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What Goes Up Must Come Down: Grounding the Dizzying Height of Vertical Mergers in the Entertainment Industry

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NOTE

WHAT GOES UP MUST COME DOWN:
GROUNDING THE DIZZying Height
OF VERTICAL MERGERS IN THE
ENTERTAINMENT INDUSTRY

I. INTRODUCTION

Does current antitrust theory suggest that closer scrutiny should be
applied to impede the recent avalanche of vertical mergers in the
entertainment industry, or should the antitrust laws be hospitable to those
mergers in deference to the Chicago School?

Part I of this Note briefly sketches antitrust theory and enforcement
over the past twenty-five years. Additionally, Part I discusses the
Chicago School approach and contrasts it with the views in recent
articles that suggest that vertical integration may be anticompetitive.
Finally, Part I deals with two seminal cases in the vertical antitrust
merger controversy: Brown Shoe and Ford Motor.

Part II introduces the entertainment industry, where many of the
1995 vertical mergers have occurred, and explains some of the probable
short-run and long-run impacts of these mergers. Next, Part II poses an
animated example of the effects of such mergers, then discusses which
antitrust theory best serves the goals of antitrust law in the area of
vertical mergers. In conclusion, this Note suggests that despite the
various utilities offered from previous theories about vertical mergers in
other industries, the proper approach to vertical mergers in the entertain-
ment industry is to return to some of the fundamental principles of
Brown Shoe and Ford Motor, an approach necessitated by the unique
character of the inputs in the entertainment industry.
II. ANTITRUST LAW AND VERTICAL MERGERS

A. Vertical Mergers

A "vertical merger" occurs when companies merge to increase ownership of "preceding or succeeding productive processes" through vertical integration.¹ For example, if Chrysler, an automobile manufacturer, bought Goodyear, a producer of tires, that merger would be considered a vertical merger. Furthermore, vertical mergers can be defined more specifically as either "backward" or "forward."² A backward vertical merger exists when a customer acquires a supplier. Chrysler buying Goodyear is a backward vertical merger.³ Chrysler is ensuring that it has a supply of tires at marginal cost.⁴ A forward vertical merger exists when a supplier acquires a customer to ensure a buyer for its product.⁵ Goodyear buying Chrysler is an example of a forward vertical merger.

In contrast to vertical mergers, horizontal mergers occur when companies which produce the same end-product (and therefore compete in the same product market) merge.⁶ Such would be the case if two producers of cars such as Chrysler and Ford decided to merge. Moreover, mergers may have both horizontal and vertical aspects. This dual effect is more likely to occur with larger companies.

¹. JOE S. BAIN, INDUSTRIAL ORGANIZATION 177 (2d ed. 1968) (discussing the concept of vertical integration); cf. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 226-28 (1978) (stating that every company is vertically integrated to a degree and discussing the historical differences between vertical growth and vertical merger).
². For a good discussion of backward and forward integration, see F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 78 (2d ed. 1980).
⁴. Marginal cost simply measures the cost to a firm for the last unit of output. See SCHERER, supra note 2, at 13-14. In a perfectly competitive industry this would be equal to the price paid by the consumer for that unit of output. See id.
⁵. For cases involving forward vertical mergers, see Paschall v. Kansas City Star Co., 727 F.2d 692 (8th Cir. 1984); Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72 (3d Cir. 1977); Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962); and Crown Zellerbach Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961).
For a good discussion of backward and forward vertical integration, see SCHERER, supra note 2, at 78.
⁶. See BAIN, supra note 1, at 164-77.
B. Recent History of Vertical Mergers

Prior to the late 1970s there was comprehensive enforcement of restrictions on vertical mergers as exemplified by Brown Shoe Co. v. United States7 and Ford Motor Co. v. United States,8 and opponents of the government stood little chance of victory in the court system.9 Thereafter, in part as a response to these and other landmark cases, antitrust legal theory succumbed to, or at least was greatly influenced by, the powerful new economic theories of the time, often characterized under the rubric of the “Chicago School.”10 As a result, there was a significant rise in the number of mergers and acquisitions after the Chicago School approach was utilized by the courts.11 Over the past few years the number of vertical mergers in United States industries steadily increased, reaching an all-time high in 1995.12 The Chicago School theory’s basic conclusion is that the majority of vertical mergers are either pro-competitive or competitively neutral, and thus, because these types of mergers supposedly result in higher efficiencies,13 due in

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7. 370 U.S. 294 (1962). Brown Shoe was one of the first merger cases to appear before the Supreme Court after § 7 of the Clayton Act was amended in 1950. See id. at 311. The amendment made § 7 applicable to vertical and conglomerate mergers, as well as to mergers between actual competitors. See id. at 317.
8. 405 U.S. 562 (1972). Both Brown Shoe and Ford Motor are discussed in more detail later in this Note. See discussion infra part I.F.
10. See infra note 22 and accompanying text. It is worth noting here that one of the great myths about American antitrust policy is that courts first began to adopt an “economic approach” to antitrust problems in the relatively recent past—perhaps as recently as the late 1970s. At most, this “revolution” in antitrust policy represented a change in economic models. Since its inception, antitrust policy has been forged by economic ideology. Herbert Hovenkamp, The Sherman Act and the Classical Theory of Competition, 74 IOWA L. REV. 1019, 1019 (1989) (footnotes omitted).
11. See Appendix.
13. However, there are those who wonder at the reality of long-run efficiencies for mergers. See D. RAVERNSCRAFT & F.M. SCHERER, THE LONG-RUN PERFORMANCE OF MERGERS AND TAKEOVERS 17-18 (1986) (finding “little support for the hypothesis that the average merger or takeover yields significant improvements in efficiency and operating unit performance”).

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part to "synergy," generally they should go unchallenged by federal antitrust enforcement agencies. But recently antitrust theorists have begun to criticize the Chicago School approach because some analysts have used the approach as a blanket justification for validating all vertical mergers. This body of critique has become known as the post-Chicago approach. Generally speaking, the post-Chicago approach gives deference to the Chicago School approach and its economic basis, but offers more sophisticated and practical analyses, concluding that there are various reasons why governmental agencies such as the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and the Federal Communications Commission ("FCC") may be justified in challenging certain vertical mergers.

C. The Chicago School Approach

The decade following 1960 marked the modern height of antitrust enforcement against vertical mergers. This period, marked by the decisions in Brown Shoe and Ford Motor, resulted in an almost per se illegality of vertical mergers which even caused a small percentage of foreclosure in market share. In fact, a per se rule against certain vertical resale restrictions was announced in United States v. Arnold, Schwinn & Co. This disfavor of vertical activity was furthered by the skepticism of synergy in recent years, one important Supreme Court decision regarding the tax implications of a corporate merger, found synergy a real enough asset to consider it as a factor toward denying a corporation tax deductions for legal and consulting fees accompanying the merger, where synergy was claimed to be one of the goals of the merger. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 88 (1992). The Court held that synergy was real enough to be required to be treated as a long-term benefit that needed to be capitalized into the value of the corporation. See id. at 90.

Despite the skepticism of synergy in recent years, one important Supreme Court decision regarding the tax implications of a corporate merger, found synergy a real enough asset to consider it as a factor toward denying a corporation tax deductions for legal and consulting fees accompanying the merger, where synergy was claimed to be one of the goals of the merger. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 88 (1992). The Court held that synergy was real enough to be required to be treated as a long-term benefit that needed to be capitalized into the value of the corporation. See id. at 90.

14. However, "synergy" has been questioned generally in all industries and specifically in the entertainment industry. See Sallie Hofmeister, Better the 2nd Time Around?, L.A. TIMES, Sept. 26, 1995, at D1; Alice Rawsthorn, Search for a Happy Ending, FIN. TIMES (London), Dec. 30, 1995, at 6; Phillip L. Zweig, The Case Against Mergers, BUS. WK., Oct. 30, 1995, at 122. In addition, other large companies such as AT&T have begun to retreat from the notion that greater efficiencies can be gained through "synergy." See Steve Lohr, Going Against the Grain, N.Y. TIMES, Sept. 21, 1995, at A1.


16. See SCHERER, supra note 2, at 551. One author noted an appearance of per se illegality of vertical mergers in a Supreme Court case from 1947. See BORK, supra note 1, at 225 (referring to United States v. Yellow Cab Co., 332 U.S. 218 (1947)).

17. See SCHERER, supra note 2, at 551. One author noted an appearance of per se illegality of vertical mergers in a Supreme Court case from 1947. See BORK, supra note 1, at 225 (referring to United States v. Yellow Cab Co., 332 U.S. 218 (1947)).
1968 Merger Guidelines which prohibited vertical mergers that resulted in the slightest increase in market share for those firms operating in a concentrated market. The main reason for the hostility toward vertical mergers was the failure, or refusal, to apply neoclassical market


The basic premise behind both the 1984 Merger Guidelines and 1968 Merger Guidelines was that market concentration could lead to higher prices to consumers. Determination of market concentration is arrived at by using the Hirschman-Hirschman Index ("HHI"). See id. at 763. The HHI number is arrived at by squaring the percentage of market share from each firm and summing those totals. See id. at 765. Thus, in a hypothetical market where there are four firms with equal market shares, the formula would look like this: $25^2 + 25^2 + 25^2 + 25^2 = 2500$ HHI. See id. at 765-71.

The 1984 Merger Guidelines characterize different HHI levels as follows:

- below 1000 = unconcentrated
- 1000 - 1800 = moderately concentrated
- above 1800 = highly concentrated

1984 Merger Guidelines, supra, at 20,560.

Thus, under the 1984 Merger Guidelines, while any merger creating a rise in concentration above 1000 could be challenged, in reality it only would be where the degree of increase is significant. However, any increase in concentration where concentration is already 1800+ likely will be challenged. See id. at 20,561.

Also, where the post-merger HHI is between 1000 and 1800, any increase in concentration over 100 results in a presumption of significant anticompetitive effects. Where the post-merger HHI is above 1800, a merger that increases the HHI by more than 50 is presumed to create significant anticompetitive effects. This presumption will rarely be overcome if the increase exceeds 200 and the resulting HHI level exceeds 2500. See id.

However, despite these guidelines there has been little enforcement under the 1984 Merger Guidelines, as compared to the 1968 Merger Guidelines. See Millstein, supra, at 760.

There is also special consideration given to "leading firms." Mergers presumptively create or enhance market power if the proposed merger involves either a leading firm with a market share of at least 35% and a firm with a market share of 1% or more; or a firm with a market share of 20% or more and a new, innovative firm in a market or attempting to enter a market that is moderately or highly concentrated, unless § 5.1 and/or § 5.3 show that such a merger will not lessen competition. See 1984 Merger Guidelines, supra, at 20,561.
efficiency theory\textsuperscript{20} to antitrust issues. The Chicago School posits that applying this economic theory would result in most, if not all vertical mergers being upheld as pro-competitive or competitively neutral.\textsuperscript{21}

The application of the Chicago School’s economic theory to antitrust law marked a new era of antitrust philosophy in the courts.\textsuperscript{22} After a decade of uncertainty concerning vertical mergers and restrictions following \textit{Schwinn}, the Supreme Court overruled the \textit{Schwinn} per se rule in \textit{Continental T.V., Inc. v. GTE Sylvania, Inc.},\textsuperscript{23} signifying the coming of age of the Chicago School.

The Chicago School approach maintains that if antitrust enforcement is guided by the neoclassical market efficiency model, then most vertical mergers should be allowed.\textsuperscript{24} This is based on the premise that the goal of antitrust law should be to maximize economic efficiency.\textsuperscript{25} If overall economic efficiency is maximized, then the consumer and producer are

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\textsuperscript{20} This Note only explains the neoclassical efficiency model to the extent necessary to facilitate a discussion of it in the context of antitrust enforcement. For a more in-depth discussion of the model, see \textit{Bork, supra} note 1, at 90-160.

\textsuperscript{21} \textit{See id.} at 245; Note, \textit{supra} note 19, at 761-62.


For an early critique of the Chicago School approach, see Herbert Hovenkamp, \textit{Antitrust Policy After Chicago}, 84 MICH. L. REV. 213 (1985). The article concludes that the Chicago School approach is faulty in two regards. First, it claims that shaping public policy based on notions of efficiencies from the neoclassical market efficiency model is “naive.” \textit{See id.} at 284. Second, it argues that the Chicago School approach is “too simple to account for or to predict business firm behavior in the real world.” \textit{Id.}

\textsuperscript{23} 433 U.S. 36, 58-59 (1977) (noting that vertical restrictions were not proven to have a negative effect on competition or to have been lacking any redeeming value).

\textsuperscript{24} \textit{See Bork, supra} note 1, at 245 (concluding that “antitrust should never object to the verticality of any merger”).

equally well-off and thus, society is at an optimal point where there is no need for antitrust enforcement. Overall economic efficiency has two basic parts, productive efficiency and allocative efficiency.

Productive efficiency is the firm's ability to maximize its output based on a minimal amount of input. For example, if Chrysler produces a car priced at $20,000 with inputs costing $15,000, then Chrysler's productive efficiency is greater than another car company that produces the same car with inputs costing $16,000. The classical price theory model says that the competitive market price will be near the price charged by the least efficient firm—in other words, the firm that has to sell its output at a price closest to its cost of input. Thus, greater overall market efficiency will drive down the average cost per unit. The justification for vertical integration through the Chicago School approach is that firms will strive for productive efficiency by integrating to a level that maximizes their productive efficiency, thereby lowering the average cost to consumers.

So, how should antitrust law react when Chrysler buys Goodyear and thereby reduces its cost of input? The classical price theory model would maintain, with regard to productive efficiency, that in this case Chrysler will either cut its price and increase its market share or will maintain its price and market share and reap greater profits. Under the Chicago School approach this vertical merger need not be prevented because the neoclassical economic efficiency model suggests that other firms competing with Chrysler will copy the method of increasing productive efficiency—i.e., buy their own tire manufacturer or start making their own tires "in-house"—thereby driving down prices to a new marginal level lower than the original marginal cost before Chrysler bought Goodyear. Thus, in the end both the car manufacturers and the consumers are better off. Consequently, the Chicago School argues

26. See Hovenkamp, supra note 22, at 237-38. Output is the final product that the firm either distributes or sells. Inputs are the products and services used to create the output sold by the firm. Inputs may include raw materials, energy, labor, or unfinished products to be finished and sold. In the entertainment industry, for example, input could include actors, scripts, singers, or animation, and output would be films, music CDs, or cartoons.

27. See BORK, supra note 1, at 92-98; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-18 (1976) (adopting the theory of monopoly).

28. See BORK, supra note 1, at 228 (noting that greater efficiencies through vertical mergers could result in a lower input cost).

that productive efficiency should never be a basis for preventing a vertical merger.

Allocative efficiency is a general type of efficiency which assesses the welfare of society as a whole.\textsuperscript{30} If Chrysler bought Goodyear and all affected people as a group were better off as compared to their condition before the merger, then allocative efficiency would be considered increased. How could anyone argue with this result? However, rarely will all people affected by the merger be better off. For example, with our Chrysler-Goodyear merger, perhaps there are resulting layoffs in management or production, or perhaps the cost of a Goodyear specialty tire increases because Chrysler does not use that type of tire. In light of these very real possibilities, the question becomes whether mergers should be disallowed where any, some, or many people are made worse off.

The measurement of allocative efficiency is much more ephemeral than the measurement of productive efficiency\textsuperscript{31} and has led economists to create simple models in order to determine how policy should be shaped relative to allocative efficiency. One such model was created by Vilfredo Pareto in 1909.\textsuperscript{32} Pareto’s theory postulated that a market status was efficient when no change from that position could make a person better off without making another person worse off. This was termed “Pareto optimality.”\textsuperscript{33} “Pareto optimality,” however, is not a very practical system and necessarily would promote the status quo, as long as one person is made worse off by the change.

For example, laws requiring greater pollution control and laws restricting white-collar crime would both be inefficient under Pareto’s axiom because various people are made worse off by the passage of those laws, namely, polluters and white-collar criminals. However, it is clear that social welfare is furthered through passage of these laws. Modern economic theorists avoid this practical limitation by the creation of “potential” Pareto efficiency, which dictates that a situation is more efficient if more people are made better off than are made worse off by

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  \item \textsuperscript{30} For a good discussion of allocative efficiency and its role under the Chicago School approach, see Hovenkamp, \textit{supra} note 22, at 239.
  \item \textsuperscript{31} For example, it is much more difficult to determine whether all the people affected by a certain merger are better or worse off as individuals, as compared to determining the relative costs of inputs and outputs for the merging firm and its competitors.
  \item \textsuperscript{32} See Hovenkamp, \textit{supra} note 22, at 239 (discussing the Pareto definition of allocative efficiency).
  \item \textsuperscript{33} See \textit{id}.
\end{itemize}
the change.\textsuperscript{34} The Chicago School approach generally follows the premise of "potential" Pareto efficiency. In fact, the guiding principal of the Chicago School theory is that antitrust policy should concern itself exclusively with maximizing net allocative efficiency.

The Chicago School approach is based on the following additional assumptions.\textsuperscript{35} First, firms are in business to maximize their profits. Second, the only real type of barrier to entry into a market is a barrier caused by governmental regulation.\textsuperscript{36} Non-governmental, or "natural," barriers will not last, as firms will tend to invest in markets that yield the highest return.\textsuperscript{37} Third, most markets are competitive even if they are highly concentrated. Fourth, the market will autonomously correct monopoly situations because other firms will enter the market seeking a share of the monopolist’s higher profits. Fifth, many industries can operate at maximum efficiency levels only at high levels of concentration. Sixth, antitrust law should only be concerned with enforcement when firms are acting inefficiently, and antitrust law should always encourage efficiency.\textsuperscript{38} Finally, adherence to the neoclassical market efficiency model as the sole guide for antitrust policy is nonpolitical.\textsuperscript{39} This, it is claimed, is true because the question of how wealth should be distributed is not part of the equation in the neoclassical market efficiency model.\textsuperscript{40}

These fundamental assumptions of the Chicago School approach, based on the neoclassical market efficiency model, led the pro-business Reagan Administration to refrain from challenging many of the mergers which took place in the 1980s.\textsuperscript{41} Additionally, in 1982 Reagan appointed William F. Baxter as the head of the Antitrust Division of the DOJ.\textsuperscript{42}

\textsuperscript{34} See id. at 239-40.
\textsuperscript{35} For a more detailed overview of these assumptions, see id. at 226-29.
\textsuperscript{36} See BORK, supra note 1, at 310-29.
\textsuperscript{37} See Hovenkamp, supra note 22, at 227.
\textsuperscript{38} Ironically, the Warren Court was famous for strict antitrust enforcement that would typically disregard whether or not its ruling would further or hinder efficiency, even going so far as to refer to efficiency as a "source of evil." See Frank H. Easterbrook, Is There a Ratchet in Antitrust Law?, 60 Tex. L. Rev. 705, 714 (1982).
\textsuperscript{39} See RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 92-94 (1981); BORK, supra note 1, at 418-25.
\textsuperscript{40} See Lande, supra note 25, at 636-37.
\textsuperscript{41} For an example of an exception to this general attitude toward validating vertical mergers, see In re B.F. Goodrich Co., 110 F.T.C. 207 (1988).
\textsuperscript{42} Baxter has been characterized as a "known opponent of the antitrust law." Shift in Analytical Approach Highlights Antitrust Conference, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1240, at 829 (Nov. 14, 1985). A keen example of the attitude held by the Reagan Administration, through Baxter, came when the DOJ acted as amicus curiae and argued to reconsider the per se rule.
This was a clear step toward furthering the philosophies of laissez-faire toward vertical mergers and an overt acceptance of the Chicago School approach by the executive branch. There was little change in policy during the Bush Administration. This "hands-off" attitude toward vertical mergers was justified by the Reagan and Bush Administrations as pro-business and fit well within the construct of "Reaganomics" and the "trickle down theory," where the basic assumptions were that the market (1) is self-correcting, (2) operates best when left alone, and (3) spreads the wealth downward to consumers. These policies which lead to a low-profile antitrust division of the DOJ continued despite rising concern over the practical applicability of the Chicago School approach by academia.

Heading into the Clinton Administration there was a widespread acceptance of the Chicago School approach to antitrust enforcement by the government and the courts, despite the mounting controversy about how the theories of the approach should govern the duties of the DOJ, FTC, and FCC. Whether due to the fact that the Clinton Administration was pro-consumer, felt unable to ignore the overwhelming number of mergers, or was sympathetic to the mounting criticism of the Chicago School approach, the Administration proved to be slightly more active than the preceding two administrations in enforcing vertical merger restraints.

The reasons for a higher profile enforcement of antitrust laws are grounded in not only the traditional concerns about the effects of vertical mergers, but also a new theory which purports that not all vertical


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mergers are harmless in the context of the ultimate antitrust goal of avoiding reductions in competition. This new theory has become known as the post-Chicago approach.

D. After Chicago

Keeping in form with the cyclical history of antitrust enforcement, it has become clear that the days of utter laissez-faire toward vertical mergers are numbered. In part, this has been a result of disagreement between Chicago School theorists and post-Chicago theorists as to the consequences of what the two groups agree are the potential harms of vertical mergers. Post-Chicago theorists acknowledge that the Chicago School recognized the potential for collusion and foreclosure, but they disagree with the conclusions regarding the actual anticompetitive harm from these consequences. In part, the cyclical turn has been based on the same type of populist-like concern toward large combinations that was a substantial part of the impetus for the passage of the Sherman Act and was the force behind the early days of antitrust enforcement.

45. See Richard Hofstadter, What Happened to the Antitrust Movement?, in THE BUSINESS ESTABLISHMENT 113, 115 (Earl F. Cheit ed., 1964) (describing the three phrases in the history of antitrust between 1890 and 1964: 1890 to 1914 represented diligent enforcement; 1914 to 1937 was the “era of neglect”; and 1937 to early 1964 represented a “reactivation” of enforcement).

The next cyclical turns occurred between 1965 and the present. There was less and less enforcement against mergers from 1965 to 1992, and from 1992 to the present there may be a turn toward more enforcement, or at least more reasons for such a turn. See generally Michael S. Jacobs, The New Sophistication in Antitrust, 79 MINN. L. REV. 1, 51-52 (1994) (discussing the cyclical nature of antitrust enforcement); Judson, supra note 43, at 1672-73 (noting that “antitrust policy is not static; it is cyclical, evolving in tandem with our perceptions of modern industrial society”).

For a discussion of the changes in American business concentration since the Civil War, see BAIN, supra note 1, at 100-11.


There is evidence that the current public sentiment regarding large mergers is still one of skepticism. See David W. Barnes, Nonefficiency Goals in the Antitrust Law of Mergers, 30 WM. & MARY L. REV. 787, 791 n.8 (1989) (noting that public lack of faith in competition is similar to what
There are several traditional concerns about vertical mergers. First, vertical mergers tend to reduce competition by eliminating potential entrants into the market because, in some instances, at least the vertically merging firm is a potential entrant into the market of the other. For example, Chrysler may attempt to begin to manufacture its own brand of tire, to ensure a source of tires, while Goodyear may begin to manufacture its own vehicle, to ensure a buyer of tires. Second, if the industry standard in the particular market is such that firms must be “two-tiered” in order to enter the market and effectively compete, then this presents a barrier to entry. Third, there is a potential harm to competition if the vertically merged firm forecloses other firms’ access to a supplier or purchaser by either refusing to sell to that firm or by creating an artificial price level, or “price squeeze.” For example, after the merger of Chrysler and Goodyear, if Goodyear refuses to sell to General Motors, then General Motors’ supply is restricted and they may be foreclosed from competing with Chrysler, or the price of tires to General Motors may increase after Goodyear refuses to sell to General Motors, due to new market conditions in the tire industry. Finally, the vertically integrated firm may impart a fear in unintegrated rivals about competing it was during the Great Depression (quoting Shift in Analytical Approach Highlights Antitrust Conference, supra note 42, at 832)); Roberta Romano, The Future of Hostile Takeovers: Legislation and Public Opinion, 57 U. CIN. L. REV. 457, 490 (1988) (concluding that the public is “distrustful of bigness in general” and is mostly concerned with consumer protection).

For an attempt to explain the changes in business concentration, see BAIN, supra note 1, at 215-21. Of course, one of the main goals of the 1950 amendments to § 7 of the Clayton Act was to halt the “rising tide of economic concentration.” Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

48. This was a concern in Ford Motor Co. v. United States, 405 U.S. 562, 570-71 (1972).
51. But see BORK, supra note 1, at 232 (insisting that such buyers will always be able to find sellers).
with the larger, vertically integrated firm.\textsuperscript{52}

Although the first and fourth concerns regarding vertical mergers, stated in the previous paragraph, are refuted under the Chicago School approach,\textsuperscript{53} the second and third concerns have given rise to numerous recent commentaries questioning the Chicago School approach. Generally, the criticism of the Chicago School approach has centered on its impracticality and inapplicability to “real world” concerns. As a result, critics have called for a more scrutinizing case-by-case examination of vertical mergers as opposed to the typical summary validation of such mergers based on Chicago School theory.\textsuperscript{54}

The development of the criticism toward the Chicago School theory has an ironic history. First, in the mid-1980s, the courts disregarded general criticism of the Chicago School by early commentators due to the popularity of the Chicago School efficiency model.\textsuperscript{55} Next, in the early-1990s, a body of case law developed which rejected some of the simplistic assumptions made by the Chicago School approach regarding market participants’ actions in the United States economy, based on the notion that market participants were “sophisticated.”\textsuperscript{56} However, this

\textsuperscript{52} See United Nuclear Corp. v. Combustion Eng’g, Inc., 302 F. Supp. 539, 556 (E.D. Pa. 1969). \textit{But see,} BORK, supra note 1, at 257 (“The idea that the smaller firms will refrain from profitable behavior out of fear seems wholly unlikely . . . .”).

\textsuperscript{53} Regarding the concern over eliminating potential entrants, under the Chicago School approach it is clear that if the market is ripe for an entrant and a business firm then enters the market to reap the profits, the fact that a potential entrant is eliminated is irrelevant to the overall market functions. Also, “fear” is not a concern where business firms are competing for a profit in a competitive market. \textit{See BORK, supra} note 1, at 256 (explaining that at the moment of merger there is a greater desire to compete vigorously, not a fear of doing so).

\textsuperscript{54} \textit{See} Lawrence A. Sullivan, \textit{Section 2 of the Sherman Act and Vertical Strategies by Dominant Firms,} 21 Sw. U. L. Rev. 1227, 1256-63 (1992).

\textsuperscript{55} \textit{See supra} notes 23-24 and accompanying text.

\textsuperscript{56} \textit{See supra} notes 23-24 and accompanying text.

\textit{See United States v. Baker Hughes, Inc., 908 F.2d 981, 986-87 (D.C. Cir. 1990); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1422-23 (S.D. Iowa 1991); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 679-80 (D. Minn. 1990); \textit{cf.} FTC v. University Health, Inc., 938 F.2d 1206, 1213 n.13 (11th Cir. 1991) (recognizing the sophisticated buyer defense, but concluding that the defendant could not assert it as to insurers because of the insurers’ inability to “refuse to reimburse their subscribers because the prices in the relevant market were too high”); United States v. United Tote, Inc., 768 F. Supp. 1064, 1085 (D. Del. 1991) (recognizing the sophisticated buyer defense, but rejecting application to its facts); United States v. Ivaco, Inc., 704 F. Supp. 1409, 1427-28 (W.D. Mich. 1989) (recognizing the sophisticated buyer defense as “the defendants’ most persuasive argument” but rejecting its application to the facts). But \textit{see} Jacobs, supra note 45, at 2, 51-53 (concluding that the more detailed judicial review of mergers under the “sophistication doctrine” would “cripple antitrust administration” and advocating that the judiciary rely on more assumptions when analyzing market behavior).

Ultimately the sophisticated buyer defense was recognized by the Supreme Court in \textit{Eastman Kodak Co. v. Image Technical Services, Inc.}, 504 U.S. 451 (1992), although the Court found that
departure from the basic Chicago School analysis tended to validate mergers, rather than restrict them, and (perhaps because of the popularity of efficiency justifications for mergers with courts at the time) this analysis was welcomed by courts, whereas the early post-Chicago theorists of the mid-1980s were ignored.\footnote{The criticisms of the Chicago School which gained an audience in the courts, marking a trend toward a more detailed judicial review, should be considered in deciding whether there should be a judicial departure from the Chicago School and an eventual judicial conclusion that antitrust law should restrain the recent flux of vertical mergers in the entertainment industry.}

Ironically, as courts became willing to take a more realistic or detailed look at mergers in order to justify validation of a greater number of efficient mergers, there grew a second body of post-Chicago commentary which concluded that the courts' "closer look" should not disregard side-effects of vertical mergers, such as after-market effects and barriers to entry, which allegedly cause market foreclosures and increases in monopoly power.\footnote{See cases cited supra note 56.}

This second wave of post-Chicago theory had a better opportunity for success in the courts based on their willingness to perform a more detailed examination of mergers. In fact, some scholars saw the decision in \textit{Eastman Kodak Co. v. Image Technical Services, Inc.}\footnote{See Riordan & Salop, supra note 46. But see David Reiffen & Michael Vita, \textit{Comment: Is There New Thinking on Vertical Mergers?}, 63 \textit{Antitrust L.J.} 917, 919 (1995) (finding Riordan and Salop's article unpersuasive due to "a faulty analogy between vertical and horizontal mergers" made by the authors, regarding concentration issues).} as a validation of post-Chicago theory in the early-1990s.\footnote{504 U.S. 451 (1992).}

The criticisms of the Chicago School which gained an audience in the courts, marking a trend toward a more detailed judicial review, should be considered in deciding whether there should be a judicial departure from the Chicago School and an eventual judicial conclusion that antitrust law should restrain the recent flux of vertical mergers in the entertainment industry.

1. The Sophistication Doctrine

The sophistication doctrine represents an early critique of the simplicity of the Chicago School approach, and application of the sophistication doctrine by the courts represents a departure from the approach, which later led to the current critique of the Chicago School as reaching erroneous conclusions as to potential anticompetitive effects of vertical mergers. Although application of the sophistication doctrine does not inherently suggest that there should be more or less antitrust enforcement against vertical mergers, it should be discussed as a prelude to the body of critique that suggests that a more detailed analysis of the increasing number of vertical mergers could lead to more vertical mergers being invalidated.

The sophistication doctrine provides that firms with tactical expertise, knowledgeableability, or intelligence are sophisticated and thus, will be able “to combat their competitors’ market power more effectively than their merely rational counterparts.” Thus, a “sophisticated buyer defense” has developed for firms that engage in vertical mergers which would otherwise face antitrust obstacles. This defense dictates that where a seller with market power proves that his buyer is sophisticated, such a fact can be a mitigating circumstance to his otherwise actual or potential monopolistic power. For example, if a hypothetical rubber manufacturer and a rubber shipping company merge to form Rubber United, Rubber United could assert that Goodyear is a sophisticated buyer and therefore, despite the market power of Rubber United, there will be no detriments to competition as a result of the merger.

Ultimately, application of the sophistication doctrine represents a new factor for market power analysis requiring courts to determine whether inequality or super-rationality characteristics exist in market participants. Critics argue that this more detailed analysis clouds the antitrust picture because market share—i.e., concentration—is no longer the only issue that courts must assess in determining whether a

61. Some define sophistication in terms of the “tactical expertise or negotiating success” of experienced firms, and other theorists describe it as “the quality of being fully informed about commercially relevant matters” in that these firms are more “knowledgeable” than the others. Jacobs, supra note 45, at 17-18.
62. Id. at 2-3.
63. For examples of analyses under the sophistication doctrine, see cases cited supra note 56.
64. See Jacobs, supra note 45, at 8 (characterizing such judicial analysis as a “quixotic search”).
firm has market power. However, if courts merely follow the Chicago School approach, without deeper investigation as to the market conditions, they would be failing to thoroughly analyze the case with respect to achieving the ultimate goal of determining whether competition really would be harmed in a given case. This more detailed analysis has found solid support in the courts, which have begun to realize the need at least to consider "sophistication."

However, as a result, judicial antitrust administration not only departed from the simplistic efficiency models of the Chicago School—whose application eased judicial review—but, courts, perhaps being enamored with efficiency, inevitably made the more complex analysis in order to allow mergers between firms with larger market shares, if greater efficiency was presented as a justification for the firm wanting to integrate. Whereas previously, a court only would look to see if the firm had a large market share, under the sophistication doctrine, a large-market-share firm may claim that it does not have market power.

Thus, the application of the sophistication doctrine represents how the basic principles of the Chicago School theory are used as a spring board, enabling courts to validate ever more extensive vertical mergers, based on the notion of efficiency. The judicial administration of vertical mergers has gone through a complete transformation. Whereas before the Chicago School approach, in the 1960s and 1970s, courts were finding...
subjective ways to invalidate vertical mergers based on the Harvard school of industrial organization, now courts in the 1990s are, through use of the sophistication doctrine, finding more subjective ways to validate vertical mergers.

Thus, the sophistication doctrine opened the door to more complex inquiries into "real market" conditions. A faction of antitrust thinkers in academia might have harbored the following question when refining the foundations behind the post-Chicago approach: If courts are going to delve into complex characteristics of the market to afford some large-market-share firm the ability to complete a vertical merger under the sophisticated buyer defense, then why should not the same court look into the economic realities that suggest that some vertical mergers really result in negative effects such as increased monopoly power and foreclosure? In other words, if courts are willing to move away from the simplistic economic models of the Chicago School to reach the conclusion that an otherwise anticompetitive merger should be considered competitively neutral, then they should step away from those same models and conclude that other vertical mergers really do increase monopoly power and cause market foreclosure.

2. Increased Power of Monopoly and Foreclosure

Perhaps spurred on by this paradoxical inconsistency, experts have recently turned a more scrutinizing and meticulous eye toward the general conclusions of the Chicago School and have found that for various reasons vertical mergers might not be as benign as previously thought. Specifically, critics of the Chicago School have identified three types of evils as potential results of vertical mergers.

First, exclusionary effects may result from increasing rivals' costs of doing business. This may entail raising unintegrated firms' input costs by foreclosing their access to important inputs or foreclosing their access to important markets.
to a sufficient customer base. Specifically, this is referred to as “input foreclosure” and “customer foreclosure,” respectively. Input foreclosure results from upstream firms refusing to sell to rival downstream competitors or simply raising those competitors’ costs for their inputs. For example, if Goodyear and Chrysler merged and thereafter Goodyear stopped selling to Ford and General Motors, or simply raised its prices to those companies, those downstream rivals would be at a competitive disadvantage with respect to Chrysler.

The Chicago School justification for allowing this type of merger would be that the competitive nature of the tire market would result in one of three possible scenarios: the existing firms will compete for the input supply refused by Goodyear, another competitor will enter the market to compete for that share, or a switching of buying and selling partners will occur. However, this simple conclusion requires insight into how the other tire suppliers will react in reality. Market conditions may not return to pre-merger conditions because other tire suppliers may be unable to expand their production of tires, or they may simply forego expansion because of their gain in market power or their new ability to coordinate pricing in the absence of Goodyear. Under each of these scenarios Ford and General Motors are worse off because of the vertical merger.

Customer foreclosure occurs when the downstream merged customer refuses to buy from the upstream rival firm. In our ongoing Goodyear-Chrysler example this would mean that Chrysler (downstream merged customer) discontinues its habit of buying tires from Michelin. The result could be that Michelin will have higher unit costs and thereby be less competitive, or in a worst case scenario, that Michelin will be forced out of the market. Also, with respect to the rival output firms (Ford and

76. Id. at 519.
77. “Upstream” refers to firms that manufacture and distribute inputs for sale to other “downstream” firms which assemble or otherwise use the inputs as part of their business. See Scherer, supra note 2, at 78. Firms can simultaneously be “upstream” and “downstream” depending on the perspective. Thus, Goodyear is downstream from the perspective of a rubber manufacturer, but Goodyear is upstream from the perspective of Chrysler.
78. See Riordan & Salop, supra note 46, at 528-29.
79. See id. at 528.
80. See id. at 551.
81. In other words, their marginal cost of producing tires increases due to the decreased demand for their supply.
82. In this way, input foreclosure and customer foreclosure may be seen as mutually exclusive possibilities because under input foreclosure if Goodyear stops selling to Ford, then customer foreclosure to Michelin is unlikely because Michelin would supposedly sell to Ford in order to pick
General Motors), because of the Goodyear-Chrysler merger the cost of input to Ford and General Motors may increase above the competitive level, namely because Michelin has higher unit costs. Consequently, the cost of cars to consumers could also increase. Under either "input foreclosure" or "customer foreclosure" the resulting competitive harms should compel enforcement against companies attempting such vertical mergers.

The second type of evil which could result from a vertical merger is the potential exchange of pricing and other competitively sensitive information between the input or output markets. This results when the output firm does not have all of its input requirements fulfilled by the vertical merger with the input firm. For example, Chrysler still needs to buy some tires from tire companies other than Goodyear. The theory is that Chrysler gains insight into pricing and supply information from other tire companies and can relay this to its merged partner, Goodyear. As a result, Goodyear gets a competitive advantage. More importantly, the likelihood for coordinated conduct among all of the unintegrated tire manufacturers increases. Even though coordination probably would not hurt the tire industry, the conduct could harm the car industry and ultimately the consumer, by allowing tire manufacturers to raise their prices above competitive levels.

Third, a vertical merger could help a regulated firm evade cost-based, maximum price regulation by setting an artificially high transfer price on inputs sold by the upstream division to the downstream division and, as a result, shift profits from the regulated to the unregulated market.

The conclusion of post-Chicago theory is that while many vertical mergers lead to efficiency benefits, the previous assumption that all vertical mergers are competitively neutral or pro-competitive, is flawed. Therefore, the court should perform a balancing between the efficiency up where Goodyear left off. In the most simple terms, these types of foreclosures represent an either/or situation.

In analyzing the FTC's decision in In re A.G. Spalding & Bros., 56 F.T.C. 1125 (1960), Bork made light of the proposition that "eager suppliers and hungry customers" would be unable to "find each other" after they were displaced by vertically merging companies. BORK, supra note 1, at 232.

83. See Riordan & Salop, supra note 46, at 557.
84. Three conditions must be met in order for competitive concerns to arise under these circumstances: the information must be useable, the information must be unique and therefore beneficial, and the structure of the input market must be conducive to pricing coordination. See id. at 558-61.
85. See id. at 561-64.
benefits against the three types of competitive harm: foreclosure, information exchange, and regulation evasion.86

E. The Current State of Certainty in the Law

The question of whether to apply the Chicago School approach or to apply more complex models in assessing the validity of vertical mergers has not been directly addressed by many courts.87 While early application of the Chicago School approach led to easier judicial administration, undertaking the more detailed analysis of the post-Chicago approach obviously creates more problems for the courts as well as for those who desire predictability when planning complex commercial mergers and acquisitions.

However, it is clear that judicial convenience and predictability for business firms are not the driving forces in determining whether vertical mergers will be upheld. Rather, trends in antitrust law have apparently been founded on vague ideas of right and wrong about various actions of American businesses. For example, the current trend is toward a more detailed analysis in order to give as much deference as possible to the firms claiming that their goal is efficiency, as the courts favor efficiency. The only consistency of law in this area has been that before the Chicago approach came about, courts invalidated vertical mergers without regard to efficiency and since the Chicago approach's dominating reign, courts have validated vertical mergers based on a general conclusion that they are efficient.

Perhaps the certainty engendered by the "efficiency justification" may be a factual explanation for the feverish pace of mergers in 1995 and the confidence with which some law firms and consulting firms have put together multi-billion dollar mergers.88

86. See id. at 564.

87. One court has commented that antitrust rules "cannot always take account of every complex economic circumstance or qualification." Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990).

In fact, courts have acknowledged that the goals of clarity and administration have lead to per se rules. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983). One attribute of the per se rule is how it allows more predictability for businessmen as to what federal enforcement agencies will do. See United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972) (noting that "[w]ithout the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act"). For academic support of the per se rule, see Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 YALE L.J. 775 (1965).

88. In fact, the law firm of Cravath, Swaine & Moore handled representation for CapCities/ABC in their merger with Disney, spending approximately 60 concentrated hours to
Under the more demanding case-by-case analysis of the post-Chicago approach, would there be more antitrust prevention of vertical mergers? As discussed above, the "sophistication doctrine" and post-Chicago theories dictate that the analysis performed by the court must be a very complex one. In fact, such judicial analyses could result in arbitrary determinations. Accordingly, from the almost per se illegality of vertical mergers in the 1960s to mid-1970s, to the almost blind acceptance of all vertical mergers from the late 1970s to early 1990s, we have now come to a point where judicial determination may have the theoretical and economic justification to make an even more in-depth review of mergers. After such a detailed review the court could conclude that despite some efficiency aspects, government agencies should use antitrust law to disallow some vertical mergers.

The question becomes whether it will take something as earth shaking as the Chicago School approach to swing the pendulum back toward more restraint of vertical mergers. Ironically, the solution to the seemingly unjust tendency to follow general themes when judging matters that effect many businesses directly, may lie in the two seminal cases: Brown Shoe and Ford Motor.

F. Two Cases in the Eye of the Storm: Brown Shoe and Ford Motor

In Brown Shoe Co. v. United States, the Supreme Court was faced with a case where the third largest seller of shoes, Brown Shoe,
wanted to acquire Kinney, the eighth largest seller of shoes. To the extent that both companies manufactured and distributed shoes, the merger had significant horizontal aspects. However, a key fact was that Kinney’s 350 retail outlets represented the largest distributorship to handle brands other than its own. In this regard, the acquisition had key vertical characteristics, amounting to a potential foreclosure of outlets to those shoe manufacturers who previously sold through the Kinney outlet.

After defining the product market as “men’s, women’s, and children’s shoes” and the geographic market as the “entire Nation,” the Court proceeded to explain the important factors in its analysis. These included whether the arrangement was a “limited term exclusive-dealing contract . . . [or] a tying contract,” whether the arrangement was for the purpose of saving a “failing company,” and whether the arrangement was between two small companies. The Court found that this was not an arrangement between two small companies, or an attempt to save a failing company, and was more like a tying arrangement, than a short-term exclusive-dealing contract. The Court concluded that it was more like a tying contract because of the evidence indicating that Brown would “force” its shoes into Kinney stores.

But, perhaps the key to the Court’s conclusion that the merger should be enjoined was based on its final factor of analysis—considering “the trend toward concentration in the industry.” Acknowledging that

91. See id. at 297.
92. Brown was the fourth largest shoe manufacturer, producing about 4% of the country’s shoes. See id. at 302-03. Kinney was the twelfth largest shoe manufacturer in the United States, producing 0.5% of the country’s shoes. See id. at 303.
93. See id. at 331.
94. Id. at 326.
95. Id. at 328.
96. Id. at 329-30 (noting that “the market foreclosure must generally be significantly greater” in a limited term exclusive-dealing contract in order to be violative of federal law).
97. Id. at 331 (noting Congress’s “intention to preserve” such failing companies).
98. See id. (stating that a merger between two small companies is permissible where the purpose of the merger “is to enable them in combination to compete with larger corporations dominating the market”).
99. See id. at 331-32.
100. See id. at 332. The Court emphasized that “ownership integration is a more permanent and irreversible tie than is contract integration.” Id. at 332 n.55 (citing Friedrich Kessler & Richard H. Stern, Competition, Contract, and Vertical Integration, 69 YALE L.J. 1, 78 (1959) (concluding that “a greater degree of integration is tolerable when contract is used”)).
101. Brown Shoe Co., 370 U.S. at 332. The Court detailed the legislative history behind the 1950 amendments to § 7 of the Clayton Act, which made the Act applicable to vertical mergers. See id. at 311-23; see also Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and
the "probable future effect of the merger" should be considered, the Court went on to conclude that based on a significant tendency toward integration in the industry, the acquisition of Kinney by Brown Shoe should be enjoined because otherwise the merger would have worked to "substantially . . . lessen competition." In Ford Motor Co. v. United States, the Supreme Court reviewed an order from the lower court divesting ownership of Electric Autolite Co. ("Autolite") from Ford Motor Co. ("Ford"). At the time, Ford was the second-leading maker of cars and, together with General Motors and Chrysler, accounted for 90% of the automobile production in the United States. Prior to Ford's acquisition of Autolite in 1961, it bought its spark plugs from Champion, when there were two independent domestic producers of spark plugs; Champion, which had a 50% share of the domestic spark plug market in 1960, and Autolite, which had a 15% market share at about that time. Within five years

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103. See id. at 301.  
104. Id. at 334.  
105. 405 U.S. 562 (1972).  
106. See id. at 564-65.  
107. See id. at 565.  
108. See id. at 566.  
109. See id.
of Ford’s acquisition of Autolite, Champion’s market share declined to 33%.

In finding that the merger should be disallowed, the Court noted two factors from the district court's ruling. First, Ford acted as a check against the ability of supra-competitive pricing in the oligopolistic spark plug market because of its status as a potential entrant into the spark plug market. Second, the Court noted that by acquiring Autolite, Ford was removing itself as a purchaser of “about ten per cent of total industry output.” This represented customer foreclosure to the spark plug manufacturers in a similar way that Brown Shoe’s purchase of Kinney would have resulted in customer foreclosure—i.e., if Kinney is viewed as a pseudo customer, instead of being viewed as a distributor, or outlet. The resulting foreclosure would tend to reduce the likelihood of future deconcentration in the spark plug market. This result would be a consequence of the raised barriers to entry that would have been caused by the merger.

In reaching its conclusion the Court observed that the evil caused by the merger was
to foreclose to the remaining independent spark plug manufacturers the substantial segment of the market previously open to competitive selling and to remove the significant procompetitive effects in the concentrated spark plug market that resulted from Ford's position on the edge of the market as a potential entrant.

Thus, the Court preferred Ford’s position as potential entrant into the market because in that position Ford encouraged the already oligopolistic market competitors to behave in a more competitive, and less monopolistic, fashion. Another benefit to Ford's nonintegrated position was that it would increase the probability of a new entrant succeeding in the spark plug market. There would be no necessity for a “two-tiered” entry. In other words, a new entrant would not need to be its own customer by selling cars as well as spark plugs.

Brown Shoe and Ford Motor were the main impetus behind the rise of the Chicago School approach. Unquestioning deference to the analysis

110. See id.
111. See id. at 567-68. There were only three significant manufacturers of spark plugs, controlling 95% of the market share at the time of the acquisition. See id. at 566 & n.3.
112. Id. at 568.
113. See id.
114. See id.
115. Id. at 574.
in these two cases is not called for, but some of the important parts of the reasoning in those cases foreshadowed the problem with rising integration in the entertainment industry.

II. VERTICAL MERGERS IN THE ENTERTAINMENT INDUSTRY

A. The Entertainment Industry

The number of mergers in the entertainment industry has been steadily on the rise in the 1990s. In 1995 alone the entertainment industry contemplated well over $35 billion worth of mergers. The three big mergers of 1995 were: Disney and CapCities/ABC ($18.83 billion), Time-Warner and Turner Broadcasting ($6.88 billion), and Westinghouse and CBS ($5.04 billion). Each of these mergers is a massive combination and each has both vertical and horizontal aspects. The horizontal aspects of these mergers can be described as the extent to which the mergers duplicate holdings of the respective companies—i.e., the mergers are horizontal to the extent that they combine previous competitors in a particular industry. For instance, Disney and ABC both owned radio stations prior to the merger. Thus, in this regard the merger is horizontal with respect to radio stations, and the output produced and input consumed by those radio stations.

At the same time, the Disney-ABC merger has various vertical aspects. For instance, Disney was able to acquire a national broadcaster

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116. For example, the dollar amount of mergers in the motion picture industry in 1992 was $1.548 billion, while in 1994 it jumped to $9.150 billion. See 1995 U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 555; 1994 U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 551. These figures include both vertical and horizontal mergers.


118. See id. This Note focuses primarily on the Disney-ABC and Time-Turner mergers because those mergers have more vertical aspects.

119. Additionally, the mergers could be seen as “product-extension mergers,” which exist when “the products (or activities) of the partners do not compete with each other but have some functional relationship in production or distribution.” PETER ASCH, INDUSTRIAL ORGANIZATION AND ANTITRUST POLICY 263 (rev. ed. 1983).

for its programming. Although the negative effects of horizontal

121. Disney's ability to acquire an outlet for its programming was made possible when the financial interest and syndication ("fin-syn") rules were abolished in 1995. Fin-syn rules prohibited ABC, CBS, and NBC from purchasing financial interests or syndication rights from producers, like Disney, and generally excluded the networks from selling syndicated programming to individual stations. The fin-syn rules were established in the 1970s and were based on the premise that the "big three" networks possessed monopsony power, and as a result could undermine the profitability of non-network program suppliers, and additionally threaten the very existence of nonaffiliated, "independent" stations. The abolition of the rules in 1995 was preceded by a relaxation of the rules in 1993 following a series of FCC orders and court appeals. See In re Evaluation of the Syndication and Fin. Interest Rules, 8 F.C.C.R. 3282 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994); In re Evaluation of the Syndication and Fin. Interest Rules, 6 F.C.C.R. 3094 (1991), vacated and remanded sub nom. Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992); In re Amendment of Syndication and Fin. Interest Rules, 94 F.C.C.2d 1019 (1983) (tentative decision and request for further comments).

The FCC's basis for abolishing the fin-syn rules was based on the presumption that the "big three" networks no longer posed a threat to non-network program suppliers and "nonaffiliated" independent stations after the emergence of such industry outlets as cable, VCRs, satellite, and other broadcast networks. This conclusion may have been erroneous as even today the lowest rated network, CBS, has more viewers than all the cable networks combined. See Prime-time Passions, ECONOMIST, Aug. 5, 1995, at 55, 56 (also noting that "[a]dvertisers shelled out more than $31 billion on broadcast TV last year compared with $4.6 billion on cable TV").

In 1995 the FCC also set August 1996 as the date for the abolition of its prime-time access rule ("PTAR") which since the 1970s had worked as a bar to affiliates of ABC, CBS, and NBC from airing network entertainment and other programming during the hour preceding prime time (7-8 p.m. EST). See Michael Freeman, A Matter of Access, MEDIAWEEK, April 15, 1996, at 40. PTAR's goal was to prevent two types of conduct that presumably limited non-network affiliated entities from having a suitable outlet and market share. First, PTAR prohibited affiliated stations in the "top 50" markets from airing new programming that the three networks might otherwise provide as part of their current prime-time schedule. See id. Second, the rule disallowed those affiliates the ability to fill that time slot with programming first aired on ABC, CBS, or NBC in previous seasons. See id.

Again, the goal of the FCC was to benefit non-network programmers and independent stations. The non-network programmers would have another possible outlet for their product, and if they could not air their product on a "big three" network, at least they would not have to compete with "prime time" quality programming during that period, if they aired their product on another outlet, such as cable. However, PTAR was more of a benefit for independent stations, who were able to take off-network hit programs (such as "Roseanne" or "Cheers") and air them during this lucrative time slot. Unfortunately, the FCC felt that for the same reasons that fin-syn was no longer needed, PTAR was also unnecessary.

One goal of this Note is to show that in fact the original goal of the fin-syn rules and PTAR, that of programming diversity, was a noble one, and that while there are more outlets for non-network program suppliers, the effect of vertical integration is to cause a retrograde motion back to the days when few entities had monopsony power over the industry. Unfortunately, the recent passing of a major communications bill by Congress does little to stop the trend toward integration between communication, media, and entertainment industries. See Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56. This act deregulates various industries, including the telecommunications, broadcast, and cable industries, opening the door for more vertical mergers in the entertainment industry.
mergers are well documented, this Note’s purpose is to explore the negative implications of vertical mergers. However, to a certain extent the type of harm in each kind of merger can be very similar.

For example, both horizontal and vertical mergers have an effect on competition and thereby on consumer welfare. In the most general terms, horizontal mergers affect competition most at the level of the merger, but may also affect upstream and downstream competition. In that way the harm resulting from horizontal mergers is very similar to the type of harm caused by vertical mergers. For example, a Chrysler-Ford merger would certainly impact General Motors, but it could also negatively impact the tire industry, as Chrysler-Ford would have significantly more market power. It has been advanced that Chrysler-Ford could force any given tire manufacturer to sell Chrysler-Ford its tires below its own marginal cost. These tire manufacturers would have to worry about making up the lost profit caused by selling to Chrysler-Ford below marginal cost in its sales to consumers and/or to General Motors and other car companies.

Similarly, the horizontal aspects of the Disney-ABC merger will not only hurt competition among radio broadcasters, but because radio advertising is now available to Disney-ABC’s television shows and movies, the horizontal aspect of the merger also impacts other industries, in addition to the one that is the subject of the horizontal merger. Thus, Disney-ABC gains a competitive advantage over its competitors in other industries, namely, television and movies, because Disney-ABC has a guaranteed outlet for advertising (radio) which it can utilize at cost. In addition, any restrictions that may apply to the type, length, or content


123. See generally Scherer, supra note 2, at 229-67.

of any such advertisement would presumably not apply to use by
the parent company. In this way the horizontal aspect of this merger impacts
other industries, and Disney-ABC’s ability to sell its output is improved
over its competitors in television and movies. These vertical-type harms,
caused by the horizontal aspects of these mergers, are significant factors
to consider when analyzing how the mergers occurring in 1995 affected
the entertainment industry.

1. Specifics of the Mergers

Both the Disney-ABC and Time-Turner mergers are about shoring
up content (and the means for producing content), and each of them, as
well as the Westinghouse-CBS merger, is also about securing radio and
television broadcasting or cable outlets for the content produced. Content
is what makes the industry work. Content includes, for example, Disney’s
production of television shows such as “Home Improvement” and
“Ellen.” The outlets for such content-rich companies as Disney and
Time-Warner include, for Disney, the eight television stations, nineteen
radio stations, sixty-five newspapers/trade/advertising publications, and
sixteen publishers of CapCities/ABC, and for Time-Warner, the
seven cable networks and one radio station (CNN Radio) of Turner
Broadcasting. Thus, CapCities/ABC and Turner are to content what
bookstores are to books. They represent the conduit through which the
product is delivered to the consumer. In this sense, the mergers are
analogous to manufacturers buying up distributors, and thus the mergers
are substantially vertical.

At the same time, Turner also owns a basketball team (Atlanta
Hawks), a baseball team (Atlanta Braves), and a music publisher, as well
as various advertising entities, production companies, and an extensive
film library. Additionally, CapCities/ABC has content and content-

125. See U.S. PUBLIC COMPANIES, supra note 120, at 314-18. CapCities/ABC also owns the
popular ESPN cable station which is a 24-hour cable sports service and sports programmer. In
addition, CapCities/ABC has 50% ownership, through joint ventures, of the Art & Entertainment
Network and Lifetime Television, two other cable stations. See id. at 315.

126. See id. at 1726-27. For Turner this includes Cable News Network (CNN), Turner
Broadcasting System (TBS), Turner Network Television (TNT), SuperStation, Inc., and CNN
Headline News. See id.

127. See id. Obviously, owning two major sports teams represents valuable content for Turner’s
television and radio outlets. Moreover, Turner owns Hanna-Barbara Productions, a producer of
animated shows and holder of a vast film library of animated shows and its characters. Turner also
owns New Line Cinema Corporation, a producer and distributor of motion pictures. See id.
Additionally, Turner owns an extensive film library which it bought from MGM in 1986 for over
$1 billion, which includes 3,000 titles from Warner Brothers and RKO, such as “Gone With the
producing holdings, such as ABC Productions, which create and produce series and movies for television.

The content offered by Disney and Time-Warner includes each company’s extensive film libraries, studio production facilities, and current on-going productions. Although there are other sources for content, none have resources comparable to Disney and Time-Warner. Also, both Disney and Time-Warner have various outlet holdings which make the mergers horizontal in some of those respects as well. Additionally, it is not reassuring to see that the “outlet"

Wind” and “Citizen Kane.” See Michael Williams & Rex Weiner, Gearing Up for MGM Sale, DAILY VARIETY, Nov. 6, 1995, at 1. Part of this billion dollar deal was the 850 Warner Brothers movies made before 1948, including various cartoons produced between 1936 and 1948. See Phil Kloer, Time Warner Turner on TV, ATLANTA J. & CONST., Sept. 23, 1995, at 3B. Finally, Turner owns Castle Rock Entertainment (which produces, among other things, the top-five television show "Seinfeld"). For a good chronology of Turner Broadcasting’s rise, see Creating an Entertainment Giant: Turner’s Long History with Time Warner, L.A. TIMES, Sept. 23, 1995, at D5.

To the extent that Turner already owned so much content and so many content-producing companies, the merger with Time-Warner was also seen clearly as a horizontal affair.

128. As for Disney, it owns two motion picture production companies, a television film production company, two home video manufacturers, two music production companies, and an engineering and development company (for shows and rides). See U.S. PUBLIC COMPANIES, supra note 120, at 528-29. Disney also owns two professional sports teams, the Mighty Ducks (hockey) and the California Angels (baseball). See Matt Lait & Greg Hernandez, Disney Teams with Angels, L.A. TIMES, May 20, 1995, at A26. Perhaps the only thing preventing Disney and Turner from owning professional football teams is the National Football League’s rule prohibiting corporate ownership of teams. See id.

As for Time-Warner, it owns a motion picture production and distribution company, six music recording companies (including Warner, Atlantic, and Elektra), three television production companies, a video production company, a cable production company (HBO), a video game and software producer, a non-music audio production company (for books on tape), and seven book publishers (including Little, Brown & Co.). See U.S. PUBLIC COMPANIES, supra note 120, at 1686-90.

129. Disney and Time-Warner own major film production studios, capable of producing both motion pictures and television shows. See sources cited supra note 128.

130. For Disney these include a cable television network (The Disney Channel), two radio stations, a magazine (Discover), and a television station (KCAL-TV, Hollywood, CA). See U.S. PUBLIC COMPANIES, supra note 120, at 529. However, as a condition of federal approval of the merger of Disney and CapCities/ABC, Disney agreed to sell its television station, KCAL. See Jube Shiver, Jr. & Sallie Hofmeister, Justice Approves Disney-CapCities Deal, L.A. TIMES, Jan. 17, 1996, at D2.

An important outlet feature of Disney is its theme parks in Los Angeles, Orlando, France, and Japan. Each theme park capitalizes on the cult-popularity of the Disney content productions, such as “Aladdin,” “Pocahantas,” and “The Lion King.” Time-Warner accomplishes the same effect, to a lesser degree, through operation of its Six Flags Corporation which has theme parks in California, Texas (2), New Jersey, Illinois, Georgia, and Missouri. The Six Flags theme parks showcase various Warner Brothers cartoon characters and promote Warner Brothers movies, such as “Batman,” by introducing a “Batman” roller coaster.

Again, Time-Warner owns twenty-three pay cable operations/stations, a cable network
companies in these mergers (CapCities/ABC and Turner Broadcasting) have shored up various other sources of content, including the "first look" deal that CapCities/ABC made with Jim Henson Productions.\textsuperscript{31}

In fact, the market share that Disney-ABC, Time-Turner, and Westinghouse-CBS will command in the various industries will be tremendous. First, for the film industry, based on figures from 1991 to 1992, Time-Turner’s market share will increase from 17.9\% to 21.9\%.\textsuperscript{132} This occurs while the share for smaller independent firms, not among the top nine studios, decreases from 10.1\% to 1.5\% during the same period.\textsuperscript{133} Additionally, in the aftermarket for films, VHS home video, Time-Warner will increase its share in that market from 14.0\% to 17.0\%, while Disney will be unaffected due to the merger, but still maintain a major market share of 21.0\%.\textsuperscript{134} Second, the television


It is important to note that often a certain facet of the industry can be either a content producer or outlet or both. For example, book publishers are an outlet to the extent that they use characters or events first created in another production part of the company, such as when a book rendition of a movie is made after the movie is first released in film form. Contrary to this, books represent content to the extent that the books themselves create the characters or events that are later translated into another form.

What is crucially important to this Note’s analysis is the increasing tendency for industries to in fact overlap, even in areas where traditionally this was not the case. For instance, film star Jim Carrey’s character from “The Mask” has been translated into an animated cartoon for Saturday morning television. This overlap or cross-industry use of inputs is critical to antitrust analysis to the extent that it creates barriers to entry for potential market competitors, while at the same time generating an efficiency justification for the mergers.\textsuperscript{131} See Lawrie Mifflin, \textit{ABC in Pact with Henson Productions}, \textit{N.Y. TIMES}, Oct. 27, 1995, at D7. Although Jim Henson Productions claims to intend to create programs for other television networks; the “first look” status of the five-year deal brings into question the other outlets’ ability to compete effectively. See id. Also, considering that HBO and Nickelodeon are owned by Time-Turner, not only does Disney-ABC have a great incentive to corner the market on the Henson productions, but the ability of other outlets, including the emerging networks of Fox, UPN, and other smaller cable and satellite outlets, to compete is doubtful at best. See generally Daniel Howard Cerone, \textit{Company Town: Disney’s Mega-Merger}, \textit{L.A. TIMES}, Aug. 1, 1995, at D1 (noting the $100 million programming deal CapCities/ABC has with the potential mega-content producer, SKG DreamWorks).


\textsuperscript{133} See Magiera, \textit{supra} note 132, at 20. This figure is indicative of the growing inability of the smaller independent firms to compete against the ever growing larger integrated firms.

\textsuperscript{134} See \textit{MARKET SHARE REPORTER}, \textit{supra} note 130, at 487.
industry, which has traditionally been concentrated, will maintain dominance over television advertising dollars despite the emergence of cable and satellite television.\textsuperscript{135} In regard to the cable industry, the merger of Time-Warner and Turner represents a merger of the second and third largest revenue makers in the industry.\textsuperscript{136} Third, for the radio industry, Westinghouse's combination with CBS will increase its share amongst top radio broadcasting groups from 12.8% to 32.1% in 1993,\textsuperscript{137} while Disney-ABC emerges as the third largest revenue-producing radio conglomerate with its twenty-one stations.\textsuperscript{138}

This market share data is important for various reasons. First, under a traditional anticompetitive analysis market share is relevant.\textsuperscript{139} Second, and more important to the question of the legality of vertical mergers, market share is relevant to the ability of the merged company to be self-sufficient at more than one level of production or in more than one connected industry.\textsuperscript{140} As a result of having market power in industries that overlap to a great extent, these merged companies will not only be self-reliant but will be able to use their vertical integration in one industry to influence its content and how that content is used in other industries.\textsuperscript{141}

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\textsuperscript{135} Also, to the extent that network broadcasters see their total industry output decrease with the proliferation of cable and satellite television, their incentive to operate on larger economies of scale should decrease, not increase, based on fundamental economic reasoning. \textit{See} \textit{BAIN}, \textit{supra} note 1, at 166-80.

\textsuperscript{136} \textit{See} \textit{MARKET SHARE REPORTER}, \textit{supra} note 130, at 328.


\textsuperscript{138} \textit{See} id.

\textsuperscript{139} The substantiality of the relevant market comprising the industry and the company's share of that market are both important to the courts' analysis. \textit{See} United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95 (1957).

\textit{Also}, the 1984 Merger Guidelines, \textit{see} \textit{supra} note 19, indicate that market share is relevant to antitrust enforcement. For a thorough discussion of the application of the 1984 Merger Guidelines, \textit{see} \textit{Ansell, Inc. v. Schmid Laboratories, Inc.}, 757 F. Supp. 467, 475 (D.N.J. 1991). Assuming the geographic market is the entire nation for many of the products at issue with these entertainment mergers, i.e., movies and national television broadcasts, the ultimate HHI figures will depend on the court's determination of what the product market is for the respective vertically merged firms. The more narrowly the product market is defined, the more likely a court will find the merger offensive under the HHI analysis.

\textsuperscript{140} \textit{See} discussion \textit{infra} Part II.A.2.c.

\textsuperscript{141} \textit{See} \textit{infra} note 142. Additionally, because the bargaining power of these large, vertically integrated firms is so tremendous, they have the unique ability to influence various input and outlet options. \textit{See}, e.g., Shiver & Hofmeister, \textit{supra} note 130, at D2 (noting that Disney would likely make its sale of the television station KCAL conditional on the new owner's airing games of the two professional sports teams owned by Disney, the Mighty Ducks and the Angels).
To illustrate, Disney-ABC may require use of one of its stars in a movie script by an independent writer and, perhaps, also require a part-and-parcel syndication agreement for distribution of the movie on ABC. At first glance this may not seem important. One might say that one network is as good as the next, but the relevance of this exclusive dealing arrangement is twofold. First, the independent writer will not be able to auction his product for what it is worth to ABC, NBC, CBS, Fox, or other buyers, as he otherwise would if there was no Disney-ABC marriage. Absent the merger of Disney-ABC, if the writer’s film is successful, he would presumably reap justifiably higher

142. Such contracts tying theatrical rights to distribution rights are common in the entertainment industry. Moreover, these types of one-sided contracts, favoring the large entertainment company, have been approved as part of industry custom by courts in two important entertainment states. First, in New York, in Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594, aff’d, 269 N.Y.S.2d 913, aff’d, 219 N.E.2d 431 (1966), the artist, a producer and director, sold the distribution rights to his film, including television rights, to Columbia. See id. at 596. Despite the fact that the artist expressly reserved the right of final approval for editing the film, see id. at 598, the court denied injunctive relief to the artist, see id., and gave the television station the right “to eliminate portions of the picture, and to interrupt [for] commercials.” Id. at 596. The court held that the artist’s contractual rights only applied to the theatrical release. See id. at 598. The court said that in order to overcome the industry custom for allowing editing for television, the artist would have to use specific language to that effect in the contract. See id.

Second, in California, in Stevens v. National Broadcasting Co., 76 Cal. Rptr. 106 (Ct. App. 1969), the artist, a filmmaker, reserved contractually “the right to edit, cut and score” the film. Id. at 108. Yet the court denied injunctive relief in ruling in favor of NBC and the other defendant, Paramount, despite the fact that the artist claimed, that as a licensee, he had the right to modify the film when it was distributed. See id. at 108. The court held that changes made for purposes of distribution were not protected in the artist’s contract. See id. at 109. For a more detailed discussion of these two cases, see Craig A. Wagner, Note, Motion Picture Colorization, Authenticity, and the Elusive Moral Right, 64 N.Y.U. L. Rev. 628, 660-61 (1989). See also Karen L. Gulick, Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry, 27 Conn. L. Rev. 53, 56 (1994) (noting that “most motion picture artists—directors, screenwriters, and cinematographers—retain no legal control over the commercial exploitation of their work”).

143. Whether this exclusive dealing contract is valid under the rule of reason is debatable. See SCHERER, supra note 2, at 590. While courts have not tackled this question specifically, case law has been willing to validate similar types of exclusive contracts between suppliers of programming and distributors. See, e.g., Ralph C. Wilson Indus. v. Chronicle Broad. Co., 794 F.2d 1359 (9th Cir. 1986) (approving exclusive distributorships of programming in the television industry under a rule of reason analysis); Satellite Television & Associated Resources, Inc. v. Continental Cablevision, Inc., 714 F.2d 351 (4th Cir. 1983) (holding that television programming is a service and therefore does not fall under the § 3 Clayton Act proscription of discrimination among distributors).

Similar exclusionary efforts in the entertainment industry found little dissuasion from the courts where the sale of programming by large carriers was discriminatory toward smaller local competitors. See, e.g., Sunbelt Television, Inc. v. Jones Interable, Inc., 795 F. Supp. 333 (C.D. Cal. 1992) (dismissing claim by television broadcast station that cable television system was monopolizing); Viacom Int’l, Inc. v. Time, Inc., 785 F. Supp. 371 (S.D.N.Y. 1992) (finding that claim of monopolization was insufficient).
bids for the television rights to his film. In this way, the vertical integration of Disney-ABC has harmed writers.

Second, it is not difficult to imagine that if vertically integrated firms like Disney-ABC, Time-Turner, and Westinghouse-CBS all prefer to televise content from writers with whom they have exclusive contracts in the film industry, then the marginal program offerings will deteriorate as independent writers with slightly superior content are passed over. This is not to say that the clearly superior content producers will be shut-out of all programming options, but it is clear there will be a greater decline in the marginal quality of programming with the proliferation of vertical mergers. Additionally, this conclusion is not limited to the script-writing industry, but can apply to various overlapping industries within the vertically merged companies.

144. In this regard the consumer’s welfare is not affected because the consumer would always have the choice to view the writers work since ABC is accessible to everyone who has a television. See Chronicle Broad., 794 F.2d at 1364 (validating exclusivity agreements where there is no showing that “program offerings are detrimentally affected”).

Also, Disney-ABC could assert efficiencies in advertising the writer’s product and preventing “free-riding” by other television outlets if, for example, without the exclusivity agreement, the writer sold television rights to a company other than ABC, after all the promotional work was done by Disney-ABC for the film. See Riordan & Salop, supra note 46, at 524-25 (discussing the elimination of free-riding through vertical integration); David J. Saylor, Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour Through the Maze, 12 CARDOZO ARTS & ENT. L.J. 321, 328 (1994); see also BAIN, supra note 1, at 202-04 (explaining how increased concentration is prompted by a desire to more efficiently promote the product).

145. To be viewed as an invalid exclusive-dealing arrangement under § 3 of the Clayton Act, 15 U.S.C. § 14 (1973), the complaining party would have to show “program offerings [were] detrimentally affected.” Chronicle Broad., 794 F.2d at 1364. Proving this would be difficult enough, but even more challenging would be the requirements likely needed to show cartel-action on the part of the defendants as well as resulting injuries. See id. The plaintiff in Chronicle Broad. was a distributor, or outlet company, that failed to prove injury. See id. Such a showing would presumably be more difficult for the other types of groups potentially affected by the lower quality programming, namely, viewers and advertisers. Viewers “consume” television shows, and their price is having to view, presumably, the commercials as well. Advertisers are customers of the distribution companies.

146. Those in the entertainment industry have not been shy about admitting that vertically merged companies would prefer their own content:

If you’re going to put on 10 new shows in a given year, let’s say you think four are great. You will buy those four no matter who they’re from. The six others fall into a gray area... [I]n the gray areas, it will go to Disney from now on... Most new shows fail anyway. You might as well fail with your own, because if you have a hit it could be your own.

Cerone, supra note 131, at D1 (quoting a former head of Disney’s television operations, Richard Frank). The article goes on to speculate as to other ways the quality of programming could be marginally damaged, noting that “Disney shows may be favored when it comes to time slot decisions” for television programming. Id.
a. Short-Run Impacts of the Mergers

The most immediate impact of any merger is the costs necessary to effectuate the merger itself. Considering that the legal and business fees associated with these types of multi-billion dollar deals often run well into the millions of dollars, this factor should not be discounted.\footnote{147} For Time-Turner these costs included the typically inefficient aspects of paying big fees "necessary" to consummate big deals, in the form of a $50 million fee paid to a consultant.\footnote{148} Additionally, there is the very real possibility that the mergers will result in complex litigation with federal agencies such as the FTC, FCC, or DOJ, regarding antitrust and perhaps other issues.\footnote{149} Also, mergers of this kind often have contractual safeguards, which amount to a windfall to one of the companies if the deal is not consummated, for whatever reason.\footnote{150} These costs militate against any efficiency justifications that may be asserted as part of the Chicago School justification of vertical mergers, at least in the short-run.

Further, there is a real likelihood that these vertical mergers are a by-product of the egos of the moguls in the respective firms\footnote{151} and not

\footnote{147} The estimated merger-related costs to CapCities/ABC totaled $57.3 million, which played a role in the company's 2.3% drop in profits. See Gary Levin, CapCities' Profits Dip, DAILY VARIETY, Feb. 6, 1996, at 4. The estimated cost for the Time-Turner deal is $10 million. See TBS Reports Fourth Quarter Results, BUS. WIRE, Feb. 6, 1996, at 1.

\footnote{148} The consultant was Michael Milken. These attorney's fees and consultant's fees can run into the tens of millions. See Benjamin J. Stein, Turner Flips a Chip, BARRON'S, Oct. 9, 1995, at 32-33 (explaining how Michael Milken received a $50 million fee for consultation regarding the intended merger between Turner Broadcasting and Time Warner). Additionally, Ted Turner's cut of the contract included a $125 million five-year compensation plan, placing him among the highest paid executives in America. See Sallie Hofmeister, Turner Says He May Cut Pay He'd Get in Merger, L.A. TIMES, Oct. 12, 1995, at D2.


In addition to government legal action, these types of mergers typically spawn civil suits, either by contractual business partners of the merging companies, or by shareholders who feel that the deal was unfair to them. See Hofmeister, supra note 148, at D2. See generally Judith H. Dobrzynski, Linking the Cost of an Acquisition to the Acquiring Chief's Vanity, N.Y. TIMES, Aug. 9, 1995, at D6 (explaining how shareholders are often negatively impacted by mergers).

\footnote{150} Time-Warner included a termination fee of $190 million in its deal with Turner should the deal fall through under certain conditions, such as Turner taking a rival offer. See If Turner Deal Falls Through; Time Could Pocket $190 Million, CHI. TRIB., Oct. 6, 1995, at B3.

\footnote{151} Matthew L. Hayward, a doctoral candidate at Columbia University Business School, co-authored a study with Donald C. Hambrick, a management professor at Columbia University, concluding that chief executive officers' egos play a more significant role in the unduly high
motivated by the traditional justifications of vertical integration, such as a desire to avoid a monopolistic supplier or simply wanting to increase economies of scale efficiencies.\textsuperscript{152} One problem with this type of egomaniacal motivation for concentration through vertical and horizontal integration is that it becomes contagious in the industry\textsuperscript{153} and could lead to an artificially high level of complexity in production.\textsuperscript{154} This contagion and increased complexity (or duplication of production aspects)

premium paid for target companies, more so than any justification of synergy or increasable efficiencies. \textit{See} Dobrzynski, \textit{supra} note 149, at D6 (noting that the study found that "the only meaningful relationship with the size of the premium is hubris, not synergies or the target's performance").

\textsuperscript{152} \textit{See} Scherer, \textit{supra} note 2, at 88-91. These economies of scale include reductions in "price shopping, the communication of work specifications, and contract negotiation [which] take time and effort," all of which are reduced, as a result of vertical integration. \textit{Id.} at 90. \textit{See also} Bork, \textit{supra} note 1, at 227 (listing as goals of vertical integration the cutting of sales and distribution costs, more effective transmission of marketing possibilities from retailer to manufacturer, better transmission of new product possibilities in the other direction, better inventory control, better planning of production runs, and creating economies of scale in management).

\textsuperscript{153} This occurs either out of fear of competitors feeling that they cannot compete without being proportional to the vertically integrated firm, and/or simply out of the same egomaniacal motivations that spurred the original merger. The facts support this contagious phenomenon, as the Disney-ABC, Time-Turner, and Westinghouse-CBS mergers all occurred in rapid fire succession within the same year, 1995. Contagious effects toward future concentration is a recognized evil by Congress as seen by the Supreme Court. \textit{See} Brown Shoe Co. v. United States, 370 U.S. 294, 333-34 (1962).

Of course, if there is a contagious effect spreading through an industry, the fact that a company merges could partially mitigate the evils of the trend in the industry if that company claims that the "purpose of the arrangement" was to avoid a takeover. \textit{Brown Shoe}, 370 U.S. at 329. This type of "white knight" mechanism is a factor favoring the defendant in antitrust analysis under \textit{Brown Shoe}. \textit{See} Congressional Research Service, \textit{Merger Tactics and Public Policy} 24-25 (1982). However, there is no evidence that any of the merging parties at issue here were targets, except for CBS, who was targeted by Turner prior to the Westinghouse merger. \textit{See} Carol Marie Cropper, \textit{After Spurned Bids, It's Often the Shareholders Who Pay}, N.Y. Times, Feb. 11, 1996, at F3 (reporting Turner offered $5.41 billion for CBS in 1985); Geraldine Fabrikant, \textit{How Ted Turner Plans to Play for a Network}, N.Y. Times, Aug. 21, 1995, at B1 (remarking on Turner's ten-year quest to purchase CBS).

\textsuperscript{154} The increased complexity of production is only fueled by the fact that Time-Turner and Disney-ABC both vowed not to have significant layoffs due to the mergers, which makes one immediately question the existence of any economies of scale efficiencies. \textit{See} Charles Haddad, \textit{Turner: Deal Wouldn't Cost Jobs; Merger Negotiations Continue}, Atlanta J. & Const., Sept. 8, 1995, at 1F (discussing Turner's statement that no layoffs would occur after the merger); Robin Schatz, \textit{Anything but Goofy; Disney Becomes Media Behemoth by Buying ABC}, Newsday, Aug. 1, 1995, at A5 (noting that no layoffs were expected as a result of the Disney-ABC deal).

The ultimate problem in this regard will be the distinct possibility of large layoffs in the long-run, once the ephemeral promise of synergies completely disappears. The same sequence of events already unfolded at AT&T, where the company laid off 40,000 people as a by-product of disintegrating. \textit{See} Edmund L. Andrews, \textit{Job Cuts at AT&T Will Total 40,000, 13% of Its Staff}, N.Y. Times, Jan. 3, 1996, at A1; \textit{see also} supra notes 14, 135; infra Part II.A.1.b.
are two more short-term detriments to these types of mergers in the entertainment industry. The former detriment of contagion can lead quickly to a situation where even the Chicago School would protest; namely, where the integration is so extensive as to result in monopolistic powers because of the horizontal aspects of the mergers.155

Another short-run impact of vertical mergers in the entertainment industry is short-run foreclosure. To a certain extent short-run foreclosure is a mixed bag of uncertainties. To the extent that other companies have contracts to deal with the merged parties, those contracts will presumably be honored. Often, however, the inability to honor both the short-run contract commitments and commitments arising from the merger results in an issue for litigation.156

What is certain is that input and customer foreclosure will occur in the short-run to the extent that market participants are not protected contractually. From there, the matter becomes one of assessing the long-run impacts of the merger.

b. Long-Run Impacts of the Mergers

Whether the vertically integrated firm is characterized as "more efficient" and therefore benign, or as inherently more powerful and therefore harmful, there is no question that the "trend" toward vertical integration in the entertainment industry has been contagious and has resulted in a realignment of market structure that impacts current and potential market participants.157 The behavior of both current and potential market participants is crucial to the judicial antitrust analysis.158 Disney's situation juxtaposed to the networks is very similar to the position Ford maintained juxtaposed to the spark plug industry in Ford Motor. Clearly, Disney is no longer a potential market entrant into network broadcasting, as it was before the merger with CapCities/ABC.159 Thus, Disney, now merged with CapCities/ABC, no longer places any

155. See Bork, supra note 1, at 238.
157. This "trend" has been far more pervasive than the trend recognized in Brown Shoe. See Brown Shoe, 370 U.S. at 301.
159. See generally Brian Lowry, Frank to Steer Disney onto Infopike, Variety, Aug. 29, 1994, at 53 (discussing Disney's reasoning behind wanting to obtain a network).
significant check on the quality and pricing behaviors of existing broadcast networks.\footnote{160}

As a result, the quality and pricing of the oligopolistic\footnote{161} network market becomes even less competitive. In this way, the "check" that would have been performed by Disney against ABC, NBC, CBS, and Fox is the same type of utility that is at the roots of the competitive process. The unknown information—here, whether or not Disney will enter the network market on its own—exists to a greater degree with a larger number of market participants. This is a key distinction between internal growth and external growth through integration.\footnote{162} The repercussion is that overall quality in the industry diminishes in the long-run as companies become more satisfied with resting on internal laurels. No longer is there a fierce competition for creating the innovative and exciting product that could be auctioned to numerous buyers. The practical result of the vertical integration is that the number of buyers has been decreased.\footnote{163} Thus, the consequence reflects a basic premise of antitrust law: a reduction of competition leads to a decrease in consumer welfare.\footnote{164}

The lessening of market participants on various levels of production and distribution can have lasting long-run effects. These can include a greater tendency toward collusion,\footnote{165} a requirement of "two-tiered" entry into the market,\footnote{166} increased sophistication among market participants,\footnote{167} and input and customer foreclosure.\footnote{168}

\footnote{160} This is similar to Ford's "removing one of the existing restraints upon the actions of those in the business of manufacturing spark plugs" as a result of its merger. \textit{Ford Motor}, 405 U.S. at 568.
\footnote{161} Most of the industries involved in these mergers are oligopolistic in character. See \textit{BAIN}, supra note 1, at 182-89.
\footnote{162} \textit{But see BORK}, supra note 1, at 226-28.
\footnote{163} This will not prevent the most innovative and impressive production companies from being able to sell their product, but it certainly will lower the price which they can command, and the marginally superior product will lose out to the "in-house" product of slightly less quality. See supra note 146 and accompanying text.
\footnote{164} "Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966); see also supra note 101.
\footnote{165} See Riordan & Salop, supra note 46, at 557.
\footnote{166} See Adams & Brock, supra note 49, at 306.
\footnote{167} On the surface this would not appear to be a negative consequence. However, through the sophisticated buyer defense, such increased sophistication—presumably gained through a greater concentration of intelligence in market participants—leads to more and more "justified" concentration in the market, through vertical integration. See discussion supra Part I.D.1.
\footnote{168} See supra notes 76-82 and accompanying text.
Despite the fact that courts are concerned with both potential market entrants and existing market entrants, it is clear that those already in the market certainly have a better opportunity to compete with the vertically integrated firm by simply integrating as well. The firm already in the market would have less expansion costs than an entrant would have entrance costs. In fact, the sunk costs to entry, where a new entrant must enter on two- or three-tiered levels, is a significant deterrent of such entry. For instance, there is no question that it would be less risky to enter an industry creating and selling animated films, than attempting to create animated films and establish a distribution network, spanning the different medians, for the films.\textsuperscript{169}

For example, companies such as UPN (Paramount's fledgling new station aspiring for network status) have a tougher road ahead today as opposed to the job which Fox was able to accomplish, when it broke into the network business to compete against the “big three” less than a decade ago. Arguably, the network market and quality has increased since Fox entered and such quality improvement would continue if barriers to entry did not exist.\textsuperscript{170} Whatever the case, it is clear from a market analysis that the ability of “non-big three” outlets to quickly capture 25\% of the market in the 1986-87 television season—prior to Fox gaining network status—is a good indicator that the “big three” were not producing such quality programming from which viewers were reluctant to switch.\textsuperscript{171} However, regardless of how quality programming is achieved, it is clear that once it is achieved, the consumer will be better off in two ways. First, because more people will watch the more

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\textsuperscript{169} Bork insists that the amount of vertical integration through merger is irrelevant. See Bork, \textit{supra} note 1, at 227-28. Only the amount of efficiency that is achieved at each level of production or distribution is relevant to whether others will be able to enter and compete. See \textit{id.} at 227. Presumably Bork would conclude that short of predatory actions (which would be checked by antitrust enforcers anyway), and assuming that there are no superior efficiencies gained through integration, any entity could enter the industry at any level of integration and compete effectively.

\textsuperscript{170} Some had argued that the market could not maintain more than four networks. However, since then, UPN and the WB Network have emerged to bring the total to six. Whether this is the ceiling or not is debatable. See Bill Carter, \textit{Networks' Gains Mask Some Basic Weaknesses}, N.Y. Times, Jan. 2, 1996, at C4 (commenting on the emergence of two new television companies in 1995, and concluding that “at least one existing network, CBS, saw its position erode” as a result of people switching to the new networks and cable programming); Lowry, \textit{supra} note 159, at 53 (discussing WB's viability as a fifth network).

\textsuperscript{171} See Radio & TV Broadcasting: Big 3 Audience Shares Continues to Erode, \textit{Standard & Poor's Indus. Surveys}, July 20, 1995, at M38 (noting that the “big three's” share has declined from 91\% in the 1978-79 season, to 61\% in the 1993-94 season); see also Carter, \textit{supra} note 170.
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creative programming, the need for more commercial time will decrease as a higher premium is warranted for the innovative programming. Second, consumers will benefit from the very fact that the programming is superior as a result of competitive forces.

Another long-run detriment of the merger between media entities, where one of them is involved in news media—like CNN, CBS, and ABC—is the ability to be objective toward the numerous business aspects of the parent company. As the number of vertical integrations grows in this industry, the ultimate harm to the consumer is the reduction in the dissemination of news.

Another important point is a question of timing. Often the trend in industries toward mergers results in multiple deals occurring in rapid succession, which is what occurred in the entertainment industry in 1995. The question then becomes whether antitrust law should intervene to delay or prevent a merger or simply do nothing and wait and see if the possible long-term detriments develop.

There is no doubt that efficiencies are a possible reality of vertical integration. The question is how the efficiencies, and other possible benefits, should be measured against the other detriments and the short- and long-run effects of the merger. Each of these three mergers has been justified citing increased efficiencies for each entity that will allow each

172. It should be noted that the amount of airtime given over to commercials "continued its record-breaking rise in 1994." Radio & TV Broadcasting: Commercial Clutter Grows, STANDARD & POOR'S INDUS. SURVEYS, July 20, 1995, at M38.

173. See Ed Bark, Deal Puts ABC in Prickly Spot, DALLAS MORNING NEWS, Aug. 6, 1995, at IC (discussing the ability of one of ABC's movie critics to continue to objectively critique Disney movies); Small World News, ST. PETERSBURG TIMES, Aug. 4, 1995, at 18A (questioning whether the Disney-owned Kansas City Star will criticize Disney films, or whether CBS News will expose Westinghouse for ruining the environment). This detriment could materialize in the short-run as the consumer loses one outlet of information about certain news stories. For example, ABC's popular news show "Nightline" failed to even mention the Disney-ABC merger the night the news broke. See Bark, supra, at IC.

174. See supra note 153. There are different opinions as to what the "trend" toward vertical integration means. This "trend" toward vertical integration was an important factor in the Court's analysis in Brown Shoe, militating against the defendant businesses. See Brown Shoe Co. v. United States, 370 U.S. 294, 332-33 (1962). However, "trend" is an unimportant novelty to Chicago School analysts. See Bork, supra note 1, at 227 (referring to trends in vertical integration as "merely the responses of businessmen to changing circumstances").

In light of the tendency for entertainment mergers to be a result of hubris on the part of the respective companies' bosses, and considering the market share proportions of the mergers under consideration here, it seems clear that the "trend" is troublesome to say the least.

175. For example, AT&T laid off 40,000 employees after determining that synergy and increased efficiency were not valid justifications for high vertical integration. See Andrews, supra note 154; Lohr, supra note 14.
to produce more products at lower input costs, thereby raising consumer welfare.\textsuperscript{176} Despite this standard Chicago School justification, there may be other short-run implications, none of which result in increased consumer welfare.\textsuperscript{177}

Moreover, when short- and long-run detrimental effects are combined with the potential harms identified by post-Chicago theorists, it becomes clear that the increase in vertical mergers in the entertainment industry should be carefully assessed, and perhaps should be checked. Specifically, the short-run detriments as well as the long-run speculative allocative efficiencies of such combinations\textsuperscript{178} suggest that each merger be carefully reviewed. The following hypothetical should help flush out the possible issues presented by these behemoth mergers.

2. An Animated Hypothetical

Let us suppose that there is a cartoon industry consisting of five animation companies (\textit{Alphy-input}, \textit{Bety-input}, \textit{Delty-input}, \textit{Gammy-input}, and \textit{Epsilony-input}) that create and produce eighty percent of the animated shows that appear on television.\textsuperscript{179} The relevant market\textsuperscript{180} for cartoons is television broadcasts airing on Saturday mornings.\textsuperscript{181} There are four major network outlets (\textit{WBC-outlet}, \textit{XBC-outlet}, \textit{YBC-outlet}, and \textit{ZBC-outlet}), a few minor network outlets, and a few cable

\begin{itemize}
\item \textsuperscript{176} See supra note 30 and accompanying text.
\item \textsuperscript{177} See supra Part II.A.1.a.
\item \textsuperscript{178} See sources cited supra notes 11, 13.
\item \textsuperscript{179} One area which might be exploited on the basis of these mergers is the cartoon industry, which has become an international enterprise. See Joe Flint, \textit{New Kids Nets Heat Up Race for Ratings}, \textit{Variety}, Jan. 1, 1996, at 70; Lawrie Mifflin, \textit{Can the Flintstones Fly in Fiji?}, \textit{N.Y. Times}, Nov. 27, 1995, at D1.
\item To a not-so-certain extent this hypothetical is grounded in "real life" concerns. For example, Warner has a multi-year contract to show cartoons on ABC, but Disney has indicated that it hopes to use ABC as a Saturday morning showcase for its own programming. See Geraldine Fabrikant, \textit{The Looney Tunes Factor}, \textit{N.Y. Times}, Sept. 12, 1995, at D1.
\item \textsuperscript{180} Determining the relevant market is part of the antitrust analysis. See United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).
\item \textsuperscript{181} This analysis is confined to Saturday morning cartoons, not just for convenience, but because under relevant case law such a distinct market is unique enough for separate treatment under antitrust analysis. See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.") (citing \textit{E.I. du Pont de Nemours & Co.}, 353 U.S. at 593-95). Of course, antitrust analysis of these three mergers would assess all "economically significant submarket[s]" as well. \textit{Brown Shoe}, 370 U.S. at 325.
\item The product market is also relevant to the analysis. For a discussion of product market definition in the entertainment industry, see James L. Seal, \textit{Market Definition in Antitrust Litigation in the Sports and Entertainment Industries}, 61 \textit{Antitrust L.J.} 737 (1993).
\end{itemize}
and satellite outlets (Cable-1, Cable-2, Cable-3, Star-4, Star-5, and Star-6). In the present year, one of the animation companies, Alphy-input, was acquired by a network, WBC-outlet, that also owned a cable and satellite outlet, Cable-1 and Star-4. WBC-outlet timed the acquisition so that it could immediately begin to air animated programming mostly supplied by Alphy-input, on one of WBC-outlet’s three outlets. WBC-outlet continues to make short-term contracts to air animated programming from Epsilony-input. Meanwhile, XBC-outlet, YBC-outlet, and ZBC-outlet all contract out for their programming which comes from Bety-input, Delty-input, Gammy-input, and Epsilony-input, in various amounts.

Alphy-input, Bety-input, Delty-input, Gammy-input, and Epsilony-input are in competition with a number of smaller animation producers that produce about twenty-percent of the animation output, but because of their larger resources and lengthy existence in the market, Alphy-input, Bety-input, Delty-input, Gammy-input, and Epsilony-input are able, on average, to produce higher quality films that receive premium prices. Each of Alphy-input, Bety-input, Delty-input, Gammy-input, and Epsilony-input compete with these smaller producers for the few outlets which exist; thus, competition is fierce. Each of XBC-outlet, YBC-outlet, and ZBC-outlet has the wherewithal to produce its own animation in-house at a moderate capital expense, as they each produce a portion of their own television shows, but to date each has deemed it more efficient to contract out for animated productions. This is primarily based on the fact that competition is intense among animators, and therefore the price of contracts is reasonable to the major networks and the quality is high. As a natural consequence the price is also reasonable to the cable and satellite outlets.182

After the merger between WBC-outlet and Alphy-input, XBC-outlet, YBC-outlet, and ZBC-outlet realize that WBC-outlet is saving advertising expenses because now it can promote all of Alphy-input’s products and thereby bolster Alphy-input’s presence in the market. This bolstering has resulted in increased ratings for Alphy-input’s productions, shown exclusively on WBC-outlet, and WBC-outlet does not have to worry about other networks “free-riding” by showing Alphy-input’s productions because of the exclusivity aspect of the arrangement between WBC-outlet and Alphy-input.183

182. For our hypothetical let us assume that despite the probability of the four major networks having monopsony power, they do not use such power to obtain animated films at lower prices, in order to avoid the Robinson-Patman Act. See 15 U.S.C. § 13(a) (1994).
183. See supra notes 143-44.
Additionally, WBC-outlet and Alphy-input are able to better coordinate Alphy-input's product for WBC-outlet's uses. Also, WBC-outlet has the security of knowing that its animated films would be supplied at marginal cost, even if there was a change in the market price. An example of this would be if Alphy-input, Bety-input, Delty-input, Gammy-input, and Epsilony-input, by virtue of collusion or otherwise, raised prices above the competitive level. Further, WBC-outlet could achieve better planning of production by internalizing Alphy-input's operations. Along these lines WBC-outlet also created economies of scale in management by laying off some management at Alphy-input. Finally, WBC-outlet received a lot of free press from the purchase of a major animation producer, and WBC-outlet knows that this kind of free advertising cannot hurt its ratings, especially for animated films.

For all of these reasons, and perhaps out of competitive envy of the increased prestige of WBC-outlet, XBC-outlet and YBC-outlet seek to purchase their own animation production company, and ZBC-outlet starts to produce fifty percent of its own animated shows, while still purchasing the rest from Bety-input, Delty-input, Gammy-input, and Epsilony-input. XBC-outlet purchases Bety-input and YBC-outlet purchases Delty-input, leaving Gammy-input and Epsilony-input as the only major independent animation production companies. ZBC-outlet is then forced to buy animation from Gammy-input and Epsilony-input, as well as a larger portion from some smaller independent animators. The question then becomes: What are the anticompetitive effects of XBC-outlet and YBC-outlet's acquisitions?

a. Under the Chicago School Approach

The immediate and simple Chicago School answer to Gammy-input, Epsilony-input, and the other smaller animation producers would be that if their product is competitive with others in the market, it will be distributed regardless of any vertical integration in the cartoon industry. Thus, presumably Gammy-input and Epsilony-input would face no foreclosure in the market by virtue of the vertical mergers.

The Chicago School theorists discount the repercussions of Gammy-input and Epsilony-input being displaced from business relationships they

185. See supra note 151.
186. See BORK, supra note 1, at 236 (averring that the structure of the supplying industry will be whatever is most efficient for the output industry).
previously maintained with any of the newly integrated firms.\textsuperscript{187} In another words, if \textit{Gammy-input} and \textit{Epsilony-input} are now foreclosed from selling their product to \textit{XBC-outlet} and \textit{YBC-outlet} because of the mergers, and prior to the mergers they sold fifty percent of their product to \textit{XBC-outlet} and \textit{YBC-outlet}, \textit{Gammy-input} and \textit{Epsilony-input} will simply have to tough it out. Presumably, \textit{Gammy-input} and \textit{Epsilony-input} will be able to pick up where \textit{Bety-input} and \textit{Dety-input} left off.\textsuperscript{183}

After dismissing all of the potential harms of the vertical merger as unfounded or insignificant, the Chicago School theorists would highlight the positive aspects of the mergers: promotion efficiencies, elimination of free-riding, coordination efficiencies, ensured supply at marginal cost, more efficient and better planning of production, better economies of scale in management, and free press. For the Chicago School theorists, these benefits, stacked up against no, or at most minimal, detrimental effects, present an impressive record of why antitrust law should avoid invalidating vertical mergers.

b. Under the Post-Chicago School Approach

The post-Chicago School approach would take a closer look at the likely effects of these mergers, and thereby address several additional concerns than were considered by the Chicago School theorists. First, the post-Chicago School approach pays closer attention to the potential harms from input and customer foreclosure. Input foreclosure may result in a greater likelihood of monopsony action on the part of the remaining animation producers toward the smaller networks, the cable and satellite outlets, and even toward the unintegrated major network.\textsuperscript{189} Another ill-effect of input foreclosure would result if \textit{Gammy-input}, \textit{Epsilony-input}, and the remaining smaller animation companies were unable to expand their production to sell animated films to companies that previously were customers of \textit{Alphy-input}, \textit{Bety-input}, and \textit{Dety-input}.\textsuperscript{190} This effect may exist only in the short-run until new market entrants arrive, or it

\textsuperscript{187} See id. at 231-32.
\textsuperscript{188} Bork implies that the transition following the merger is not a serious concern and has no impact on competition. See id. at 232.
\textsuperscript{189} See Riordan & Salop, supra note 46, at 528-29. The likelihood of this is enhanced by the exclusive nature of the relationship between \textit{WBC-outlet} and \textit{Alphy-input}, \textit{XBC-outlet} and \textit{Bety-input}, and \textit{YBC-outlet} and \textit{Dety-input}. In other words, \textit{Alphy-input}, \textit{Bety-input}, and \textit{Dety-input} no longer produce animated films other than for use by their parent company.
\textsuperscript{190} See id.
may endure for a longer period if there is a fear about entering the increasingly integrated market, perhaps because of the two-tiered nature of the more successful companies. As a result of customer foreclosure, Gammy-input and Epsilony-input could have higher unit costs, simply because they may be forced to sell less as WBC-outlet, XBC-outlet, and YBC-outlet refuse to buy from them.

Additionally, there is a significantly greater possibility that the merged animation companies (Alphy-input, Bety-input, and Deity-input) could benefit from information received by WBC-outlet, XBC-outlet, and YBC-outlet, if the respective outlet company continues to do business with any of the remaining animators. This is achieved because of the exchange of pricing and other competitively sensitive information.191 For example, because WBC-outlet still deals with Epsilony-input, then WBC-outlet could pass on any sensitive information it obtains to Alphy-input. Thereafter, Alphy-input could use that information to its advantage against the other animation producers, if Alphy-input were to compete, absent any exclusivity arrangement with WBC-outlet.192

This analysis by the post-Chicago School theorists is geared more toward the probable action of real market participants. It goes beyond the most simple, practical assumptions of the Chicago School approach and, for that reason, involves greater speculation as to probable actions by market participants. While the analysis is more complex, it is more likely to result in a realistic picture of the market structure following a trend toward integration.

As a result, the post-Chicago approach involves a closer look into the various aspects of the vertical merger, which may result in finding a violation of antitrust law, despite efficiencies that may exist, and which would have protected the merger under the Chicago School approach. However, even if the hypothetical mergers contemplated by XBC-outlet and YBC-outlet are thought to violate antitrust law under post-Chicago theorist’s “closer look,” there are specific features of the entertainment industry which necessitate an even closer look.

c. Special Aspects of Analysis for the Entertainment Industry

Most of the examples describing how economics should influence federal antitrust enforcement involve generic input and output items. At

191. See supra notes 83-84 and accompanying text.
192. See Riordan & Salop, supra note 46, at 537-58.
one extreme the analysis may even use the hypothesizer’s favorite, the “widget.” But even if the item is not so generic, the example usually centers around something like shoes or cars. The relatively generic types of inputs and outputs involved in these industries make price a very key indicator as to whether an input producer can compete.

However, when it comes to a product that is judged on its ability to gain ratings approval, for example a cartoon, a much more subjective evaluation is required which goes beyond the mere question: How much does it cost? This subjective evaluation is made by the company heads in the entertainment industry, and while the ratings system brings some objectivity to the assessment of a cartoon’s “worth,” there are characteristics unique to the entertainment industry, discussed below, which add to the subjectivity of the vertically merged corporation’s choice of cartoon.

This is not to say that the quality of input with relatively more generic goods has no impact on the quality of the output. Rather, the relationship is exponentially greater when comparing entertainment output with such items as shoes or cars. Based on this, there is no certainty that any cartoon producer could compete on the sole criteria of being able to efficiently produce a quality product, despite Bork’s arguments. In other words, when faced with two inputs of grade “A” leather, one priced at $100 and the other priced at $105, Chrysler is unlikely to chose the input costing $105. At the same time, when presented with cartoons like “The Flintstones,” priced at $100, and “The X-Men,” priced at $105, assuming that each had similar approval ratings, it would not be shocking for an entertainment company to pick the higher priced cartoon. This is based on the entertainment company’s use of the particular cartoon, which goes beyond televising it on Saturday mornings.

Additionally, there are thousands upon thousands of inputs of differing quality for the entertainment company to choose. So, unlike the input for cars—tires, steel, leather, etc.—which is relatively limited, the input for entertainment industry end-products is extremely diverse. For example, there may be only a few different qualities of leather, while there are tens of thousands of actors or singers of differing quality. This diversity is another problematic factor weighing against vertical mergers in the entertainment industry because of its tendency to foreclose more

193. See supra note 190 and accompanying text.
194. See supra notes 125-30; infra note 203 and accompanying text.
Whereas competition usually dictates that quality inputs at cheap prices will be available for the downstream firm, when competition is stunted by merger and the input is diverse, not only will the price of the input be higher, but there is a greater likelihood that the quality of the input will decrease. For example, the hypothetical Chrysler-Goodyear firm will use the raw material of rubber that is relatively homogenous, and therefore the end-product's quality will not be damaged, even if the firm uses a lower priced rubber for its tires.

Contrarily, Time-Turner might back a movie just because one of its stars in the music industry will be the actor. In this case, the quality of the actor or script could very feasibly be below margin and higher priced, but because the tail often wags the dog in the entertainment industry, the movie will be made, and the end-product very easily could be of low quality. The entertainment industry leader might justify this lower quality product—and presumably the lower revenue generated from the movie product—by relying on the entertainer’s increased exposure in the market, leading to greater sales in other products and the entertainer’s increased willingness to promote and produce products for other aspects of the vertically integrated entertainment company.

Bork states, “the decision to make oneself or to buy from others is always made on the basis of difference in cost and effectiveness.” In other words, a business will always do what is best for the business’s profit, which business is nearest to the consumer. This is not the case in an entertainment industry that is integrated to the extent of the mergers under discussion here, such that the concern is not always the business selling to the consumer. Instead, the entertainment industry may be concerned more with profits on a larger scale, spread throughout the various integrated output industries. Arguably, Madonna is not the best actress for the role in “Evita,” yet she will get the part in that film

195. See Rawsthorn, supra note 14, at 6 (speculating that the main reason Time-Warner backed the movie “Evita” was because one of their most successful pop stars, Madonna, was interested in the starring role).
196. Another justification for using a popular star in another industry for an acting role, like the use of Madonna in “Evita,” would be the supposition that he or she has significant “drawing power” at the box office. In other words, consumers would attend the movie with Madonna in the starring role, based entirely upon the consumers’ loyalty to Madonna as a singer.
197. BORK, supra note 1, at 236.
198. See id.
because of Warner’s ties to both the film and music industries.¹⁹⁹ The ultimate loser in this process is the consumer because the more this type of vertical integration proliferates throughout the entertainment industry, the lower the marginal quality of entertainment will become.

On Bork’s behalf, one might assume he would argue that if this is the case, then ultimately the fully integrated structure of firms will come tumbling down upon itself, similar to what occurred with AT&T.²⁰⁰ But will it really? What will be the impetus, and how much impetus is required in an oligopolistic market?²⁰¹ If all firms, or most (i.e., ABC, Fox, Turner, CBS), are heavily integrated, might the marginal quality simply drop slightly and the profit remain the same, except that now it is controlled by fewer, and richer, entrepreneurs?

In part, this conclusion is reached because entertainment, to a degree unlike other industries, relies heavily on image. “Star” status is important to any film or television series’ success.²⁰² As a result of this “star” factor, while the marginal quality of the entertainment in the individual industries decreases, the overall profit in the entertainment industry will increase, as singers appear in movies, movie actors appear in cartoons, or cartoons appear in primetime.²⁰³

Consequently, assuming that there are diseconomies of scale at a certain level in the stream of entertainment commerce (i.e., either in production or distribution), because of the unique nature of the entertainment industry, an independent producer or distributor cannot simply enter the market and “beat [the vertically merged company] on costs.”²⁰⁴ This ability may be feasible with generic type examples such as spark plugs, but when the input is not generic, the ability to sell the product

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¹⁹⁹. See supra notes 195-96.
²⁰⁰. See supra notes 154, 175.
²⁰¹. For a good discussion regarding oligopolistic markets and predictable actions by market participants therein, see Herbert Hovenkamp, Vertical Restrictions and Monopoly Power, 64 B.U. L. REV. 521 (1984).
²⁰². One of the many examples of this phenomenon is the ability of stars from one television series to parlay their success into a star role in a new series. For example, the character “Fraiser” went from the very popular show “Cheers” to his own television series entitled “Fraiser.” Such a transition is also possible between different industries.
²⁰³. One example of this type of cross-industry promotion is the success that Disney has had using its animated characters to promote the professional hockey team it owns. See James Flanigan, Raiders’ Departure Has an Old-Fashioned Ring to It, L.A. TIMES, June 25, 1995, at D1 (noting that “Mighty Ducks games at the Anaheim Pond are an animation show of Disney characters”); see also Chris Woodyard, Disney Teams with Angels; A Big League Merchandiser Steps Up to the Plate, L.A. TIMES, May 19, 1995, at A16 (“Eisner . . . plans to cross-market the [Angels] baseball team with the Mighty Ducks and Disneyland, all within a couple miles of each other in Anaheim.”).
²⁰⁴. BORK, supra note 1, at 241.
competitively is questionable at best. Also, because of the tightly oligopolistic entertainment market, it is highly improbable that outsiders will be encouraged to enter the market. This will result in the long-run foreclosure that is a byproduct of barriers to entry.

That is why it is as critical in the entertainment industry, as it was in the car and spark plug industry, to maintain the viability of potential market entrants. For example, before the merger with CapCities/ABC, Disney was a potential entrant into the television market. Disney could have entered the network market just as Fox, UPN, and Warner Brothers have. So the Disney-ABC merger was a barrier to entry at least to Disney itself. On the opposite side, ABC is no longer a purchaser of other companies’ content, in any significant way.

Another unique aspect of the entertainment industry is the fact that consumer preferences are more dominant than in perhaps any other industry. This preference for the established firms in the market, like ABC, CBS, and NBC, is an additional barrier to entry that stands in the way of new entrants and is compounded by the fact that the “depth of entry” is more and more extensive based on the increasing integration.

Thus, the unique characteristics of the entertainment industry, namely, (1) non-generic or unique inputs and outputs, (2) the diversity of input options, (3) the “star” factor, and (4) dominant consumer preference, each represent additional potential problems with vertical mergers in the entertainment industry, added to those already noted by the post-Chicago School analysts.

Therefore, while the answer to the problem posed by the hypothetical cartoon industry, regarding the mergers by XBC-outlet and YBC-outlet, could result in a finding of illegality under the post-Chicago

205. See supra note 161.
207. See supra note 170.
208. See Ford Motor, 405 U.S. at 567-68.
209. See Riordan & Salop, supra note 46, at 551.
210. See generally BAIN, supra note 1, at 204-06 (discussing barriers to entry). “[A]llegiance of buyers to particular brand names—usually built up by prolonged and persistent persuasive advertising—and from the dependence of buyers on the ‘reputations’ of certain sellers” results in buyer preference. Id. at 205. This is the barrier to entry that ABC and CBS, and to a lesser extent Turner, enjoys. But see BORK, supra note 1, at 255 (claiming that “efficiencies . . . make entry less attractive”). This preference is exemplified by the television watcher who flips on his set and immediately checks what is on ABC, NBC, and CBS before randomly surfing the other channels.
211. In other words, entry is required at two- or three-tiered levels.
VERTICAL Mergers

approach (if there was a factual finding of input or customer foreclosure, exchanges of competitively sensitive information (resulting in an unfair competitive advantage), or collusion), a more thorough analysis of the hypothetical is required in light of the unique characteristics discussed above for mergers in the entertainment industry. The merger of XBC-outlet and YBC-outlet would need to be scrutinized under each of these additional four factors.

The question thus becomes, in light of these unique characteristics: What body of antitrust law can federal enforcement agencies rely on to enjoin such mergers in the entertainment industry? In other words, is a check currently available to the judiciary so that it can stop the type of vertical mergers in the entertainment industry which lead to undesirable market conditions as a result of its unique characteristics? Or, would an entirely new body of case law need to be developed in order for courts to properly analyze vertical mergers in industries with non-generic/multi-use inputs, like the entertainment industry?

Ironically, in the midst of the fury of current forward-looking articles on how to approach vertical mergers in light of the post-Chicago approach, the answer to our hypothetical can be answered by looking back. Whether intentionally or not, the two seminal cases in antitrust, Brown Shoe and Ford Motor, provide the keys to how vertical mergers in the entertainment industry should be analyzed.

B. The Solution: Harking Back to Some of the Principles of Brown Shoe and Ford Motor

The Supreme Court in Brown Shoe made it clear that “[a] most important . . . factor” in its analysis of the validity of the vertical merger was “the economic purpose of the vertical arrangement.”\textsuperscript{212} The Court wanted to determine if there was “an intention to preserve the ‘failing company.’”\textsuperscript{213} Although the Court did not address whether Brown Shoe or Kinney had any aspirations for greater efficiencies, the Court was intent on focusing on the motivations behind the merger.\textsuperscript{214}

Analysis of the above hypothetical cartoon mergers contemplated by XBC-outlet and YBC-outlet should involve the same type of detailed fact-finding as to the real motivations behind the proposed mergers.

\textsuperscript{213} Id. at 331 (citing International Shoe Co. v. FTC, 280 U.S. 291 (1930)).
\textsuperscript{214} See id. at 332 (noting that the past behavior of Brown Shoe Co. and testimony of its president indicated the arrangement would be analogous to a tying arrangement).
Assessment should be made of the viability of the proposed efficiencies claimed by the companies. For example, if there is no intention to make layoffs at the managerial levels, then any claim of increased economies of scales at that level should be discounted.\textsuperscript{215} Moreover, each claim of increased efficiency, or of benefits such as free press, should be balanced against the likely harms of the vertical merger to the market.

The Court in \textit{Brown Shoe} was very cognizant of the importance of trends in the market.\textsuperscript{216} The Court measured the trend over an eleven-year period of acquisitions of retail outlets by manufacturers.\textsuperscript{217} While the Court did not emphasize the length of time between these mergers, it was concerned about what the trend would accomplish if left unchecked.\textsuperscript{218} However, it seems fair to assume that the Court would have been more concerned with the mergers if they occurred within a short period of time, presumably because of the Court's inability to judge the actual effects of the mergers on the market.\textsuperscript{219} Also, while a "trend in [the] industry . . . toward oligopoly" was enough to concern the Court in \textit{Brown Shoe},\textsuperscript{220} it should be clear that the trend toward more and more concentration through vertical integration, in our already oligopolistic cartoon industry, would concern the Court much more. Thus, the \textit{Brown Shoe} Court's concern regarding motivations and trends in the industry would militate against the validation of the mergers in our hypothetical cartoon industry.\textsuperscript{221}

The \textit{Ford Motor} Court distinguished between internal growth and external growth through integration.\textsuperscript{222} The distinction is based on the subtle balance that is silently formed by the inability of the different market participants to know whether their competitors may at any time enter the market, if any one of them decides to sell at or near monopo-

\begin{itemize}
\item \textsuperscript{215} \textit{See supra} note 154.
\item \textsuperscript{216} \textit{See Brown Shoe}, 370 U.S. at 332 ("Another important factor to consider is the trend toward concentration in the industry.").
\item \textsuperscript{217} \textit{See id.} at 301 (analyzing the number of acquisitions in the industry between 1945 and 1956).
\item \textsuperscript{218} \textit{See id.} at 300-01.
\item \textsuperscript{219} \textit{Cf. id.} at 332-34 (noting that it is the "probable effects of the merger" which the courts must consider in its examination of the merger (emphasis added)).
\item \textsuperscript{220} \textit{Id.} at 333.
\item \textsuperscript{221} Additionally, the concern over firms' motivations and industry trends would also present considerable obstacles to other vertical mergers in the entertainment industry because of issues regarding contagion and ego. \textit{See supra} notes 151-55 and accompanying text.
\end{itemize}
listic price levels.\textsuperscript{223} This is the precise benefit that the \textit{Ford Motor}
Court found in Ford's situation in the context of the oligopolistic spark plug industry.\textsuperscript{224}

The Supreme Court in \textit{Ford Motor} noted that if Ford had decided to enter the aftermarket for spark plug manufacturing by the "internal-expansion route," then "there would have been no illegality."\textsuperscript{225} The Court also noted that such internal expansion is "not . . . proscribed."\textsuperscript{226} It is clear why such internal growth is preferred to external growth through vertical mergers. By entering a market through internal expansion a company is challenging the ability of the already existing companies to compete with it. Although the internally-expanding company may have advantages because it is its own customer, there are several disadvantages as well.

The internally-expanding company must strive to match the innovativeness and skill that is wielded by those already viable in the market. Through this challenge, the internally-expanding company will either succeed or fail. But in the process there is a chance that it could offer some innovation to the process.\textsuperscript{227} Likewise, there is a distinct possibility that the new entrant will motivate the already-existing market competitors to improve, as they fear the added competition of the new market entrant. This would be the case whether there is a real need to improve, or just a perceived need. These are all basic principles indicating why the competitive market works best with the greatest number of competitors.\textsuperscript{228}

Considering the market conditions in the cartoon hypothetical, the principles in \textit{Ford Motor} could weigh against the mergers proposed by \textit{XBC-outlet} and \textit{YBC-outlet}. Specifically, because there are few market

\begin{footnotes}
\textsuperscript{223} For discussion on a more sophisticated result from the exchange of such competitively sensitive information, see sources cited \textit{supra} notes 82-83 and accompanying text.
\textsuperscript{224} \textit{See Ford Motor}, 405 U.S. at 567-68.
\textsuperscript{225} \textit{Id.} at 568 (quoting \textit{Ford Motor}, 286 F. Supp. at 441).
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} Perhaps critics of this plan would point out that this trial and error method is inefficient, but that is not necessarily the case. Also, critics might contend that such "new innovativeness" could be duplicated internally. However, there is no substitute for the market forces of old-fashioned competition that were at the roots of antitrust law in the first place. \textit{See infra} note 229.
\textsuperscript{228} This is what led the Court in \textit{Ford Motor} to quote Congressman Celler, of the Celler-Kefauver bill (1950 amendment to § 7 of the Clayton Act): "[T]he worth of the individual is the worth of the Nation; no more and no less. That which strengthens the individual bolsters the Nation; that which dwarfs the individual belittles the Nation." \textit{Hearing on H.R. 988 et. seq. Before the Subcomm. No. 3 of the House Comm. on the Judiciary}, 81st Cong. 14-15 (1949) (quoted in \textit{Ford Motor}, 405 U.S. at 569 n.5).
\end{footnotes}
participants in both the input and outlet industries, each individual market participant would likely pose as a check against any monopolistic tendencies of input or outlet firms. As long as it is feasible that input firms would compete in the same industry as outlet firms, and vice versa, then the mergers contemplated by XBC-outlet and YBC-outlet should be disallowed—in favor of attempts, such as that made by ZBC-outlet, to internally expand—so that those outlet firms check the activities of the input companies.229

Thus, both Brown Shoe and Ford Motor lend valuable principles to the analysis of harm to competition that could result in the hypothetical cartoon industry. These principles should be applied in determining whether the vertical mergers in the cartoon industry will harm competition, as well as in analyzing the wave of vertical mergers in the entertainment industry that occurred in 1995.

IV. Conclusion

The post-Chicago School approach, as outlined above,230 suggests more rigorous antitrust scrutiny of vertical mergers. It is likely that more attacks under this theory will succeed, or at least should succeed.

The extrapolations on the results that would occur based on a post-Chicago approach to vertical mergers in the entertainment industry are motivated by the unique characteristics of the industry.231 Specifically, entertainment industry inputs, like works of artists generally, lend themselves to multiple uses in the entertainment industry, and thereby create efficiency justifications for vertical mergers in the industry. Thus, there arises a conundrum: inputs that are non-generic and have multiple uses (but, are of high quality) are more likely to be excluded from the market as a result of vertical mergers in the entertainment industry, yet at the same time non-generic/multi-use inputs (of lower quality) are more likely to serve firms’ efficiency justifications for creating the vertical mergers in the entertainment industry.

229. Additionally, requiring internal expansion in the entertainment industry decreases the potential subjective abuses of unique inputs by requiring justifications for use of marginally inferior inputs, other than those given by the vertically-integrated firm. See supra Part II.A.2.c. Moreover, the “star” factor becomes less prevalent, at least as far as inter-industry application goes. See supra notes 203-04 and accompanying text. Finally, forcing firms to internally integrate will provide smaller firms, like Fox, UPN, and Warner Brothers, the opportunity to chip away at the established consumer preference. See supra notes 207-09 and accompanying text.

230. See supra Part II.A.2.b.

231. See supra Part II.A.2.c.
This conundrum brings the goal of efficiency face-to-face with its old adversary of antitrust law, under Section 7 of the Clayton Act, the goal of preventing concentration. However, the latter goal should be given greater deference in the entertainment industry because of the factors discussed above, regarding the foreclosure of higher quality inputs. Based on this, and other factors, courts should pay closer attention to vertical mergers in the entertainment industry.

This ultimate conclusion may be tied to the fundamental concept that two competitors are better than one when it comes to consumer welfare, and therefore internal growth is preferable to vertical mergers. A refusal to distinguish between internal growth and external growth through integration—i.e., merger—is at the heart of the Chicago School’s failings.

While the Chicago School theorists concern themselves with simplistic models that have implicit in them seemingly solid logic to support their conclusions that vertical mergers have little effect on competition or price, the models fail to appreciate the complexities and irrationalities of big business in the United States. As a result, a court’s failure to apply a more detailed case-by-case analysis affects workers who are the victims of “efficiency layoffs,” such as the “build-up” efficiencies that occur when redundant positions at vertically merged companies are eliminated, or the “break-up” efficiencies sought after by AT&T. But, moreover, the court’s more limited analysis ultimately affects the quality of content, when the abilities of independent content producers to compete are foreclosed by vertical mergers in the entertainment industry.

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232. See supra note 101 and accompanying text. Arguably, this decrease in concentration could lead to the “freedom of opportunity” which allows “individuals . . . to choose whatever trade or profession they prefer, limited only by their own talent and skill and by their ability to raise the (presumably modest) amount of capital required.” SCHERER, supra note 2, at 13.

233. See discussion supra Part II.A.1.a-b.

234. See Diesenhaus, supra note 101, at 2075 (discussing how legislative history of the 1950 § 7 amendments implies a preference for internal growth over merger growth).

235. See Bork, supra note 1, at 229-30.

236. See Andrews, supra note 154.
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<td>73.1</td>
<td>122.2</td>
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Source: 1989 U.S. Dep't of Commerce, Statistical Abstract of the United States 530. These figures include both vertical and horizontal mergers.