying of any organization, but still behind Comcast and the NCTA. In 2013, 36 members of Congress held shares of Google's stock. In 2014, it employed 98 lobbyists, including 79 former government officials and two former members of Congress.[43]

8

8.3.1.2 Campaign Contributions

One of the tasks of lobbyists is to advise firms how to target their campaign contributions. Contributions are an important way in which companies can gain political support for their interests. This connection may be most active in the political culture of the USA, but corporate money is deployed for political impact in most countries, though often more hidden from public view. Listed in ◘ Table 8.3 shows the campaign contribution by media companies during one election cycle. These numbers are based on contributions from PACs,[44] soft money donors, and individuals giving $200 or more. Companies cannot donate directly; rather, the money came from the organization's employees and shareholders contributing to a company's or industry's PAC, or from its individual employees or owners in direct contributions, and those individuals' immediate families. The company totals include subsidiaries and affiliates.

In the election cycle 2011–2012, individuals and PACs associated with the communications and electronics industries spent a total of $198 million, of which 63% went to Democratic candidates and 37% to the Republicans.[45] In 2014, a non-presidential election year, that number dropped to $116 million (Democrats: 59%; Republicans: 40%). In the election cycle 2016, total contributions by the communications and electronics industry almost tripled to $295 million. Of this, Democrats received 69% and Republicans 31%).

◘ Table 8.3 show a strong preference for Democrats in the high tech firms (except for Cisco) and in several major media firms; and a leaning toward Republicans in AT&T and from the trade associations for cable TV and broadcasting.

8.3.1.3 Lobbying Strategies

There are two different types of lobbying strategies: inside and outside strategies. Inside strategies contribute to a candidate's campaign directly or through intermediaries such as Political Action Committees (PACs).[46] The influence of PACs is somewhat constrained because the maximum gift it can give to a single candidate during an election cycle is $10,000.

Outside strategies generate public pressure on policy-makers to support a group's agenda. There need not be direct access to specific policy-makers for an impact to be made. This is a good tactic to use with politicians who are sitting on the fence of an issue. Groups with large and ideologically cohesive memberships are best able to use such "grassroots" tactics. They are able to leverage a large membership to provide resources, infrastructure, and volunteers.

"Astroturf" campaigns try to create the appearance of a grassroots movement. They pay contractors to generate phone calls, letters, and emails to politicians to make it appear that a particular opinion represents public opinion. The internet has created many new ways to generate such activities.

39 Sher, Andy. "Lobbyists had busy year in Nashville." *Times Free Press.* May 30, 2011. Last accessed June 17, 2017. ► http://www.timesfreepress.com/news/news/story/2011/may/30/lobbyists-had-busy-year-nashville/50827/.
Peterson, Andrea. "Comcast is donating heavily to defeat the mayor who is bringing gigabit fiber to Seattle." *Washington Post.* October 31, 2013. Last accessed June 17, 2017. ► https://www.washingtonpost.com/news/the-switch/wp/2013/10/31/comcast-is-donating-heavily-to-defeat-the-mayor-who-is-bringing-gigabit-fiber-to-seattle/.

40 Badger, Emily. "How the Telecom Lobby is Killing Municipal Broadband." *Citylab.* November 4, 2011. Last accessed June 17, 2017. ► http://www.citylab.com/tech/2011/11/telecom-lobby-killing-municipal-broadband/420/.

41 Brodkin, Jon. "ISP lobby has already won limits on public broadband in 20 states." *ArsTechnica.* February 12, 2014. Last accessed June 17, 2017. ► http://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states/.

42 Collaborative Research on Corporations. "Company Profile." November 2009. Last accessed June 21, 2010. ► http://www.crocodyl.org/wiki/news_corp.

43 Celniker, Jared and Russ Choma. "Net Neutrality." *OpenSecrets.* April 2015. Last accessed June 17, 2017. ► https://www.opensecrets.org/news/issues/net_neutrality/.

44 Only those groups giving $5000 or more need to report and are listed here.

45 All data from various pages of ► https://www.opensecrets.org/industries.

46 Hemson, Paul. *The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington.* Washington, D.C: CQ Press, 1998.

Table 8.3 Campaign contributions by policial action committees and employees, ($ million, Election cycle 2016)[a]

Industry/Company	Total contributions ($ million)	Percentage of contributions to Democrats (Balance to 100% went to Republicans) (%)
TV Production	23.7	90.0
TV/Radio Stations	8.7	51.0
Music Production	5.3	89.0
NCTA (cable TV association)	2.7	43.0
Cable/TV Production	2.6	62.0
NAB (broadcaster association)	2.1	45.0
Newsweb Corp.[b]	37.8	99.8
Asana[c]	18.0	99.0
Saban Capital	16.1	99.0
Comcast	12.6	73.0
AT&T	11.6	33.0
Alphabet (Google)	9	63.0
Microsoft	8.4	56.0
Oracle	6.7	50.0
DreamWorks SKG	5.4	45.0
Facebook	4.6	67.0
Qualcomm	4.4	81.0
Disney	4.3	39.0
Cisco	3.7	28.0
Allied Wallet[d]	3.4	64.0
Duchossois Group[e]	3.3	0.0
Verizon	3.2	47.0
Time Warner	2.4	87.0
Apple	2.3	89.0
21st Century Fox	2.1	53.0
Bad Robot Productions[f]	1.9	48.0
Hubbard Broadcasting	1.9	2.0
Cox Enterprises	1.8	40.0
Intel	1.8	57.0
National Amusements (Redstone)	1.5	68.0
Escription[g]	1.1	39.0

[a] All data from various pages of ► https://www.opensecrets.org/industries
[b] Minority media company which owns newspapers, radio stations, and TV stations, formed by Fred Eychaner
[c] A company started by a co-founder of Facebook which focuses on worker productivity and tracks their work
[d] A company that provides credit card processing on websites (i.e. payments online)
[e] A holding company which invests in other companies as well as owns subsidiaries that own racetracks, manufacture security, lighting, and other products. It is a private company valued at over $3 billion
[f] JJ Abrams' film production company
[g] Owned by Nuance Communications which makes the Dragon Naturally Speaking and other items. Escription offers medical dictation services to doctors and therapists etc.

In 2008, a public FCC hearing on net neutrality was so packed that many activists and reporters were turned away. Comcast had quietly sent employees on work time to cheer for its side.[47]

The campaign by the music industry against file-sharing by users is an example of deftly spinning an industry interest into a public interest.[48] The Recording Industry Association of America organized a coalition of about 60 artists to persuade key senators to hold hearings to publicize the perspective of artists, and sponsored ads featuring these performers. The goal was to change the debate from one of big media companies' profits being challenged by college students to one of being fair to beloved artists.

8.3.1.4 Regulations on Lobbying

There are several types of restrictions on lobbying. In the USA, individuals who devote at least 20% of their working time to lobbying activities must register as lobbyists.[49] Lobbying firms and in-house lobbyists must file quarterly reports of their activities. Companies that pay more than $5000 for a trade association's lobbying activities and participate in that association's lobbying activities must be listed. Lobbyists and companies must report financial contributions to or on behalf of a public official, including contributions to third parties who make a public official an honoree.

There are other restrictions in the USA. Recipients of federal funds, such as grants, contracts or co-operative agreements, cannot use government money to lobby the government. Furthermore, recipients of federal funds, such as a public television station, that uses non-federal funds for lobbying purposes must report those activities to the awarding agency.

Lobbyists are prohibited from intervening during the period in which an agency is engaged in a decision. For example, rules ban contact between lobbyists and the FCC during "blackout periods" when a case is being decided.

There are also limits on the "revolving door," that is, the way in which government employees move to jobs in an industry which they previously regulated. A former government employee is forever banned from representing another person or organization before a Federal agency on matters in which she participated personally and substantially while working for the government. For 2 years, a former employee may not lobby on matters which were pending under the employee's supervision in government service.[50] There is concern that a former government employee may influence his ex-colleagues. But such restrictions may be bypassed by the former official by merely advising the company or law firm without directly representing them before the agency. On the other hand, overly strict prohibitions have problems, too. It may not be fair to limit the job prospects of qualified people after they leave government service. This would deter talented people from working for the government in the first place, or to leave it to make room for new blood. Should a top tax accountant who once worked for a tax authority be restricted from doing tax work in the future after leaving government service?

8.3.1.5 Case Discussion

Comcast Local Lobbying: A Hypothetical Case

How to set an optimal lobbying budget? The analysis is similar to the one we used for litigation. Suppose that a municipality considers providing free municipal wi-fi service for people to connect to the internet and that Comcast wants to influence the city councilors to forgo their plan. How much should it invest in these efforts?

Based on market surveys and experience in other localities, Comcast estimates that one-third of its broadband customers will drop its service in favor of the free wi-fi service. There are 100,000 home broadband customers and their customer value to Comcast is $40 a month in revenues. Assuming (hypothetically and for simplicity) the profit margin is half of the revenue, the loss to Comcast would be total margin revenue times the profit, divided by the number of lost customers: $40 million/2/3 = $8 million. The NPV of this loss at a 12% discount rate is about $64 million over 30 years. How would Comcast counter this potential loss?

Comcast's government relations experts estimate that each $10 million of lobbying would reduce the probability of the municipal wi-fi proposal to be adopted by another 20%. Therefore, Comcast may invest in lobbying efforts and spend money according to ◘ Table 8.4.

That table shows that Comcast should spend about $20 million on lobbying. Beyond that, the additional cost of lobbying by $10 million exceeds the NPV of improvement ($8.2 million).

47 Jansen, Dean. "Comcast Secretly Pays People to Fill Seats at FCC Hearing." *Miro Internet TV Blog*. February 26, 2008. Last accessed July 11, 2013. ► http://www.getmiro.com/blog/2008/02/comcast-secretly-pays-people-to-fill-seats-at-fcc-hearing/.

48 Watkins, Michael, Mickey Edwards, and Usha Thakrar. *Winning The Influence Game: What Every Business Leader Should Know About Government*. New York: John Wiley & Sons, Inc., 2001.

49 United States Senate, Secretary of the Senate and Clerk of the House. "Lobbying Disclosure Act Guidance." January 1, 2008. Last updated December 15, 2011. Last accessed July 31, 2012. ► http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf.

50 Dunbar, John. "The FCC's Rapidly Revolving Door." *Center for Public Integrity*. February 19, 2003. Last accessed June 17, 2017. ► https://www.publicintegrity.org/2003/02/19/6581/fccs-rapidly-revolving-door.

Table 8.4 Illustration for cost and value of lobbying

Total cost of lobbying ($ million)	Δ Cost of lobbying ($ million)	Probability of adoption (%)	Δ Probability of adoption (%)	Value of Δ probability ($ million)
0	0	100.00		
10	10	80.00	−20.0	12.8
20	10	64.00	−16.0	10.24
30	10	51.20	−12.8	8.2
40	10	40.60	−10.2	6.5
50	10	32.77	−8.2	5.2
60	10	26.22	−6.6	4.1
70	10	20.98	−5.2	3.3

8.3.2 Public Relations Management

Public relations are a set of communications activities to create a positive image for an organization and its goals. Unlike advertising, no money is spent on the outright purchase of time and space to relay the company's message.[51]

Publicity is a sub-set of PR effort, the effort to create positive news about a person, product, or organization. Publicity is typically a short-term strategy, while PR is a long-term organized program.[52]

In the 19th century, generating publicity was limited to press agents getting newspapers to mention products or events. A few masters of the art, such as P.T. Barnum, would stage pseudo-events to attract reporters. The goal was to gain visibility. But in time PR emerged with a more ambitious aim: to shape public opinion.[53] The main elements of PR include press relations, product publicity, corporate communications, lobbying, and counseling.[54] Relevant target audiences are employees of the firm, stockholders and investors, the media, civic and business organizations, governments, and financial groups.

One of the tools of effective PR is to understand public perceptions about companies, issues, and trends. There are various techniques and tools for this. They include longitudinal analysis of public opinion polls, interviews, and surveys.[55] More recently, online communications have enabled new tools and software services that help to analyze and identify topics and trends.[56] There are various indicators—such as the number of retweets, mentions, or likes.[57]

8.3.2.1 Managing Unfavorable Publicity

The internet provides great PR opportunities to spread a company's perspective and news, but it offers the same opportunities to rivals and critics. It also allows for untrue statements,[58] that criticize a company's products, actions, and leadership.[59]

Companies often monitor the internet for comments about them, using employees or specialized internet monitoring firms.[60] In some cases, such people aim to provide positive comments without identifying themselves as paid by the company. This can seriously backfire. Moreover, if employees misrepresent information about the company's performance, they could violate the anti-fraud rules of the securities laws, which may expose the company to civil and criminal liability. In some cases, negative comments about a company might be made by outside short-sellers in order to drive its share price down. Even in such situations, the rules of stock exchanges often require that a firm respond to rumors, even those made anonymously on the internet. A terse "no comment" will often not suffice.

Companies that are subject to of online criticism—whether true or false—may bring lawsuits against the websites that

51 Henry, Kenneth. "Perspective on Public Relations." *Harvard Business Journal* 45 (July/August 1967): 14.

52 Belch, George and Michael Belch. *Advertising and Promotion: An Integrated Marketing Communications Perspective*, 4th ed. New York: Irwin/McGraw-Hill, 1998.

53 Epstein, Edward Jay. *The Big Picture, The New Logic of Money and Power in Hollywood.* New York: E.J.E. Publications, Ltd., Inc., 2005.

54 Lamb, Charles W., Joe F. Hair, and Carl McDaniel. *Marketing*. Mason, OH: South-Western, 2013.

55 Taylor, Andrea L., Suraje Dessai, and Wändi Bruine de Bruin. "Public Perception of Climate Risk and Adaptation in the UK: A review of the literature." *Climate Risk Management* 4–5 (2014): 1–16.

56 Examples are Trendsmap, Hashtags.org or Neo Reach, a Stanford start-up that helps managing campaigns with influencers in social media. Chapdelaine, Rachel. "7 Marvelous Resources for Researching Trending Twitter Topics". *Inbound Marketing Blog.* January 29, 2014. Last accessed August 19, 2015. ► http://www.inboundmarketingagents.com/inbound-marketing-agents-blog/bid/333604/7-Marvelous-Resources-for-Researching-Trending-Twitter-Topics.

57 Cha, Meeyoung et al. "Measuring User Influence in Twitter: the Million Follower Fallacy." *Proceedings of the Fourth International AAAI Conference on Weblogs and Social Media* (May 23–26, 2010): 10–17.

58 Casarez, Nicole B. "Dealing with cybersmear: how to protect your organization from online defamation." *Public Relations Quarterly* 47, no. 2 (July 2002): 40–45.

59 van der Merwe, Rian et al. "Stakeholder Strength: PR Survival Strategies in the Internet Age." *Public Relations Quarterly* 50, no. 1 (Spring 2005): 39–49.

60 Ernst, Marcia M. and John C. Ethridge Jr. "Corporate Strategies for Combating Cybersmear." *Trust the Leaders* no. 4 (Summer 2003). Last accessed June 17, 2017. ► http://www.sgrlaw.com/ttl-articles/920/.

publish it. Their main objective is not primarily to fight the website but rather to force it, by a legal subpoena, to reveal the identity of the person who posted the comment. Many websites that receive such a subpoena give a user who posted the comment two weeks' notice before they comply. This enables the user time to go to the court to cancel the subpoena.[61]

Companies can use several methods to "crisis manage" unfavorable publicity. The key goal is not to allow rivals or critics to define the issue.[62] A wise course is to confess, apologize, and present a plan of how to fix the problem.[63] The company should offer refunds, write to critics privately, and try to get the discussion out of the public space.

8.3.2.2 Case Discussion

Google Versus Comcast: PR

When Google aimed to buy its rival Yahoo, it expected a fast approval, partly based on its positive image. However, it soon faced the likelihood of being charged with monopolistic practices, threatening a positive brand image that had been defined by its "Don't be evil" slogan. Its opponent circulated a critical document entitled "Google Data Collection and Retention" that depicted Google as a "Big Brother" gobbling up private data. Google's rival Microsoft spent much money in order to derail the merger. It pushed bills in New York and Connecticut to regulate the collection of data. It orchestrated a letter campaign and got Congress to hold hearings. It persuaded non-profit groups to publicly object, and it induced large advertisers to oppose the deal. Google was increasingly seen as abusing its market dominance and as commercializing private and personal data. It was also seen as evading payment of its fair share of taxes.[64] As a result Google lost the aura of public-spirited start-up. And once the shine was off others jumped in too. When Google applied to the FCC to license unused portions of the radio spectrum, it was opposed by broadcasters. When it pushed for "net neutrality," the telecom and cable companies fought it. When it wanted to digitize libraries, the publishing industry fiercely opposed the plans. When it moved data, the EU Commission targeted its privacy practices.

Facing such reverses and opposition, Google ramped up its PR team—Global Communications and Public Affairs—to 130 people in 2008, and it has grown since then.[65] Google launched a PR campaign beyond just invoking its mantra of "Don't be evil," and company managers were sent out to talk to reporters, academics, politicians, and law-makers to explain why Google should be loved rather than feared.[66] Google CEO Sundar Pichai was not a big fan of press interviews, but those he gave were used by the PR department to provide insights into the working life at Google and the goals, projects, and vision of the company. Google engaged in good-citizen PR activities beyond those for direct marketing activities. For example, there were meetups for Women in Tech. The company focused on environmental sustainability with Google Green, and announced that it would solely use renewable energies by 2017.[67] Google supported non-profit causes, gave out Global Impact Awards, and hosted impact challenges to encourage entrepreneurs to tackle global societal issues.[68] In the process, Google aimed to establish a public image of a company that cares not only about its own success but also for the world.

Google's rival Comcast listed 59 professionals as press contacts in 2017.[69] They included 21 at Comcast corporate itself, 24 at its cable operations, and 14 at its NBC Universal division. PR operations also include support staff and top managers. They had to deal with several PR disasters. On the customer relations level there were offensive and rude phone treatment of customers that were recorded and went viral. A practice of billing subscribers for services that were never provided was revealed. On the regulatory level, Comcast launched a PR campaign to support its attempted merger with Time Warner Cable. But it ultimately failed. Other PR campaigns dealt with its acquisition of NBC Universal (successful), with the abolition of neutrality rules (successful), and with offers to buy 21st Century Fox and SkyTV.

Tools of Comcast's PR department include a website with blog posts, features stories, videos, employee stories, and regular press releases. To improve its image and be a good corporate citizen, Comcast, like many other firms, used philanthropic engagement through several corporate foundations. The company sought and received the GreenCircle Sustainability Award in 2016. It offered Internet Essentials, a connectivity service targeted at low-income customers.[70] It used sponsorships to develop a broad reach and local engagement.

61 Ernst, Marcia M. and John C. Ethridge Jr. "Corporate Strategies for Combating Cybersmear." *Trust the Leaders* no. 4 (Summer 2003). Last accessed June 17, 2017. ► http://www.sgrlaw.com/ttl-articles/920/.

62 Thompson, Nicholas and Fred Vogelstein. "The Plot to Kill Google," *Wired*. January 19, 2009. Last accessed June 17, 2017. ► https://www.wired.com/2009/01/ff-killgoogle/.

63 Berman, Craig. "How Should Firms Respond to Negative Publicity?" *Chron*. Last accessed June 17, 2017. ► http://smallbusiness.chron.com/should-firms-respond-negative-publicity-69,199.html.

64 Warner, Jeremy. "Google's Public Relations Disaster." *The Telegraph*. January 30, 2016. Last accessed June 17, 2017. ► http://www.telegraph.co.uk/technology/2]\016/02/01/jeremy-warner-googles-public-relations-disaster/.

65 Ciarallo, Joe. "Google Founder to PR Department: You Have Eight Hours of My Time This Year." *Adweek*. November 17, 2017. Last accessed February 17, /2017. ► http://www.adweek.com/digital/google-founder-to-pr-department-you-have-eight-hours-of-my-time-this-year/.

66 Orey, Michael. "Google's PR Campaign." *Bloomberg*. April 29, 2009. Last accessed June 17, 2017. ► http://www.bloomberg.com/news/articles/2009–04-28/googles-pr-campaign.

67 Torkington, Simon. "Google to run on 100% renewable energy in 2017." *World Economic Forum*. December 6, 2016. Last accessed February 17, 2017. ► https://www.weforum.org/agenda/2016/12/google-green-renewable-energy-in-2017/.

68 Google. "Global Impact Awards." Last accessed February 17, 2017. ► https://www.google.org/global-giving/global-impact-awards/.

69 Comcast. "Press & Industry Analyst Contacts." Last accessed February 17, 2017. ► http://corporate.comcast.com/news-information/press-industry-analyst-contacts.

70 Kang, Cecilia. "Comcast is trying to improve its image with a program for low-income consumers." *The Washington Post*. May 9, 2014. Last accessed February 17, 2017. ► https://www.washingtonpost.com/business/technology/comcast-is-trying-to-improve-its-image-with-a-program-for-low-income-consumers/2014/05/09/cab489cc-d231-11e3-937f-d3026234b51c_story.html.

8.3.2.3 How Much PR Spending?

The question is how a company can measure the effectiveness of its PR activities. It may count news clips, conduct surveys, or monitor the internet.[71] Media impressions are audited by adding up the circulation, TV audience ratings, and online links. One can also measure the total number of media impressions on specific audiences.[72] One can also do a content analysis of what has been written and broadcasted about the company. This consists of looking at the percentage of positive/negative articles by publication, reporter, subject, or target audience.[73] One can also measure a company's exposure compared with that of rivals.

The oil company Shell developed a so-called Content Engagement Index to quantify the effectiveness of its posts on social networks such as Facebook, Twitter, and so on. This also allows tracking the improvement of messages over time. Shell calculates the index in this way:

$$\text{Number of Visits} + (\text{Number of Likes} \times 20) + \frac{(\text{Number of Comments} \times 50)}{\text{Intended Audience}} \times 100$$

In measurements to quantify effectiveness of PR one distinguishes between reach and impressions. Impressions are the number of media mentions times their circulation. In contrast, reach does not count multiple impressions on the same individuals. It is thus a smaller number.

Metrics for measuring PR effectiveness are:

- total number of impressions over time;
- total number of impressions on the target audience;
- total number of impressions on specific audiences

To develop these measures, one can use content analysis and track what has been written, broadcast,[74] and so on. The search can follow several dimensions:

- positive and negative key words;
- percentage of positive articles over time;
- ratio of positive to negative articles;
- percentage of positive/negative articles by publication or reporter;
- percentage of positive/negative articles by subject;
- percentage of positive/negative articles by target audience;
- coverage compared with rivals;
- covered issues and messages.

Measuring exposure is one step in determining success. The next question is how much these efforts cost and how much the firm should spend. How does one answer this question, given the vagueness of inputs and outputs? There are several ways in which to proceed.[75]

1. *Past budgets.* Matching the past year or for a similar recent project. But this assumes projects that are indeed similar and that the earlier project or year deserves to be imitated.
2. *Competitive parity.* Spending attempts to match those of a rival. This involves educated guessing. Furthermore, companies may have different backgrounds, visibility, image, problems, and goals, thus making comparisons difficult or irrelevant.
3. *Affordability.* This approach—spend as much as the company can comfortably afford—may be realistic during hard times, but that may be exactly the time when the company's public image needs most help.
4. *Downside Calculation.* How costly to the firm will be inaction? Such an estimate is difficult.
5. *Stage of Lifecycle.* Start-up projects, for example, require more public communications than mature projects.
6. *Rate of return analysis.* The cost relative to the estimated value of expected results.
7. *Marginal net analysis.* Incremental PR benefit should equal incremental PR cost. This is conceptually a good procedure, but in practice hard to calculate. One would have to assign the value per message of the audience reached. This could be a value similar to the price of a paid advertising message to the same audience. After that step, one must estimate the impact of PR spending on such audience reach. This could be estimated by the number of favorable press mentions following the PR efforts.

A study sponsored by the PR industry shows that the PR spending of the "Most Admired" companies from 1999 (as identified by *Fortune* magazine) correlates positively with their standing in terms of admiration rank. In 1999, the average spending on PR of the top 200 companies based on reputation was around $6 million. The firms with the best reputation had a larger PR staff size.[76] The spending of the bottom 200 was significantly lower at around $2.8 million.

8.4 The Regulatory Process

We have so far discussed three major tools of non-market competition: litigation, lobbying, and PR. We now discuss a fourth one: dealing with regulation. Such regulation comes in two major flavors: governmental regulation (by local, state, national, and international agencies) and industry-self-regulation.

71 Paine, Katie D. "How to measure your results in a crisis." *The Institute for Public Relations*. 2002. Last accessed June 17, 2017. ► http://www.instituteforpr.org/wp-content/uploads/Crisis_2002.pdf.

72 Belch, George and Michael Belch. *Advertising and Promotion: An Integrated Marketing Communications Perspective*, 4th ed. New York: Irwin/McGraw-Hill, 1998.

73 Lindenmann, Walter K. "Guidelines and Standards for Measuring the Effectiveness of PR Programs and Activities." *The Institute for Public Relations*. 2003. Last accessed June 17, 2017. ► http://www.instituteforpr.org/wp-content/uploads/2002_MeasuringPrograms.pdf.

74 Lindenmann, Walter K. "Guidelines and Standards for Measuring the Effectiveness of PR Programs and Activities." *The Institute for Public Relations*. 2003. Last accessed June 17, 2017. ► http://www.instituteforpr.org/wp-content/uploads/2002_MeasuringPrograms.pdf.

75 Smith, Ronald D. *Strategic Planning for Public Relations*. 2nd ed. Mahwah: Lawrence Erlbaum Associates, 2005.

76 Harris, Thomas L. and Impulse Research. *Corporate communications spending & reputation of Fortune 500 companies*. Los Angeles: Impulse Research Corporation, 1999.

8.4.1 Self-Regulation

Self-regulation can be beneficial to companies because it is usually more expert-driven, speedy, and flexible than government regulation. The rules set better match the problems. Moreover, it is less expensive for government because the industry is responsible for developing and enforcing its rules and punishments.[77]

Self-regulation can be done within a single company or by agreement among a group of companies. Major TV and cable networks have their own Standards & Practices departments that check programs and advertising to ensure that the materials in compliance with regulations, that the material is not offensive to audiences or other advertisers, and that "viewer discretion" warnings are provided where necessary.[78] The Standards and Practices department at the ABC TV network alone used to have 35 people.[79] In addition to review by the major TV networks, local TV stations that retail the content may also check it because of content concerns in their community.[80] Furthermore, advertisers may have their own standards to meet for advertising to be acceptable.[81]

Self-regulation by powerful companies can have far-reaching effects. When home video rental was all pervasive and dominated by one major chain that refused to stock films rated above R, the noted film critic Roger Ebert observed: "Blockbuster in effect exercises censorship over American movies by making it economically prohibitive for studios to consider NC-17 films." Later, the content standards of online firms such as Google YouTube, Facebook, and Netflix had a similar effect.

The newspaper industry also self-regulates. Most newspapers have internal codes to set standards on the behavior of journalists, including standards on privacy or breach of trust. Some newspapers have internal ombudsmen officers to provide aggrieved objects of stories an avenue for complaint. But in 2004, only 30 to 40 of the 1400 US newspapers had such a system, allegedly for financial reasons, though probably more for reasons of avoiding unfavorable publicity. After years of resistance and following a major plagiarism scandal, the *New York Times* hired an ombudsperson, titled a "Public Editor," who also writes a column.[82] The paper also issued a 54-page manual as a code of conduct, "Ethical Journalism".[83] It states that "staff members must obey the law in pursuit of news." The manual provides 155 situations that newspapers and journalists might have to deal with. Among other things, it discusses protecting the newspaper's neutrality, the staff's civic performance and journalistic activities outside the paper, and conflicts of interests. It deals with advertisers, marketing and production, and with contributions and gifts. It discourages the use of anonymous sourcing but does not prohibit it.

While individual newspapers will try to police themselves, industry-wide efforts to self-regulate newspapers have been resisted in the USA.[84] In many other countries, however, press boards self-police newspapers. In Britain, there is a Press Complaints Commission (PCC). The PCC investigates complaints about content, such as the accuracy of an article. It also regulates press activity through a Code of Practice.[85] The PCC defines privacy standards and identifies groups whose anonymity must be preserved, including victims of sex crimes and medical patients.[86] The PCC cannot impose fines on newspapers, but it requires that all breaches be publicized by them.

Similarly, the Swiss Press Council tries to enforce a Declaration of Duties and Rights of Journalists.[87] It cannot sanction journalists but its decisions are made public and are posted on its website. Important decisions are released to news agencies, major editorial offices, and so on. In Sweden, Denmark, and Ireland, only an "affected person" can bring forth a complaint to a Press Commission or Board. In contrast, in Finland, Germany, and Australia, anyone who feels offended by a mass media publication can make a complaint, whether directly affected or not.[88]

Industry-wide self-regulation may have drawbacks, both for the public at large and for companies involved in the process:

- Codes of conduct set by competitors among themselves often lead to price collaboration and cartel behavior, such as the prevention of aggressive moves by new rivals. This has often been the case with codes of professional ethics that prohibited advertising by lawyers or doctors, and made it harder for newcomers to enter and compete.
- Self-regulation affords only limited due process to aggrieved parties.

77 Campbell, Angela J. "Self Regulation and the Media" *Federal Communications Law Journal* 51, no. 3 (May 1999): 711–771.

78 Dessart, George. "Standards and Practices." *The Encyclopedia of Television*. Last accessed July 23, 2012. ► http://www.museum.tv/eotv/standardsand.htm.

79 The Museum of Broadcast Communications. "The Encyclopedia of Television." Last accessed May 31, 2007. ► http://www.museum.tv/archives/etv/; U.S. House of Representatives (108th). Hearings on H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004.' February 26, 2004. Last accessed June 1, 2007. ► http://republicans.energycommerce.house.gov/108/Hearings/02262004hearing1216/hearing.htm.

80 U.S. House of Representatives (108th). Hearings on H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004.' February 26, 2004. Last accessed June 1, 2007. ► http://republicans.energycommerce.house.gov/108/Hearings/02262004hearing1216/hearing.htm.

81 Berger, Robin. "The Importance of Being Decent." *TVTechnology*. June 8, 2005. Last accessed July 23, 2012. ► http://www.tvtechnology.com/news/0110/the-importance-of-being-decent-/184683.

82 Overholser, Geneva. "Budding Relationships." *Global Journalist.* April 1, 2004. Last accessed July 23, 2012. ► http://www.globaljournalist.org/stories/2004/04/01/budding-relationships/.

83 The New York Times Company. "Ethical Journalism." September 2004. Last accessed July 23, 2012. ► http://www.nytco.com/pdf/NYT_Ethical_Journalism_0904.pdf.

84 Press councils exist in the USA in several states, such as in Minnesota until 2014. Silverman, Craig. "Last press council in U.S. will close next month." *Poynter*. April 10, 2014. Last accessed June 17, 2017. ► https://www.poynter.org/2014/last-press-council-in-u-s-will-close-next-month/247192/.

85 Press Complaint Commission. "Welcome to the Press Complaints Commission Website." Last accessed August 1, 2012. ► http://www.pcc.org.uk/.

86 Press Complaint Commission. "Welcome to the Press Complaints Commission Website." Last accessed August 1, 2012. ► http://www.pcc.org.uk/.

87 Media Wise. "Switzerland - Press Council (1999)." June 15, 2011. Last accessed July 11, 2013. ► http://www.mediawise.org.uk/switzerland-2/.

88 Fielden, Lara. "Regulating the Press: A Comparative Study of International Press Councils." Oxford: Reuters Institute for the Study of Journalism, April 2012. Last accessed July 11, 2013. ► https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Working_Papers/Regulating_the_Press.pdf.

- The setting of the self-regulation usually does not include parties outside the companies' own interest.
- Self-regulation may be pushed on an industry by government when it has no legal rights to do so directly, for example because of constitutional protections of free speech from direct governmental intervention.
- The self-regulation mechanisms have no powers to enforce sanctions against violators.[89]

8.4.1.1 Self-Regulation in the Film Industry

There is no government regulation of the film industry in the USA. Instead, the Motion Picture Association of American (MPAA) self-regulates the sector. As early as 1907, the city of Chicago passed a law allowing the precensorship of movies. In 1915 the US Supreme Court upheld the right of local government to censor movies, deeming them as being solely "entertainment."[90] In consequence, throughout the 1920s and 1930s, local politicians, religious organizations, and protectors of decency claimed a right to censor movies in each town where they had influence. In response, in 1924, the studios decided to set up a common standard setting, headed by former postmaster general William Hays, in order to undercut the local censorship boards. He negotiated a "production code" among the studios. The "Hays Office" set principles, monitored films, and at times proposed script changes and censored films. For example, the code said that in films, lawbreakers could not escape justice, even married couples had to sleep separately, and divorce had to lead to bad results.[91] In the Great Depression the Hays Office even criticized films that focused on social problems such as poverty.

More recently, the MPAA ratings system for their movies, such as G or PG-13 (Parental Guidance for Children under 13), has given advance warnings about the content of movies and its advertising. The rating process has been described as secretive, with unclear standards, and favoring films from the big studios that fund the system.[92]

8.4.1.2 TV Self-Regulation

The TV industry's self-regulation in the U.S. is similar to that of the film industry. The National Association of Broadcasters (NAB) established a code for content and for the types of products that could be advertised and how. Drinking alcohol, for example could not be shown explicitly.[93] There were many no-nos such as hypnotism, occultism, astrology, ridiculing people with disabilities, and of course obscene, profane, or indecent material. To ensure compliance, the individual networks created their internal divisions of network standards and practices. In 1982 the code was held to violate anti-trust law in one of its economically central provisions, which limited, by joint agreement, the supply of advertising minutes and hence raised their price.

In 1990, the NAB issued a new "Statement of Principles in Radio and Television Broadcasting," which was much more unregulated and flexible. Instead of the long list of prohibitions, it advised (instead of mandated) that member stations and networks should use responsible and careful judgment when it came to violence, drugs, and sexually related content.[94]

In the 1980s parents started suing networks for their children's injuries or deaths when they attempted to imitate something they saw on one of the network's shows. Several of these cases went to the Supreme Court.[95] Stung by the negative publicity, the networks instituted self-regulation. In 1997, most of the TV and cable networks (except for NBC) "voluntarily" agreed to rate their own programming according to a system that provided ratings for V (violence), S (sex), and L (language). These TV ratings ("Parental Guidelines") were established to be used with the so-called "V-chip," which was mandated by law to be built into all new television sets. A 2007 poll said that only 27% of all parents could figure out how to program this.[96]

Even without industry-wide specific regulations, most radio and TV stations conduct themselves in a similar fashion in order not to alienate their audiences and advertisers. Based on its own set of standards, the largest US radio broadcaster, Clear Channel Radio (later renamed iHeartRadio), suspended the popular, nationally syndicated *Howard Stern Show* for its indecency in terms of topics and language. Stern had ignored Clear Channel Radio's standards.

Another form of content-based self-regulation under governmental pressure has been the "family viewing time" between 8 and 9 pm, where networks are supposed to avoid violent and controversial content.

8.4.1.3 Cable TV Self-Regulation

Each cable company has its own "code of conduct." The rules are publicly available. When it comes to industry-wide standards, in response to a US Senate bill to regulate customer service, the cable TV industry instituted self-regulatory policies with regards to customer service. Cable companies agreed to answer all calls from customers in 30 seconds, restore interrupted service in 24 hours, and give 30 days' notice to consumers when changing prices or channel line-ups.

89 Ewart, Brian J. "The Law and Economics of the FCC's Decency Standard." *Selected Works*. May 26, 2009. Last accessed July 5, 2012. ► http://works.bepress.com/brian_ewart/1/.
90 Epstein, Edward J. *The Big Picture, The New Logic of Money and Power in Hollywood*. New York: E.J.E. Publications, Ltd., Inc., 2005.
91 Epstein, Edward J, *The Big Picture, The New Logic of Money and Power in Hollywood*. New York: E.J.E. Publications, Ltd., Inc., 2005.
92 See the documentary *This Film is Not Yet Rated*.
93 Limberg, Val E. "Ethics and Television." *The Museum of Broadcast Communications*. Last accessed July 23, 2012. ► http://www.museum.tv/eotvsection.php?entrycode=ethicsandte.
94 Limberg, Val E. "Ethics and Television." *The Museum of Broadcast Communications*. Last accessed July 23, 2012. ► http://www.museum.tv/eotvsection.php?entrycode=ethicsandte.
95 Thompson, Robert J. and Steve Allen. "Television in the United States." *Encyclopædia Britannica. Encyclopædia Britannica Online Academic Edition*. July 31, 2012. Last accessed July 5, 2012. ► http://www.britannica.com/EBchecked/topic/1513870/television-in-the-United-States.
For example, Niemi v. National Broadcasting Company, Zamora et al. v. Columbia Broadcasting System, and DeFilippo v. National Broadcasting Company.
96 Labaton, Stephen. "F.C.C. Moves to Restrict TV Violence." *The New York Times*. April 26, 2007. Last accessed June 17, 2017. ► http://www.nytimes.com/2007/04/26/business/media/26fcc.html.

Additionally, the cable industry has often self-regulated itself on issues such as customer privacy, billing practices and disputes. Most cable networks also restrict nudity and profanity, at least until late at night. Premium subscription networks such as HBO do not abide by these rules.

8.4.1.4 Self-Regulation in the Advertising Industry

In many countries, there is self-regulation by the advertising companies. In the USA, several trade associations of advertising associations joined forces to establish an Advertising Self-Regulatory Council (ASRC).[97] The ASRC has become the advertising industry's primary self-regulatory mechanism. It reviews complaints from consumers and consumer groups, local better business bureaus, and competitors. If the ASRC and the advertiser fail to resolve the controversy, either one can appeal to a review panel. If the advertiser loses the appeal, it is expected to discontinue the ad.

The ASRC cannot impose sanctions or order an advertiser to modify or stop running an ad, but advertisers who participate in an investigation and appeal rarely refuse to accept the panel's decision.[98] In 1996, of the board's investigations, 16 ad claims were substantiated, five were referred to the government, and 75 were modified or discontinued.[99]

An example to a challenge was for Malt-O-Meal's use of the phrase "Betcha Can't Taste the Difference" in 2007 advertisements. The board found that Malt-O-Meal's testing was flawed.[100] The chicken brand Perdue Farms was also scrutinized in 2007, with the board recommending that the company discontinue placing a "no preservatives" and "fresh" label in the advertising for its products when they actually contained several chemical additives.

Competitors and consumers complained about advertising by the satellite TV firm DirecTV. The board recommended that the company discontinue its claim that it offered "movies in 1080p HD, the same stunning quality as Blu-Ray." It also recommended that the advertiser discontinue its claims of "99.9% signal reliability" and its claim that it is a "myth" that its service suffers from weather outages. It also recommended that the advertiser limit the claim that it has "Over 130 HD channels—with the capacity for over 200 channels coming soon."[101] The cable companies Cox Communications and Time Warner Cable had to modify their description of offering a "fiber optic network" because it conveyed the message that their cable networks extended fiber to the home, which was not the case. The board also recommended that Cox discontinue the use of consumer testimonials disparaging Verizon FiOS customer service and billing practices, and modify its "up to" speed claims to more accurately reflect the limitations of the maximum available speed.

In Europe, the self-regulation of advertising is prevalent. There is a European Advertising Standards Alliance, a non-profit organization representing the advertising industry in Europe.[102] In Germany there are two advertising standards organizations:[103] *Deutscher Werberat* handles issues of taste, decency, and social responsibility, and *Wettbewerbszentrale* deals with issues of unfair commercial practices by applying unfair competition law. In the UK, self-regulation takes place through two advertising standards organizations.[104] The Advertising Standards Authority (ASA) is a "one-stop-shop" for all advertising standards. ASA applies the Advertising Codes, written by Committees of Advertising Practice. There is also Clearcast, which evaluates preproduction advertising scripts and offers preclearance to agencies on proposed TV ads prior to broadcast.

Particularly troubling advertising messages are those aimed at children. In the USA, the Children's Online Privacy Protection Act imposes rules on websites. It forbids collecting "personal information" (name, address, contact information, the child's image, geo-data, etc.), to contact a child, and to use "behavioral advertising."[105]

On the self-regulatory side, The Children's Advertising Review Unit of the Council of Better Business Bureaus was established in 1974 to self-regulate such marketing. It is financed by the children's advertising industry and sets guidelines and reviews compliance with its own rules as well as with federal laws, with respect to advertising directed at children under 12 years old, as well as online privacy practices.[106] In Australia, the self-regulatory code of the advertising industry is that advertising and marketing that are directed at children be conducted within "prevailing community standards."[107] Similar practices of self-regulatory guidelines and codes can be found in other countries, such as France, Ireland, and Spain.

97 The American Advertising Federation (AAF), the American Association of Advertising Agencies (AAAA), the Association of National Advertisers (ANA), and the Council of Better Business Bureau (CBBB).

98 In 1993, for the first time in its history, the ASRC's predecessor NARC referred a matter to the Federal Trade Commission following an advertiser's refusal to modify a commercial in accordance with a NARC decision.

99 Henry, Kenneth. "Perspective on Public Relations." *Harvard Business Journal* 45 (July/August 1967): 14; Belch, George and Michael Belch. *Advertising and Promotion: An Integrated Marketing Communications Perspective*, 4th ed. New York: Irwin/McGraw-Hill, 1998.

100 National Advertising Review Board. "NARB Panel #140." March 13, 2007. Last accessed Last accessed July 5, 2012. ► http://www.narbreview.org/quarterly/pdf/narbpanel140.pdf.

101 In a similar complaint against the rival satellite TV providers Dish Network, the board determined that the claim "99.9% signal reliability" conveys the messages that consumers will experience interruption-free television service 99.9% of the time, which is not supported by the evidence. Although the signal is available (emitted from the satellite 99.9% of the time, the consumer still may not be able to watch television 99.9% of the time, for example owing to weather factors.

102 International Chamber of Commerce. "Marketing & advertising." Last accessed June 17, 2017. ► http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/marketing-and-advertising/self-regulation/.

103 European Advertising Standards Alliance. "Germany." Last accessed June 17, 2017. ► http://www.easa-alliance.org/members/europe/germany.

104 European Advertising Standards Alliance. "United Kingdom." Last accessed June 17, 2017. ► http://www.easa-alliance.org/members/europe/united-kingdom.

105 Federal Trade Commission. "Children's Online Privacy Protection Rule ("COPPA")." Last accessed June 17, 2017. ► https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule.

106 Better Business Bureau. "Child's Advertising Review Unit (CARU)." Last accessed ► http://www.us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=24783d03-2c4b-4b0e-b46f-5fb29117b7c6.

107 Australian Association of National Advertisers. "About - AANA." September 2, 2015. Last accessed June 17, 2017. ► http://aana.com.au/about/.

8.4.1.5 Self-Regulation of the Video Game Industry

When video games became popular and absorbed an increasing attention by youngsters, advocacy groups such as the Parents Television Council (PTC) raised concerns that video game violence can result in numbing children's reactions to violence. They lobbied for protective legislation.[108] In response, the Entertainment Software Association in the USA established the Entertainment Software Rating Board.[109] ESRB sets a rating system and enforces it. The control sets age restrictions on the sale of games, and focuses on informing parents about content within games. The ESRB system uses six age-based ratings – from "EC" (early childhood) to "AO" (Adults Only) – and at least 30 content descriptors. In legal terms, video games are not required to be rated, but most games submit to this in order to be acceptable to retailers and video game console manufactures.

The effectiveness of this "voluntary" rating system was checked out by a government agency. The Federal Trade Commission (FTC) sent out undercover shoppers who reported that almost all stores that sell video games strictly apply the ESRB ratings. Whereas in 2000, 83% of underage teenage customers could purchase M-rated ("mature") video games, in 2009 this had decreased to 20%, and later decreased further to 13%.[110]

8.4.1.6 Internet Self-Regulation

Internet companies generally prefer self-regulation to government involvement in consumer protection. The system that evolved is that of "seals of compliance." Several industry organizations (the Better Business Bureau, TrustE, and the Direct Marketing Association) issue such a seal to websites that agree to disclose their data privacy practices and follow certain rules. They are monitored for adherence, though this is reportedly quite spotty.

For example, to receive a seal of compliance for privacy practices, a website must agree to disclose its data practices and be checked for adherence. It must show:

- what personal information is being gathered;
- how it will be used;
- with whom it will be shared;
- what the dispute resolution mechanism is;
- whether the user can control its dissemination.

Another technique of online self-regulation is for companies, industry association, governments, or private groups, to issue a list of objectionable websites for blocking by intermediaries such as Google. However, there is often no transparency and accountability showing how the list was assembled. It may simply include content that some users found objectionable but that is not illegal. Such blacklisting lacks transparency and due process, and tends to overblock, limit free speech, and encourages the emergence of organized societal "nannies" who detect hate speech in any controversial opinion they do not approve of. In the aggregate, such efforts lead to a waste of law enforcement, company resources, and to efforts to extend jurisdictional reach beyond a country's territory.[111]

8.4.1.7 Case Discussion

Self-Regulation at Comcast

The cable TV companies have historically collaborated with each other closely in self-regulation. Comcast worked with other cable companies to create standards of behavior regarding customer privacy, billing practices, and disputes. The industry agreed to refrain from using customers' viewing data for marketing or resale. This collaboration helps the industry preserve public image and staves off government regulation of these issues, but it also reduces rivalry in service quality.

8.4.1.8 Managing the Self-Regulatory Process: Technical Standards

The setting of technical standards and protocols is important for companies and industries. Standards can be mandated by government, established cooperatively within the industry, or, left to the market where they may emerge noncooperatively. This is also discussed in ► Chap. 4, Technology Management.

Official standard bodies are typically broad based and slow moving. Private standards consortia can be fast and narrow, but can easily be the tool for a narrow industry group, often centered around a central firm. It is not clear which approach works better. Practically speaking, a company's standards activities must deal with both the official national and international standard bodies as well as with private technology development consortia.[112]

There are numerous technical standards. Past and current major examples include:

- TV: NTSC, PAL, and SECAM analog standards; ATSC and DVB digital standards;
- Radio: DAB+, ISDB-T, and DAB Eureka 147 standard for digital radio and S band standards for satellite direct radio;
- mobile phones: GSM, CDMA, LTE, and 5G standards;
- short-range wireless: WiFi IEEE 802.11, Bluetooth IEEE 802.15.1;

108 Coombs, Timothy and Sherry Holladay. "Self-Regulatory Discourse: Corrective or Quiescent?" *Management Communication Quarterly* 25, no. 3 (2011): 494–510; Parents Television Council. "Violent Video Games and Minors." Last accessed June 17, 2017. ► http://www.parentstv.org/ptc/videogames/main.asp.

109 Entertainment Software Rating Board. "Frequently Asked Questions: What is ESRB?" Last accessed August 1, 2012. ► http://www.esrb.org/ratings/faq.jsp#1.

110 Federal Trade Commission. "FTC Undercover Shopper Survey on Enforcement of Entertainment Ratings Finds Compliance Worst for Retailers of Music CDs and the Highest Among Video Game Sellers." April 20, 2011. Last accessed June 17, 2017. ► http://www.ftc.gov/opa/2011/04/violentkidsent.shtm.

111 Mueller, Milton L. *Networks and States: The Global Politics of Internet Governance.* Cambridge, MA: The MIT Press, 2010.

112 Dr. Ken Wacks, interview with the author, July 2, 2007.

- audio recordings: 45 single, LP, compact tape, CD;
- video recordings: VHS, Beta, DVD, Blu-ray;
- internet communication: TCP/IP network protocol;
- world wide web: HTML and CSS standards for website design;
- signal compression: MPEG-4, H.265, MP3.

The internal organization of how standards function inside media and tech companies varies considerably depending on size, age, and the tech savviness of a company. Some companies have full-time employees devoted to standards, usually at the vice-principal level such as a Director of Standards and Industry Group. However, it is more common for employees across the company, typically from the R&D department, to devote part of their time toward standards, depending on the technology in question. In addition, companies may bring in late-career engineers to monitor standards. Even though some may not be engaged in the latest technology R&D, they can be effective at playing the politics of the standards game. But many smaller companies pay no attention to standards until they are forced to.

Companies need to estimate the costs of their standards activities. For example, a company might need two engineering employees to devote two months to attend committee meetings and travel, plus two weeks of part-time attention. As mentioned, the personnel cost alone would be around $60,000 a year.[113]

Suppose a company has an interest in seeing a standard adopted internationally. How should it proceed? The first step is to find out if anyone else is working on developing the standard. It must ask if a standard body is already working to develop a standard.

- Are there consortia for this standard?
- What other companies have an interest in this standard? For or against?
- What group would be working on the standards?
- What group within one's own country is working on the standards?
- Do several domestic and international groups work on related issues and do they coordinate in order to avoid the duplication of standards?

The next step is to influence one's own country. Within an international committee, standards are written by delegated experts appointed by each country. These experts often have "marching orders" from their country as well as their company. Some countries, such as China, allocate state money to the standards process - the USA does not. The American National Standards Institute delegates the power to various industry trade groups, for example the Telecommunications Industry Association (TIA), to write standards for international proposals. TIA allows companies to join and charge membership fees that are based on revenue. Typical fees range from $1000 to over $70,000 a year. Any company with a US presence can participate, so the "American" group working on the US proposals may include many non-US firms. Once a company is a member of the appropriate committee, it tries to find other companies with similar views if possible.[114]

When a national standard is set, the US State Department (and in other countries similar national departments dealing with international economic affairs) determines its national positions. Individual companies have to support the US government, at least in public. Supportive companies then create a New Work Item Proposal (NWIP) to send to other countries for their endorsement. Companies want to get an international committee to back their proposal or at least to circulate the proposal to other countries. The committee then decides whether or not to endorse the NWIP. An endorsement requires "substantial support," meaning more than 50% must vote yes and less than 25% can vote no (members may also abstain). The NWIP is then circulated, sometimes without the endorsement of the home country's committee. For a NWIP to survive in the international process, a majority of countries must agree that discussion on the topic is worthwhile, and at least five countries must agree to vote for it.

Countries then choose endorse the NWIP or not (which requires comments and revision). The old draft and comments then become a new draft that is circulated again to countries. At this stage, companies often try to influence countries other than their home country, because each country in international standards bodies receives one vote. This involves behind-the-scenes lobbying, usually by government consultants or employees. The EU countries are generally savvier at this than the USA, and they have many more votes.

When multiple companies want to see a certain standard implemented, they may pool their efforts, even if they are competitors.[115] Each subsequent phase takes about three to six months. The Final Draft International Standard is then published, and placed in a library and sold. This whole process is very political. Companies and countries often call in favors from other companies or countries. They debate not only the merits, but also the procedures, rules, and paperwork. Companies may hire consultants who are specialists to represent them in negotiations and committee meetings. The consultants can argue, propose, and monitor the process on a company's behalf.[116] In order to set standards tactics, a company should try to know other participants' objectives beforehand, who its allies are, and what compromises it might have to make.[117]

Since the standard-setting process is composed of technology, politics, and economics, companies must be selective when picking sides and seek:

- low cost licensing;
- multiple sourcing;
- assuring future participation on joint tech development on this and future products;
- future deals.

113 Dr. Ken Wacks, interview with the author, July 2, 2007.

114 Dr. Ken Wacks, interview with the author, July 2, 2007.

115 WiMax Forum. "About the WiMax Forum" June 2001. Last accessed August 1, 2012. ▶ http://www.wimaxforum.org/about/.

116 Dr. Ken Wacks, interview with the author, July 2, 2007.

117 Shapiro, Carl and Hal Varian. *Information Rules*. Boston: Harvard Business School Press, 1999.

Determining the optimal level of investment in the standards process is difficult, but possible if one can estimate the NPV of a successful adoption of a favored standard in comparison to other standards, as well as the impact of the additional effort to achieve that goal.

8.4.2 Direct Government Regulation

8.4.2.1 The Role of Government Regulation

In many countries, the regulatory system for electronic media changed after 1980. Around the world, telecom companies were privatized, and private competitors were allowed to enter into telecoms, television, and cable TV. Semi-independent regulatory agencies now regulate and control the digital sector.[118]

In the USA, vital infrastructure industries and media organizations have been privately owned but regulated. A decisive step in that direction took place after a bitter gubernatorial election campaign in 1906 in New York. It pitted Republican Charles Evans Hughes (late Chief Justice of the US Supreme Court) against Democrat William Randolph Hearst, the newspaper mogul depicted in the famed movie *Citizen Kane*. Hearst favored European-style nationalization of public utilities. But Hughes won the election and established the New York Public Service Commission to regulate privately owned infrastructure. This became the US model. In contrast, most other countries followed an alternative model and their infrastructure industries such as telecommunications or TV were under state ownership for a long time. The goals of state ownership over these industries were:

- public control over vital services;
- state influence over avenues of politics and culture;
- redistribution to economically weaker regions and individuals;
- technological development.

The alternative to direct governmental ownership is governmental regulation. The USA, it is mostly the federal government that regulates the media industry. The states have some powers over intra-state telecom, and local governments issues over cable TV franchises. The US Congress passes broad laws, and then delegates the working out of the details, their implementation, and enforcement to the specialized regulatory agency. The Federal Communications Commission (FCC) operates as an independent regulatory commission; in other words, it is not subject to direct control by the White House or Congress. However, the appointment and budget processes and other methods provide tools for pressuring the agency.

Other regulatory agencies deal with a range of issues central to media companies such as competition and advertising (Federal Trade Commission) and company stock transaction and financial reporting (Securities and Exchange Commission). These independent commissions have broad powers that set general rules (quasi-legislative powers), decide specific cases (quasi-judicial powers), implement law such as select TV licenses (executive powers), and enforce compliance (executive powers).

There are also executive agencies subject to direct government authority, such as the Anti-trust Division of the Department of Justice provides a competitive market structure. Within the Commerce Department there are two organizations that regulate the media: the National Telecommunications and Information Administration controls frequencies, while the National Institute of Standards and Technology oversees the standards setting process. The US Trade Representative deals with international trade issues. The US Patent and Trademark Office, Registrar of Copyrights, and the Copyright Royalty Tribunal regulate IP. Additionally, various courts and local and state agencies exert some rules over media issues under their jurisdiction.

Similar regulatory structures have evolved in recent decades in many other countries. A common trend is a move toward "converged" agencies that deal with mass media like TV as well as telecom, and more recently media.

Figure 8.4[119] is an organizational chart of the FCC.[120] It was organized around bureaus in charge of certain industries (wireline, wireless, media); functions (technology, law; international; consumer protection, public safety); and process (enforcement, strategic planning, PR). Other countries regulatory agencies are often organized along similar lines.

The regulatory agencies of many countries control the use of the wireless spectrum. They license broadcasters and mobile telecom operators. They set the price for some telecommunication, services, specify interconnection prices, and control ownership limits and nationality restrictions, among other activities. They may set rules on content (e.g. protection for children) and on required domestic content.

Critics of communication regulatory agencies often argue against industry-specific agencies, because they often end up "captured" by the industries they are supposed to control. Instead, they argue, there should be only generic regulation for the entire economy, such as that of market power (anti-trust) or of consumer protection. On the other hand, such general agencies possess much less specific expertise and come up with "one size fits all" rules.

Some countries have given their media and communications regulatory agency particular independence from direct governmental political control in order to keep some distance between politics and media regulation. Often the intention to create independence from the government in power is not

118 Cherry, Barbara A. "Regulatory and Political Influences on Media Management and Economics." In *Handbook of Media Management and Economics*. Eds. Alan B. Albarran, Sylvia M. Chan-Olmsted, and Michael O. Wirth. New York: Lawrence Erlbaum Associates, 2006; Napoli, Philip M. "Issues in Media Management and the Public Interest." In *Handbook of Media Management and Economics*. Eds. Alan B. Albarran, Sylvia M. Chan-Olmsted, and Michael O. Wirth. New York: Lawrence Erlbaum Associates, 2006.

119 Federal Communication Commission. "FCC Organizational Chart." January 23, 2017. Last accessed May 17, 2017. ► https://www.fcc.gov/sites/default/files/fccorg-01232017.pdf.

120 "FCC Organizational Chart." *Federal Communication Commission*. Last accessed July 17, 2017. ► http://www.fcc.gov/fccorgchart.html.

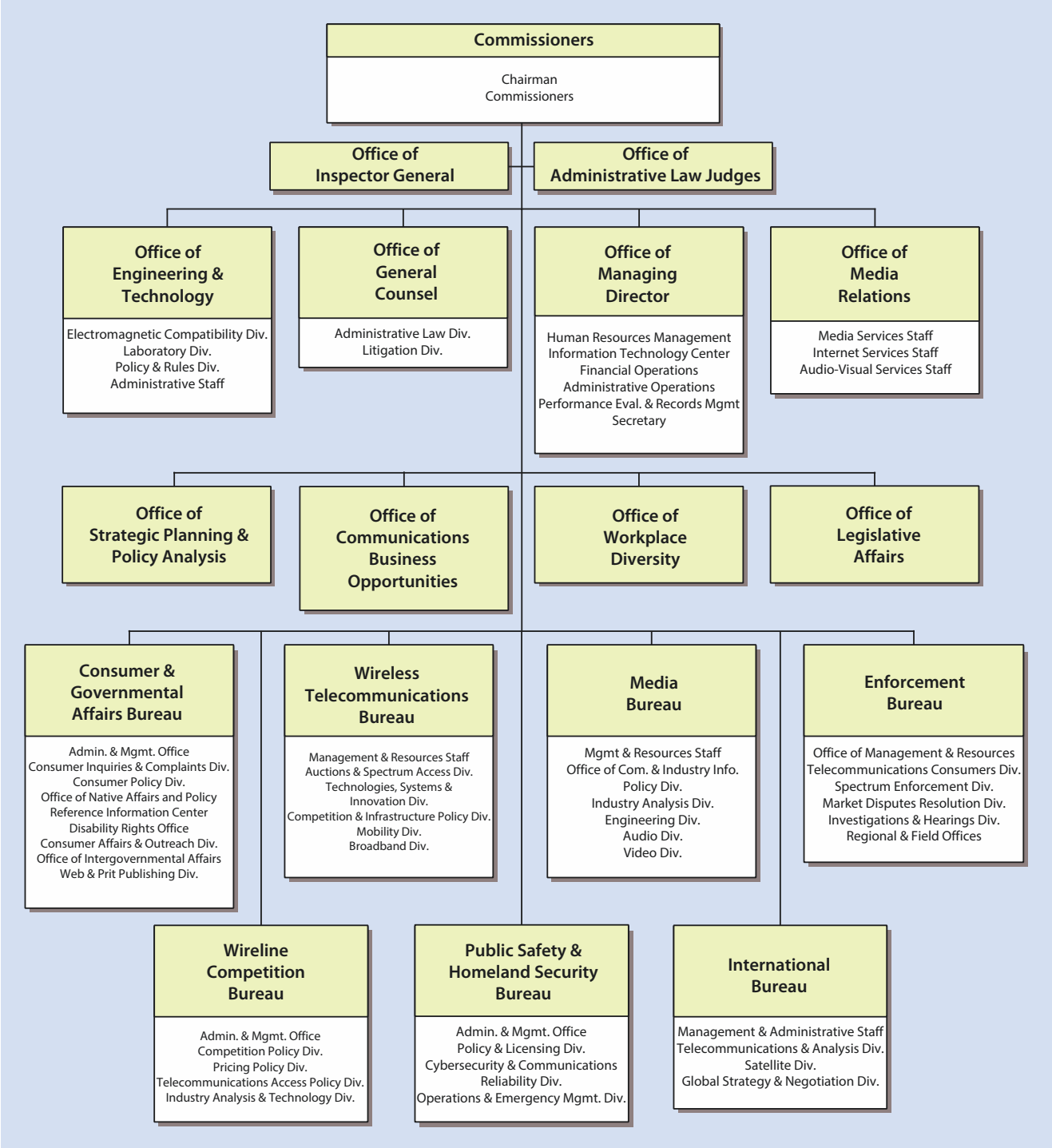


Fig. 8.4 FCC organizational chart

matched by reality. Other countries maintain the agencies as part of directly accountable ministries. An example is Japan's Ministry of Internal Affairs and Communications. Similarly, in India the media regulator is the Ministry of Information and Broadcasting,[121] and in China the Television Regulatory Agency, which is part of the State Administration of Radio, Film, and Television, which also owns the major TV networks (China Central Television, CCTV).

In the UK, the Office of Communications (Ofcom) is an independent regulator and competition authority the communication industries. Its Broadcasting Code Guidance sets regulations on televised content and broadcasting licenses. It issues "guidance notes" that address crime, religion, drug

121 Indian Television.com. "The Cable Television Networks Rules, 1994." September 29, 1994. Last accessed August 1, 2012. ► http://www.indiantelevision.com/indianbrodcast/legalreso/catvnetworkrules.htm.

and alcohol use, offensive language, and the treatment of discriminatory or impartial content material.[122]

The Regulatory Process

The regulation by agencies proceeds through a codified set of rules called, in the USA, the Administrative Procedure Act (APA). Other countries have similar codes that deal with the way an administrative agency must proceed. The APA is based on the goal of creating an open and transparent system. An agency must solicit comments, engage in open decision-making, and establish a factual record.

Agency actions consist of two major different approaches.

- "Rule Making": creating general rules. Example: setting a ceiling on ownership of TV stations.
- "Adjudication": deciding company-specific cases. Example: whether a merger of two companies exceeded the ownership ceiling.

The rule-making procedures include some of the following.

Often, an agency or commission publishes a Notice of Inquiry, inviting outside parties to comment on issues before the agency. All comments are public, and public hearings are possible. Parties may also respond to each others' comments.

The next step is often a Notice of Proposed Rulemaking, with further opportunity for public comments. The agency can seek information beyond the one provided by interested parties in order to form a final decision. The agency heads or commissioners may also modify the draft. When they meet to discuss this, it must be in a public and open meeting, with notice given to the public. No "backroom meetings" are allowed, though in practice their staff are free to do so. The vote on rules must be public, and final rules are then published. This is not the end of the story, however. Often, various interested parties sue in court to overturn the rules, or at least to delay them.

In the second major form of administrative action, adjudication, the agency reaches a decision on a specific case, not on a broader rule. (In practice, however, such adjudication of a specific case will create precedent and affect other cases as well as parties' behavior and expectation.) A case is often started by the filing of a complaint by the agency or another governmental body, by a private citizen, a harmed party, or by a petition by the company itself. The company must produce a response to a complaint from the outside.

To develop its case the agency can obtain information in three involuntary ways:

1. Reporting requirements—companies must periodically produce reports.
2. Subpoenas—directed to companies or specific individuals who are instructed to produce documents or testimony.[123]
3. Conduct a physical inspection—as long as it is authorized by law and complies with constitutional protections.

A complaint is often heard by an administrative law judge (ALJ) in a public hearing which has many of the trappings of a trial. Testimony and cross-examination is allowed, which provides another way for the agency to obtain information. The ALJ then issues a decision. A party can object to the ALJ decision, and the agency or commission then review the decision. If objections remain, the party must go to the outside courts system. In the USA, that would be the Federal Courts of Appeals for judicial review.

The agency decision can be reversed only on relatively narrow procedural grounds, not because it is unwise in terms of policy.

Grounds for legal appeals are limited:

- exceeding authority or jurisdiction;
- did not follow procedure;
- no due process or no substantial supportive evidence;
- violation of constitution.

In contrast, "bad policy" is no ground for appeal.

U.S. courts typically follow what has become know, as "Chevron Deference," based on the landmark case *Chevron vs. Natural Resources Defense* (1984). Before *Chevron* courts could supersede agency interpretations on questions of law but deferred to the agencies on questions of fact. The Chevron case established a two-step process:

- The court rules whether the underlying legislative language is ambiguous or not. If it is clear and unambiguous, the court's judgment supersedes the agency.
- If the legislative language is found to be ambiguous, then any "reasonable" agency interpretation supersedes the court's own judgment.

The legal philosophy behind the Chevron Deference is that Congress has given the agency the power to interpret ambiguous laws; but the agency has no power to change clear legislation on its own.

A further appeal is possible, but the US Supreme Court rarely takes administrative appeals, mostly only if two lower appellate courts have issued conflicting decisions, or where a major constitutional issue is at stake.

8.4.2.2 The Strategic Use of the Regulatory Process

Companies use the regulatory process strategically to achieve their objectives. An example is the merger of AT&T and BellSouth in telecoms. This proposed merger was opposed by a group of new and smaller telecom providers. They were worried about the potential market power of the new com-

122 Ofcom. "Guidance Notes, Section One: Protecting the Under 18s." December 16, 2009. Last accessed July 11, 2013. ► http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section1.pdf.

123 Subpoenas require specific statutory authority and can be enforced through judicial contempt proceedings. *United States vs. Morton Salt*, 338 U.S. 632 (1950) imposes limits on agency subpoenas. They cannot be too indefinite or overly burdensome, and must seek only relevant information.

bined firm and their loss of bargaining power. The competitors tried to block or at least delay the merger's approval.[124] They succeeded for a while. Finally, AT&T made several concessions to its rivals in order to hasten the FCC's approval of the merger.

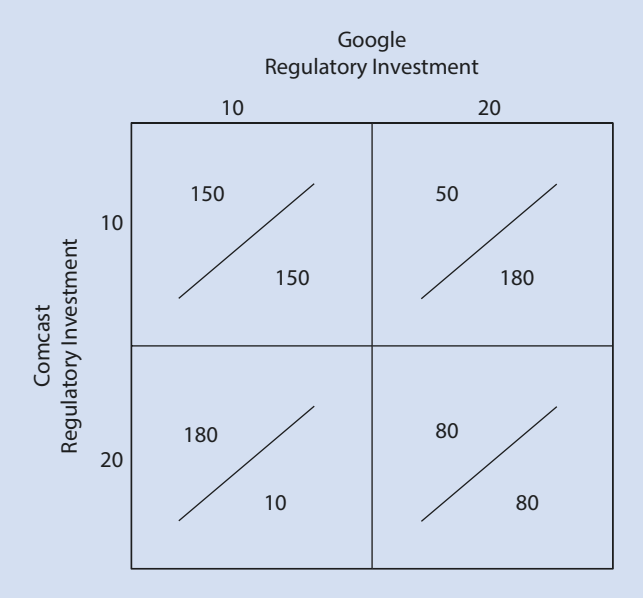
Given such a use of the process, how can one analyze a firm's actions and options in the regulatory environment in terms of managerial strategy? Game theory is one approach. Game theory models analyze the behavior of companies as they make moves and counter-moves. A firm can use this approach to take into account the reasoning of other firms. (However, since this analysis usually works for only two- or three-player scenarios, game theory cannot provide answers to many situations.)

As an example, let us look at Comcast as it competes against Google. The two companies can fight each other individually or they can collaborate. This is a scenario known in game theory as the "Prisoner's Dilemma." If firms conspire, they can both do well. Collusion and sharing the market may be more profitable to both than engaging in a regulatory war. The options of company behavior are listed in ◘ Fig. 8.5, together with the outcomes in terms of "payoffs" for each combination of actions. Each box shows the net profit for the two companies due to their regulatory investments, with Comcast's profit in the upper left corner of each box, and Google's profit in the lower right corners.

A game theory analysis of the situation shows that a hypothetical collaboration between Comcast and Google would be more profitable for both companies. If Google spends $10 million, Comcast should spend $20 million for a payoff of $180 million. If it spends only $10 million, its net payoff is $150. But Google's payoff matrix shows that if Comcast selects $20 million, then Google's best move is to do the same and spend $20 million, for a payoff of $80.

The dilemma is that this solution, in which both companies take the most rational action to maximize their individual profit, actually ends up with both firms having *lower* profits (each $8 million). If both companies realized the dilemma, they would each spend only $10 million and each would have a net payout of $150 million. The solution rests with co-operative, co-ordinated, or "tacit" strategy, which is why self-regulation often ends up being beneficial to collaborating competitors.

A major strategy of companies is to use (or abuse) the regulatory process to delay decisions that are unfavorable. One way to do so is to go to court in order to challenge the way in which an agency has made its decision; that is, the process. Another way is to delay the decision's implementation while the agency's decision is appealed. For example, in 2014, the major media companies Disney, Time Warner, and CBS faced an FCC order that would have forced them to make their contracts with pay-TV providers public. They successfully sought to postpone ("stay") their compliance while they appealed the



◘ **Fig. 8.5** Google and Comcast in a prisoner's dilemma game—Payout Matrix

decision. In such a case, it is not even necessary that the court decides in favor of the plaintiffs because the review of the case has already caused a delay that benefited them.[125]

Other ways to slow down a decision or its implementation is to file procedural motions; to request extensions; to seek a remand of the case to the agency or administrative law judge; to reopen the proceeding due to new evidence; to challenge the jurisdiction of the agency; to object to its procedure; to file cases, when possible, in multiple jurisdictions, sometimes through allies. When these decisions come out differently in different appellate courts, they must then be resolved by the US Supreme Court, which assures yet another bite at the apple or at least a substantial delay. If the agency denies the motion for a stay that can be appealed too, and even that court's decision can be further appealed to the Supreme Court. Granting a stay, is within the discretion of a court, based on a variety of factors, including the likelihood of prevailing on the merits; the public interest; the harm to the plaintiff or others by proceeding immediately.

It is much harder to accelerate decisions. The main way is to fully co-operate with an agency because anything else might result in a delayed decision. In cases of company-specific adjudication, the company might agree to conditions in a "settlement" (compromise deal) that also enables the agency to publicly claim a victory of sorts. The problem is that opponents have the opposite incentive and will play for delay, and often can do so as long as they have "standing." Persons or companies have standing if they show that they suffer a "legal wrong because of agency action" or are "adversely affected." They can then appeal the agency's decision in court.

124 Gohring, Nancy. "Competitors ask FCC to block AT&T, BellSouth merger." *IDG News Service*. June 12, 2006. Last accessed June 5, 2007. ► http://www.networkworld.com/news/2006/060606-competitors-ask-fcc-block-merger.html?fsrc=rss-bellsouth.

125 The appeals court threw out the FCC's order for failing to show the information was a key element to the merger review process. Hurley, Lawrence and Alina Slyukh. "U.S. appeals court throws out FCC order on programming contracts." *Reuters*. May 8, 2015. Last accessed June 17, 2017. ► http://www.reuters.com/article/usa-court-television-idUSL1N0XZ1GJ20150508.

8.4.2.3 Case Discussion

Comcast Versus Google: The Financial Value of a Regulatory Strategy

Comcast and Google must decide how much they should invest in the regulatory process. How would one analyze how much to spend on a specific regulatory issue in opposition to another stakeholder? The key question is the value of success to a company, both positively in terms of its own opportunities and in reducing the impact of a competitor. As an example, let us look at the value of a policy to Comcast that prevents or delays Google from offering rival video services.

Table 8.5 shows, with hypothetical numbers, the negative impact on Comcast from Google's entrance into video service. The negative NPV for Comcast that is the result of Google's competing entry is nearly $471 million (the first line). The second line shows the impact if entry is delayed by a year. Therefore, Comcast benefits from the one-year delay in Google's entry by $470.89 million minus $371.04 million, or about $100 million. This is a significant number, and it is worth a major Comcast effort.

How much then should Comcast spend on the regulatory process? Does this mean that Comcast should spend that amount, $100 million? Not quite. The optimal number would be where the extra dollar in regulatory investment results in an extra dollar worth of value of delay. That could be the case at a much lower number; spending more would not make much of a difference.

To determine that number requires:

1. estimation of monetary value of the goal;
2. estimation of the probabilities of success for deficit spending levels, given an estimated spending by the other side;
3. estimation of the impact on probability of success of different spending levels by the other side.

Table 8.5 Negative impact on Comcast from the entry of Google into video service

Year	1	2	3	4	5	6	7	8	NPV (with 12% discount rate) ($ million)
Loss of cable profits ($ million)	−10	−10	−100	−130	−200	−137	−137	−137	−470.89
Loss of cable profits ($ million) with a one-year delay	−0	−10	−10	−100	−130	−200	−137	−137	−371.04

8.5 Substantive Media Law

Every country has its own legal arrangements. It would be impossible to cover them all. Hence we will follow mostly the American system while also providing other examples and models from around the world.

8.5.1 Content Restrictions

Most democratic countries have constitutional protections to protect the freedom of speech, in particular by the media. The First Amendment of the US Constitution is a particularly strong bulwark against governmental constraints of the press. But even with such basic laws, there are some restrictions as to what the media can publish or show.

8.5.1.1 Defamation: Libel and Slander

Defamation includes any publication or broadcast of false information that exposes an individual to social or occupational harm.[126] In the USA, the classification of the target of a media story as a public figure, as opposed to a private person, is a crucial question. The 1964 case *NY Times vs. Sullivan* set this rule for the USA. In covering a private figure, a publication is liable for damages if it can be shown that it has acted with negligence in publishing a false statement. But for public figures the statement must not only be false, it must also be shown that it was published with malicious intent or with reckless disregard for accuracy. This standard is difficult to meet, and the burden of proof is on the complaining target of the story, the plaintiff. It gives the media considerable protection. In many other countries, in contrast, the defending media company must prove that its statement was both correct and was also made responsibly. Often the loser is also liable for court costs on top of damage payments.

Generally, truth is a defense, and the target of an unfavorable story or comment cannot claim that he was harmed by a truthful but unflattering story. This principle is limited somewhat in some countries by laws on privacy protection that can hold a comment or story, even if true, to be a violation of privacy or of the "right to be forgotten."

In Singapore, restrictive libel laws have been used against critics of the government. Journalists and publishers have been bankrupted by court decisions which found that criticisms against a public official or of the agency they directed included some inaccuracies and were therefore libelous.

In a case in the UK, Deborah Lipstadt, a history professor at Emory University in Atlanta, called the British historian David Irving a "holocaust denier." She was sued for libel by

126 Blumenthal, Howard J. & Goodenough, Oliver R. *This Business of Television*. New York: Billboard Books, 1998.

Irving in England.[127] As a result, Prof. Lipstadt essentially had to prove, in a London courtroom, the occurrence of the Holocaust. She also had to prove that Irving misstated the truth. The key issue in the trial was to document Irving's manipulation of historic material to support his viewpoint. The case was decided in favor of Prof. Lipstadt, but it took her many months to prepare, and had she lost on a technicality she would have been liable to cover the other party's legal costs.

In all cases, since it is crucial for a publication not to have been careless or lacking in its verification process, media managers must ensure that internal controls and safeguards are in place. Companies can also get insurance to cover claims for libel, slander, and breach of privacy or publicity. The insurance companies will expect certain internal safeguards to be in place at the media company in order to reduce their financial exposure.

The case also illustrates that authors and publications, including online writers, must be aware of overseas libel laws which might affect them. Beyond general legal issues, there are also country-specific laws. For example, it is illegal to offend the royal families of the Netherlands or Thailand.

In the USA, even patently false claims are protected when they are satire. In 1983, Jerry Falwell, the prominent Fundamentalist Protestant minister, sued *Hustler*, a sleazy magazine, for having created a fictitious advertisement for a popular liquor that described him as having an incestuous encounter with his own mother. However, the US Supreme Court held that the parody did not amount to libel.

Some jurisdictions, under political pressure, have tried to carve out special protections. In the USA, several states have "veggie libel" laws, which holds people liable for falsely disparaging perishable food products,[128] on the theory that by the time farmers can provide counter-evidence to a misleading or false information, their products would have spoiled. Courts have been unsympathetic to this kind of law on constitutional or factual grounds. In *Texas Cattlemen vs. Oprah Winfrey* (1998), ranchers sued the TV star Oprah Winfrey for producing a show that discussed the potential risk of contracting "mad cow" disease from beef. Meat prices fell for two weeks after the show's airing, and the cattlemen claimed a collective loss of millions caused by the program. However, the court ruled against the ranchers because they failed to prove that Winfrey had deliberately or recklessly made false statements that hurt their business, or that her program had caused the price declines.

A contrast is the case *Hertel vs. Switzerland* (1998). This was about an injunction against a Swiss scientist in connection with a magazine article about his research findings that food prepared in microwave ovens was harmful to human health. His report was used to form the basis of an article which called for the banning of microwave ovens. Consequently, the association of manufacturers of household appliances successfully secured a court order that he make no further statements.[129]

Internet Libel

A related question is who is responsible for a libelous statement. Is it the writer/speaker, or the medium in which the statement appears? This question becomes particularly important when applied to the internet, where online users often post reckless and false statements. Should the ISP, website, or portal be held liable for "publishing" what its users are writing?

In one early case, *Statton Oakmont vs. Prodigy* (1995), an investment bank sued Prodigy, the website/ISP, for statements posted on its MoneyTalk bulletin board. The statement claimed that Stratton had engaged in fraud. Since Prodigy used software to screen out obscene or offensive language, it was more than a passive distributor such as a phone company acting as a common carrier, and it was held liable. The US Congress passed a "Good Samaritan" provision in 1996 that limited the liability of ISPs for defamation.[130]

One year later, a White House official and Clinton confidant, Sydney Blumenthal, sued Matt Drudge, the creator of the high-rating Drudge Report, for libel and defamation. Drudge had posted a factually false story that alleged Blumenthal had beat up his wife. Blumenthal also sued AOL for displaying the report. Drudge apologized and retracted the story, but Blumenthal filed a $30 million libel lawsuit two weeks later. The courts ruled that AOL was not liable, based on the 1996 law, which states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider."

Another law establishes that there is no legal liability by websites that host information provided by others unless it can be proven that they had actual knowledge about it being defamatory. But this creates other problems. Content might be taken down on the mere say-so of an individual or organization claiming defamation. Another category of restriction is content that is offensive along racial, ethnic, or gender lines. In many countries there are rules against "hate speech," which at times has expanded quite a bit in scope.[131] But even when it is legal to include such content, no respectable media company likes to be labeled insensitive or racist, and thus content that might be legally OK but is controversial to some user or considered "fake news" by them is taken down. The privately owned websites, in doing so, exercise their own free speech right. They are, after all, not public utilities or common car-

127 Brown, Buce D. "Write Here Libel There, So Beware." *The Washington Post*. April 23, 2000. Last accessed June 17, 2017. ► https://www.washingtonpost.com/archive/opinions/2000/04/23/write-here-libel-there-so-beware/c297c2dc-0568-473f-9b97-876f6aab8dd8/.

128 Turano, Rebecca. "Agricultural Disparagement Statutes: An Overview." *Pennsylvania State University School of Law*. April 2010. Last accessed June 17, 2017. ► https://pennstatelaw.psu.edu/_file/aglaw/Agricultural_Disparagement_Statutes_Rebecca_Turano.pdf

129 Johnson, Bruce and Kyu Ho Youm. "Commercial Speech and Free Expression: The United States and Europe Compared." *Journal of Internal Media & Entertainment Law* 2, no. 1 (Winter 2009): 159–198.

130 Digital Media Law Project. "Stratton Oakmont v. Prodigy." May 24, 1995. Last accessed June 17, 2017. ► http://www.citmedialaw.org/threats/stratton-oakmont-v-prodigy.

131 Strossen, Nadine. *Hate: Why we should resist with Free Speech, not Censorship*. Oxford, 2018.

riers that must be content-neutral. There would be a problem if the authors of such expressions and views had no reasonable alternative websites or clouds to go to. In Germany, since 2018, large websites such as Google, Facebook, or Twitter, must delete hateful user posts, including "insults" and "blasphemy" within 24 hours of a complaint, or be subject to severe penalties (up to $60 million) and personal liability (up to $6 million.) Other EU countries have considered following suit, as had Russia done immediately, while extending these rules to other types of political expression.

Measures through which media platforms can control user-generated content include:

- Users are given a feature/button next to every piece of content by which they can easily report inappropriate content.
- Major platforms such as YouTube have a team for content control (called flaggers) who check that submitted videos, pictures, keywords, or comments are appropriate and follow the site's guidelines. If they flag content, an administrator controls the content and deletes it if this is deemed by the company to be necessary. These flaggers (and admins) can be full-time employees of the company, but in some cases are also active users of the community.
- Major platforms have algorithms which analyze texts for listed words or visual content for patterns that suggest nudity or violence. These programs then send a report to a human administrator who checks the content.

Although websites are not liable for libel posted by others where they are not on notice, they might still end up in the middle of conflicts. In "cybersmearing" cases, a company that feels aggrieved by a post sues the website for defamation in order to "out" the company employee or critic who posted the unfavorable information. Such cases balance free speech rights with the right to be free from defamation.[132] Therefore, courts require companies to make a strong initial showing of an unlawful statement before they issue a sub-poena. Several states go further and hold these cases as an abuse of the judicial system to stop criticism, and they have enacted laws that prohibit suits that infringe upon free speech.

Case Discussion

What Should NBC Do to Avoid Potential Liability for Defamation?

NBC's expenditure on libel lawsuits includes the cost of compliance with legal standards, the cost of settlements, litigation expenses, adverse judgments, and negative impact on reputation, audiences, and advertisers. Let us assume that NBC would face ten defamation lawsuits per year for unpreventable error, and 20 suits per year owing to preventable error. An estimated 10% of these suits go to trial. The average cost per trial is $15 million, and NBC loses 50% of its trials each year. The average judgment per lost trial is $20 million. Libel insurance is based on the number of trials in the preceding year, and amounts to $ 1 million per trial. The expected libel costs for the year, not including negative impact on its reputation, are $72 million.

Internal safeguards would reduce probability of preventable error lawsuits by 10% per $5 million spent, and by 3% for an additional $5 million. Since it costs $5 million to lower expected libel cost by $7.2 million, NBC should invest that amount, but not an additional $5 million which buys only $2.1 in lower libel cost.

8.5.1.2 Morality and Child Protection

Many people, ranging from conservative morality watchdogs to liberal feminists, oppose overt sexual imagery in media and seek to have it banned. But what, exactly, is pornography? Does it include Michelangelo's *David* or Goya's *Naked Maja*? When the courts were stuck trying to define obscenity, Supreme Court Justice Potter Stewart famously stated, "I know it when I see it." The US Supreme Court created a hugely complex test to determine whether content is pornographic.[133] Judges must consider the following elements when defining obscenity. A complainant must:

1. apply contemporary community standards;
2. show that the dominant theme of the material taken as a whole appeals to prurient interest;
3. show that it is patently offensive as defined by state law;
4. show that it lacks serious literary, scientific, political, or artistic merit.

Because it is difficult to meet this rigorous test, convictions for obscenity have become rare in the USA. A lower standard of obscenity exists for broadcasting. In the USA, and typically around the world, anything that is "patently offensive" is prohibited or restricted on broadcast TV, which is a lower threshold than the test for indecency for print or film. The reason, as the US Supreme Court held in *FCC vs. Pacifica Foundation* (1978), when it found that a monologue of "Filthy Words" by the comedian George Carlin was only partly protected by the First Amendment, is the "pervasive presence" of radio broadcasts and their easy accessibility by children.[134] Because there are a limited number of broadcasting licenses, government can apply conditions on what they do, to protect the public interest.

Following this rationale, many countries restrict or prohibit the presence of over-the-air broadcasts of obscenity and

132 Ernst, Marcia M. and John C. Ethridge Jr. "Corporate Strategies for Combating Cybersmear." *Trust the Leaders* no. 4 (Summer 2003). Last accessed June 17, 2017. ► http://www.sgrlaw.com/ttl-articles/920/.

133 Miller v. California, 413 U.S. 15 (1973).

134 Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978).

indecency, such as nudity, violence, and offensive words.[135] The rules for cable TV programs are much laxer, because they do not require government licenses. The rules for pay-TV and on-demand video are basically those of the print press.

In 2004, the singer Janet Jackson partly revealed her breast in the Super Bowl half-time show produced by MTV and aired by CBS. There were many complaints, because in a live event, parents could not be warned in advance. The FCC fined CBS but the network appealed. An appeal court overturned the fine, but mostly on technical grounds. Congress raised the maximum fine of indecency from $27,500 to $500,000 for single indecency violation. A network with 20 stations may thus have to pay fines of $10 million for a single impromptu use of an expletive. In addition, the FCC encouraged a time delay on live broadcasts, and required display ratings for violence, nudity, and offensive language.

This type of issue does not go away, and passions run high on both sides. In just a few months of 2009, the FCC received 181,080 complaints. A single episode of Fox's animated show *Family Guy* generated over 100,000 complaints.[136] Many of those complaints were organized by traditional-values groups. Taking an opposing perspective, free-speech groups such as the American Civil Liberties Union argued that even if some people were upset at the content of a program, many others had no problem, and on principle "government should not parent parents."

In Europe, countries enforce their individual rules through agencies such as the UK's Ofcom. But the European Commission (EC) has the final say when content is broadcast across borders. Article 22 of the EC's policy requires member states to protect minors from damaging, indecent content through either audio or visual warnings. Even though there is no central enforcement agency, member states must notify the EC of penalties imposed by them.

Under political pressure, in 2006 alone the NAB, the TV and cable industry spent $300 million in advertising time to educate parents about the V-chip and other ways in which they could block programs whose ratings along several dimensions (violence, suggestive dialogue, sexual content, and coarse language) were unacceptable to them.[137]

Studies show that relatively few households actually use V-chip blocking. Morality groups therefore advocate an à la carte choice of cable channels so that subscribers can altogether drop undesirable channels rather than block programs on them.

Language

In 2003, the Irish rock band singer Bono, of the band U2, created controversy during the Golden Globes Awards when he blurted out, on live TV, "This is really, really fucking brilliant." The FCC originally decided that Bono's exclamation was not obscene since it was not used in a sexual context. However, after pressure from PTC, it reversed its decision in 2005.

Broadcasters generally do not challenge FCC fines because they do not want to antagonize regulators and politicians or even jeopardize their licenses. But in 2006, Fox, followed by other networks, challenged the rules on "fleeting" expletives such as those used by Bono. Six years later, the US Supreme Court overturned the FCC on legal technicalities, concluding that broadcasters such as Fox had not received adequate notice regarding "fleeting expletives." Partly as a result of these controversies, the TV networks instituted a seven-second delay on all live broadcasts, to enable the cutting of an offensive moment.

Obscenity on the Internet

Around the world, there have been persistent attempts to "clean up" the internet, partly for adults but primarily for children. Laws protecting children from internet content have therefore been enacted in the USA and many other countries, and the standards are tougher than they are for print books.

These laws have included, in the USA, the Communications Decency Act of 1996, which allowed the FCC to criminalize indecency on the internet. In *Reno vs. ACLU* (1997), the Supreme Court struck down the CDA as a violation of the freedom of speech protected by the First Amendment. Undeterred, in 1998, Congress passed the Child Online Protection Act, which was also struck down by the courts. Congress then passed the Children's Internet Protection Act, which required libraries and schools to install blocking if they accepted federal funds.[138] This decision, in contrast, was upheld by the Supreme Court because children have fewer protected rights within educational settings.

The problem arises when users provide the video content themselves. Blogs and video sites such as YouTube therefore monitor content to keep illegal and hazardous materials from being posted, as previously discussed.[139]

TV Political Balance

Many years ago, the FCC in the USA defined several components of the public interest which broadcasters must follow:

1. balance of opposing viewpoints;
2. localism;
3. diversity in terms of programming, services, and ownership.[140]

A Fairness Doctrine existed from 1949 to 1987,[141] required cable operators and broadcasters to discuss important controversial public issues in a balanced fashion. In contrast, in

135 Blumenthal, Howard J. and Oliver R. Goodenough. *This Business of Television.* New York: Billboard Books, 1998.

136 Murphy, Jaclyn. "Cursing and Nudity: The deadly sins of network television." *Campbell Law Observer.* August 13, 2013. Last accessed June 17, 2017. ► http://campbelllawobserver.com/cursing-and-nudity-the-deadly-sins-of-network-television/.

137 Labaton, Stephen. "F.C.C. Moves to Restrict TV Violence." *New York Times.* April 26, 2007. Last accessed June 17, 2017. ► http://www.nytimes.com/2007/04/26/business/media/26fcc.html.

138 Federal Communications Commission. "Children's Internet Protection Act." Last accessed June 17, 2017. ► http://www.fcc.gov/cgb/consumerfacts/cipa.html.

139 Fitzpatrick, Michael. "... While Japanese Face Web Censorship." *The Guardian*. January 3, 2008. Last accessed June 13, 2012. ► https://www.theguardian.com/technology/2008/jan/03/censorship.japan.

140 Napoli, Philip M. "Issues in Media Management and the Public Interest." In *Handbook of Media Management & Economics.* Eds. Alan Albaran, Sylvia Chan-Olmstead, and Michael Wirth. Mahwah, NJ: Erlbaum, 2006.

141 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

another case,[142] the US Supreme Court ruled that a newspaper had no obligation to permit a "right of reply" by a person affected by a mistake in the paper. However, the FCC abandoned the Fairness Doctrine in 1987. Some countries maintain such requirements of balance. In Germany, for example, private TV broadcasters must ensure a diversity of opinions.

Protecting Children

In 1996, the FCC required all television stations to air at least 3 hours of educational programming per week. However, there is no consensus regarding what constitutes "educational" programming and several stations made spurious claims that their shows were educational. For instance, the Spanish-language network Univision was fined $24 million for labeling some of its soap opera telenovelas "educational."

Since children cannot easily distinguish between programming and advertising and are easily influenced, the US government has tried, mostly unsuccessfully, to limit advertising aimed at children. The FCC established standards regarding the amount of children's programming that could air a limited amount of advertising: this was 10.5 minutes per hour on weekdays and 12 minutes per hour on weekend days.[143] "Safe Harbor" rules established that broadcast television programs up until 9 pm should be children-friendly shows.

8.5.1.3 Government Restrictions of Publication

In the USA, there can be no "prior restraint" on publication, meaning the government cannot prevent the materials from being published, even where it is claimed to endanger national security.[144] In the "Pentagon Paper Case" against the *New York Times* and the *Washington Post*, imposing such restraint was not accepted by the US Supreme Court, and thus has remained the state of the law. (The only exception in US history was when a lower court used prior restraint on the small magazine *The Progressive*, against its publishing a guide describing how to build an H-bomb. The government then dropped the case, because this prior restraint would likely have been held unconstitutional in a higher court.)

The exception is "intentional incitement to imminent violence or other great harm, with a high likelihood that it will occur, and which cannot be prevented except by suppression." A court order preventing publication is extremely difficult to obtain and must be based on clear evidence that real and specific violence would directly follow the incitement.[145]

In the UK, the Official Secrets Act of 1989 prohibits the disclosure of confidential material from government sources by employees and journalists. There is no defense based on the "public interest" to publish the information. Even disclosure of information that is already in the public domain, such as published in another country, can be considered a crime.

Judicial Gag Orders

In the USA (and more frequently, the UK), a judge may issue a gag order on the reporting of a criminal case, in order to ensure a fair trial. Such an order, aims at preventing the press from influencing the jurors, and to reduce the incentive for lawyers to grandstand to the press about their case.

Prior Restraints by Private Parties

Private parties can try to obtain prior restraints. In 1999, the MPAA got a prohibition on an online hacker magazine, *2600*, to publish an article specifying how to break a DVD encryption. This injunction was upheld based on copyright/property rights, rather than free speech.

8.5.1.4 The Regulating of Advertising

In the USA, the FTC is in charge of unfair competition and false advertisement on the US federal level. The FTC also regulates contests, sweepstakes, premiums, trade allowances, and direct marketing.[146]

Generally, advertising claims must be substantiated. Advertisers must have a reasonable basis for the claims made in the ads. In many countries, consumer protection agencies may stop advertisements that do not meet that standard, and may levy fines on violators. A plaintiff who is awarded damages for false advertising by a rival can receive profits that resulted from the offending advertisement, as well as attorneys' fees, and (in the USA) three times the damages if actual harm is proven.

Consumer protection agencies may require advertisers to affirmatively disclose certain types of information in their ads so that consumers are aware of all the consequences, of the use of a product or service. This might include fuel mileage information in car ads or warnings about cigarettes. There may be requirements that advertising claims must be substantiated.

Three main types of false advertisements are prohibited:

- misrepresentation;
- bait and switch (advertising a product with no intention of selling it, then switching to a higher-priced item);
- false price comparison.

Online advertisements must contain the same disclosures as on traditional media, and they must be clear, conspicuous, and understandable to the intended audience.

Beyond laws and regulations, competitors are often able to bring civil suits against a company for deception and false advertising. Messages do not need to be literally false if they create a false impression. A complaining party may be awarded monetary damage payments for the false advertising by a competitor, plus legal fees (and in the USA damages three times in size of the damages). Even more expensive are class-action lawsuits, in which large groups of consumers, represented by a lawyer who often organizes the complaint, seek damages from a company for false advertising.

To avoid lawsuits many media outlets, advertisers, and advertising agencies check and review ads before distributing them to ensure that they are not deceptive, offensive, or illegal.

142 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
143 Ramsey, William A. "Rethinking Regulation of Advertising Aimed at Children." *Federal Communications Law Journal* 58, no. 2 (April 2006): 367–398.
144 Blumenthal, Howard J. and Oliver R. Goodenough. *This Business of Television.* New York: Billboard Books, 1998.
145 In the case of the Wikileaks disclosures (2011), a government prosecution was initiated, though not for the publishing as such but for collaborating in the leaking of classified material by a military person. Wikileaks was also not considered a press or journalistic organization but a source.
146 Belch, George and Michael Belch. *Advertising and Promotion: An Integrated Marketing Communications Perspective*, 4th ed. New York: Irwin/McGraw-Hill, 1998.

Case Discussion

Comcast Advertising

Comcast is engaged in an advertising campaign to promote its high-speed internet offerings. It must distinguish its service from Google's fiber network without violating the laws against false advertising. Suppose that Comcast releases the following ad: "Comcast's high-speed internet service is twice as fast as Google's at only half of the price." Since nothing in the advertisement appears wholly implausible, a reasonable buyer might have a legitimate expectation that the ad's claims are true. Possible concerns are:

- Is Comcast using the same metric for measuring its rival Google's services? Suppose that Comcast offers "shared" service that slows down if other users are online, while Google's service is unshared and hence more dependable on maintaining speed?
- Do Google and Comcast offer truly comparable packages? Suppose that to get the low broadband price a consumer must also subscribe to a more expensive video service?

These are all areas in which Comcast should not make itself vulnerable to false-advertising legal complaint brought by Google or by the government.

Suppose that Comcast instead advertisers: "[Our] high-speed internet is so much cheaper than Google's that with the money you'll save, you'll feel like a billionaire." Since the second advertising message is an obvious exaggeration and no reasonable buyer would rely on the claim, it is unlikely that Comcast would face a false advertising suit.

8

8.5.1.5 Commercial Speech

There are many reasons to prohibit false advertisement. Of course, there are similarly good reasons to ban lies among acquaintances or by political candidates. Yet, we do not so. The reason is that we consider the former commercial speech, while the latter is personal or political speech, whose banning would require various restrictions on vigorous communication.

Commercial speech is defined as speech on behalf of a profit-making activity and proposing a transaction. The US Supreme Court has given commercial speech less protection, and it can therefore be regulated. Thus, a scientist is within her rights if she writes a research article and claims that "Product X reduces baldness," even if this may be an incorrect conclusion based on the evidence. However, if a company makes the same claim in an advertisement and it is wrong, it can be challenged by a competitor, prosecuted by government agencies, and sued by unhappy customers.

There is a four-part test for commercial speech restrictions in the USA to be constitutional:

1. Speech that is inaccurate may be banned.
2. Even if speech is accurate, there can be a public interest in regulating it.
3. The restriction must be effective.
4. There must be a "reasonable fit" of goal and restriction.

The case *Nike vs. Kasky* (2002) involved the sports equipment maker Nike, which had been criticized for its foreign labor practices. When Nike defended itself publicly, it was accused to violating the commercial speech requirement of accuracy. The California Supreme Court ruled that according to California law, Nike's speech was an example of unprotected commercial speech. Though this holding was based on the California constitution, it affects all companies doing business in California, which is almost every big company. The US Supreme Court did not decide the case, but the ruling probably would have been overturned because it was so restrictive, given that the court has been increasingly reluctant to uphold restrictions on commercial speech when the company's message went beyond straight promotion.[147] In Europe, too, commercial speech receives less protection than personal or political speech.[148]

8.5.2 Anti-trust and Anti-monopoly Law

Economists tend to believe that the market structure of its industry strongly affects a firm's behavior and performance. Therefore, if there are problems with market power in an industry it is better for government to deal with its market structure and make it more competitive rather than try to micromanage companies' behaviors through regulation.[149] The main culprits are monopoly and its cousin oligopoly. The basic US law on anti-trust is the Sherman Act of 1890, which is a very general statement around which courts, for more than a century have created a body of case law that states rules and principles. Monopolies are not illegal per se, and there can be "innocent monopolies" as long as they behave in a reasonable manner. But monopolies obtained through acquisitions of competitors, predatory pricing, or other active attempts to obtain dominance can be challenged, with the government blocking a merger, or breaking up the company (divestiture), or other restrictions.

Antitrust lawsuits can also be brought by private parties such as competitors, suppliers, and customers. If successful,

147 In the case *Sorrell vs. IMS Health Inc.*, 564 U.S. 552 (2011) the court made it easier for companies to challenge commercial speech restrictions by defining market research, such as data mining, as speech and thus protected by the First Amendment. This adds to several commercial speech cases, where the US Supreme Court has struck down laws that restrict what corporations can say publicly in their advertising.

148 One example is the *Jakubowski vs. Germany* (1994) case. Manfred Jakubowski was ordered to stop criticizing his former news agency employer using a circular distributed by his own public relations agency. The ruling of the court was that the dissemination of his circular was not to discuss public issues, but to promote his business interests and improve his position in the market. He was allowed to criticize in other means but prohibited to do so using the commercial circular. Johnson, Bruce and Kyu Ho Youm. "Commercial Speech and Free Expression: The United States and Europe Compared." *Journal of Internal Media & Entertainment Law* 2, no. 1 (Winter 2009): 159–198.

149 Kranenburg, Hans van, and Annelies Hogenbirk. "Issues in Market Structure." In *Handbook of Media Management and Economics*. Eds. Alan B. Albarran, Sylvia M. Chan-Olmsted, and Michael O. Wirth. New York: Lawrence Erlbaum Associates, 2006.

company practices could be prohibited. A winning plaintiff in the USA can get three times the actual damages plus attorney's fees. This creates a strong incentive for plaintiffs and their lawyers to challenge monopolies, and private anti-trust cases are brought much more often as governmental ones. In 1980, a jury awarded the tiny telecom company MCI $1.8 billion in treble damages from its rival AT&T. (This was later reduced to about $175 million.) Other remedies to stop anti-competitive practices include ordering a firm to discontinue specific actions through a "cease and desist" order.

Antitrust actions may force a firm to split up. This happened to the Hollywood major studio companies when they were forced to sell off their movie theaters. Similarly, NBC, when dominant in radio, was forced to sell one of its two networks, which became ABC. The giant phone company AT&T was broken up into eight pieces as a result of a governmental anti-trust case. The software giant Microsoft was nearly split up but managed to escape.

European Union (EU) competition laws are derived from the Treaty of Rome, which prohibits activities restricting, preventing, or distorting competition among member states. Additionally, the Treaty of Rome prohibits companies with dominant market positions from abusing their power.

In 2006 EC officials warned Microsoft not to shut out rivals in the security software market by launching its Windows Vista operating system with a built-in anti-virus software. Later that same year (2006), the EC fined Microsoft $357 million for not complying with its mandate, and later, in 2007, it fined the company an additional $613 for continued non-compliance. In 2008, the EC initiated two major investigations against Microsoft for bundling its Internet Explorer browser with its Windows operating system and for refusing to disclose information enabling competitor interoperability. Microsoft was fined $1.35 billion for continuing to ignore the remedies prescribed in the initial case. Microsoft was also ordered to untie its Internet browser from its Windows operating system in Europe. In 2009, Microsoft did so and inserted a "ballot box" that allows the user to select from 12 different browsers to install which one to use with the Windows operating system. This was done until 2014 when the agreement expired, as this agreement only covered Windows 7 and 8. In some updates for Windows 7 and 8 the system did not automatically tell EU users that they had the option of installing other browsers. Because of this omission by Microsoft, the EU fined it an additional $731 million in 2013.

The EC opposed several major mergers or joint ventures on the basis of anti-trust violations, among them MCI-WorldCom, WorldCom-Sprint, Bertelsmann-Kirch-Deutsche Telekom, Time Warner-EMI, and Bertelsmann-EMI.

When the American telecom companies MCI WorldCom and Sprint planned to merge in 2000, the US Justice Department blocked the merger, as did the EC. That action by the EC was unprecedented in that both companies were US-based, with only minor business in Europe, and the EC had not previously prohibited a merger of two US corporations. The EC claimed jurisdiction to prohibit the merger because several markets within its member states would have been adversely affected. Beyond the jurisdictional issue is also the question whether this merger posed a problem. The MCI WorldCom company soon collapsed—maybe it would have survived in alliance with Sprint—and was then merged into the much larger Verizon without an EC challenge. Sprint, too, became a negligible competitor in wireline long-distance service.

The proposed merger between the large music groups EMI and Warner Music group would have created a trans-atlantic joint venture through a $20 billion music industry giant. The two firms offered proposals to address objections to the merger. They offered to sell off the Virgin Music label and other portions of their music publishing businesses to reduce concerns about the dominant position they would have in the music industry.

Similarly, the attempted merger of EMI with Bertelsmann was blocked, despite promises by the companies that they would sell off large parts of their assets to competitors. In the end, EMI went bankrupt, arguably a much worse outcome than letting it survive as part of another firm. Bertelsmann first merged its own music business with Sony's and then sold it off to its partner. Time Warner spun off its music group. The entire industry was in major decline, which led to the efforts toward consolidation.

In the USA, the anti-trust laws (the Clayton Act of 1914) prohibit horizontal agreements among competitors, where they restrict competition. It is illegal to engage in price-fixing, restriction of output, group boycotts, and market division by territory or customer categories. Price fixing is an agreement between competitors to raise, lower, or stabilize prices. But sometimes true competitors behave in the exact same way without any agreement, simply because it makes sense independently to match market prices or lose business otherwise. US courts have therefore held that parallel behavior alone is insufficient to prove a price conspiracy among competitors, as long as they are based on an independent business justification.[150]

The exchange of price information among competitors has been viewed with some suspicion since it facilitates price fixing. It is deemed to not be unlawful per se, as long as any relevant date is also available to the public, and as long as there exists no coercive mechanism which pressures the firms to adhere to price schedules. Moreover, there need to be legitimate business reasons for the exchange of the price information. In order to encourage cartel companies to break rank, the US Justice Department instituted a "Prisoner's Dilemma" system in which it offers amnesty guarantees to a whistleblower company or individual that co-operates with an investigation, although this offer only applies to the first in the door.

Specifically exempted from the anti-trust laws are several professional sports leagues (baseball and football), as well as labor unions, utilities such as phone companies and

150 Nagle, Thomas T. and Reed K. Holden. *The Strategy and Tactics of Pricing: A Guide to Profitable Decision Making*, Second Edition. New York: Taylor & Francis, 1995.

other companies that are otherwise price regulated, as well as newspapers, to some extent. The Newspaper Preservation Act of 1970 grants newspapers several exemptions from federal anti-trust laws, making it legal for two newspapers within the same market to form a joint operating agreement for production marketing and advertising solicitation when one is in danger of financial failure.

8.5.2.1 Price Discrimination?

When a consumer pays less for a good or service than he is willing to pay, the difference between the two is known as the "consumer surplus." The history of media is the history of the fight over consumer surplus, the fight between consumers and media companies. Too high of a consumer surplus may weaken the financial base of media companies and their ability to provide upgrades and innovation. Prices that are too low usually result in driving everyone out, and the "last man standing" becomes a monopolist. A consumer surplus that is too low, on the other hand, discourages consumption.

Under US law there cannot be any discrimination for commodities of like grade and quality, but this does not apply to discrimination in services—medical doctors or TV cable providers for instance. Price discrimination is permissible to match a competitor's price. More details on price discrimination are provided in ► Chap. 10 Marketing of Media and Information.

8.5.2.2 Predatory Pricing

Predatory pricing is defined as selling below a marginal cost, with the aim of eliminating a competitor and then raising prices. Predatory pricing is difficult to prove and unpopular to enforce, since price cutting is a benefit to consumers. According to the US Supreme Court, "there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful."[151]

In 2003, the French ISP Wanadoo was fined €10 million by the EC for predatory pricing. At the time Wanadoo was Europe's largest ISP. Wanadoo, a subsidiary of France Telecom, had priced its broadband services at a loss to drive out competition, achieving a market share in France of 72%.[152] An extremely low price, by itself, is not a violation. The Wanadoo case highlights some difficulties in applying predatory pricing laws since it is difficult to determine what is "below marginal cost" in telecoms and digital services, where marginal costs are naturally very low.[153] Furthermore, for new products it is not unusual for a company to accept losses in the early years.

A related issue is price squeeze. DT, the German telecom giant, sold essential telecom services to competitors on a wholesale basis, as well as to consumers as a retail service. Nine competitors claimed that DT was charging them higher wholesale prices (where it held market power) than it was charging its own retail consumers, thereby making it impossible to compete in the retail market. The EC subsequently fined DT €12.6 million.

8.5.2.3 Profit and Investment Regulation

For some products or services there may be what is called a natural monopoly: the economies of scale are so high that there is really no room for a second competitor. Examples might be electric distribution, a highway, or sewer systems. Or it could simply be a gas station in a small town, where demand is too small to enable a second station to survive. In some cases, natural monopolies can be overcome through rival technologies, but in other cases they can be quite persistent. Where the service or product is of an essential nature, such as in the case of electricity, water, or rail transport, there might be a governmental intervention. This can take the form of governmental ownership private gains subject to regulation. The fundamental regulatory goal is, in the presence of a natural monopoly, to ensure service at a competitive price. This was an issue for telecom service, but also for some cable TV. There are two main approaches: the direct regulation of prices or an indirect regulation through the regulation of profits. Profit regulation involves a "rate of return" regulation, which assures that the profit on invested capital be "reasonable" in comparison to similar risky investments and not as high as it would be for an unrestricted monopoly. To do so, a company's prices are approved, based on several steps described in ► Chap. 11 Pricing of Media and Information. In theory, this procedure results in prices that are similar to market prices, if competition existed rather than monopoly. But in real life, major problems exist:

- Each of the investment, expense, revenue, and profit items is subject to interpretation and dispute. They also tend to be quite big in magnitude, which makes these disputes high-stake matters.
- The system creates incentives to overinvest in capital.
- There is a tendency to "cost-plus" pricing, and few incentives to reduce cost.
- It is complicated to administer.

The second approach is price regulation instead of profit regulation. In theory, it is simple to administer in order to control prices. An example of the system is a price cap regulation in telecoms, which exists in a number of countries. Prices are allowed to change according to formula, in which this year's prices are based on last year's, plus inflation, minus a "productivity factor."

8.5.2.4 Regulation of "Universal Connectivity"

The reach of a communications service across a country's geography and socio-demographic groups is known as "universal service" or "universal connectivity" and is often a key political goal. To achieve it beyond the coverage that would

151 Federal Trade Commission. FTC Staff Comment to the Honorable Demetrius C. Newton Concerning the Alabama Fuels Marketing Act. January 29, 2004. Last accessed May 29, 2007. ► http://www.ftc.gov/be/v040005.shtm.

152 Cullen, Drew. "EC fines Wanadoo €10 m for predatory pricing." *The Register*. July 16, 2003. Last accessed May 29, 2007. ► http://www.theregister.co.uk/2003/07/16/ec_fines_wanadoo_euro_10m.

153 It is difficult to determine the threshold "below cost" in telecom service, since marginal costs are so low.

be attained in a market equilibrium requires some form of subsidy. The subsidies can come directly from the government budget or indirectly through transfers inside a regulated system. There typically exists a broad political coalition for universal service:

- conservatives from rural states;
- liberals supportive of the poor;
- hardware manufacturers;
- labor unions;
- the many companies using the service to reach customers.

For telecoms, the USA has a complicated system of universal service financing, which involves both federal and state programs. There is a surcharge of about 17.4% (2016) on interstate telecom (and not internet) services. The percentage charge varies over time based on the need to raise a certain amount of subsidy, with the money going into a universal service fund. Part of that fund supports cheap internet connectivity for schools, hospitals, and libraries. That cost was about $2.36 billion in 2015.[154] Of this, $2.08 billion went to the E-rate program (schools and libraries), and $278 million to the Rural Health Care program (tele-health and tele-medicine infrastructure in hospitals). The rest of the fund goes toward price support of service in rural high-cost areas ($1.16 billion) and to support of service to low income households ($1.53 billion).

8.5.2.5 Support for National Industry

Most countries encourage development of high-tech and media industries. In the USA, there are hundreds of Federal and local programs. They have led, among other things, to the creation of the internet. Other countries have a still more active government support system. An example is France. Although France created the word "entrepreneur" is French, the post-World War II French economy has its roots in large state-run companies, so-called "national champions," which received high levels of government financial and research support,[155] whether in electronics or media.[156] There have been success stories in media and IT, such as the telecoms operator France Telecom (Orange) and the pay-TV company Canal Plus. On the other hand, Bull SA, a computer maker and IT company, was picked as the key element for French government policy in the 1960s to establish a national computer industry. Yet the company posted losses in ten out of 15 years through 2002. Its revenues fell from €5 billion revenues and 44,000 employees in 1990, to €1.5 billion, 8000 employees in 2002, and still fewer in 2016. Government made up for Bull's losses with billions of euros in subsidies,[157] and the company was kept alive by subsidies. In 2001–2002, the government granted €490 million in an "emergency loan." In 2003, it forgave 90% of that loan. The bailout was called a "grave violation of state aid rules" by EC's competition commissioner Mario Monti, and the EC took France to the European Court over the bailout. Yet Bull was given a new loan in 2004 of about $690 million.

More successful was another French initiative, that of video games. A strong view took hold among French politicians that video games, combining as they do new media, traditional arts, and technology, and with the potential to become a major art form in the 21st century, were a strategic industry for the country.[158] In 2003, Prime Minister Raffarin announced the creation of the Ecole Nationale du Jeu Video et des Medias Interactifs, dedicated to training game development managers. In addition, the government created a fund for game development and a tax credit on game production expenses. During the French 2007 presidential elections, all major candidates pledged to support the video game industry. After winning that election, President Nicolas Sarkozy publicly expressed strong support again. He advocated that the French video game tax credit be approved by the EU Commission, and this was the case. As part of this effort, the French Ministry of Culture elevated three video game designers to Knight in the Order of Arts and Letters.

The major players in the French video game market are Atari, Gameloft, Infogrames Entertainment SA, UbiSoft, Arkane Studios, Darkworks, and Quantum Dream. Between them, they make up approximately 10% of the world market and approximately 20% of the mobile games. In this instance, therefore, French industrial policy worked fairly well.

Support for Domestic Cultural Production

Many countries have legislated programming quotas with regards to broadcasting. In the EU, 50% of all airtime must be of European origin. In Italy, 6% of this 50% must be aimed specifically at children and 20% of this 50% must be suitable for children.[159] In Australia, a minimum of 260 hours of children's C programs and 130 hours of Australian preschool P programs are required annually.[160] In Malaysia, 80% of programs must be in the national language[161]—in other words in

154 Universal Service Administrative Company. "Building the Foundation: 2015 Annual Report." Last accessed June 17, 2017. ► http://www.lifelinesupport.org/_res/documents/about/pdf/annual-reports/usac-annual-report-2015.pdf.

155 Trumbull, Gunnar. *Silicon and the State: French Innovation Policy in the Internet Age.* Washington DC: The Brookings Institution, 2004.

156 Major examples: communications satellite, the Minitel consumer computer network system; the SECAM color TV standard; France Telecom network infrastructure; Alcatel telecom equipment; computer development projects.

157 Shannon, Victoria. "Bull S.A., the Computer Company, Aims to Emerge From Dependence on France." *New York Times*. August 25, 2003. Last accessed June 17, 2017. ► http://www.nytimes.com/2003/08/25/business/bull-sa-the-computer-company-aims-to-emerge-from-dependence-on-france.html.

158 Crampton, Thomas. "For France, Video Games Are as Artful as Cinema." *New York Times*. November 6, 2006. Last accessed June 17, 2017. ► http://www.nytimes.com/2006/11/06/business/worldbusiness/06game.html.

159 Blumenau, Jack. "Children's Media Regulations: A report into state provisions for the protection and promotion of home-grown children's media." *Save Kids' TV*. Last accessed July 11, 2013. ► http://www.savekidstv.org.uk/wp-content/uploads/2011/05/SKTV-competitor-territory-research-post-final-updated-24.4.11.pdf.

160 Australian Government Convergence Review. "Discussion Paper: Australian and Local Content." *Department of Broadband, Communications, and the Digital Economy, 2011*. Last accessed July 11, 2013. ► http://www.dbcde.gov.au/__data/assets/pdf_file/0007/139255/P.4_11352_Convergence_Review_Discussion_Papers_Aus_Content_v4_FA_web.pdf.

Malay and not in Chinese—and in Canada 60% of programs must be "Canadian programs,"[162] which are defined as shows that have Canadian producers, funders, or creators.

Building on the ideas of the earlier "Television Without Frontiers" which set import/broadcast quotas for European TV, the EC passed the "Principles and guidelines for the Community's audiovisual policy in the digital age" in 1999. This new code mandates how much foreign-created, or foreign-language, programming can be aired, and several other topics.[163]

Content support policies are deeply entrenched. Though they have traditionally focused on film and TV, their rationale of supporting national culture and a domestic production sector carries over into newer forms of media, as the French governmental support for the video game industry illustrates. Thus, media companies have to navigate this policy area both as an opportunity and as a barrier.

8

8.5.2.6 Interconnection Regulation

Wholesale prices among networks are perhaps the most important economic and regulatory issue for a telecom network. If interconnection prices are low, they would better support new competitors and thus provide more choices for consumers. But when they are very low, they reduce the incentive for new entrants as well as for the incumbent to build their own competing infrastructure.

The tension between the convergent forces of technology and the centrifugal forces of business competition is most pronounced on the front where they intersect: the rules of interconnection of the multiple hardware and software subnetworks and their access into the integrated whole. As various discrete networks grow, they must interoperate in terms of technical standards, protocols, and boundaries. In the networks of networks, their interconnection becomes critical. Control of interconnection by any entity, whether by government or by private firms, is the key to the control of the telecoms system and its market structure.

The term interconnection covers a wide matrix of relations. On the physical level of transmission conduits, it includes linkages within and among various types of entities and industries. On the higher levels of applications and content, interconnection becomes an issue of access and interoperability for entities such as ISPs, value-added service providers, video program channels and information providers, and more. On a geographic level, interconnection issues cross boundaries and involve many carriers, service providers, and national policy-makers.

8.5.2.7 Access Regulation

Recent years have witnessed major battles over the terms of access by providers of online content providers and other services to the segment of the internet platform that is run by the ISPs. The content providers want to be free from any gatekeeper powers by the ISPs, whether over the type of content, the provider, or the price. The ISPS, in turn, argue that they make major investments into distribution networks and that they should be able to control them. Both sides have considerable market power—the ISPs over the pipes, and several of the internet companies over major instrumentalities such as search engines or social networks.

The ISP companies have a track record of using gatekeeper power, whether over the interconnection of other networks, by phone companies, or of content, by cable companies. Perhaps the best way to analyze the issues is to view it as a triangle involving three parties: the providers of internet content and applications, such as Google, Netflix, HBO, Skype, and Facebook; the end-users of that content (some of whom are also providers at the same time) like you and me; and the electronic pipes and platforms that connect between them and transport the information packets, such as Comcast or AT&T. These pipes come in two different sections: "last-mile pipes" that reach individual end-users and "middle-pipes" that constitute the local and national network system such as content delivery networks (CDNs). It is important to distinguish between those two different segments.

The question, then, is what kind of control the pipes can exercise over the content, prices, and quality of information packets that are sent by providers to end users, and over the access of end users to the providers.

The logic of economic behavior would lead the end and middle pipes—to charge content and applications providers as they send out packets, even when these are requested by the end users. As a result, the internet might cease being mostly free to end users for usage, though with fixed monthly connectivity fee. Instead, they might have to pay each time they click on a website, thereby reducing the use and excitement of the internet.

For several years, the FCC, backed up by the US Supreme Court, had deregulated broadband operations, categorizing them as "information services" without common carrier obligations to serve everybody equally and with nondiscrimination.

Internet firms and content providers fear restrictiveness by the pipes in favor of their own offerings, and the exercise of monopoly pricing. The ISPs conversely, fear being returned to the strictly regulated common carrier status of the past, with supervision over prices and service quality. They argue that the result of imposing onerous conditions on them will only result in the most open network that was never built.

In 2015, the FCC reclassified ISPs as subject to common carrier for broadband services. In 2017, with a Republican majority this regulation was abolished again.

161 Bhattacharjee, Ken and Toby Mendel. "Local Content Rules in Broadcasting" *Article19*. March 2001.

162 The Economic Freedom Network. "Canadian Content Regulations." October 20, 1999. Last accessed July 11, 2013. ► http://oldfraser.lexi.net/publications/forum/1998/august/canadian.html.

During the 2016 election, the Democratic candidate, Hillary Clinton, was heavily favored and supported by the content and applications providing industries. In contrast, the Republican candidate, Donald Trump, called net neutrality a "top-down power grab," using it as a prime example when he promised to "reform the entire regulatory code." After he got elected, he appointed as the new FCC chairman Ajit Pai, a foe of net neutrality.

The net neutrality issue was described as a lobbying bonanza. Lawmakers and activist groups on both sides focused on the issue to raise cash and mobilize support.[164]

Congressional action came from the left, with bills directing the FCC to establish/adopt regulations to prohibit ISPs from offering "paid prioritization," as well as from the right, with bills to prohibit the FCC from regulating broadband ISP service as a telecommunications service.

In the 2014 election cycle, 373 House members (out of 435 total) and 45 senators (out of 100) were recipients of campaign donations from either the Comcast corporate PAC or employees of Comcast. Comcast donors gave a total of $2.9 million to congressional candidates.[165] Comcast was the eighth biggest spender on federal lobbying in 2014.

On the other side was Google, whose PAC and employees gave about $1.6 million to Congressional candidates in 2014, favoring Democrats over Republicans. Google donors gave to 249 members of the House (average donation $3967) and 64 members of the Senate ($6692). Google was also the pro-net neutrality organization that spent the most on lobbying—$16.8 million in 2014—and was the ninth-biggest spender on federal lobbying of any organization.

In parallel to their non-market actions the rival parties generated business responses to the regulations by trying to bypass the internet and its regulations. Several large ISP companies (AT&T and Verizon) instituted "Zero-Rating," which means not counting certain content against their data quota the consumer gets or part of a general subscription. AT&T does not count video content from DirecTV, which AT&T owns, against its data caps for mobile subscribers. But the company charges other content producers that compete with DirecTV. Under President Obama, the FCC had warned that these practices might obstruct fair competition and harm consumers by preventing them from accessing video content from other content providers.[166]

All of these approaches must pass muster with regulatory agencies. The resolution of these issues in a dynamic environment will occupy regulators and stakeholders for a long time.

8.5.2.8 Spectrum Allocation

Spectrum has become increasingly important to media and communications firms, and increasingly expensive. Its allocation is a battleground and the decision-makers are in government, not the market. Underlying just about any mobile and handheld distribution and communications is the use of the electromagnetic frequency spectrum. Because one signal using a particular frequency interferes with another signal on the same frequency, some forms of traffic management have been necessary from the early days of radio and until today. This means that certain frequencies and frequency bands are allocated to particular uses and users.

The five basic systems for spectrum allocation are:

1. Administrative decisions based on the merit of applications as well as politics (e.g. broadcast TV);
2. Auctions, with the highest bidders winning the licenses (e.g. mobile telecom);
3. Occupancy (first-come, first served) (Example: private TV in Italy);
4. Free access (Example: WiFi);
5. Free access but with user fees.

Emerging are several new tools for unlicensed access in which there is no exclusive control by an entity over a frequency, but a shared and open use coupled with a user fee payment.[167]

8.5.2.9 Privacy Regulation

Privacy often has two meanings: the right to be left alone (protected against intrusion) and the ability to control information about oneself.[168] There is often a tradeoff between privacy and other values, such as:

- Law enforcement;
- Freedom of the press;
- The public's "right to know";
- Free flow of information;
- Economic efficiency;
- Managerial decision-making.

In Europe, privacy rules are set by specialized data protection agencies that set regulations across the entire economy ("omnibus" laws) in advance of violations. Individuals,

163 Reding, Viviane. "Television without frontiers: amending the directive." *Intermedia* 29, no. 4 (September 2001): 4–9.

164 Romm, Tony. "Net Neutrality: A Lobbying Bonanza" *Politico.* February 23, 2015. Last accessed June 17, 2017. ► http://www.politico.com/story/2015/02/net-neutrality-a-lobbying-bonanza-115,385.

165 Choma, Russ. "Net Neutrality Fast Facts," *OpenSecrets.org.* February 26, 2015. Last accessed June 17, 2017. ► http://www.opensecrets.org/news/2015/02/net-neutrality-fast-facts/.

166 Another business response was to try to bypass the Internet through "Specialized services" or "managed services" that were not subject to net neutrality rules. Cable and phone companies can offer certain special services such as digital phone and video-on-demand that run on a dedicated part of the cable pipe and is separate from the portion reserved for public Internet access. They can offer these managed services to media content companies. ISP companies such as Comcast and Verizon were thus seeking deals with content providers about having their online TV services treated as part of a package of "managed" or "specialized" services.

167 Noam, Eli. "Spectrum Auctions: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism. Taking the Next Step to Open Spectrum Access." *The Journal of Law and Economics* 41, no. S2 (October 1998): 765–790.

168 Noam, Eli. "Privacy in Telecommunications: Markets, Rights, and Regulations." Cleveland, OH: United Church of Christ, 1994.

known as "data subjects," are granted, in particular, the following rights:

1. Right to information: to know where information about them came from and what it is used for;
2. Right of access: to see the data;
3. Right of rectification;
4. Right to opt out and delete the data if it is objectionable.

The data subject can thus know whether data related to her is being processed, the purpose of processing, the categories of data, and the recipients to whom data is disclosed.

The US has a more ad hoc type of data privacy regulation, including rules for information financial records, medical records, video rentals and use, telemarketing and cable TV usage, and cable. The US Constitution does not expressly grant a right to privacy, but the Supreme Court has interpreted several sections of the Constitution to protect different aspects of individual privacy.

In Europe, Article 25 of the EU Privacy Directive states that transfers of personal data to another country are permitted only if the third country ensures an "adequate" level of protection. This has created ongoing transatlantic disputes over privacy rules and practices. To resolve them, the US and EU agreed on "safe harbor" principles. If a US organization joined a self-regulatory program such as TRUSTe or BBBOnline, it qualified for Safe Harbor status. But in 2015 the EU court struck down Safe Harbor as being insufficient for privacy protection in the EU. A few months later the US and EU announced a new Privacy Shield Framework which would comply with EU data privacy regulations and replace Safe Harbor. Similar to Safe Harbor, companies that wish to participate in the Privacy Shield must self-certify specific actions they commit to take.[169]

In 2018, the EU implemented a strict Europe-wide "General Data Protection Regulation" which requires compliance by every company doing business in Europe.

8.5.2.10 Looking Ahead

The future role of government in the media, IT, and communications sector is shaped by two contradictory trends. The first is technological, the second socio-political. The rapid advance in technology creates problems for government regulation to keep up. The power of semiconductors has doubled every one to two years. This rate of progress became known as Moore's Law, and has shown remarkable resiliency.[170] However, no business or government institution can change at 40% a year. The question is: can the regulatory and legal system keep up with rate of technological and business change? This leads to pressures for government to withdraw from fast moving and dynamic sectors, a trend that is often described as "deregulation." It was expected that the advances in technology would lead to openness and competition, and cause legacy regulation to shrink and eventually disappear. However, this is not the case, and government regulation has remained prominent, and in some cases even increased.

The counter-force has been the push-back by segments of society based on direct negative impacts.

Wherever we look today around the information society and economy, protests and protesters are emerging. Elements of this emerging activism are:

- Net neutrality advocates;
- the "open source" movement to limit copyrights;
- privacy champions;
- proponents of unlicensed spectrum;
- municipal and free Wi-Fi initiatives;
- media reformers opposing media concentration;
- supporters of network upgrades and of affordable services;
- Advocates for a state-owned basic infrastructure.

Why such discontent? Isn't everything in this field becoming cheaper, faster, and more widely available? Many people are familiar with various flash points but have not connected the dots; they do not recognize that they are facing an incipient social movement on the model of environmentalism. Of course, it would be surprising if a technological revolution or an economic transformation did *not* lead to unrest.

Many advocates look at media issues with a basic syllogism:

1. Important aspects of social and political life have deteriorated—political apathy, violence, consumerism, gender and racial stereotyping, neglect of the world's poor, poor nutritional habits, and so on.
2. Information media play a central role in either creating or exacerbating these problems, or in preventing their alleviation.
3. Therefore, reforms of the information sector bring about social reform.

This syllogism is shared by the anti-authoritarian left and the political right, as well with traditionalists who are deeply suspicious of information medias' role in modernism and hedonism.

During the industrial revolution, when technology advanced at a very rapid pace while social institutions were relatively stagnant, the results were upheavals and revolutions. Now there is another economic upheaval upon us, the information revolution. As with any change, there will always be winners and losers:

169 Companies must do more than previously, including saying how to contact the groups to whom data is given, giving individuals the right to access their personal data, and what choices the individual has to limit the use and disclosure of the data, as well as the means by which this can be done. International Trade Administration. "Policy Shield Framework: 1. Notice." Last accessed June 17, 2017. ► https://www.privacyshield.gov/article?id=1-NOTICE.

170 Noam, Eli. "Moore's Law at risk from industry of delay." *Financial Times.* January 19. 2006. Last accessed December 4, 2012. ► http://www.ft.com/intl/cms/s/2/c22f7fa4-891b-11da-94a6-0000779e2340.html.

- losing industries and companies, such as the music sector, travel agencies, or print publishers;
- losing workers, whose jobs are being outsourced or offshored.

It is therefore almost inevitable that the media and communications sector will become a battlefield. Companies must be prepared for these conflicts.

8.5.2.11 The Future of Video Regulation

How would consumers use the emerging extraordinarily powerful broadband platforms? For residential households, the answer to this question is video entertainment, broadly defined. First, there will be a widening of content options, to even greater diversity. And second, there will be a deepening of content, an increasing richness of content in terms of the bit rate of information supplied per time unit to human sensory receptors. In either case, media content increasingly flows over what used to be described as telecommunications and cable TV networks. This raises the question about the regulatory treatment of such media operations.

The deepening of the entertainment medium will affect the nature of television considerably. Entertainment service offerings will include content that is immersive, interactive, 3D, more realistic, and more individualized. This leads to a whole set of issues and conflicts.[171]

Governments always maintain some regulatory control over electronic media to protect a variety of societal goals. Whether such controls are justified is less important than the fact that they will not disappear just because the platforms change. Many believe that one cannot regulate the internet, even if one wanted to. But it is only difficult for regulators to establish controls over the content part of communication. If they cannot reach the bits themselves and their source, they can still go after the physical elements of delivery: networks and infrastructure platforms cannot hide, and a two-way medium cannot easily operate across borders without permission.

Inevitably, internet-based TV will be used for controversial applications and content. Beyond stopping such uses, additional societal media policy goals will enter. It is a long list, and includes, in no particular order, child protection, content diversity and openness, ownership diversity, political balance, privacy, morality, spam, trade, national culture, consumer protection, IP protection, revenue generation, coverage across geography, and income, cyber-security, transparency, and employment. Some of these problems can be dealt with by commercial content providers. But much content is supplied by users themselves, in one of the more interesting aspects of internet TV. And some such users inevitably generate disruptive and anti-social content. Because most of the originators of the content cannot be easily reached directly by a national government, it is likely that blocking prior to content delivery to citizens will become a responsibility of the physical network and platform operators, who will be subject to regulations along these lines. Networks will therefore operate as a kind of national cordon sanitaire.

On the distribution side, the emerging online media system means more powerful pipes. These fiber pipes exhibit very strong economies of scale. This makes it difficult to compete against large incumbents. There are also increases in boom and bust characteristics of the sector.

Another issue is the content industry itself. There is a great expectation of a wide open and diverse media system, yet to produce such content is expensive. It requires creativity, many programmers, and new versions every two or three years to keep people buying. Such expensive content exhibits strong economies of scale on the content production side and network externalities on the demand side. These trends toward market power for networks, platforms, and content makes it unlikely that society will leave video media alone.

Additionally, the infrastructure providers also become, in effect, the tax collector by garnering the source of revenues for societal goals such as program production and spreading connectivity. It is an efficient tax collection device that is hard to avoid or evade. Infrastructure providers can also be reached to offer "in-kind" services, especially to achieve diversity and pluralism. They may allocate transmission for nationally favored purposes, such as public access or disadvantaged social groups.

As a result, regulation of the next-generation internet TV services will proceed through the network and platform core as opposed to through regulation of the content and applications providers. Accordingly, it is apparent that the regulation of communications will continue to exist as a means for the government to establish some control over mechanisms in the electronic environment, and as a way for rival firms and industries to gain advantages through non-market competition.[172]

171 Noam, Eli. "The Third Stage of Video: Cloud TV" forthcoming monograph.

172 As discussed, the notion that you can't regulate the internet is incorrect. On the contrary, one can regulate packetized information and its conveyance much more effectively than undifferentiated waves and bits. Moreover, on the internet, information is identifiable by the sender and recipient, and therefore it is targetable and able to be regulated.

8.6 Outlook

8.6.1 Case Discussion

Comcast's Non-market Competition Spending

A "back of the envelope" estimate of the annual cost for Comcast of regulatory and policy-oriented activities:

- outside lawyers $15 million;[173]
- inside lawyers. $12 million;
  - staff: $9 million;[174]
  - General counsel: $3 million;[175]
- outside lobbyists: $11.5 million;[176]
- inside lobbyists $10 million;
- outside PR $25 million;
- inside communications $10 million;
- political contributions through trade associations etc. $6.25 million;[177]
- political contributions by managers: $20 million;
- strategic philanthropy $20 million;[178]
- **Total $130 million**.

Comcast's annual revenues are about $85 billion. As the numbers above show, the company spends annually an estimated $130 million on non-market competitive activities. Is this money well spent? It is 0.15 of 1% of its revenues. If a doubling of such non-market activities budget would raise revenues by a mere 1%, or prevent it from dropping by that amount, the ROI on that spending would be a huge 654%. Given such high return, in a competition an expansion of the non-market budget is likely over time. But the same is also true for its rivals.

8

8.6.2 Conclusion

For a time, many people thought that the pervasiveness of law and regulation in the media and communications sector was transitory, induced by temporary bottlenecks or by government itself. Technology, entrepreneurship, and competition would make governmental interventions obsolete. But now, there is a greater recognition that in this sector a role of government has much resiliency, especially where there is only partial competition. Market power is increasing owing to the fundamental economics of electronic media. New problems have emerged, such as privacy. More generally, we have experienced in recent years that as an economy becomes more information sector based, it also becomes more volatile, with a boom and bust cycle, higher risk, and greater inequality. In consequence, the role of government in public interventions remains large and is likely to grow. In the process, various stakeholder groups are steering regulatory intervention in directions that favor themselves.

As we have seen with the example of Comcast in the case discussion, the return on investment in non-market competition is high. If so, will companies spend still more money on this function? The answer is yes. What then are the implications for the policy process in the long run? Spending by companies on strategic litigation, the policy process, politics, and PR will inevitably rise. Budgets and efforts will spiral upwards to greater activities by all, including by non-profit organizations.

This growing injection of money into the governmental process will have negative effect on politics and on society. (As it happens, however, many media companies will be beneficiaries in a narrow sense. The need and efforts of every constituency and product marketer to generate attention and influence means that they will have to spend more money on advertising to reach consumers, the public, and policy-makers. And such spending will benefit media companies as the platforms for marketing efforts.)

Therefore, it is most likely that the legal and regulatory function of media firms will keep growing. Managing non-market competition will become an even more important part of the managerial toolkit.

8.7 Review Materials

Issues Covered

In this chapter, we have covered the following issues:

- Why the government and law play a major role in media.
- What the function of the GC is.
- How to use litigation as a business strategy.

173 Hourly fee in large cities estimated at $600/h (compare Lemoine, Gano. "How Much Does an Entertainment Lawyer Cost?" *Lemoine Law Firm.* March 9, 2010. Last accessed June 17, 2017. ► http://lemoinefirm.com/how-much-does-an-entertainment-lawyer-cost/); est. 100 outside counsel cases in 2015 (Law360. "Comcast Corporation." Last accessed June 17, 2017. ► http://www.law360.com/companies/comcast-corporation/outside_counsel), est. 1 man month (=250 hrs) per case.

174 Est. average salary of 180 k/year (Glassdoor. "Senior Counsel Salaries." Last updated May 8, 2017. ► https://www.glassdoor.com/Salaries/senior-counsel-salary-SRCH_KO0,14.htm; Robert Half Legal. "2016 Salary Guide for the Legal Field." Last accessed June 17, 2017. ► https://www.roberthalf.com/sites/default/files/Media_Root/images/rhl-pdfs/robert_half_legal_2016_salary_guide.pdf) / headcount: 25 (LinkedIn estimate) + 100% additional salary for support staff (paralegals, secretaries).

175 Comcast and NBCU combined, estimated from Corporate Counsel. "The 2016 GC Compensation Survey: Top Industry Earners." July 20, 2016. Last accessed June 17, 2017. ► http://www.corpcounsel.com/home/id=1202763139481; and Corporate Counsel. "The GC Compensation Survey: First 100." July 19, 2016. Last accessed June 17, 2017. ► http://www.corpcounsel.com/home/id=1202763026404.

176 OpenSecrets. "Comcast Corp.: Annual Lobbying by Comcast Corp." Last accessed June 17, 2017. ► https://www.opensecrets.org/lobby/clientsum.php?id=D000000461&year=2015 (Comcast) + 25% (estimated) of NCTA lobbying (OpenSecrets. "National Cable & Telecommunications Assn.: Lobbying Totals, 1998–2016." Last accessed June 17, 2017. ► https://www.opensecrets.org/orgs/lobby.php?id=D000022131).

177 OpenSecrets. "Comcast Corp.: Profile for 2016 Election Cycle." Last accessed June 17, 2017. ► https://www.opensecrets.org/orgs/summary.php?id=D000000461 + 25% (estimated) of NCTA contributions (OpenSecrets. "National Cable & Telecommunications Assn.: Total Contributions." Last accessed June 17, 2017. ► https://www.opensecrets.org/orgs/totals.php?id=D000022131&cycle=2014.)

178 The Comcast Foundation. 2014 Form 990-PF. Last accessed June 17, 2017. ► http://corporate.comcast.com/images/2014-IRS-Form-990-PF.pdf.
NBCUniversal Foundation. 2014 Form 990-PF. Last accessed June 17, 2017. ► http://pdfs.citizenaudit.org/2015_08_PF/13-6096061_990PF_201412.pdf.

- How to organize lobbying, legal, and PR functions.
- How to use lobbying strategies as a tool.
- How to use PR management to create a positive image.
- How to determine how much to invest in PR.
- How industry self-regulation works.
- How government regulation is organized.
- What the procedure of administrative law is.
- How to use the regulatory process strategically.
- What the main content restrictions are.
- How to protect a business against libel lawsuits.
- What can and what cannot be claimed in advertising.
- How anti-trust laws apply to the media industry.
- What the goal of investment and pricing regulations are
- What elements of media activism are.
- How the future role of government in the media looks like.
- How to manage compliance.
- How firms leverage political spending.
- How to set price discrimination and what the legal constraints are.
- What governments do in pursuance of industrial policy.
- How regulated prices and profits are calculated.
- How the internet is being regulated.
- What the extent of media concentration is and what legal constraints are.
- How new entrants can use the rules of interconnection and unbundling.
- How the electromagnetic spectrum is being licensed.
- Where the debate over net neutrality stands.
- How online TV is likely to be regulated.

Tools Covered

We used these tools to address the above issues:

- Determining optimal investment in:
  - PR and public affairs;
  - Lobbying;
  - Litigation.
- Decision trees to determine lawsuit strategy.
- Calculation of financial settlements.
- Quantifying the value of lobbying.
- Metrics to measure PR effectiveness.
- Rate of return analysis.
- Marginal net analysis.
- Strategic setting of standards.

8.7.1 Questions for Discussion

1. Explain the advantages and disadvantages of using outside legal counsel to media firms. What steps can be taken to ensure cost savings when outsourcing legal functions?
2. Discuss some qualities of effective PR professionals. How does a PR campaign figure in the non-market strategy of a firm?
3. How do lobbyists add value to a firm's operations? What factors need to be considered when investing in a lobbying operation? What skills do effective lobbyists need?
4. How can a company assure the compliance by its employees of government regulations?
5. When is industry self-regulation a viable strategy? Discuss the strengths and weaknesses of self-regulation.
6. Discuss a regulatory approach to deal with deceptive advertising. How would a firm proceed to stop unfair competitive practices by a rival?
7. Are technical standards always in the interest of the firm? Discuss various ways in which standards are established.
8. How does a firm determine the optimal investment in non-market strategy?
9. What are the fundamental differences between European and US approaches to libel? Describe examples.
10. How should broadcasters and online websites deal with sexually explicit images during broadcasts in web postings?

8.7.2 Quiz

1. Which of the following is *not* an argument advanced by proponents of "net neutrality"?
   A. Price discrimination will stymie innovation in internet services;
   B. Uniform pricing is optimal for infrastructure owners;
   C. The internet is a "commons";
   D. The infrastructure owner should not control content.
2. What is the fundamental conflict of interconnection pricing?
   A. High prices needed to maintain infrastructure; low prices needed to spur consumer electronics sector;
   B. High prices needed to support competition; low prices needed to support universal service;
   C. High prices needed to support universal service; low prices needed to support competition;
   D. High prices needed to spur consumer electronics sector; low prices needed to maintain infrastructure.

3. Paying political consultants to generate the appearance of a spontaneous public reaction in favor of the firm is an example of:
   A. An astroturf campaign;
   B. A grassroots PR operation;
   C. Strategic lobbying;
   D. None of the above.

4. When are employees liable during a criminal prosecution involving a firm?
   A. At any time, they are employed;
   B. When they act in their own interest;
   C. When a criminal act takes place under directives from supervisors;
   D. When acting within the scope of the employment and for the corporation's benefit.

5. What is not a required component of a corporate compliance program?
   A. A compliance code;
   B. Employee training programs;
   C. Independent board of program review;
   D. Enforcement and disciplinary actions.

6. What is not considered legitimate grounds for appeals of administrative law?
   A. Bad policy;
   B. Exceeding jurisdiction;
   C. Lack of due process;
   D. Constitutional violation.

7. What kinds of monopolies are subject to legal challenge?
   A. Ones obtained through acquisitions;
   B. Monopolies created through exclusivity agreements;
   C. Predatory pricing;
   D. All the above.

8. In price cap regulation
   A. Prices are directly linked to profits;
   B. Prices are determined by a formula;
   C. Prices are set similar to market prices;
   D. None of the above.

9. Which is not a main function of legislative lobbying?
   A. Collection of unpublished intelligence;
   B. Communication of interest group's positions with the intention of (re)shaping public policy;
   C. Testify on behalf of the bill at legislative hearings;
   D. Contact consumers to obtain popular opinion.

10. Which is not a component of PR?
    A. Purchase of time and space to relay company's message;
    B. Professional communications;
    C. Establishing and maintaining a good company "name";
    D. Publicity.

11. What was the court ruling in the 1964 *NY Times vs. Sullivan* case?
    A. Recovery for defamation charges by third parties cannot be honored by a court of law;
    B. First Amendment prevents recovery by a public figure for defamation unless statement was false, or a reckless disregard for truth;
    C. IP rights must be reviewed by newspaper staff prior to publication of third party items;
    D. Public personalities cannot claim damages from intentional defamation.

12. Which of the following is a true statement concerning international copyright law?
    A. It is territorially applied;
    B. Copyrights are not heritable;
    C. It uniformly expires after 14 years;
    D. Both A and B.

13. Which is not a part of the legal function in businesses?
    A. Contracts;
    B. Compliance;
    C. Market strategy;
    D. Tort liability.

14. Which of the following are considered problems with self-regulation?
    1. Threat of government regulation is necessary for effectiveness
    2. Industry codes often lead to cartel behavior
    3. Firms chronically flout self-imposed rules
       A. Only 1;
       B. Only 2;
       C. 1 & 2;
       D. 1, 2, and 3.

15. Rate-of-return regulation ensures:
    A. Contractors give companies their projected returns;
    B. Prices are controlled by a simple formula;
    C. Profit of monopoly on invested capital to be "reasonable" in comparison to similar reasonable risky investments;
    D. No incentives to over-invest or be wasteful exist.

16. What is a Click-wrap agreement?
    A. Agreement between two parties determining the location of banking transactions;
    B. Forum selection clauses that define the geographic jurisdiction and the law to be applied should litigation arise;
    C. Contract clause that determines the binding principles of the contract if one party is representing a minor;
    D. None of the above.

17. What are typical tasks that outside lawyers are hired for?
    A. Antitrust battles;
    B. Office agreements;
    C. Bill collection;
    D. All of the above.

18. Why is it important for companies to have an internally defined settlement range for different litigation stages within their litigation management?
    A. Because 90% of cases never make it to court and are settled beforehand;
    B. It helps control the costs for external lawyers working on the case;
    C. It helps winning the cases;
    D. It provides a basis for estimating internal staffing.

19. Which of the statements below is correct about publicity and PR?
    A. PR is short-term and publicity long-term;
    B. PR is long-term and publicity short-term;
    C. Publicity aims to form a public opinion;
    D. PR effectiveness is measured via total money spent on online marketing.

20. Codes of conduct developed by companies as part of self-regulating mechanisms,
    A. Can be used as a basis to enforce sanctions against violators;
    B. Usually includes also parties outside of the companies' own interests;
    C. May be pushed on industries as compromises by a government, when they do not have legal rights to do so directly;
    D. Rarely lead to cartel behavior and price collaboration.

21. When is a publication liable for damages when reporting false information about a public figure in the United States?
    A. When it acted with minor regard to accuracy;
    B. When it acted with negligence in publishing;
    C. When it acted not only with negligence in publishing but also pursued malicious intent;
    D. When the statement was incorrect and not made responsibly.

22. Which of the following is a possible activity by content platforms to control user-generated content?
    A. Algorithms detecting identifying unsuitable content;
    B. User-generated reporting of content;
    C. Executive decision to remove content;
    D. Content control teams within content platform companies;
    E. All of the above.

23. What is the difference between market and non-market competition?
    A. Non-market competition refers to strategies focused on strengthening presence in foreign markets while market competition refers to strategies focused on competing for customers within a market;
    B. Market competition is a rivalry for customers whereas non-market competition is a rivalry not for customers but for favorable treatment by governments, courts, and the policy process;
    C. Non-market competition refers to competition that is not directly associated to revenue generation whereas market competition does so;
    D. Market competition usually leads to price reduction, innovation and quality improvements whereas non-market competition refers to the opposite, often caused by a monopolistic market situation.

24. Which component is not always necessary for the creation of a contract enforceable by law?
    A. The emergence of digital activism;
    B. Traditional firms are being disrupted and, thus are increasingly under pressure and imperil employment numbers;
    C. Governments have been an obstacle to the digital economy from the beginning;
    D. Ever since the emergence of the Internet, its community increasingly demanded regulatory actions, such as net neutrality protections.

25. What are practices to quantify how much a firm should spend on PR?
    A. Doing an analysis comparing the overall cost relative to the estimated overall value of expected results;
    B. As long as the extra PR benefits are larger than the extra cost;
    C. Estimate the spending's of competitors and match them;
    D. Match last year's expenditure, and add if needed;
    E. All of the above.

Quiz Answers

1. B
2. C
3. A
4. D
5. C
6. A
7. D
8. B
9. D
10. A
11. B
12. A
13. C
14. C
15. C
16. B
17. D
18. A
19. B
20. C
21. C
22. E
23. B
24. C
25. E