



Managing Law and Regulation

8.1 Introduction: Non-Market Competition – 202

8.1.1 Case Discussion – 202

8.1.2 The Relationship of Government and Media – 203

8.2 The Legal and Public Affairs Functions in Media Firms – 205

8.2.1 General Counsel: Head of Legal Department – 205

8.2.2 Outside Counsel – 205

8.2.3 Litigation Management – 206

8.3 Influencing Government and the Public – 209

8.3.1 Lobbying – 209

8.3.2 Public Relations Management – 212

8.4 The Regulatory Process – 215

8.4.1 Self-Regulation – 215

8.4.2 Direct Government Regulation – 215

8.5 Substantive Media Law – 218

8.5.1 Content Restrictions – 218

8.5.2 Antitrust and Anti-monopoly Law – 220

8.6 Outlook – 223

8.6.1 Case Discussion – 223

8.6.2 Looking Ahead – 223

8.7 Review Materials – 225

8.7.1 Questions for Discussion – 225

8.7.2 Quiz – 226

Quiz Answers – 229

8.1 Introduction: 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 not only in the marketplace, but also in a “non-market” sphere. Competition in a market encourages companies to lower prices, to create innovative products and to improve quality. In contrast, non-market competition is a rivalry not for customers but, rather, for favorable treatment by governments, courts, standards committees, industry associations, and various stakeholder 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 the opportunity of firms, 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 wish list for the US government (and similarly in other countries) to protect, subsidize and exempt their activities and companies.³

8.1.1 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 NBCUniversal, one of the major producers and distributors of TV and film programs (Universal), and an operator of multiple broadcast and cable channels (NBC). Comcast has also moved into the voice telecom

(VoIP) and broadband Internet service (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 Internet service providers, of which Comcast is the largest in the USA. But Google

has also aggressively entered the infrastructure and ISP market itself, by building a local fiber-to-home market, first in Kansas City and then in several other cities. On these networks, it offers broadband at 1 gigabit/sec, as well as video channels and phone service.

Google and Comcast compete in both the market and non-market spheres. Google must get licenses from the Federal Communications Commission (FCC) and local or state franchise permits in order to offer video and telecom service, and conform to their regulations and

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.

8.1 · Introduction: Non-Market Competition

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, seeks protection from 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, the protection of intellectual property and weak antitrust enforcement.

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

- 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;
- Unrestricted access to ISPs ("net neutrality");
- 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;
- Restrictions on the ability to control its ISP network operations ("net neutrality").

Comcast and Google must decide how much to "invest" in their regulatory activities, how to measuring their "productivity", and 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? How should they "produce" positive outcomes?

8.1.2 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. 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 nineteenth 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 information technology:

- Frequency allocation, including for broadcasting and mobile devices;
- Price regulation of phone and cable companies;
- Granting and protecting of patents and copyrights;
- Anti-monopoly and ownership controls;
- Funding and supporting technical innovations;
- Creating and enforcing obscenity and privacy laws;
- Establishing network interconnection and connectivity rules;
- Censorship of certain content such as hate speech;

- Creation of 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 also played an important role in the creation of many technology innovations. They 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?

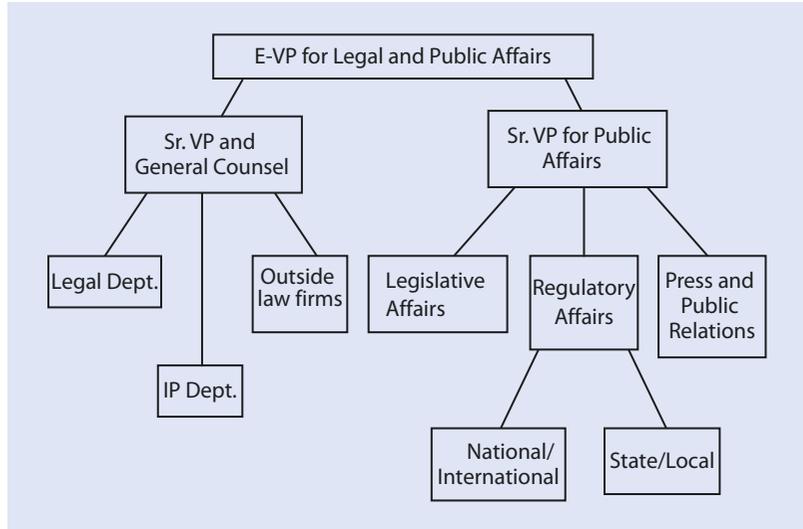
Media are important, essential, influential and, often, controversial. They affect culture, politics, commerce and technology. They also exhibit certain fundamental economic characteristics that may result in a media system with societal shortcomings in terms of ownership concentration and viewpoint 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 enjoys. 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, employment conditions and so on.

As noted, the nature of media is such that there is a high fixed cost for the 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.

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 out-migrating 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;

■ **Fig. 8.1** Organizational Chart of a Corporate Legal and Public Affairs Function



- Societal values such as child protection;
- Consumer protection in activities on the new platforms.

All 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 multi-faceted role of government, the legal and public affairs functions in media firms have become increasingly important and complex, and they require significant management responsibility. Startups are rarely able to afford the legal talent internally, even though they may have the greatest need for it in the early stages of their business life. For a large company, a typical organizational chart for this function may resemble that of ■ Fig. 8.1.

Public affairs departments manage regulatory affairs, legislative affairs, press relations and public relations (PR). The legal activities of a company deal with contracts, transactions, intellectual property, 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 actions, and defend against such actions by others.

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 external lawyers. In the past, it was not essential for the general counsel to have management skills as it was assumed that legal ability was more important. More recently, the internal law department may employ several hundred attorneys and staff, and general counsels must also act as managers. They must control the 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 about compliance with legal and regulatory requirements.

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 not only 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 external law firms are hired to deal with governments and legal systems of other countries.

It takes time and money to manage external 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 are the company's in-house attorneys.⁴ There are also cost disadvantages for going outside. External lawyers are often more expensive on an hourly basis.

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. It is typical for a company, media or otherwise, to use several different firms for its legal needs.

Outside counsel use several billing arrangements. They may use 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 use hourly rates. When lawyers manage several aspects of the client's career, they may take their fee as a percentage of a client's income subject to their management, typically 5%.

8.2.3 Litigation Management

How should a company determine how much to spend on legal expenses? First, we will address litigation. Statistically, the typical US company making \$1 billion plus in annual revenues faces 556 lawsuits per year, ranging from employment disputes to consumer injuries, copyright violations and contract performances. It spends more than \$12 million per year on litigation alone and a further \$19.8 million on settlement payments and adverse judgments.⁵ It also spends 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 decide actively how to set budgets for individual cases and whether to initiate, settle, or fight. It must require law firms (whether internal or external) 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 as it may constrain them, and 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,⁶ 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.

In order to determine its strategy, a company may arrange the various options and probabilities in a "decision tree,"⁷ 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. 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, for 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 factors. These estimates must be realistic, neither painting a rosy picture in order to entice a potential client, nor so gloomy as 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.

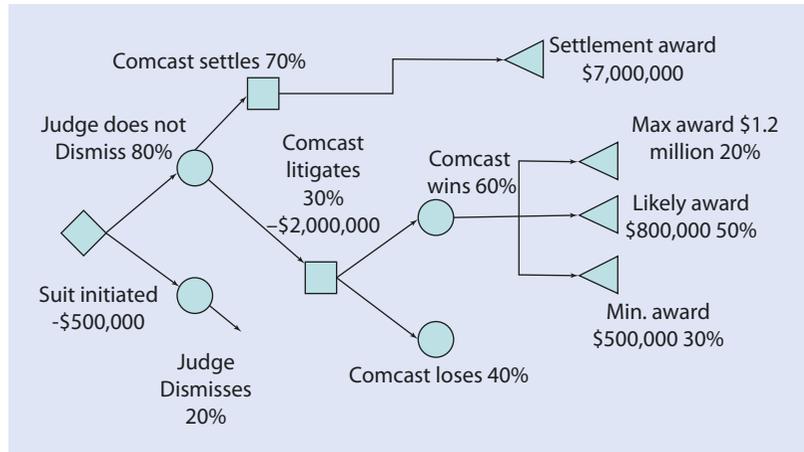
4 Sheldon, Michael. "Pros and Cons of In-House Counsel." *The Hartford*. Last accessed June 17, 2017. ► <https://www.thehartford.com/business-playbook/in-depth/in-house-counsel-pros-cons>

5 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/>

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

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

■ **Fig. 8.2** Decision Tree for Decision to Litigate



8.2.3.1 Case Discussion

Should Comcast Sue Google?

Suppose Comcast considers suing Google, accusing it of antitrust behavior in the advertising service market. How can Comcast estimate the expected value of the case? Comcast could create a decision tree outlining the costs and expected benefits from the suit and probabilities of outcome (■ Fig. 8.2).

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

whether it settles (a 70% likelihood) or fights back (30%). If the latter is the case, it will cost Comcast \$2 million, with four possible outcomes: a total loss (40% probability), or a win (60%), where there are three

$(-500,000) + (0.2)(0) + (0.8)[(0.7)(7,000,000) + (0.3)[-2,000,000 + 0.4(0)$

$+ (0.6)[(0.2)(12,000,000) + (0.5)(8,000,000) + (0.3)(5,000,000)]] = \$4,240,200$

Comcast should bring the case, as its expected value, after subtracting the cost of bringing the case, is \$4.24 million. However, if the probability of winning drops from

possible outcomes with equal probability: a high win, a more realistic win, or a minimal win.

Q: Should Comcast sue?

The expected value of the case for Comcast is:

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.

8.2.3.2 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 of 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.

8.2.3.3 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 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 (the 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 extra expected value for less than its 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 were 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 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.

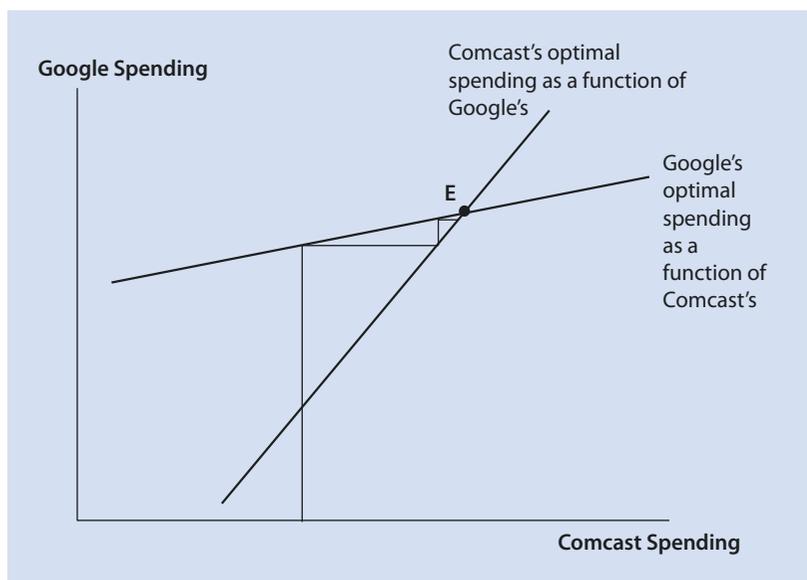
Comcast, too, will do the same calculation for Google's spending level, and thereby set its own "reaction function" of optimal spending.

Comcast and Google will raise each other's spending until some

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	$\Delta E(V)$
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

Fig. 8.3 Company Reaction Curve for Optimal Investment in Litigation



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, more

likely, both sides will then conduct a cost-benefit analysis for the spending and consider settlement parameters based on the decision calculus discussed above.

In conclusion: 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-specialists.

8.3 Influencing Government and the Public

We now move from private litigation law to public regulatory law and policy. A firm can deal with public policy in several ways. It can take it as given, or it can try to shape it. Robert Galvin, the head of the wireless technology firm Motorola for more than three decades, described his company’s strategy as “writing the rules of the game” to shape Motorola’s market environment.⁸ Here, “lobbying” is the major tool. Basic lobbying techniques include⁹:

- Direct lobbying of policy makers;
- Coalition-building;
- Generating grassroots lobbying;
- Political finance;
- Public communications and advocacy efforts;
- Impacting key government personnel appointments.

8.3.1 Lobbying

Trade associations and small firms often coordinate 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.

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. Effective lobbyists are politically sophisticated, experienced and persuasive. They must be able to network and to 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.¹⁰

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 the hour or day, with an upfront retainer payment for a basic service level.

Companies must consider how much to spend. For example, in 2014 the television, music and movie industries in the USA reported spending a total of \$115 million on lobbying.¹¹ 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.

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

9 Mack, Charles S. *Business, Politics, and the Practice of Government Relations*. Westport: Quorum Books, 1997.

10 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.

11 OpenSecrets. “TV/Movies/Music: Lobbying, 2016.” Last accessed June 17, 2017. ► <https://www.opensecrets.org/industries/lobbying.php?cycle=2016&ind=B02>.

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.¹² In 2013, Comcast had the seventh largest lobbying expenditure of a US company or organization, spending \$18.8 million.¹³ 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 from 2007 to 2012 for Obama's campaign and for the Democratic National Committee.¹⁴ The company greatly expanded through a series of mergers steered through government approval. 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 NBCUniversal Political Action Committee, which is among the largest political action committees (PACs) in the United States. It raised over \$3.7 million in 2011/12 for various candidates.¹⁵ Comcast is also a major backer of the National Cable & Telecommunications Association (NCTA) Political Action Committee, which raised \$2.6 million. The NCTA represents

Comcast and other cable companies, and in 2013 was the fifth largest lobbying organization in the United States, spending nearly \$20 million.¹⁶

While the majority of their 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 and state government.¹⁷ 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.¹⁸ By 2014, such restrictions on municipal broadband were passed in 20 states.¹⁹ At that point, the FCC intervened and pre-empted the states by permitting municipal broadband. That issue went to the courts, which overturned the FCC.

Comcast's external hired lobbyists and consultants included at least 12 firms in the US. Examples:²⁰

- Tony Podesta, former counsel to Senator Ted

Kennedy, and the brother and business 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 none of these activities is unlawful or unusual for a large corporation in the USA.

In the net neutrality debate, the greatest lobbying effort, in opposition to Comcast, 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 2014, it employed 98 lobbyists, including 79 former government officials and two former members of Congress.²¹

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

13 OpenSecrets. "Lobbying Top Spenders: 2013." Last accessed June 17, 2017. ► <https://www.opensecrets.org/lobby/top.php?showYear=2013&indexType=s>.

14 *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-exec-have-been-big-obama-supporters>.

15 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.

16 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>.

17 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/>.

18 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/>.

19 Brodtkin, Jon. "ISP lobby has already won limits on public broadband in 20 states." *Ars Technica*. 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/>.

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

21 Celniker, Jared and Russ Choma. "Net Neutrality." OpenSecrets. April 2015. Last accessed June 17, 2017. ► <https://www.opensecrets.org/>

8.3.1.2 Case Discussion

Comcast Local Lobbying—A Hypothetical Case

How to set an optimal lobbying budget? Suppose that a municipality considers providing a free municipal WiFi 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 the experience in other localities, Comcast estimates that one-third of its broadband customers would drop its service in favor of the free WiFi 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 one half of the revenue, the loss to Comcast would be total revenue times the profit margin, 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 WiFi proposal being adopted by another 20%. Therefore, Comcast may invest in lobbying efforts and spend money according to Table 8.2.

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).

Table 8.2 Illustration for Cost and Value of Lobbying

Total cost of lobbying (in millions)	Δ Cost of lobbying (in millions)	Probability of adoption (%)	Δ Probability of adoption (%)	Value of Δ probability (in millions)
\$0	\$0	100.00		
\$10	\$10	80.00	−20.00	\$12.80
\$20	\$10	64.00	−16.00	\$10.24
\$30	\$10	51.20	−12.80	\$8.20
\$40	\$10	40.96	−10.20	\$6.50
\$50	\$10	32.77	−8.20	\$5.20
\$60	\$10	26.22	−6.60	\$4.10
\$70	\$10	20.98	−5.20	\$3.30

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.²² The influence of PACs is somewhat constrained because the maximum gift a PAC 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. It is not

necessary to access specific policy makers directly to make an impact. Public pressure is a good tactic to use with politicians who are 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 size 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 this represents public opinion. The internet has created many new ways to generate such activities.

news/issues/net_neutrality/.

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

The campaign by the music industry against file-sharing by users is an example of deftly spinning an industry interest into a public interest.²³ 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 artists who are held in high regard.

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.²⁴ 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.

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 two years, a former employee may not lobby on matters which were pending under the employee's supervision in government service.²⁵ There is concern that a former government

employee may influence their old 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. It 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 the tax authority be restricted from undertaking tax work in the future after leaving government service?

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.²⁶ *Publicity*, a subset of PR activity, is 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.²⁷

In the nineteenth 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, "public relations" emerged with a more ambitious aim: to shape public opinion.²⁸ The elements of PR include press relations, product publicity, corporate communications, lobbying and counseling.²⁹ Relevant target audiences are employees of the firm, stockholders and investors, the media, civic and business organizations, governments and financial groups.

23 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.

24 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>.

25 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>.

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

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

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

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

8.3 · Influencing Government and the Public

One of the tools of effective PR is to understand public perceptions about companies, issues and trends. There are various techniques and tools with which to do so. They include longitudinal analysis of public opinion polls, interviews and surveys.³⁰ More recently, online communications enables new tools and software services that help in analyzing and identifying topics and trends.³¹ There are various indicators—such as the number of re-tweets, mentions, or likes.³²

In measurements to quantify the 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 measure 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, or broadcast³³ 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.

8.3.2.1 How Much PR Spending?

How would a company measure the effectiveness of its PR activities? They may count news clips, conduct surveys or monitor the Internet.³⁴ 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.³⁵ Or one can do a content analysis on what has been written and broadcast about the company. This consists of looking at the percentage of positive/negative articles by publication, reporter, subject, or target audience.³⁶ One can also measure a company’s exposure compared with rivals.

The oil company Shell developed a Content Engagement Index to quantify the effectiveness of its own individual posts on social networks such as Facebook, Twitter and so on. Moreover, it allows the improvement of messages to be tracked over time. Shell calculates the index as can be seen in the following formula:

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

30 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.

31 Examples are such as Trendsmap, Hashtags.org or Neo Reach, a Stanford startup 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>.

32 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.

33 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.

34 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.

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

36 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.

Measuring exposure is one step in determining success. The next point to consider is how much these efforts cost and how much the firm should spend. How would one answer that question, given the vagueness of inputs and outputs? There are several ways to proceed.³⁷

1. *Past Budgets*: Matching the budget of 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 guesswork. Also, 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 most needs help.
4. *Downside calculation*: How costly to the firm will inaction be? Such an estimate is difficult to do.
5. *Stage of lifecycle*: Startup 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 PR efforts.

8.3.2.2 Managing Unfavorable Publicity

The Internet provides great PR opportunities for spreading a company’s perspective and news, but it offers the same opportunities to rivals and critics.

It also allows for untrue statements³⁸ that criticize a company’s products, actions and leadership.³⁹

Companies often monitor the Internet for comments about them, using employees or specialized Internet monitoring firms.⁴⁰ In some cases, such people aim to provide positive comments without identifying them as paid for by the company. This can seriously backfire.

Also, 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 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 the subject of online criticism—whether true or false—may bring lawsuits against the websites that publish it. Their main objective is not primarily to fight the website but, rather, to force it, by means of a legal subpoena, to reveal the identity of the person who posted the comment. Many websites that receive such a subpoena give the 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.

Companies can use several methods to “crisis manage” unfavorable publicity. The key goal is not to allow rivals or critics to define the issue.⁴¹ A wise course is to confess, apologize, and present a plan on how to fix the problem.⁴² The company should offer refunds, write to critics privately and try to get the discussion out of the public space.

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

39 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.

40 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/>.

41 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/>.

42 Berman, Craig. “How Should Firms Respond to Negative Publicity?” *Chron*. Last accessed June 17, 2017. ► <http://smallbusiness.chron.com/should-firms-respond-negative-publicity-69199.html>.

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

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 main flavors: governmental regulation (by local, state, national and international agencies) and industry self-regulation.

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 matches for the problems. Also, it is less expensive for government because the industry is responsible for developing and enforcing its rules and punishments.⁴³

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 which screen programs and advertising to ensure that the material is in compliance with regulations, that the material is not offensive to audiences or other advertisers, and that “viewer discretion” warnings are provided where necessary.⁴⁴ The standards and practices department at the ABC TV network alone used to have 35 members of staff.⁴⁵ In addition to the review by the major TV networks, local TV stations that retail that content may also screen it because of content concerns in their community.⁴⁶ Furthermore, advertisers may have their own standards to meet for advertising to be acceptable.⁴⁷

The newspaper industry also self-regulates. Most newspapers have internal codes setting standards on the behavior of journalists, including standards on privacy, or breach of trust. Some newspapers have internal ombudsmen to provide aggrieved subjects of stories an avenue for complaint.

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.
- 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 mechanism has no powers to enforce sanctions against violators.⁴⁸

8.4.2 Direct Government Regulation

8.4.2.1 Role of Government Regulation

In the USA, vital infrastructure industries and media organizations have been privately owned but regulated. In contrast, most other countries followed an alternative model and 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.

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

44 Dessart, George. “Standards and Practices.” *The Encyclopedia of Television*. Last accessed July 23, 2012. ▶ <http://www.museum.tv/eotv/standardsand.htm>.

45 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>.

46 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>.

47 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>.

48 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/.

The alternative to direct governmental ownership is governmental regulation. Typically, a legislature passes broad laws, and then delegates the working out of the details, their implementation and their enforcement to a specialized regulatory agency. In the USA, the Federal Communications Commission (FCC) operates as an independent regulatory commission, i.e. it is not subject to direct control by the White House or Congress. However, the appointment and budget processes, Japan's together with other methods, provide tools for pressuring the agency.

Other regulatory agencies deal with other 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 Antitrust Division of the Department of Justice (DOJ), the US Patent and Trademark Office and the Registrar of Copyrights. 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 live TV as well as telecom, and more recently online media.⁴⁹

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. They may set rules on content (e.g. protection for children) and on required domestic content.

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 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,⁵⁰ and, in China, the Television Regulatory Agency, which is part of the State Administration of Radio, Film and Television (SARFT), which also owns the major TV networks (China Central Television, CCTV).

The Regulatory Process

The regulation by agencies proceeds through a codified set of rules—in the USA, this is the Administrative Procedure Act (APA). Other countries have similar codes that deal with the manner in which 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 main 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 *rulemaking* procedures include some of the following steps.

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

The next step is often a Notice of Proposed Rulemaking (NoPR), with further opportunity for public comments. The agency can seek information beyond that 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 staffs are free to do so. The vote on rules must be public, and final rules

49 Federal Communications Commission. “FCC Organizational Chart.” January 23, 2017. Last accessed May 17, 2017. ► <https://www.fcc.gov/sites/default/files/fccorg-01232017.pdf>.

50 Indian Television.com. “The Cable Television Networks Rules, 1994.” September 29, 1994. Last accessed August 1, 2012. ► <http://www.indiantelevision.com/indianbroadcast/legalreso/catvnetworkrules.htm>.

8.4 · The Regulatory Process

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 a precedent and affect other cases as well as parties’ behavior and expectations.) A case is often started by the filing of a complaint by the agency or another governmental body, or 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.

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 are 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 may then review the decision. If objections remain, the party must go to the outside courts system—in the USA, that would be a federal Court of Appeals—for judicial review.⁵¹

The agency decision can be reversed only on relatively narrow procedural grounds, not because they are 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 the Constitution.

In contrast, “bad policy” is no ground for appeal.

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 telecom. 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 combined firm and their loss of bargaining power. The competitors tried to block, or at least delay, the

merger’s approval. 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.

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 challenging the way an agency has made its decision, i.e. the process. Another way is to delay the decision’s implementation while they appeal the agency’s decision. 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 decision. In such a case, it is not even necessary that the court decide in favor of the plaintiffs because the court review of the case already causes a delay that benefitted them.

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, and the harm to the plaintiff or others by proceeding immediately.

It is much harder to accelerate decisions. The main way is to cooperate fully with an agency because anything else could result in a delayed decision. In cases of company-specific adjudication, the company may agree to conditions in a “settlement” (compromise deal) that also enables the agency publicly to 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 can show that they suffer a “legal wrong because of agency

⁵¹ A further appeal is possible, but the US Supreme Court rarely takes administrative appeals, and mostly only if two lower appellate courts have issued conflicting decisions, or where a major constitutional issue is at stake.

action” or are “adversely affected.” They can appeal the agency’s decision in court.

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 providing also 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 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.⁵² The 1964 case *NY Times v. 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 (a) correct, and (b) was 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 public officials, or of the agency they directed, included some inaccuracies and were therefore libelous.

In all cases, since it is crucial for a publication not to have been careless or lacking in verifying details, media managers must ensure that internal controls and safeguards are in place. Companies can also get insurance to cover claims for libel, slander, 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.

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? The US Congress passed a “Good Samaritan” provision in 1996 that limited the liability of Internet service providers for defamation.⁵³ There is no legal liability by websites that host information provided unless it can be proven that they had actual knowledge about it being defamatory or otherwise illegal. But this creates other problems. Content could be taken down on the mere say-so of any 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, have expanded in scope.⁵⁴ 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 may be legally acceptable but is

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

53 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>.

54 Strossen, Nadine. *Hate: Why we should resist it with Free Speech*, Not Censorship. Oxford, 2018.

controversial to some users is being taken down. The privately owned websites, in doing so, exercise their own right to free speech. They are, after all, not public utilities or common carriers that must be content-neutral. 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 the rules to other types of political expression.

Measures for media platforms to control user-generated content include:

- Users being given a feature/button next to every piece of content by which they can easily report inappropriate content.
- Major platforms such as YouTube having a team for content control (called flaggers) who check that submitted videos, pictures, keywords, or comment are appropriate and following the site’s guidelines. If they flag content, an administrator controls the content and deletes it if deemed by the company to be necessary. These flaggers (and administrators) 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.

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.⁵⁵ 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. Because there were a limited number of broadcasting licenses, government can apply conditions on what they do, to protect the public interest as it sees it.

In Europe, countries enforce their individual rules through agencies such as the UK Office of Communications (Ofcom). But the European Commission (EC) has 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.

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 been enacted in the USA and many other countries, and the standards are tougher than they are for print books. In the USA, such laws are periodically passed by Congress and usually struck down by the US Supreme Court as violating the First Amendment.

8.5.1.3 Government Restrictions of Publication

In the USA, there can be no “prior restraint,”⁵⁶ on publication, meaning the government cannot prevent the materials from being published, even where it is claimed to endanger national security. The exception is “intentional incitement to imminent violence or other great harm, with the 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.

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.

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

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

8.5.1.4 The Regulation of Advertising

Generally, advertising claims must be substantiated. Advertisers must have a reasonable basis for the claims of the adverts. In many countries, consumer protection agencies may stop advertisements that do not meet that standard and may levy fines on violators. Consumer protection agencies may require advertisers to affirmatively disclose certain types of information in their advertisements so that consumers are aware of all the consequences of the use of a product or service. This may include fuel mileage information in car adverts, or warnings about cigarettes.

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; they can simply create a false impression. A complaining party may be awarded monetary damage payments for the false advertising of a competitor, plus legal fees (and, in the USA, triple 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 adverts before distributing them to ensure that they are not deceptive, offensive, or illegal.

8.5.1.5 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 advert: "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 may have a legitimate expectation that the advert's claims are true. Possible concerns are:

- Is Comcast using the same metric for measuring its rival Google's services? Suppose that it offers "shared" service that slows down if other users are online, while Google's service is unshared and hence more dependable with regard to 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 a legal complaint of false advertising brought by Google, or by the government.

Suppose that Comcast instead advertises "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 lawsuit for false advertising.

8.5.2 Antitrust and Anti-monopoly Law

Economists tend to believe that the market structure of an 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. The main culprits are monopoly and its cousin, oligopoly. The basic US law on antitrust is the Sherman Act of 1890, which is a very general statement around which

courts 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, that company's 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 antitrust cases are brought much more often as governmental ones. 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 antitrust case. The software giant Microsoft was nearly split up but managed to escape.

European Union 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 also prohibits companies with dominant market positions from abusing their power.

In the USA, the antitrust 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 the division of markets by territory or customer categories. Price fixing is an agreement between competitors to raise, lower, or stabilize prices. However, sometimes true competitors behave in exactly the same way without any agreement, simply because it makes sense independently to match market prices, rather than otherwise lose business. 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.⁵⁷

8.5.2.1 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 could be electric distribution, a highway, or sewer systems. Or, it

could be simply 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 transportation—there may be a governmental intervention. This can take the form of governmental ownership, or of making 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 the telecom service, but also for some cable TV services. There are two main approaches: the direct regulation of prices, or 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 with similar risky investments and not as high as it would be for an unrestricted monopoly.

8.5.2.2 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 others, to the creation of the Internet. Other countries have a still more active government support system. An example is France. Although 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,⁵⁸ whether in electronics or media.⁵⁹ There have been success stories in media and IT, such as the telecom operator France Telecom (Orange), the pay-TV company Canal+ and the videogame company Ubisoft. On the other hand, Bull SA, a computer manufacturer and IT company, was picked as the key element for French government policy in the 1960s to establish a national computer industry. Despite major infusions of government money and other benefits, the company was a disaster.

57 Nagle, Thomas T., and Reed K. Holden. *The Strategy and Tactics of Pricing: A Guide to Profitable Decision Making*, 2nd ed. New York: Taylor & Francis, 1995.

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

59 Major examples: Communications satellites, the Minitel consumer computer network system, the SECAM color TV standard, France Telecom network infrastructure, Alcatel telecom equipment, Computer development projects.

8.5.2.3 Support for Domestic Cultural Production

Many countries have legislated programming quotas with regard to broadcasting. In the European Union, 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.⁶⁰ In Australia, a minimum of 260 hours of children's C programs and 130 hours of Australian pre-school P programs are required annually.⁶¹ In Malaysia, 80% of programs must be in the national language⁶² Malay rather than in Chinese, and in Canada 60% of programs must be "Canadian programs,"⁶³ which are defined as shows that have Canadian producers, funders, or creatives.

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 carry over into newer forms of media, as the French governmental support for the videogames industry illustrates. Thus, media companies have to navigate this policy area both as an opportunity and as a barrier.

8.5.2.4 Access Regulation

Recent years have witnessed major battles over the terms of access by providers of online content 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 in 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 compa-

nies over major instrumentalities such as search engines or social networks.

Internet firms and content providers fear restrictiveness by the pipes in favor of their own offerings as well as the exercise of monopoly pricing. ISPs fear being returned to the strictly regulated common carrier status of the past, with a supervision over prices and 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, this dispute led the FCC to the imposition of common carrier status on broadband services provided by ISPs. In 2017, with a Republican majority, this regulation was abolished again.

8.5.2.5 Privacy Regulation

Privacy often has two meanings: the right to be left alone (protected against intrusion), and the ability to control information about oneself.⁶⁴ 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, known as "data subjects," are granted rights, in particular the following:

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 subjects can thus obtain information what data related to them is being processed, the purpose of the 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 financial information,

60 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.savekids.tv.org.uk/wp-content/uploads/2011/05/SKTV-competitor-territory-research-post-final-updated-24.4.11.pdf>.

61 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/P4_11352_Convergence_Review_Discussion_Papers_Aus_Content_v4_FA_web.pdf.

62 Bhattacharjee, Ken, and Toby Mendel. "Local Content Rules in Broadcasting" *Article19*. March 2001. Last accessed July 11, 2013. ▶ <http://www.article19.org/data/files/pdfs/publications/local-content-rules.pdf>.

63 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>.

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

medical records, video rentals and use, telemarketing, and cable TV usage.

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 trans-Atlantic disputes over privacy rules and practices.

8.6 Outlook

8.6.1 Case Discussion

Comcast's Non-market Competition Expenses Conclusion

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

- Outside lawyers: \$15 million;⁶⁵
- Internal lawyers: \$12 million;
- Staff: \$9 million;⁶⁶
- General counsel \$3 million;⁶⁷
- External lobbyists: \$11.5 million⁶⁸
- Internal lobbyists: \$10 million;
- External PR: \$25 million;
- Inside communications: \$10 million;

- Political contributions through trade associations etc. \$6.25 million;⁶⁹
- Political contributions by managers: \$20 million;
- Strategic philanthropy \$20 million.⁷⁰

Comcast's annual revenues are about \$70 billion. As the numbers above show, the company spends, annually, an estimated \$110 million

on non-market competitive activities. Is this money well-spent? This figure is 0.16 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 636%. Given such high return competition, an expansion of the non-market budget is likely over time. But the same is also true for its rivals.

8.6.2 Looking Ahead

The future role of government in the media, IT and communication 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. As mentioned earlier, Gordon

Moore, the computer electronics pioneer, observed that the power of semiconductors doubled every one to two years. This rate of progress—about 40% per year—became known as “Moore's Law,” which has shown remarkable resiliency.⁷¹ However, no business or government institution can change at 40% per year. The question is whether the regulatory and legal system

65 Hourly fee in large cities estimated at \$600/hour (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 hours) per case.

66 Est. average salary of \$180,000/year (Glassdoor. “Senior Counsel Salaries.” Last updated May 8, 2017. ► https://www.glassdoor.com/Salaries/senior-counsel-salary-SRCH_KOO_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).

67 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>.

68 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>).

69 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>).

70 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.citizensaudit.org/2015_08_PF/13-6096061_990PF_201412.pdf.

71 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>.

can 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 the “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 is the push-back by segments of society based on direct negative impacts. Prior to the era of industry competition, digital infrastructure and the transition to IP, traditional network and media industries were highly regulated.

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

- The “open source” movement to limit copyrights;
- Privacy champions;
- Proponents of unlicensed spectrum;
- Net neutrality advocates;
- Municipal and free Wi-Fi promoters;
- Media reformers opposing media concentration;
- Supporters of network upgrades and of affordable services.

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 would *not* lead to unrest.

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:

- Losing industries and companies, such as the music sector, or travel agencies;
- Losing workers, whose jobs are being outsourced or off-shored.

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

Beyond regulation is also an increasing role of governments in the upgrade of infrastructure. It is generally recognized that advanced networks and network applications benefit society and economy. Therefore many countries proceed with activist and interventionist approaches for platforms.⁷²

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 due 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 become more information-sector based, it also becomes more volatile, with a boom-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 upward to greater activities by all, including by non-profit organizations.

This growing injection of money into the governmental process will have a negative effect on politics and on society. (As it happens, however, many media companies will also be beneficiaries

⁷² 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; therefore, it is targetable and able to be regulated.

8.7 · Review Materials

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, and managing non-market competition will become an ever more important part of the managerial toolkit.

8.7 Review Materials

Issues Covered

We have covered the following issues in this chapter:

- Why the government and law play a major role in media;
- The function of the general counsel;
- How to use litigation as a business strategy;
- 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;
- The procedure of administrative law;
- How to use the regulatory process strategically;
- The main content restrictions;
- How to protect a business against libel lawsuits;
- What can and what cannot be claimed in advertising;
- How antitrust laws apply to the media industry;
- The goal of investment and pricing regulations;
- The elements of media activism;
- The future role of government in the media.

Tools Covered

We used these tools to address those 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.

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 regulatory approaches to deal with deceptive advertising. How would a firm proceed to stop unfair competitive practices by a rival?

7. How does a firm determine the optimal investment in non-market strategy?
8. What are the fundamental differences between European and United States approach to privacy? Describe examples.
9. How should broadcasters and online websites deal with sexually explicit images during broadcasts and in web postings?
4. What is not considered legitimate grounds for appeal of a governmental regulation in a court?
5. What kinds of monopolies are subject to legal challenge?

- A. Bad policy.
B. Exceeding jurisdiction.
C. Lack of due process.
D. Constitutional violation.

- A. Ones obtained through acquisitions.
B. Monopolies created through exclusivity agreements.
C. Predatory pricing.
D. All of the above.

8.7.2 Quiz

1. What is the fundamental conflict of inter-connection pricing?
- A. High prices are needed to maintain infrastructure; low prices are needed to spur the consumer electronics sector.
B. High prices are needed to support competition; low prices are needed to support universal service.
C. High prices are needed to support universal service; low prices are needed to support competition.
D. High prices are needed to spur the consumer electronics sector; low prices are needed to maintain infrastructure.
2. 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.
3. 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 their employment and for the corporation's benefit.
6. Which is not a main element of legislative lobbying?
- A. Collection of unpublished intelligence.
B. Communication of interest group's positions with the intention of shaping public policy.
C. Testimony on behalf of the bill at legislative hearings.
D. Creating goodwill among potential consumers.
7. Which is not a component of public relations?
- A. Purchase of time and space to relay company's message.
B. Professional communications.
C. Establishing and maintaining a good company "name."
D. Publicity.
8. 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. The First Amendment of the US Constitution prevents a public figure to win in a lawsuit against the press for defamation unless the statement was false, with a reckless disregard for truth.

8.7 · Review Materials

- C. Intellectual property rights must be reviewed by newspaper staff prior to publication of third party items.
- D. Public personalities cannot claim damages from intentional defamation.
9. Which of the following is a true statement concerning international copyright law?
- It is territorially applied.
 - Copyrights are not heritable.
 - It uniformly expires after 14 years.
 - Both A and B.
10. Which is not a part of the legal function in businesses?
- Contracts.
 - Compliance.
 - Market strategy.
 - Tort liability.
11. Which of the following are considered problems with self-regulation:
- Threat of government regulation is necessary for effectiveness.
 - Industry codes often lead to cartel behavior.
 - Firms chronically flout self-imposed rules.
- Only I.
 - Only II.
 - I and II.
 - I, II, and III.
12. What are typical tasks that outside lawyers are hired for?
- Antitrust battles.
 - Office agreements.
 - Bill collection.
 - All of the above.
13. Why is it important for companies to have an internally defined settlement range for different litigation stages within their litigation management?
- Because 90% of cases never make it to court and are settled beforehand.
 - It helps control the costs for external lawyers working on the case.
 - It helps winning the cases.
 - It provides a basis for estimating internal staffing.
14. Which of the statements below is correct about publicity and PR?
- PR is short-term and publicity long-term.
 - PR is long-term and publicity short-term.
 - Publicity aims to form a public opinion.
 - PR effectiveness is measured via total money spent on online marketing.
15. Codes of conduct developed by companies as part of self-regulating mechanisms?
- Can be used as a basis to enforce sanctions against violators.
 - Usually includes also parties outside of the companies' own interests.
 - May be pushed on industries as compromises by a government, when they do not have legal rights to do so directly.
 - Rarely lead to cartel behavior and price collaboration.
16. When is a publication liable for damages when reporting false information about a public figure in the United States?
- When it acted with minor regard to accuracy.
 - When it acted with negligence in publishing.
 - When it acted not only with negligence in publishing but also pursued malicious intent.
 - When the statement was incorrect and not made responsibly.
17. Which of the following is a possible activity by content platforms to control user-generated content?
- Algorithms detecting identifying unsuitable content.
 - User-generated reporting of content.
 - Executive decision to remove content.
 - Content control teams within content platform companies.
 - All of the above.

18. 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.
19. What are not contributing factors to the increasing role of the government in the digital economy?
- 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.
20. 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. C
- ✓ 2. A
- ✓ 3. D
- ✓ 4. A
- ✓ 5. D
- ✓ 6. D
- ✓ 7. A
- ✓ 8. B
- ✓ 9. A
- ✓ 10. C
- ✓ 11. C
- ✓ 12. D
- ✓ 13. A
- ✓ 14. B
- ✓ 15. C
- ✓ 16. C
- ✓ 17. E
- ✓ 18. B
- ✓ 19. C
- ✓ 20. E