



**Testimony of Gene Kimmelman,  
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**Before the  
Antitrust, Competition Policy and Consumer Rights Subcommittee  
of the  
Senate Judiciary Committee**

**On**

**News Corp./DirecTV Merger**

June 18, 2003

## SUMMARY

Consumers Union<sup>1</sup> welcomes this opportunity to testify before the Senate Antitrust, Competition Policy and Consumer Rights Subcommittee regarding the proposed merger between the News Corporation (“News Corp.”) and Hughes Electronics Corporation’s satellite television unit DIRECTV (“DirecTV”). Given the current concentration in the media marketplace, as well as the further concentration that will result from the Federal Communications Commission’s (FCC’s) recent relaxation of media ownership rules, we believe that the proposed merger between network and cable giant News Corp. and DirecTV, the largest direct broadcast satellite (DBS) service provider, will further increase prices for consumers and decrease the diversity of voices in the media marketplace.

Today, consumers are not receiving the fruits that a competitive cable and satellite marketplace should deliver, and consumers are likely to suffer further harm if antitrust officials do not impose substantial conditions on the proposed deal between News Corp. and DirecTV. Since passage of the 1996 Telecommunications Act, cable rates have risen over 50%,<sup>2</sup> and FCC data show that satellite competition is not creating downward pressure on cable rates. Despite the promise for more diversity from new technologies such as the Internet and satellite, a mere five media companies control nearly the same prime time audience shares as the Big Three networks did 40 years ago.<sup>3</sup> Unfortunately, the market for news production and distribution is becoming more concentrated.

And a troubling situation is about to get much worse.

The recently announced proposed merger between News Corp. and DirecTV, combined with the FCC’s decision two weeks ago to significantly weaken its media ownership regulations, threaten to seriously harm meaningful competition between media companies in this nation. This lack of competition will mean that control of the media that Americans rely upon most for news, information and entertainment will likely be placed in the hands of a few powerful media giants.

The FCC’s June 2<sup>nd</sup> order dramatically reworked the rules that protected the diversity, localism, and competition of the media in this country. Under the new rules, mergers between television stations and newspapers in a single community will now be allowed in approximately 200 markets comprising 98 percent of the population. Ownership of two or even three television stations by one company are allowed in over 160 U.S. markets under the new FCC rules. In these markets, the new rules do not provide for any public interest review of such mergers. The

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<sup>1</sup> Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union’s income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union’s own product testing, *Consumer Reports* with more than 4 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union’s publications carry no advertising and receive no commercial support.

<sup>2</sup> Bureau of Labor Statistics, Consumer Price Index (March 2003). From 1996 until March 2003, CPI increased 19.3% while cable prices rose 50.3%, 2.6 times faster than inflation.

<sup>3</sup> Tom Wolzien, “*Returning Oligopoly of Media Content Threatens Cable’s Power.*” The Long View, Bernstein Research (Feb. 7, 2003).

FCC made these radical rule changes despite the presence of considerable media concentration in eighty to ninety percent of the markets affected by this decision.

The result, according to industry analysts, is that broadcast television station owners will either purchase television stations in new markets, or will swap properties with other large media owners, concentrating ownership of both television station and newspapers within one market in an attempt to achieve cost “synergies.” But experience with the television duopolies permitted by waiver prior to the FCC’s decision to weaken its rules shows that these “synergies” have come from the elimination of news programming and news reporters and the substitution of a single, centralized news operation in place of multiple, independent news divisions.

The proposed merger of News Corp. and DirecTV comes in the wake of this FCC decision. While the antitrust laws can and should be used to limit potential competitive abuses resulting from the News Corp./DirecTV merger, these laws are not enough to prevent the excessive consolidation in the marketplace of ideas that will result from any combination of transactions under these relaxed ownership rules. Antitrust has never been used effectively to promote competition in and across media where there is no clear way – like advertising prices – of measuring competition/diversity in news sources, information and points of view presented through the media.

Media moguls themselves admit their desire to avoid real competition within their industry. At the National Cable and Telecommunications Conference last week, Mel Karmazin, president and chief operating officer of Viacom, declared in reference to colleagues from Microsoft, AOL Time Warner, and Comcast, “I can’t imagine being a competitor with any of these guys.”<sup>4</sup>

Consumers Union believes the Department of Justice should impose significant conditions on the News Corp./DirecTV deal, and Congress should alter the laws that enable industry consolidation spurred by excessive deregulation to weaken or undermine competitive conditions in media markets. The News Corp./DirecTV merger is likely to lead to higher prices for both satellite and cable television, since the combined company can maximize its earnings by inflating the prices it charges for its broad array of popular programming that all cable and satellite customers purchase.

We are pleased to see that the combined News Corp./DirecTV entity has agreed to offer access to their programming as part of the acquisition.<sup>5</sup> However, this promise must be expanded to prevent other forms of anticompetitive discrimination, and must be enforceable through appropriate Department of Justice oversight mechanisms.

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<sup>4</sup> Richard Linnett, “*Media Rivals Backslap at Cable Conference.*” [AdAge.com](http://AdAge.com), June 10, 2003.

<sup>5</sup> “As part of the acquisition, News Corp. and DIRECTV has agreed to abide by FCC program access regulations, for as long as those regulations are in place and for as long as News Corp. and Fox hold an interest in DIRECTV. . . Specifically, News Corp. will continue to make all of its national and regional programming available to all multi-channel distributors on a non-exclusive basis and on non-discriminatory prices, terms and conditions. Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services with respect to the price, terms or conditions of carriage on the DIRECTV platform.” News Corporation Press Release, “*News Corp. Agrees to Acquire 34% of Hughes Electronics for \$6.6 Billion in Cash and Stock.*” Apr. 9, 2003.

Even given the terms of what News Corp. is willing to concede by way of program access, substantial danger remains. First, there is a danger that News Corp. will discriminate against non-affiliated programmers in determining what programming to offer on its DirecTV satellite system. News Corp. could also pressure cable operators to do the same in return for more favorable carriage terms for News Corp. owned programming.

Second, the agreement preserves the right to a variety of exclusive carriage arrangements, including distribution of Liberty Media programming, as well as sports programming where News Corp. enjoys substantial market power. Liberty Media owns approximately 18% of News Corp., and News Corp. has interests in several Liberty properties, indicating a close relationship between the two. It is hard to understand how such exclusive arrangements involving a company with such massive market power would not have a detrimental impact on competition in video programming. Antitrust officials must prevent these types of behavior.

We believe it is time for Congress to intervene and finally deliver more choices and lower prices for the media services consumers want, and to reverse the excessive relaxation of media ownership which threatens the critical watchdog function media companies play in our nation's democracy. It is time for Congress to look beyond the rhetoric and focus on the reality of deregulated video markets. Congress should:

- Reconsider its grant of retransmission rights to broadcasters, where a broadcaster also owns a second means of video distribution.
- Let consumers pick the TV channels they want for a fair price.
- Prevent all forms of discrimination by those who control digital TV distribution systems and those who control the most popular programming in a manner that prevents competition in the video marketplace.
- Most importantly, reverse the FCC's decision to weaken media ownership rules that prevented companies from owning the most popular sources of news and information in both the local and the national markets.

## THE NEWS CORPORATION/DIRECTV MERGER

If competition in the multichannel video market had performed up to its hope and hype, the NewsCorp./DirecTV merger might not be so threatening. But in light of the failure of deregulation, it presents a problem for public policy that cannot be ignored. There are two points of power in the marketplace – distribution and program production. The problem with a merger between News Corp. and DirecTV is that it combines the two.

The reach of News Corp.'s media empire is truly staggering. The following are highlights of some News Corp. properties in the U.S.:

- Broadcast Television Stations (35 stations, including two broadcast stations in New York, Los Angeles, Dallas, Houston, Minneapolis, Phoenix and Orlando)
- Filmed Entertainment (20<sup>th</sup> Century Fox Film Corp., Fox 2000 Pictures, Fox Searchlight Pictures, Fox Music, 20<sup>th</sup> Century Fox Home Entertainment, Fox Interactive, 20<sup>th</sup> Century Fox Television, Fox Television Studios, 20<sup>th</sup> Television, Regency Television and Blue Sky Studios)
- Cable Network Programming (Fox News Channel—the most watched cable news channel, Fox Kids Channel, FX, Fox Movie Channel, Fox Sports Networks, Fox Regional Sports Networks, Fox Sports World, Speed Channel, Golf Channel, Fox Pan American Sports, National Geographic Channel, and the Heath Network)
- Publishing (New York Post, the Weekly Standard, HarperCollins Publishers, Regan Books, Amistad Press, William Morrow & Co., Avon Books, and Gemstar – TV Guide International)
- Sports Teams and Stadiums (Los Angeles Dodgers, and partial ownership in the New York Knicks, New York Rangers, LA Kings, LA Lakers, Dodger Stadium, Staples Center, and Madison Square Garden)

News Corp.'s merger with DirecTV adds a new, nationwide television distribution system to News Corp.'s programming/production arsenal. DirecTV is the nation's largest satellite television distribution system, with more than 11 million customers and the ability to serve all communities in the United States.

News Corp.'s vast holdings provide it with leverage in several ways. "The biggest, most powerful weapon News Corp. has is 'a four-way leverage against cable operators, competing with satellite and using the requirement that cable get retransmission consent to carry Fox-owned TV stations, while potentially leveraging price for Fox-owned regional sports networks and its national cable and broadcast networks. . .'"<sup>6</sup>

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<sup>6</sup> Diane Mermigas, "News Corp.'s DirecTV Monolith." Mermigas on Media Newsletter, (Apr. 16, 2003), quoting Tom Wolzien, a Sanford Bernstein Media Analyst.

One of News Corp.'s most important weapons is significant control over regional and national sports programming. Mr. Murdoch often describes sports programming as his "battering ram"<sup>7</sup> to attack pay television markets around the world. As David D. Kirkpatrick noted in an April 14, 2003 *New York Times* article regarding Mr. Murdoch's control over sports programming:

In the United States, News Corp.'s Entertainment subsidiary now also controls the national broadcast rights to Major League Baseball, half the Nascar racing season and every third Super Bowl. On cable, Fox controls the regional rights to 67 of 80 teams in the basketball, hockey and baseball leagues as well as several major packages of college basketball and football games, which it broadcasts on more than 20 Fox regional sports cable networks around the country. By acquiring DirecTV, Mr. Murdoch gains the exclusive right to broadcast the entire slate of Sunday NFL games as well.

With DirecTV, Mr. Murdoch can start a new channel with immediate access to its subscribers, currently 11 million. He has other leverage in Fox News, now the most popular cable news channel, and essential local stations in most major markets around the country.<sup>8</sup>

It is important to consider the ramifications of Mr. Murdoch's control of over 40% of Fox broadcast stations nationwide, control of 11.2 million satellite subscribers, and his stranglehold over regional sports programming. With those extensive holdings, News Corp. is in a position to determine what new programming comes to market, and to undercut competitive programming. The company will be able to decide what programming it does not want to carry and may be able to indirectly pressure cable operators (by offering a lower price for Fox programming as an inducement) not to carry programming that competes with Fox offerings. We believe Mr. Murdoch has a right as an owner to put whatever he wants on his system, but with the FCC having voted to weaken the media ownership rules, companies like News Corp. will have the ability to control key sources of news and information in an unprecedented manner.

The merger between News Corp. and DirecTV is extremely unlikely to stop skyrocketing cable rates and could very well exacerbate the problem. According to David Kirkpatrick's *New York Times* article,<sup>9</sup>

some analysts said the structure of the deal suggested Mr. Murdoch hoped to use DirecTV mainly to punish other pay television companies and benefit his programming businesses. The Fox Entertainment Group, an 80 percent-owned subsidiary of News Corporation, will own a 34 percent stake in DirecTV's parent, creating the potential for programming deals that favor Fox over DirecTV.

'My sense is that the major purpose for News Corporation controlling DirecTV is to use it as a tactical weapon against the cable companies to get them to pay up

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<sup>7</sup> David D. Kirkpatrick, "Murdoch's First Step: Make Sports Fans Pay." *The New York Times*, Apr. 14, 2003.

<sup>8</sup> Id., Emphasis added.

<sup>9</sup> David Kirkpatrick, "By Acquiring DirecTV, Murdoch Gets Upper Hand." *The New York Times*, Apr. 10, 2003.

for its proprietary programming,' said Robert Kaimowitz, chief executive of the investment fund Bull Path Capital Management.

While News Corp. has agreed to abide by the FCC's program access requirements, this pledge could end up being nothing more than a tool for pumping up cable prices. That is, while News Corp. agrees to make its programming available on non-discriminatory terms and conditions, there is absolutely nothing that would prevent News Corp. from raising the price that it charges itself on its satellite system, in return for increased revenues from the other 70 million cable households. If a cable system refuses to pay the increased price, then News Corp. will be able to threaten cable operators with use of its newly acquired satellite system to capture market share away from cable in those communities.

An article in the *Washington Post*<sup>10</sup> recently detailed the way this might work:

For instance, News Corp. raised the cost of his Fox Sports content to some cable systems by more than 30 percent this year, according to one cable operator. Like most officials interviewed yesterday, he refused to be identified, saying he had to continue dealing with News Corp.

Most recently, in Florida, News Corp. pulled its Fox Sports regional sports programming off of competitor Time Warner Cable's system over a rate dispute. News Corp. wanted to charge more than Time Warner was willing to pay, but the conflict was resolved and service restored. "If this happens when Rupert owns DirecTV, you can assume DirecTV will go into the market and just pound away at the cable system," said one cable channel executive.

And price is only the beginning of the problems in this industry. Even in the 500-channel cable universe, control of prime time programming rests in the hands of a very few media companies. Given the enormous power that will be concentrated in News Corp. as a result of the DirecTV transaction, not only will the combined entity be able to insist on top dollar for its programming, it will be able to determine who makes it and who fails in the programming marketplace.

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<sup>10</sup> Frank Ahrens, *Murdoch's DirecTV Deal Scares Rivals.* " Washington Post, Apr. 11, 2003.

## **CABLE RATES HAVE ESCALATED AND SATELLITE COMPETITION HAS NOT KEPT THEM UNDER CONTROL**

Despite the growth of satellite TV, the promise of meaningful competition to cable TV monopolies remains unfulfilled. Cable rates are up 50% since Congress passed the 1996 Telecommunications Act, nearly three times as fast as inflation.<sup>11</sup> We welcome the possibility that satellite would aggressively cut its price and compete with cable, thereby keeping cable rates in check, but for several reasons that is unlikely to happen.

Satellite competition has failed to prevent price increases on cable because cable and satellite occupy somewhat different product spaces. First and foremost, the lack of local channels on satellite systems in many communities prevents satellite from being a substitute for cable; in fact, many satellite subscribers also purchase cable service for the express purpose of receiving local channels. And while many larger communities now receive local broadcast channels from satellite, service is not as attractive as cable in several respects and many consumers simply cannot subscribe. Many urban consumers cannot receive satellite services because of line of sight problems, or because they live in a multi-tenant dwelling unit where only one side of the building faces south.

Restrictions on multiple TV set hookups also make satellite more costly. The most recent data on the average price for monthly satellite service indicates that consumers pay between \$44 and \$80 a month to receive programming comparable to basic cable programming. This monthly fee often includes two separate charges above the monthly fee for basic satellite programming – one fee to hook a receiver up to more than one television in the household, and another fee so consumers are able to receive their local broadcast channels.

Satellite customers often subscribe to receive high-end services not provided (until the recent advent of digital cable) on cable systems, such as high-end sports packages, out of region programming, and foreign language channels. In essence, it is an expensive – but valuable – product for consumers who want to receive hundreds of channels.

If satellite were a close substitute for cable, one would expect that it would have a large effect on cable. In fact, the FCC's own findings and data have contradicted the cable industry claims for years. The FCC found that satellite only “exerts a small (shown by the small magnitude of DBS coefficient) but statistically significant influence on the demand for cable service.”<sup>12</sup> In the same econometric estimation, the FCC concluded that the “the demand for cable service is somewhat price elastic (i.e. has a price elasticity of minus 1.45) and suggests that there are substitutes for cable.”<sup>13</sup> This elasticity is not very large and the FCC recognizes that in using the modifier “somewhat.” The FCC also attempted to estimate a price effect between satellite and cable. If cable and satellite were close substitutes providing stiff competition, one would also expect to see a price effect. Most discussions of substitutes and price elasticity in

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<sup>11</sup> Bureau of Labor Statistics, Consumer Price Index (March 2003). From 1996 until March 2003, CPI increased 19.3% while cable prices rose 50.3%, 2.6 times faster than inflation.

<sup>12</sup> Report on Cable Industry Prices, February 14, 2002, p. 36.

<sup>13</sup> Report on Cable Industry Prices, February 14, 2001, p. 36.

economics texts state that substitutes exhibit a positive cross elasticity.<sup>14</sup> The FCC can find none. In fact, it found quite the opposite. The higher the penetration of satellite, the higher the price of cable.<sup>15</sup>

The most recent annual report on cable prices shows that the presence of DBS has no statistically significant or substantial effect on cable prices, penetration or quality.<sup>16</sup> This is true when measured as the level of penetration of satellite across all cable systems, or when isolating only areas where satellite has achieved a relatively high penetration.<sup>17</sup> At the same time, ownership of multiple systems by a single entity, large size and clustering of cable systems results in higher prices.<sup>18</sup> Vertical integration with programming results in fewer channels being offered (which restricts competition for affiliated programs).<sup>19</sup>

In other words, one could not imagine a more negative finding for intermodal competition or industry competition from the FCC's own data. All of the concerns expressed about concentrated, vertically integrated distribution networks are observed and the presence of intermodal competition has little or no power to correct these problems. The claims that the cable industry makes about the benefits of clustering and large size – measured as price effects – are contradicted by the data. In fact, only intramodal, head-to-head competition appears to have the expected effects. The presence of wireline cable competitors lowers price and increases the quality of service.

While we hope that satellite will ultimately have a price disciplining effect in those communities where satellite offers local broadcast stations it is clear that the single most important variable in cable prices is whether there is a cable overbuilder in a particular

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<sup>14</sup> Pearce, George, *The Dictionary of Modern Economics* (MIT Press, Cambridge, 1984), p. 94. Cross Elasticity of Demand. The responsiveness of quantity demanded of one good to a change in the price of another good. Where goods i and j are substitutes the cross elasticity will be positive-i.e. a fall in the price of good j will result in a fall in the demand for good i as j is substituted for i. If the goods are complements the cross elasticity will be negative. Where i and j are not related, the cross elasticity will be zero. Taylor, John, B., *Economics* (Houghton Mifflin, Boston, 1998), p. 59.

A sharp decrease in the price of motor scooters or rollerblades will decrease the demand for bicycles. Why? Because buying these related goods becomes relatively more attractive than buying bicycles. Motor scooters or rollerblades are examples of substitutes for bicycles. A substitute is a good that provides some of the same uses or enjoyment as another good. Butter and margarine are substitutes. In general, the demand for a good will increase if the price of a substitute for the good rises, and the demand for a good will decrease if the price of a substitute falls.

Bannock, Graham, R.E. Bannock and Evan Davis, *Dictionary of Economics* (Penguin, London, 1987).

Substitutes. Products that at least partly satisfy the same needs of consumers. Products are defined as substitutes in terms of cross-price effects between them. If, when the price of records goes up, sales of compact discs rise, compact discs are said to be a substitute for records, because consumers can to some extent satisfy the need served by records with compact discs. This account is complicated by the fact that, when the price of an item changes, it affects both the REAL INCOME of consumers and the relative prices of different commodities. Strictly, one product is a substitute for another if it enjoys increased demand when the other's price rises and the consumer's income is raised just enough to compensate for the drop in living standards caused (pp. 390-391).

Cross-price elasticity of demand. The proportionate change in the quantity demanded of one good divided by the proportionate change in the price of another good. If the two goods are SUBSTITUTES (e.g. butter and margarine), this ELASTICITY is positive. For instance, if the price of margarine increases, the demand for butter will increase (p. 99).

<sup>15</sup> Report on Cable Prices, p. 11.

<sup>16</sup> Federal Communications Commission, 2002b.

<sup>17</sup> Federal Communications Commission, 2001b, describes the DBS variable as the level of subscription. Federal Communications Commission, 2002b, uses the DBS dummy variable.

<sup>18</sup> The cluster variable was included in the Federal Communications Commission 2000a and 2001b Price reports. Its behavior contradicted the FCC theory. It has been dropped from the 2002 report. The MSO size was included in the 2002 report. System size has been included in all three reports.

<sup>19</sup> Vertical integration was included in Federal Communications Commission, 2002b.

community. Wire-to-wire competition does hold down cable rates, whereas satellite seems not to. The U.S. General Accounting office describes this phenomenon:

Our model results do not indicate that the provision of local broadcast channels by DBS companies is associated with lower cable prices. In contrast, the presence of a second cable franchise (known as an overbuilder) does appear to constrain cable prices. In franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider.<sup>20</sup>

In other words, where there are two satellite and one cable company in a market, prices are 17 percent higher than where there are two cable companies and two satellite providers in a market. If we had this type of competition nationwide, consumers could save more than \$5 billion a year on their cable bills.

## PROGRAM PRODUCTION

The failure of competition in the cable and satellite distribution market is matched by the failure of competition in the TV production market. In the 1980s, as channel capacity grew, there was enormous expansion and development of new content from numerous studios. Policymakers attributed the lack of concentration in the production industry to market forces and pushed for the elimination of the Financial Interest in Syndication rules (Fin-Syn) that limited network ownership and syndication rights over programming. The policymakers were wrong.

Following the elimination of the Fin-Syn rules in the early 1990s, the major networks have consolidated their hold over popular programming. The market no longer looks as promisingly competitive or diverse as it once did. Tom Wolzien, Senior Media Analyst for Bernstein Research, paints the picture vividly—he details the return of the “old programming oligopoly”:

Last season ABC, CBS and NBC split about 23% [of television ratings]. . . But if the viewing of all properties owned by the parent companies – Disney, NBC, and Viacom – is totaled, those companies now directly control television sets in over a third of the TV households. Add AOL, Fox and networks likely to see consolidation over the next few years (Discovery, A&E, EW Scripps, etc.), and five companies or fewer would control roughly the same percentage of TV

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<sup>20</sup> U.S. General Accounting Office, *Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate: Issues in Providing Cable and Satellite Television Services.* October 2002. In an important clarifying footnote, the report finds that:

“This was a larger effect than that found by FCC in its 2002 *Report on Cable Industry Prices* (FCC 02-107). Using an econometric model, FCC found that cable prices were about 7 percent lower in franchise areas when there was an overbuilder. One possible explanation for the difference in results is that we conducted further analysis of the competitive status of franchises that were reported by FCC to have an overbuilder. We found several instances where overbuilding may not have existed although FCC reported the presence of an overbuilder, and we found a few cases where overbuilders appeared to exist although FCC had not reported them. We adjusted our measurement of overbuilder status accordingly.”

households in prime time as the three net[work]s did 40 years ago. The programming oligopoly appears to be in a process of rebirth.<sup>21</sup>

In addition, the number of independent studios in existence has dwindled dramatically since the mid-1980s. In 1985, there were 25 independent television production studios; there was little drop-off in that number between 1985 and 1992. In 2002, however, only 5 independent television studios remained. In addition, in the ten-year period between 1992 and 2002, the number of prime time television hours per week produced by network studios increased over 200%, whereas the number of prime time television hours per week produced by independent studios decreased 63%.<sup>22</sup>

Diversity of production sources has “eroded to the point of near extinction. In 1992, only 15 percent of new series were produced for a network by a company it controlled. Last year, the percentage of shows produced by controlled companies more than quintupled to 77 percent. In 1992, 16 new series were produced independently of conglomerate control, last year there was one.”<sup>23</sup>

The ease with which broadcasters blew away the independent programmers should sound a strong cautionary alarm for Congress. The alarm can only become louder when we look at the development of programming in the cable market. One simple message comes through: those with rights to distribution systems win.

Of the 26 top cable channels in subscribers’ and prime time ratings, all but one of them (the Weather Channel) has ownership interest of either a cable MSO or a broadcast network. In other words, it appears that you must either own a wire or have transmission rights to be in the top tier of cable networks. Four entities – News Corp. (including cross ownership interests in and from Liberty) AOL Time Warner, ABC/Disney and CBS/Viacom – account for 20 of these 26 channels.

Of the 39 new cable networks created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these networks have ownership by the top four programmers. Eight involve other MSOs and 10 involve other TV broadcasters. Similarly, a recent cable analysis identified eleven networks that have achieved substantial success since the passage of the 1992 Act. Every one of these is affiliated with an entity that has guaranteed carriage on cable systems.<sup>24</sup>

Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems – either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

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<sup>21</sup> Tom Wolzien, “*Returning Oligopoly of Media Content Threatens Cable’s Power.*” The Long View, Bernstein Research (Feb. 7, 2003). Emphasis added.

<sup>22</sup> Coalition for Program Diversity, Jan. 28, 2003.

<sup>23</sup> Victoria Riskin, President of Writers Guild of America, West. *Remarks at FCC EnBanc Hearing, Richmond, VA* (Feb. 27, 2003).

<sup>24</sup> Federal Communications Commission, *Ninth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB docket No. 02-145 (Dec. 31, 2002).

- AOL Time Warner has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers.
- Liberty Media owns some cable systems and has rights on Comcast systems and owns cable networks with approximately 880 million subscribers. Liberty owns almost 20% of News Corp.
- Disney/ABC has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers.
- Viacom/CBS has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers.
- Fox has must carry-retransmission and ownership in cable networks reaching approximately 370 million subscribers and a substantial cross ownership interest with Liberty.

These five entities account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly. Other entities with ownership or carriage rights account for four of the five remaining most popular cable networks. The only network in the top 25 without such a connection is the Weather Channel. It certainly provides a great public service, but is hardly a hotbed for development of original programming or civic discourse. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

In the world of broadcast and cable networks, almost three-quarters of them are owned by six corporate entities.<sup>25</sup> The four major TV networks, NBC, CBS, ABC, Fox, and the two dominant cable providers, AOL Time Warner (which also owns a broadcast network) and Liberty (with an ownership and carriage relationship with Comcast and Fox), completely dominate the tuner. Moreover, these entities are thoroughly interconnected through joint ventures.

If distribution rights win, then an entity like News Corp./DirecTV would create a powerhouse with guaranteed transmission rights on all three of the technologies used to distribute TV to the home. It will own broadcast stations, have must carry/retransmission rights on cable and satellite because of the broadcast licenses it holds, and own the largest satellite network. This is an immense power of distribution for a company that is vertically integrated into both broadcast and cable programming.

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<sup>25</sup> One of the more ironic arguments offered by the cable operators feeds off of the observation that broadcast networks have carriage rights. They argue that even if cable operators foreclosed their channels to independent programmers, these programmers could sell to the broadcast networks. This ignores the fact that cable operators control the vast majority of video distribution capacity. There are approximately 60 channels per cable operator on a national average basis (Federal Communications Commission, 2002b, p. 10). There are approximately 8 broadcast stations per DMA on a national average basis (BIA Financial, 2002). Each broadcast station has must carry rights for one station. They can bargain for more, particularly in the digital space, but the cable operators control more stations there as well. In other words, if we foreclose 85 percent of the channels, the programmers will be able to compete to sell to the remaining 15 percent of the channels. Needless to say, this prospect does not excite independent programmers.

In the 1992 Cable Act, Congress recognized that the Federal government “has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals . . . of providing a fair, efficient, and equitable distribution of broadcast services.”<sup>26</sup> Congress also recognized that “[t]here is a substantial government interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.”<sup>27</sup>

These governmental interests, as well as a finding that “[c]able television systems often are the single most efficient distribution system for television programming,” formed the original rationale behind Retransmission Consent. Because a majority of the country was receiving broadcast television service through cable, it was necessary to require that cable systems carry local broadcast signals. However, a merger between News Corp. and DirecTV would change the landscape against which Retransmission Consent was created. Given that this transaction will provide News Corp. with assets that no local broadcaster had in 1992 when Retransmission Consent was originally put in place – it will have a satellite distribution system capable of reaching a majority of the country – it seems that the original logic behind the rule is strained in the present circumstances. Not only will News Corp. own its own transmission system, but it also owns other programming that it bundles with its network programming, which may give it too much market power in negotiating cable and other carriage agreements. Congress should revisit the necessity of Retransmission Consent as it pertains to stations owned and operated by News Corp.

## CONCLUSION

Consumers Union believes that the Department of Justice should impose substantial conditions on this deal which will otherwise be harmful to competition in the video programming market—harm that will be borne on the backs of consumers.

In addition, Congress should impose a new set of nondiscrimination requirements that would enable all media distributors and consumers to purchase video programming and related services on an individual – as opposed to bundled – basis under terms that maximize competition and choice in the marketplace. Congress must reexamine the enormous market power and leverage that Retransmission Consent provides broadcast programmers – particularly one like News Corp. which, as a result of the merger with DirecTV, will own a new nationwide video distribution system (in addition to its over-the-air broadcast distribution system). And Congress should require cable and satellite operators to offer consumers the right to select the channels they want to receive at a fair price – in other words, require an a la carte program offering from all video distributors. Since the average household watches only about a dozen channels of video programming, this requirement could empower consumers to help discipline excesses in cable (or satellite) pricing, and could possibly spur more competition.

Congress must also carefully consider all the ramifications associated with the FCC’s June 2<sup>nd</sup> decision concerning the media ownership rules. Given that this decision was made

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<sup>26</sup> Public Law 102-385, Section 2(a)(9).

<sup>27</sup> Public Law 102-385, Section 2(a)(12).

despite existing concentration in most of the nation's media markets, and given that the new rules do not provide for a public interest review of future mergers, Congress should enact legislation to reverse the FCC's decision.

If the FCC's decision is not reversed, the consolidation of news outlet ownership permitted by the new rules would likely result in the concentration of broadcast television station and newspaper ownership in a few hands within individual markets. The News Corp./DirecTV deal would look almost harmless in comparison to the avalanche of media mergers that could ensue. It is completely unfair to force American consumers to accept inflated cable rates and inadequate TV competition. But excess consolidation in the news media is even worse: the mass media provides Americans the information and news they need to participate fully in our democratic society. Without the ownership rules that effectively limit further consolidation in media markets, one company or individual in a town could control the most popular newspaper, TV and radio stations, and possibly even a cable system, giving it dominant influence and power over the content and slant of news. This could reduce the diversity of cultural and political discussion in that community.

The cost of excessive media consolidation and further media deregulation is very high. The cost of market failure in media markets is the price we pay when stories are *not* told, when sleazy business deals and bad accounting practices do *not* surface, when the watchdog decides that it would rather gnaw on the bone of softer news than chase down the more complicated realities that must be uncovered to make democracy function.