Section A: Managing Non-Market Competition

I. THE LEGAL AND PUBLIC AFFAIRS FUNCTIONS IN MEDIA FIRMS
   2. General Counsel
   3. Outside Counsel
   4. Litigation Management
      A. How to Budget for an Individual Case
      B. How to Analyze Dynamic Spending

II. INFLUENCING GOVERNMENT AND THE PUBLIC
   1. Lobbying
      A. Organizing the Lobbying Function
         1) How to Choose the Lobbying Function
         2) Retained or In-House Lobbyist
3) How Much to Spend

B. Lobbying Strategies

1) “Inside” Strategies

2) “Outside” Strategies

C. The Reaction Against Media Firms: The New Information

D. Regulations on Lobbying

2. Public Relations Management

A. PR Function

B. Measuring PR Effective

C. How Much PR Spending?

III. **THE REGULATORY PROCESS**

1. Self Regulation

A. By Companies

B. By Industries

1) Film

2) TV

3) Advertising

4) Internet

5) Newspapers

C. Managing the Self-Regulation Process
1) Using the Standards Process Strategically

2. Direct Government Regulation
   A. Role of Government Regulation
   B. Strategic Use of the Regulatory Process

IV. **SUBSTANTIVE MEDIA LAW**

1. Content Restrictions
   A. Defamation: Libel and Slander
      1) Internet Libel Cases
   B. Obscenity and Indecency
      1) Obscenity on the Internet
      2) Children’s TV
   C. Government Restrictions of Publication
      1) Freedom of Information Act and the Press
   D. Advertising Regulation
      1) Commercial Speech

2. Antitrust and Market Structure Law

3. Anti-Competitive Behavior under Antitrust Law
   A. Price Discrimination
   B. Predatory Pricing
   C. Resale Price Maintenance
D. Private Antitrust Suits

E. EU Antitrust Policy

4. Profit and investment Regulation

V. GOVERNMENT INDUSTRIAL AND CULTURAL POLICY

1. Industrial Policy for IT
   A. Industrial Policy in France

VI. CONCLUSION

1. Issues Covered
2. Tools Covered
3. Management Implications

Section B: Major Media Regulatory Issues

I. TEN MAJOR U.S. REGULATORY ISSUES

1. Media Ownership
2. A La Carte Pricing of Cable Channels
3. Interconnection and Unbundling of Networks
4. Transition to Digital TV
5. Reform of Spectrum Allocation
6. Regulating the Internet
7. Internet Jurisdiction
8. Internet Infrastructure Upgrade
9. Net-Neutrality
10. Regulation of Internet TV
    A. Internet Centric
    B. TV-Centric
    C. “Layers” Approach
    D. Telecom Centric

Section A: MANAGING NON-MARKET COMPETITION

Introduction: Non-Market Competition

When firms compete with each other, they do so in the market and as well as in a “non-market” sphere. Market competition encourages companies to use lower prices, innovate products and improve service. In contrast, non-market competition is a rivalry not for customers but for favorable treatment by governments, courts, and industry associations. Non-market strategies are actions that influence
regulation, litigation, legislation, and standards, as part of competing with rivals\textsuperscript{1}. Non-market strategies have become increasingly important even though they usually do not directly generate revenues. The more government affects controls the opportunity of firms, the more important non-market strategies become\textsuperscript{3}.

**A Brief History of Relationship between Government and Media**

Government, law, and litigation have always played a major role in media. In 1455, Johannes Gutenberg invented the printing press, and immediately became the subject of several law suits. Most of what we know about Gutenberg comes from the record of the several lawsuits he was embroiled in throughout his life. After Gutenberg’s invention, the Catholic Church began to regulate printing and publishing. In 1501, Pope Alexander issued a bull that required the licensing of such activity. In 1559, the Vatican created the *Index Expurgatorius*, which contained a list of banned books. Other countries, such as England and France, also tried to control print. In 1637, the Star Chamber in England limited the number of printers to two and required approval by the official publications English censor. In France before the Bastille was destroyed in 1789 in the French Revolution, over 800 authors, printers, and book dealers had been imprisoned there.


\textsuperscript{3} Baron, David P., “Integrated strategy, trade policy, and global competition”, California Management Review, Winter 1995, Vol. 37, Iss. 2; pg.47
The nineteenth century witnessed more inventions and more interventions. When Samuel Morse invented the telegraph in the 1840s, the government postal monopolies in most countries took control of the new medium. Private operators were banned (Germany) or nationalized (Britain). In 1876, Alexander Graham Bell’s telephone immediately triggered a battle before government over patents. Here too, governments assumed operative ownership almost immediately in most other countries. In the 1900s, Guglielmo Marconi invented wireless communications. Here, too, governments almost immediately established control over this new invention and banned private broadcasting around the world.

Governments play a role in the media through a very long list of achievements:

- Frequency allocation for broadcasting and mobile devices
- Price regulation of phone and cable companies
- Grants of patents and copyrights
- Anti-monopoly and ownership controls
- Funding of technical innovations such as communications satellites, the internet, packet switching, spread spectrum, mobile technology, and microwave transmission
- Creating libel, obscenity and privacy laws
- Establishing network interconnection and connectivity rules
- Censorship of certain content
- Creation of advertising rules
- Supporting high-tech development
- Protecting trade and supervision
- Financing of public service television
- Standards setting
- Creating orbital slots for satellites
- Tax incentives
- Enforcing customs fees and trade rules
- Securities regulations
- Setting immigration rules
- Procurement of equipment and services
- Regulating market and company structure
- Regulating interconnection, and content, advertising, investment and technology standards

What are the reasons for government intervention in the media sphere which go further than they do in almost any other sector? Media are important, essential, and often controversial. They affect culture, politics and commerce technology, and infrastructure. They also exhibit certain fundamental economic characteristics. A pure hands-off ("laissez-faire") market model for media may have some societal
shortcomings. It is also treated. Free speech guarantees of a nation’s constitution, give content media substantial protections from governmental control. There are many political and cultural specific causes for government intervention. We will deal here only with the economic ones.

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

But media issues go vastly further than business and economics; they include politics, culture, national identity and societal roles. Contrasting with the realm of the market is the public sphere. This concept was popularized by the German sociologist Jürgen Habermas. The public sphere is “the space within which ideas, opinions, and views freely circulate”¹¹. Media is central to the public sphere, making public discourse possible. In this sphere, people are not just

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consumers but citizens\textsuperscript{12}. Under the public sphere concept government needs to assure a diverse and responsible media. This assumes implicitly that government has no self-interest, and that it can define what “responsible” means.

Constitutional free speech guarantees also limit the government’s role in the media sphere\textsuperscript{13}. The First Amendment of the U.S. Constitution says, “Congress shall make no law... abridging the freedom of speech, or of the press\textsuperscript{14}.” However, this only applies to media content, not to media business activities, technical infrastructure, or general activities such as media as employer, use of carbon, etc.

\section*{I. The Legal and Public Affairs Functions in Media Firms}

As we have seen, the legal and public affairs functions in media firms have become increasingly important and complex. It has thus become a greater management responsibility. Below is an organizational chart for this function for this company:


\textsuperscript{14} United States Constitution

The left branch of the chart above may be thought of as dealing with “private law,” mostly commercial and employment transactions, while the right branch deals with “public law,” mostly involving government. But public and private law in media are not clearly demarcated and often overlap, especially in the U.S. reality. Public regulatory issues can be fought through private litigation of one company against another, for example in the antitrust field. The court decisions then often become precedents for similar case in the future and hence become something resembling laws and regulations. Conversely, public law issues include
employment, securities, exports and imports and many other issues affecting transactions.

Public affairs departments manage regulatory affairs, legislative affairs, and PR. The private law activities of a company deal with contracts, transactions, intellectual property, employment, compliance issues, tort liability, advertising, competitor behavior and real estate. These activities of corporate legal departments also create corporate entities, distribution agreements, license acquisitions, and labor agreements. They screen content for libel and rights infringement, protect trademarks, and initiate infringement actions.

There are several loosely defined areas of legal specialization that are relevant to media and communication. They, too, overlap considerably. They include:

- Entertainment Law
- Patent Law
- Publishing Law
- Copyright and Intellectual Property Law
- Constitutional Law
- Regulatory Law
- Public Utility Law
- Employment and Labor Law
- Law of Libel and Defamation
• Corporate Law
• Antitrust Law
• Contract Law
• Tax Law
• Advertising and fair trade practice law

Entertainment law is a collection of private law that applies to media activities. It is an umbrella term that incorporates many of the legal specializations listed above, as in those aspects relevant to the entertainment industries. An entertainment lawyer can be part of an artist’s team of agents, assistants and personal managers. Some law schools offer a slew of courses in entertainment law. However, media companies rarely hire entry-level lawyers and prefer to hire lawyers out of law firms with some experience and a network of connections.

In the theatre world, entertainment lawyers deal with securing rights to perform plays, acquiring insurance and dealing with venues for performances\textsuperscript{16}. For television, entertainment lawyers negotiate rights to music, secure syndication rights, and negotiate advertising contracts\textsuperscript{17}. Entertainment lawyers in the film sector work on complex financial transactions, story and music copyrights, and

talent negotiations. Internet lawyers are active on online trademark infringement, liability for online publishers and distributors, database protection, information security and privacy protection.  

Like entertainment law, publishing law is not a discrete area of law. It is a combination of traditional areas of intellectual property, contracts, torts, and free speech constitutional law. The two sides in publishing law transactions are usually major publishing companies and authors. However, authors and publishers can be on the same side. For example, author James Frey and Random House were co-defendants in a 2006 class action lawsuit over Frey’s falsifications about his drug use in his memoir “A Million Little Pieces.” In 2006, Harvard freshman Kaavya Viswanathan signed a two-book, $500,000 deal with publishing company Little, Brown & Company. When it was revealed that Viswanathan had plagiarized copyrighted works in her book that had already sold 50,000 copies, Little Brown hired a top intellectual property law firm to deal with the mess. The company cancelled the contract and recalled the unsold copies of the book.

Intellectual Property (IP) Law is a distinct area of law, involving patents, copyrights, trademarks, and trade secrets. Some top IP firms are boutiques that

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only do IP-related work. (Not that this meaning of “IP” has nothing to do with the “IP” used as an acronym for “Internet Protocol”)

Among the legal specializations in the media field, Patent attorneys are the most clearly defined, requiring certification by patent offices\(^{21}\). Patent lawyers must have technical backgrounds or degrees in addition to being admitted to the bar. (Patent agents are non-lawyers with experience in the field\(^{22}\).) Even though many inventors draft patent applications by themselves, patent attorneys and patent agents (non-lawyers) are often hired for their expertise. Patent lawyers also bring and defend infringement suits.

Intellectual property law is discussed in more detail in the chapter entitled “Managing Intellectual Assets.”

I.2. General Counsel: Head of Legal Department

The general counsel (GC) or in-house counsel, is the head of an organization’s internal legal department and monitors the outside lawyers. In the past, it was not essential for the general counsel to have management skills because it was assumed that legal ability was more important. But within the internal law department, ranging from one attorney to several hundred, the general counsel also


\(^{22}\) USPTO. General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the USPTO. http://www.uspto.gov/web/offices/dcom/olia/oed/grb.pdf
acts as a manager. She must control cost and quality of internal and external legal services, oversee lawyers serving in various business units, and supervise the training of other lawyers and employees about compliance with legal and regulatory requirements. However, becoming part of management also creates a problem of intermingling roles and blurs the lines of traditional attorney-client relations. In 2005, the one hundred highest paid general counsels in the U.S. earned at least $844,000, plus stock options and bonuses\(^2\).

The following is a list of the salary and bonus of other top paid general counsels at media firms\(^3\):

<table>
<thead>
<tr>
<th>Company</th>
<th>Salary and Bonus (millions of dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Electric</td>
<td>5.3</td>
</tr>
<tr>
<td>Viacom</td>
<td>3.8</td>
</tr>
<tr>
<td>Time Warner</td>
<td>3.7</td>
</tr>
<tr>
<td>AT&amp;T</td>
<td>2.9</td>
</tr>
<tr>
<td>CBS</td>
<td>2.4</td>
</tr>
<tr>
<td>News Corp.</td>
<td>1.9</td>
</tr>
<tr>
<td>Verizon</td>
<td>1.8</td>
</tr>
<tr>
<td>Qwest</td>
<td>1.5</td>
</tr>
</tbody>
</table>

Viacom General Counsel Michael Fricklas received $3.8 million dollars in salary and bonuses, making him media’s second highest paid general counsel in 2005\(^26\). In 2006, Disney’s general counsel Alan Braverman was the top paid media general counsel making $3.9 million dollars in salary and bonus\(^28\).

Viacom has over 250 lawyers in all of its divisions and the corporate center. The company has tried to achieve a uniform, corporate legal culture through the creation of an in-house program called “Viacom Law School,”\(^27\)

**Compliance Management**

A company is liable when a company employee commits a violation when acting within the scope of employment and for the corporation’s benefit. Over-compliance is a risk-avoidance behavior. However, under-compliance imposes needless costs by causing fines, delays and negative publicity. And uncertainty about what is compliant may slow down decisions, slow down investments and raise costs. Setting up a corporate compliance program is important. A high

\(^26\) no source found  
ranking senior manager must be named and a compliance code be developed. Then the manager must familiarize the lower managers with the code and develop an oversight system that will help protect the company. Employee training programs must be created to educate them on how to be compliant and what the disciplinary actions are for non-compliance. Finally, the company must develop mechanisms for corrective action.

The Sarbanes-Oxley Act was passed in 2002 to ensure that companies take steps to ensure employee compliance with securities law and accounting principles. Section 302 of this law requires the CEO and CFO of publicly traded companies to certify that the company has established and maintained an effective system of internal control\textsuperscript{29}. Compliance issues exist for companies that operate globally. The company must make policies to ensure that it is complying with a variety of international regulations, some of which might be in conflict with each other\textsuperscript{30}.

I.3. Outside Counsel

The General Counsel is also responsible for hiring independently practicing lawyers. Firms hire such ‘outside counsel’ to benefit from specialization, contacts


and economies of scale. Outsourcing to outside counsel is used for specialized and complex matters like antitrust battles or proxy fights, but outside counsel is also used for routine matters, such as bill collection. Outsourced law firms often deal with governments in other countries or states. International law experts are needed to deal with foreign laws on content, trade, tax, telecom, labor and safety laws. Some law firms also provide full service and will work in related non-legal areas that are important to their clients. For example, Intellectual Property firm Fish & Richardson maintains the literary agency Kneerim & Williams at its offices.32

However, there are some downsides to hiring an outside counsel. It may take time and money to manage outside professionals. The outside counsel may have less incentive to keep costs low and may strive for an expensive perfectionism. In addition, outsiders may be less knowledgeable about the business and the deal itself than company attorneys, especially depending on the importance of the case.33

Regular corporate staff lawyers, make about $150,000 plus benefits, which translates into roughly $80 an hour. Outside lawyers have a broad range of billing rates. The usual rate for partners was between $300 and $600, and the rate billed for associates’ time was $200 to $350 per hour.

32 Fish & Richardson website. http://www.fr.com
33 http://www.frof.com/articles/artDetail.asp?id=25
Entertainment law firms are usually based in major media centers and capital cities. There are two kinds of entertainment law firms, those that represent the entertainment companies, which are generally law national law firms, and those that represent the talent, which are generally boutique or “plaintiff” law firms. The Beverly Hills Bar Association alone includes about 1250 entertainment lawyers as members, with the tone set by a few influential boutique firms and the entertainment law departments of several major firms.

It is typical for a company, media or otherwise, to use many different firms for its legal needs. This is because different firms have different specialties and cost structures. For example, Disney’s principal corporate law firm is Dewey Ballantine, with 540 lawyers located at its headquarters in New York alone. Disney’s other law firms include DLA Piper, with over 3,700 lawyers at its Chicago headquarters, and Wachtell Lipton with 270 lawyers in its New York office. However, the law firm Sheppard Mullin successfully represented Disney in arguing that promotional deals (like Disney’s deals with McDonald’s) are not part of a film’s gross receipts, therefore actors cannot claim a percentage. That case took four years of discovery and fifteen weeks of trial to resolve.

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Outside counsel has a few ways of billing companies for their services. Sometimes they use an hourly charge, a contingency fee, a flat fee (which is becoming more popular), or they settle on an alternative fee arrangement.

Large law firms that represent media companies are less flexible with fees than small firms representing the artists. They typically use different hourly rates for partners, junior and senior associates, paralegals, and expenses for photocopying and travel. For example, L.A. entertainment lawyer Scott Schwimer charges an initial $3,000 retainer from which $400 and hour is subtracted. Some lawyers take their fee as a percentage of a client’s income, typically 5%, especially when they manage many aspects of the client’s career. When lawyers represent talent they are typically part of an artists’ team with managers and agents and negotiate the artists’ employment contract with an entertainment company. One entertainment lawyer explained the time pressures: “When a client gets an offer to be in a potential series, the offer might come in on a Tuesday, and they want to test

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Wednesday, so we have 24 hours -- sometimes less -- to get a contract done.

Because the studios won't even test you without a deal in place.\(^{45}\)

**I.4 Litigation Management**

**I.4.A. How to Control the Costs of Outside Counsel**

Outside counsel can be effective but costly. Some ways that a company can work to keep costs low is to require an advanced budget, to pursue alternative fee arrangements, create competition for outside legal work, and to maintain tight control of the billed time. A company can also increase the size and quality of its own law departments.\(^{53}\)

Offshoring legal work offers savings because the hourly fee of a New York lawyer is often upwards of $300, whereas the hourly fee of an equivalently talented lawyer in India is $30.\(^{54}\) Patent cases have also increasingly been sent offshore in order to reduce the cost of the lengthy and expensive research.\(^{57}\) In 2007 the offshore business was estimated to be $60 to $80 million for the year.\(^{55}\)


12,000 legal jobs in India were created by U.S. law firms, and the number is estimated to rise to 80,000 by 2015\(^56\).

The managerial question in this decision is how much to invest in non-market competition such as private litigation, lobbying, regulatory litigation and public relations. In each case, legal, lobbying and public relations professionals will set the tone. Their goals need not be perfectly aligned with the company because excessive perfectionism can lead to over-spending on a case. The strategies of the several professionals also need to be coordinated.

Statistically, the average U.S. company of $1 billion plus in annual revenues faces 556 lawsuits per year and spends more than $12 million per year on litigation alone. It spends $19.8 million on settlement payments and adverse judgments\(^58\).

Companies need to decide how to set budgets for individual cases and whether to initiate, settle, or fight. Litigation management requires inside or outside law firms to submit and plan a budget of expected cost. Outside law firms tend to resist setting a litigation budget because it may constrain them and because cases are often unpredictable. But companies must consider how they can win a case at a reasonable cost, what the potential benefits are, and how risky the case is.

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\(^56\) “India Can Earn US$47 BN from Legal Outsourcing (Can Tap $25 Billion US Legal Offshoring Business),” Financial Times, September 18, 2006

\(^58\) http://www.cfo.com/article.cfm/8044747/c_8027107?f=TodayInFinance_Inside
Ninety percent of cases settle and never make it to trial\textsuperscript{59}. It is, therefore, important for managers to define a settlement range at all stages of litigation. Settlements are an important part of risk management and occur when litigation goals can be achieved through mediation within a reasonable budget. A Deloitte & Touche survey shows that mediation resolves eighty-five percent of cases in less time\textsuperscript{60}. Settlement strategies are in important part of risk-management. The best time for settlements to occur are during the outset of a case or the close of discovery when no major investment has been made and all the facts are known before trial preparation\textsuperscript{61}.

In order to determine whether a company should settle a case, a law firm may be asked to conduct an electronic search of jury verdicts in similar cases to estimate potential damages\textsuperscript{62}. In order to determine potential risks, a company schematically arranges the various uncertainties in any given case of litigation in a ‘decision tree’\textsuperscript{64}. A decision tree is a tool of analysis that identifies options and probabilities. They distinguish aspects of a case that can be manipulated by a firm, and those that are out of its control\textsuperscript{65}.

\textsuperscript{60} Ziebarth, Irene E., Warren, Nancy J., “How To Stay Within Your Litigation Budget,” \textit{The Metropolitan Corporate Counsel}, Sept, 2003, p.44
Each node shows a certain event that has two potential outcomes. For instance, the two results may be whether or not a witness testifies. Every outcome has a probability associated with it, and all of the probabilities add up to one\textsuperscript{67}. After identifying uncertainties, lawyers should provide numerical risk assessments to each possible outcome\textsuperscript{68}. All final outcomes on the right side have financial consequences, such as penalties and legal expenses, if the case is lost. Multiplying the probabilities with the monetary values of each outcome will generate the expected value. The sum of all the expected values is the value of the entire case\textsuperscript{70}. Decision trees are useful, but can become cumbersome if too many variables are involved. Below is an example for a decision tree\textsuperscript{71}:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{decision_tree.png}
\caption{Example of a decision tree.}
\end{figure}

\textsuperscript{71} http://www.vanguardsw.com/dphelp4/dph00005.gif
I.4.B. How to analyze dynamic spending?

The optimization solution of non-market spending by firm A is to invest until marginal cost equals marginal benefits. This requires:

- Estimation of the dollar value of the goal, if attained
- Estimation of the probability of success with zero investment by the firm, given an estimated level of spending by the opposing firm
- And estimation of the impact of spending above opponents on the probability of success...

These estimates need to be made by professionals and experts on the issue. From these estimates, one can calculate the benefits from spending, and their optimal level relative to the other side. It should be noted that such experts tend to be reluctant to estimate probabilities. “It all depends,” will often be said.
II. Influencing Government and the Public

We now move from private litigation and law to the public area of law and government. There can be three basic responses by a company to public policy:  

1. Passive reaction – take policy as given  
2. Anticipation – factoring government policy into planning  
3. Shaping – proactive effort to achieve specific policy objectives  

When choosing a political strategy, companies can divide the process into three dimensions of decision making.

- Transactional v. Relational  
- Collective v. Individual  
- Informational v. Financial v. Constituent-Based

Choosing a Political Strategy: Transactional v. Relational

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The transactional approach is issue-by-issue and is in response to proposed policies. It involves a short-term relationship with policy makers. A transactional strategy is better for firms with diverse policy interests across business units.\textsuperscript{75} Whereas the relational approach involves developing long-term relationships with policy makers in order to build trust. Then these relationships can be used to shape policies before they are developed. A relational strategy is better for firms with homogenous policy interests across business units.\textsuperscript{76}

**Choosing a Political Strategy: Individual v. Collective**

If a company employs the individual strategy, it works alone on the case, but if the collective strategy is used, alliances are formed in the industry through trade associations or ad hoc coalitions.\textsuperscript{77} An individual strategy is usually better for large companies with a lot of resources because there is less of a need to share company information with competitors. A collective strategy, on the other hand, is better for


high profile issues because it limits the company’s exposure. This strategy is also good for smaller firms with limited resources.\textsuperscript{78}

**Choosing a Political Strategy: Informational v. Financial v. Constituent-Based**

An informational strategy includes briefings by executives for policy makers, commissioning research, and shaping media coverage. A financial strategy is executed through campaign contributions. A constituent-based strategy involves putting pressure on policy makers by generating support for the company’s position amongst voters. The financial and informational approaches are better for the late stages of the policy process, whereas the constituent-based approach is better for shaping the environment before specific policies are discussed.\textsuperscript{80} The informational approach also complements relational strategies, while the constituent-based approach is best for large companies that can credibly influence many voters.\textsuperscript{81} This also applies to trade associations, non-governmental


organizations (NGOs), and advocacy groups. For collective political action, some of the major media-oriented trade associations in the US are\textsuperscript{83}:

- AAP: Association of American Publishers
- MPA: Magazine Publishers of America
- MPAA: Motion Picture Association of America
- NAB: National Association of Broadcasters
- NCTA: National Cable & Telecommunications Association
- RIAA: Recording Industry Association of America
- INMA: International Newspaper Marketing Association
- NNA: National Newspaper Association
- Association of Local Television Stations
- NAA: Newspaper Association of America
- USTA: US Telecom Association
- TIA: Telecommunications Industry Association
- CTIA: Cellular Telecommunications and Internet Association
- National Public Safety Telecommunications Council
- Open Internet Coalition

• NATOA: National Association of Telecommunications Officers and Advisors
• NCTA; The National Cable & Telecommunications Association
• American Cable Association (representing smaller cable companies)
• AEA: American Electronics Association
• Business Technology Association
• Compete America
• DVD Copy Control Association
• Electronic Industry Alliance
• Road to 100G
• Search Engine Marketing Professional Association, and
• Semiconductor Industry Association

Advocacy groups include Accuracy in Media (AIM), a conservative-oriented monitor in the news media, and Fairness and Accuracy in Reporting (FAIR), its liberal counterpart. Some major media-oriented trade associations in Europe include: 91

• The European Federation of Magazine Publishers

• European Publishers Council,

91 http://www.mondotimes.com/media/trade.html
• Association of European Radio,

• European Advertising Standards Alliance, and

• European Association of Communications Agencies

II.1 Lobbying

Lobbying is a major tool political strategy by commercial and non-profit organizations. Under the US Constitution, it is part of guarantees rights to free speech, assembly, and petition the government. Basic lobbying techniques include:

• Direct lobbying
• Coalition-building
• Grassroots lobbying
• Political finance, and
• Public communications efforts, such as advocacy advertising, promotion of press editorials, placement in news stories.

Lobbying targets are usually legislators and staff, the executive branch, officials and staff of independent agencies, state and local officials, and government agencies of other countries. For example, in 2009 the television, music and movie industries in the U.S. spent $107,276,953 on lobbying in total.

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97 http://www.opensecrets.org/industries/indus.php?ind=B02
Top Media Firms in TV/Movie/Music Industry, officially reported lobbying in the U.S in 2009:\(^98\):

<table>
<thead>
<tr>
<th>Client/Parent</th>
<th>Total Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Cable &amp; Telecommunications Assn</td>
<td>$15,980,000</td>
</tr>
<tr>
<td>Comcast Corp</td>
<td>$12,590,000</td>
</tr>
<tr>
<td>National Assn of Broadcasters</td>
<td>$11,090,000</td>
</tr>
<tr>
<td>National Amusements Inc</td>
<td>$7,275,000</td>
</tr>
<tr>
<td>Recording Industry Assn of America</td>
<td>$6,246,809</td>
</tr>
<tr>
<td>News Corp</td>
<td>$5,300,000</td>
</tr>
<tr>
<td>Time Warner Cable</td>
<td>$4,825,424</td>
</tr>
<tr>
<td>Time Warner</td>
<td>$4,390,000</td>
</tr>
<tr>
<td>Liberty Media</td>
<td>$3,866,000</td>
</tr>
<tr>
<td>Sony Corp</td>
<td>$3,570,000</td>
</tr>
<tr>
<td>Clear Channel Communications</td>
<td>$3,078,901</td>
</tr>
<tr>
<td>Vivendi</td>
<td>$2,860,000</td>
</tr>
<tr>
<td>Cox Enterprises</td>
<td>$2,680,000</td>
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<td>SoundExchange</td>
<td>$2,101,000</td>
</tr>
<tr>
<td>Charter Communications</td>
<td>$2,000,000</td>
</tr>
<tr>
<td>Motion Picture Assn of America</td>
<td>$1,840,000</td>
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<td>Csc Holdings</td>
<td>$1,690,000</td>
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<td>ASCAP</td>
<td>$1,353,000</td>
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<td>Broadcast Music Inc</td>
<td>$1,220,000</td>
</tr>
</tbody>
</table>

II.A. Organizing the Lobbying Function

How do we know these figures? In the U.S., companies and trade associations must report them, and all lobbyists must register, and report their clients. In Europe, Europe has weaker regulations on lobbying, usually without a mandatory registration\(^{74}\), and based on voluntary registration and self-regulation by itself. A company must deal with several organizational issues in analyzing its lobbying\(^{75}\):

- How to choose the right person?
- Should lobbyists be in-house or retained?
- How much to spend on lobbying?

Strong lobbyists are politically sophisticated, persuasive, and experienced in legislative procedures. They should be able to network and maintain coalitions and connections. They must be able to play many roles, such as advocates, gatherers of intelligence, policy analysts, political campaigners, alliance builders, collection agents, publicists, courtiers, unpaid assistants, and fundraisers.


\(^{75}\) Source: Mack, Charles S. “Business, Politics, and the Practice of Government Relations”, 1997
Lobbyists have diagnostic capabilities and must be able to assess potential governmental impact and define achievable goals. They must be capable in building organizations. Lobbyists must also be personable and capable of building relationships with key players in the government and create a “relationship capital” to draw upon when needed.

The second organizational issue that a company must address is whether a lobbyist should be an employee or a hired independent professional. For a long-term, repetitive, or continuing issue it is better to use an in-house lobbyist. However, for short term or unique issues, retaining a lobbying firm is more cost effective. Retained lobbyists tend to be expensive because most charge by the clock or ask for an up-front retainer that covers a legislative session or calendar year. Third, companies must consider how much to spend on lobbying. Below is a chart of the lobbying expenses of the U.S. telecom industry, combined, which spent $53,796,903 in 2009.

Historically telecom companies have spent large amounts of money on lobbying. The chart below shows the lobbying expenses of top
telecommunications companies in 2009\textsuperscript{87}. Qualcomm, one of the largest electronics companies in the U.S., spent over $6,000,000.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{Client/Parent} & \textbf{Total} \\
\hline
Qualcomm & $6,040,000 \\
\hline
Cellular Telecom & Internet Assn & $5,610,000 \\
\hline
Motorola & $4,910,000 \\
\hline
Verizon & $4,740,000 \\
\hline
Qwest & $2,857,633 \\
\hline
Deutsche Telekom & $2,840,723 \\
\hline
Sprint Nextel & $2,509,000 \\
\hline
Research In Motion & $1,948,981 \\
\hline
Alcatel-Lucent & $1,942,500 \\
\hline
Telecommunications Industry Assn & $755,284 \\
\hline
\end{tabular}
\end{table}

Internet and computer industries also spend large amounts of money on lobbying because regulation and policy influence their growth as well. This number has climbed to more than $100 million since 2000\textsuperscript{90}.

\textsuperscript{87} https://www.opensecrets.org/lobby/indusclient.php?lname=B09&year=2009&filter=P
The chart below is a list of lobbying expenses of the top computer and internet companies in 2009:\textsuperscript{92}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{Client/Parent} & \textbf{Total $Mil} \\
\hline
Microsoft & $6.7 \\
\hline
IBM & $5.4 \\
\hline
Oracle & $5.1 \\
\hline
Entertainment Software Assn & $4.6 \\
\hline
Google & $4.0 \\
\hline
Intel & $3.9 \\
\hline
Hewlett-Packard & $3.7 \\
\hline
Dell & $2.9 \\
\hline
SAP Aktiengesellschaft & $2.9 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{90}“Influence and Lobbying: Computers/Internet,” Center for Responsive Politics. Last accessed on 11 June 2008 at http://www.opensecrets.org
\textsuperscript{92} http://www.opensecrets.org/lobbyists/indusclient.asp?code=B12&year=2007
The TV, film, and music industry combined spent over $107 million in 2009. These industries spend money to lobby issues such as profanity rules, censorship, and intellectual property rights.

<table>
<thead>
<tr>
<th>Client/Parent</th>
<th>Total ($Mil)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Cable &amp; Telecommunications Assn</td>
<td>3.9</td>
</tr>
<tr>
<td>National Assn of Broadcasters</td>
<td>3.6</td>
</tr>
<tr>
<td>Comcast Corp</td>
<td>3.1</td>
</tr>
<tr>
<td>National Amusements Inc</td>
<td>2.4</td>
</tr>
<tr>
<td>Time Warner Cable</td>
<td>1.5</td>
</tr>
<tr>
<td>Recording Industry Assn of America</td>
<td>1.4</td>
</tr>
<tr>
<td>Sony Corp</td>
<td>1.0</td>
</tr>
<tr>
<td>Clear Channel Communications</td>
<td>0.9</td>
</tr>
<tr>
<td>Vivendi</td>
<td>0.8</td>
</tr>
</tbody>
</table>

News Corp. spent around $11 million on lobbying between 1998 and 2007. Its outside hired lobbyists and consultants included at least 12 firms win the U.S. above. Individuals included:

- Tony Podesta, former counsel to Senator Ted Kennedy and brother of President Clinton’s chief-of-staff
- Ed Gillespie, former Republican Party chairman

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• Alfonse M. D’Amato, former New York Senator
• Rudolph W. Giuliani, former New York Mayor
• Jack Quinn, former White House Counsel under President Clinton

The annual lobbying expenses of News Corp. steadily increased over the years and reached over $5 million in a single year\(^96\).

Below is a list of the money spent on outside lobbying firms in the year 2009 alone, listing only the top 8 of 27 listed\(^100\).

<table>
<thead>
<tr>
<th>Firms Hired</th>
<th>Reported Contract Expenses (included in Total Reported by Filer)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT&amp;T Inc</td>
<td>$14,729,673</td>
</tr>
<tr>
<td>Breaux Lott Leadership Group</td>
<td>$600,000</td>
</tr>
<tr>
<td>Mayer Brown LLP</td>
<td>$600,000</td>
</tr>
<tr>
<td>Akin, Gump et al</td>
<td>$480,000</td>
</tr>
<tr>
<td>DC Navigators</td>
<td>$400,000</td>
</tr>
<tr>
<td>Navigators Global LLC</td>
<td>$400,000</td>
</tr>
<tr>
<td>Wiley Rein LLP</td>
<td>$330,000</td>
</tr>
<tr>
<td>Polaris Government Relations</td>
<td>$320,000</td>
</tr>
<tr>
<td>Quinn Gillespie &amp; Assoc</td>
<td>$240,000</td>
</tr>
</tbody>
</table>

**Campaign Contributions**

One of the tasks of lobbyists is to advise firms where campaign contributions should be targeted\(^105\). Contributions are an important way for companies to gain


\(^105\) Source: Phill Brooks, "Lobbyist Explanations" Missouri Digital News,
political support for their interests. This may be most developed in the political cultures of the U.S., but some corporate money is deployed for political impact in every country, though usually much more hidden from public view.

All media companies are active in making campaign contributions as shown by the following charts. During the 2008 election cycle media companies made a majority of their contributions to Democrats¹⁰⁸:

<table>
<thead>
<tr>
<th>Industry</th>
<th>Total Contributions ('000)</th>
<th>Percent to Democrats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cable TV</td>
<td>$7,446</td>
<td>62%</td>
</tr>
<tr>
<td>TV/Radio Stations</td>
<td>$4,622</td>
<td>49%</td>
</tr>
<tr>
<td>Music Production</td>
<td>$3,630</td>
<td>78%</td>
</tr>
<tr>
<td>TV Production</td>
<td>$2,746</td>
<td>87%</td>
</tr>
</tbody>
</table>

These numbers are based on contributions from PACs, soft money donors, and individuals giving $200 or more. (Only those groups giving $5,000 or more are listed here.)

In many cases, the companies themselves did not donate; rather the money came from the organization's PAC, or from its individual employees or owners, and those individuals' immediate families. The company totals include subsidiaries and affiliates. All donations took place during the 2007-2008 election cycle and

¹⁰⁸ Data from http://www.opensecrets.org
were released by the Federal Election Commission on October 19, 2008.

Individually, most media companies’ and employee’s campaign contributions in 2008 distribute were as follows:\(^{110}\):

<table>
<thead>
<tr>
<th>Organization</th>
<th>Amount ('000)</th>
<th>Democrats</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Electric</td>
<td>$492</td>
<td>90%</td>
</tr>
<tr>
<td>Reed Elsevier</td>
<td>$152</td>
<td>66%</td>
</tr>
<tr>
<td>Time Warner</td>
<td>$3,518</td>
<td>44%</td>
</tr>
<tr>
<td>Comcast</td>
<td>$2,238</td>
<td>65%</td>
</tr>
<tr>
<td>News Corp</td>
<td>$1,255</td>
<td>64%</td>
</tr>
<tr>
<td>Walt Disney</td>
<td>$815</td>
<td>68%</td>
</tr>
<tr>
<td>Clear Channel</td>
<td>$680</td>
<td>42%</td>
</tr>
<tr>
<td>Time Inc(^{111})</td>
<td>$81</td>
<td>81%</td>
</tr>
</tbody>
</table>

AT&T was one of the most active companies among all corporate contributors to political campaigns in 2008, as can be seen below:\(^{112}\):

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount Donated ('000)</th>
<th>% Given to Democrats</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT&amp;T</td>
<td>$1,655</td>
<td>44%</td>
</tr>
<tr>
<td>Comcast</td>
<td>$1,036</td>
<td>65%</td>
</tr>
</tbody>
</table>

\(^{110}\) Data from http://www.opensecrets.org
\(^{111}\) Data from http://www.campaignmoney.com
\(^{112}\) Data from http://www.opensecrets.org
<table>
<thead>
<tr>
<th>Company</th>
<th>Total Contrib. (‘000)</th>
<th>to Dem.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comcast</td>
<td>$2,238</td>
<td>65%</td>
</tr>
<tr>
<td>Time Warner</td>
<td>$1,732</td>
<td>78%</td>
</tr>
<tr>
<td>National Amusements</td>
<td>$1,664</td>
<td>87%</td>
</tr>
<tr>
<td>National Cable &amp; Telecom</td>
<td>$1,196</td>
<td>53%</td>
</tr>
<tr>
<td>News Corp</td>
<td>$829</td>
<td>75%</td>
</tr>
<tr>
<td>Disney</td>
<td>$815</td>
<td>68%</td>
</tr>
<tr>
<td>National Association of Broadcaster</td>
<td>$770</td>
<td>56%</td>
</tr>
</tbody>
</table>

The top 2008 campaign contributors from the television, movie and music industries were\textsuperscript{116}.  

\textsuperscript{115} Data from http://www.campaignmoney.com  
\textsuperscript{116} http://www.opensecrets.org
Rupert Murdoch and his family also contributed to the 2008 Presidential election\textsuperscript{118}. The Murdochs donated a total of $11,300 to John McCain.

Here is a list of the largest computer, media, and telecom contributors from the 2008 campaign\textsuperscript{122}:

<table>
<thead>
<tr>
<th>Organization</th>
<th>Amount ('000)</th>
<th>Dems %</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT&amp;T</td>
<td>$4,507</td>
<td>49%</td>
<td></td>
</tr>
<tr>
<td>Microsoft</td>
<td>$3,243</td>
<td>72%</td>
<td></td>
</tr>
<tr>
<td>Time Warner</td>
<td>$3,00</td>
<td>81%</td>
<td></td>
</tr>
<tr>
<td>Comcast</td>
<td>$2,920</td>
<td>64%</td>
<td></td>
</tr>
<tr>
<td>Verizon</td>
<td>$2,502</td>
<td>50%</td>
<td></td>
</tr>
<tr>
<td>National Amusements</td>
<td>$1,851</td>
<td>87%</td>
<td></td>
</tr>
<tr>
<td>Google</td>
<td>$1,669</td>
<td>82%</td>
<td></td>
</tr>
<tr>
<td>News Corp</td>
<td>$1,629</td>
<td>77%</td>
<td></td>
</tr>
<tr>
<td>National Cable &amp; Telecommunications Assn</td>
<td>$1,540</td>
<td>53%</td>
<td></td>
</tr>
<tr>
<td>Cisco Systems</td>
<td>$1,420</td>
<td>65%</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{118} http://www.opensecrets.org

B. Lobbying Strategies

II.B.1. Inside Strategies

There are two different types of lobbying strategies: inside and outside strategies. Inside strategies contribute to a candidate’s campaign through political action committees (PACs) or coordinated member giving\textsuperscript{135}. The influence of PACs is constrained because the maximum gift it can give to a single candidate during an election cycle is $10,000\textsuperscript{137}.

II.B.2. Outside Strategies

Outside strategies generate public pressure on policy makers to support a group’s agenda. A company does not need access to specific policymakers directly to make an impact. It is a good tactic to use for members who are on the fence of an issue. Additionally, groups with large and ideologically cohesive memberships are best able to use grassroots tactics. They are able to leverage a large size membership who can provide resources, like infrastructure or volunteers, to candidates\textsuperscript{143}.

\textsuperscript{135} Source: Paul S. Hernson, “The Interest Group Connection” 1998
\textsuperscript{137} Source: Paul S. Hernson, “The Interest Group Connection” 1998
\textsuperscript{143} Source: Paul S. Hernson, “The Interest Group Connection” 1998
“Astroturf” campaigns are campaigns designed to create the appearance of a grassroots movement, to falsely convey a broad based support on an issue\textsuperscript{145}. Such campaigns may pay political consultants to generate phone calls and letters to politicians to represent that this is public opinion\textsuperscript{147}.

In an example of an Astroturf campaign, the MediaOne Cable Company wanted to transfer operating licenses to AT&T after its acquisition. Several communities in Massachusetts wanted to challenge this plan\textsuperscript{149}. In response, MediaOne organized employees living in each community to help persuade key local government officials to vote in favor of the proposal. These employees were asked to send letters to the local government and attend hearings on the proposal. This astroturf campaign was successful in that 98% of 115 MediaOne communities in Massachusetts voted to transfer the licenses.\textsuperscript{151}

The anti-Napster campaign is also an example of a grassroots effort. Napster, the first major file sharing company, was sued in 1999 by the Recording Industry Association of America (RIAA), rapper Dr. Dre, and band Metallica for copyright infringement.\textsuperscript{153} Napster’s opponents and the RIAA organized a coalition

\textsuperscript{145} Source: Paul S. Hernson, “The Interest Group Connection” 1998
\textsuperscript{147} Source: Joshua Marshall, “Mr. Gates Goes to Washington”, The American Prospect 7/17/00
of about 60 artists to persuade key senators to hold hearings to publicize the perspective of artists, who received more sympathy and attention than the record companies. Additionally, Artists Against Piracy also purchased ads in newspapers to give Napster’s opponents a more appealing face.154

D. Regulations on Lobbying

There are several types of restrictions on lobbying. In the U.S, individuals who devote at least 20% of their working time to lobbying activities must register as lobbyists.156 Lobbying firms and in-house lobbyists must file quarterly reports of their activities. Additionally, companies that pay at least $5,000 for a trade association’s lobbying activities and “actively participate” in that association’s lobbying activities must be listed on that association's public lobbying reports.157 Moreover, lobbyists and companies that file lobbying reports must report financial contributions to or on behalf of a public official, including contributions to third-parties who make a public official an honoree.158

Recipients of federal funds, like grants, contracts or cooperative agreements cannot use government money for lobbying the government (The “Byrd Amendment”). Also, a recipient of federal funds, such as public television stations, that uses non-federal funds for lobbying purposes must report those activities to the awarding agency.

Lobbyists are prohibited from intervening during the agency decision process. Specific rules ban contact between lobbyists and the FCC during prescribed “blackout periods,” when a case is being decided. However, there are loopholes so that lobbyists can use to make presentations to the agency at the request of a sympathetic FCC Commissioner.  

There are also limits alone on the “revolving door” in which government employees move to jobs in an industry which they previously regulated. The Federal Office of Government Ethics states: “A former employee is forever banned from representing another person or organization before a Federal Department, agency, or court on certain matters in which the former employee participated personally and substantially while working for the government.”

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159 Christopher Stern, Digital Capital, Washington Post, 2/27/03
a former employee may not lobby on matters which were pending under the employee’s supervision in government service.\textsuperscript{161}

There is concern that a government employee may already rule favorably for a future employer in an attempt to get a job. Despite limits on the revolving door, there are numerous examples of former regulators who have joined industry or law firms representing the industry.\textsuperscript{162} Additionally, restrictions may be bypassed by merely advising the company as law firms without directly representing them.

On the other hand, it may not be fair to limit the job prospects of qualified people. It would deter talented people from working for the government. For example, should a top tax lawyer, who once worked for the Internal Revenue Service, be restricted from doing tax work in the future?


II.2 Public Relations Management

II.2.A. Public Relations

Public Relations are ‘communications techniques to help an organization to create a good reputation for itself and its goals.’ Public relations (PR) management is the company function which evaluates public attitudes, and executes a program of communication to gain public support. Unlike advertising, no money is spent on the outright purchase of time and space to relay the company’s message.

Governments spend money on public relations. The European Union spends 2 billion pounds a year on public relations campaigns – this number is bigger than Coca Cola’s global advertising budget.

Publicity, a subset of the public relations effort, refers to the generation of news about a person, product, or service that appears in broadcast or print media.

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Publicity is typically a short-term strategy, while public relations are a concerted program extended over a period of time.\textsuperscript{167}

In the latter half of the nineteenth century, the publicity business was generally limited to the relatively modest objective of getting newspapers to mention products that already existed. To this end, freelance press agents, paid by the number of “mentions,” would provide editors of local newspapers with items to fill their pages. In a few extreme cases, such as the ballyhoo of P.T. Barnum, press agents would stage pseudo-events to attract reporters to products.\textsuperscript{168} The elements of public relations include press relations, product publicity, corporate communications, lobbying, and counseling.\textsuperscript{169} Relevant target audiences are:

- employees of the firm,
- stockholders and investors,
- the media,
- educators,
- civic and business organizations,
- governments, and
- financial groups.

\textsuperscript{168} http://toughsledding.files.wordpress.com/2008/08/ptb.jpg
\textsuperscript{169} Lamb, Hair, Mcdaniel, Marketing, South-Western Collge Publishing, 1996
Even though the internet provides great PR and marketing opportunities, there are downsides. For example, the Internet allows for the proliferation of untrue and defamatory statements.\textsuperscript{170} The Internet has lead to third-party websites “gripe sites” that criticize a company’s products, actions, and leadership negatively. These websites pose new challenges for a company controlling its image.\textsuperscript{171-172} Examples are:

- www.walmartwatch.com
- www.ihatestarbucks.com
- www.exxposeexxon.com

Gripe sites, however, can be beneficial to companies because they can provide a sense of customer reaction to products. Companies therefore often monitor internet chat rooms and gripe sites.

In some cases, PR efforts have been used to provide positive comments without identifying these as company sponsored. But this has often backfired when exposed.

A company could try to use legal action to take down certain websites or statements, if shown to be defamatory. However, this method may alienate the

\textsuperscript{170} Casarez, Nicole B. “Dealing with cybersmear: how to protect your organization from online defamation” Public Relations Quarterly :2002
\textsuperscript{172} Casarez, Nicole B. “Dealing with cybersmear: how to protect your organization from online defamation” Public Relations Quarterly :2002
public and gives the criticism more exposure. Another alternative would be to take steps to placate critics, by considering alternatives to their problem or a more general reform of practices. This is harder to do for fundamental issues. Another option is to create company-managed forums for criticism. This gives companies greater control and creates a positive public image of being concerned and attentive to critics. But if done in a manipulative way, this is likely to backfire.\textsuperscript{173}

II.2.B. Measuring PR Effectiveness

There are different ways to measure the effectiveness of PR. Companies may look count news clips or conduct overnight surveys or phone interviews, and other media impressions.\textsuperscript{174} Companies may also measure the reach of PR by looking at the exposure. Media impressions are audited by adding up the circulation, TV audience ratings, and online links of the media impressions. One can also measure the total number of impressions on specific audiences.\textsuperscript{175} One can

\textsuperscript{174} Katie Delahaye Paine, “How to measure your results in a crisis”. The Institute for Public Relations, 2002.
also do a content analysis on what has been written and broadcasted about the company.\textsuperscript{176} This consists of looking at:

- the percentage of positive/negative articles by publication, reporter, subject, or target audience.\textsuperscript{177}
- prominence (headline, cover story, etc.)
- who was remembered or quoted\textsuperscript{178}

One can also look at one’s exposure compared to that of rivals.

**Managing Unfavorable Publicity**

Companies can use several methods to manage unfavorable publicity. They can use crisis management, in which fast and accurate communication is key. Companies should also start early and work through the worst damage.\textsuperscript{179}


II.2.C. How Much PR Spending?

Measuring exposure is one step in determining success. The next question is how much these efforts cost and how much the firm should spend. There are several ways to determine how much to spend on public relations.\(^\text{181}\)

1. Past Budgets

Spending a budget that matches a similar, recent project. But this assumes projects that are indeed similar and that the earlier project deserves to be imitated.\(^\text{182}\)

2. Competitive parity

Comparisons involve some guessing – companies may have different backgrounds or have disparate goals.\(^\text{183}\)

3. Affordability

This approach can be realistic during lean times, but that may be the time when companies use it most to improve their situation.

4. Downside Calculation


This approach estimates the effect that inaction will have on the company’s project, which is difficult to do.\textsuperscript{184}

5. Stage of Lifecycle

Covers the issue’s phase. Start up projects, for example, require more attention than mature projects.

6. Rate of return analysis

Focuses on the cost relative to estimated value of expected results.

7. Marginal net analysis

Incremental PR benefit should equal incremental PR cost. This is a good procedure, but in practice exceedingly hard to calculate. One would have to assign value on per-thousand, per message reach on the audience reached. This could be a value similar to that of a paid advertising message to the same audience. After that, one would have to estimate the impact of PR spending. This could be estimated by the number of favorable press members mentions which his/her efforts generate by journalists that were approached.

The PR spending of *Fortune* Magazine’s list of “Most Admired” companies from 1999 seem to correlate positively.\(^\text{185}\)

In 1999, the average spending on PR of the top 200 companies based on reputation is around $6 million. The spending of the bottom 200 is significantly lower and around $2.8 million. Note that this study was sponsored by the PR industry. Furthermore, it is possible that the firms with the best reputations are the largest companies, and most of the higher spending is because of greater general activity level.

The average PR spending for “Most Admired” Companies by PR activity was\(^\text{186}\)

<table>
<thead>
<tr>
<th>PR Activity</th>
<th>Amount ($)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Media relations</td>
<td>1,004</td>
<td>22%</td>
</tr>
<tr>
<td>B. Executive outreach</td>
<td>239</td>
<td>5%</td>
</tr>
<tr>
<td>C. Investor Relations</td>
<td>544</td>
<td>12%</td>
</tr>
<tr>
<td>D. Annual and Qtr Reports</td>
<td>635</td>
<td>14%</td>
</tr>
<tr>
<td>H. Industry Relations</td>
<td>709</td>
<td>15%</td>
</tr>
<tr>
<td>I. Employee Communications</td>
<td>1,084</td>
<td>23%</td>
</tr>
<tr>
<td>J. Department management</td>
<td>425</td>
<td>9%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4,641</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

As shown, the firms with the best reputation have a larger PR staff size\(^\text{187}\).

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III. The Regulatory Process

We have so far discussed in this chapter three main tools of non-market competition: litigation, lobbying, and public relations. We now discuss the fourth tool: dealing with regulation.

III.1 Self- Regulation

Self-regulation can be beneficial to companies because it allows for more flexibility and speed, and is usually more expert-driven and less radical than government regulation. It also requires fewer lawyers and allows for more flexibility. Both companies and industries can use self-regulation.

Self regulation can be done within a single company or amongst a group of companies. Each major broadcast network as well and many cable satellite networks have their own “Standards and Practices” Department (PSD) which screen programs and advertising to ensure compliance with laws, and that the material is not offensive to audiences, particular groups, and also advertisers, confirming that the material is appropriate for the specific time slot.254

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In 2008, the Standards and Practices department at the ABC TV network were thirty-five people. Networks often delay certain live TV programming, and issue “viewer discretion” warnings. In addition to the Standards and Practices departments of the major TV networks, local networks that retell their content may also screen it. For example the ABC affiliate in Biloxi, Mississippi refused to air the program *NYPD Blue* because of content concerns. Furthermore, advertisers may have their own ethics codes for advertising to be acceptable.

Self-regulation by powerful companies can have far-reaching effects. The noted film critic Roger Ebert said that the largest home video chain choked films’ creativity: “Blockbuster in effect exercises censorship over American movies by making it economically prohibitive for studios to consider NC-17 films.”

The Newspaper industry also self-regulates. Most newspapers have internal codes set standards on the behavior of journalists, including standards on privacy or breach of trust.

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The New York Times also has a 52-page manual as a code of conduct, “Newsroom Integrity Statement” (1999).\(^{258}\) It states that “staff members must obey the law in pursuit of news.” The gives 155 situations that newspapers and journalists might have to deal with. Among other things, it discusses protecting the newspaper’s neutrality, the staff’s civic performance and journalistic activities outside of the paper, and conflicts of interests. It deals with advertisers, marketing and production, and with contributions and gifts.\(^{259}\) It discourages the use of, but does not prohibit anonymous sourcing.\(^{260}\)

The U.S. has not created an industry-wide self regulating system. Some newspapers have internal ombudsmen officers to provide aggrieved objects of stories an avenue for complaint. But in 2004, only thirty to forty of the 1,400 US newspapers had such a system, allegedly for financial reasons, though probably more for reasons of avoiding unfavorable publicity.\(^{261}\) Nevertheless, after years of resistance and following a major plagiarism scandal, the Jayson Blair affair, The New York Times hired an ombuds, titled a “Public Editor”, who also writes a column.\(^{262}\)


III.1.A. By Companies

Company self-regulation is often extended to wider arrangements. Such self-regulation can help consumers and businesses by setting an agreed-upon standard level of quality and technical specifications that allows uniform and low-cost production and development, and enhanced compatibility.\textsuperscript{263}

Here are some examples of self-regulatory organizations in the U.S:

- NAB – National Association of Broadcasters
- MPAA – Motion Pictures Assoc. of America
- Advertising Council
- IETF – Internet Engineering Task Force

III.1.B. By Industries

However, self-regulation has drawbacks. Industry codes set by competitors among themselves often lead to price collaboration and cartel behavior, such as the prevention of new rivals. This is often the case with advertising by professions such as law or medicine. Furthermore, self-regulation also affords no due process to parties that are aggrieved by it. And the setting of the self-regulation usually

\textsuperscript{263} Majoras, Deborah P. \textit{Self Regulatory Organizations and the FTC}. 2005
involves no public participation. In addition, self-regulation may be mostly created to forestall government regulation.

1. Film Self-Regulation

There is no government regulation of the film industry in the United-States. Instead, the Motion Picture Association of American (MPAA) self-regulates the sector.

As early as 1907, Chicago passed a law allowing the pre-censorship of movies. In 1915 the U.S. Supreme Court ruled on the issue and upheld the right of local government to censor movies. The Supreme Court at the time deemed movies as solely “entertainment,” which did not necessitate First Amendment protection any more than a basketball game. In consequence, throughout the 1920s and 1930s, local politicians, religious organizations, and self-styled custodians of public morality, such as the Catholic League of Decency, the Daughters of the American Revolution, and the National Congress of Parents and Teachers, claimed a right to censor movies all over the country. In response, in 1924, the studios

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decided to set up a common censor, former postmaster general William Hays, in order to undercut the local censorship boards.\textsuperscript{265}

Hays negotiated a formula, or “production code” among the studios. The “Hays Office” set principles, monitored films, proposed script changes and censored films. For example, the code said that in films law breakers could not escape justice, married couples had to sleep separately in twin beds, and divorces had to lead to bad results.\textsuperscript{266} In the 1930s, the Hays Office even criticized films that focused on social problems such as poverty in the Great Depression.\textsuperscript{267}

Currently, U.S. studios put ratings on their movies, such as G or PG-13 (Parental Guidance for Children under 13), to give advance warnings about the content of movies. The rating process is secretive, has unclear standards, and favors big studios, which fund the system. (See the movie, “This Film is Not Yet Rated”)

\textbf{2. TV Self-Regulation}

The TV industry’s self-regulation is similar to that of the film industry. Prodded by the Congress and the FCC, in 1997, most of the TV and cable networks (except

\begin{footnotesize}
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NBC) “voluntarily” agreed to rate their own programming according to a system that provided ratings for V (violence), S (sex), and L (language) ratings. These TV Parental guidelines have also been established to be used with the so-called “V-chip,” which was mandated to be built into all television sets manufactured after 2000.

A 2007 poll which said that only 27% of all parents could figure out how to program the V-chip.269

3. Self-Regulation by the Advertising Industry

There is also self-regulation by and of the advertising companies. Until 1982, the National Association of Broadcasters (NAB) “Blue Book” industry code limited the number of TV spots. Advertisers questioned if this was in the public interest or merely to keep the supply of advertising time low, and keep prices high. Indeed, a court ruled that this system violated antitrust law and anti-competitive.

In 1971, four trade associations, the American Advertising Federation (AAF), the American Association of Advertising Agencies (AAAA), the Association of National Advertisers (ANA), and the Council of Better Business Bureau (CBBB), joined forces to establish the National Advertising Review

Council (NARC). The council has two operating arms, the National Advertising Division of the Council of Better Business Bureaus (NAD) and the National Advertising Review Board (NARB). The NAD/NARB has become the advertising industry’s primary self-regulatory mechanism. It reviews complaints from consumers and consumer groups, local Better Business Bureaus, and competitors. If the NAD and the advertiser fail to resolve the controversy, either can appeal to a NARB panel. The NARB is composed of 85 advertising professionals and prominent public-interest members. If the NARB panel agrees with the NAD and rules against the advertiser, the advertiser must discontinue the advertising. If the advertiser refuses to comply, the NARB refers the matter to the appropriate government agency and indicates the fact in its public record.

The NARB cannot impose sanctions or order an advertiser to modify or stop running an ad, but advertisers who participate in a NAD investigation and NARB appeal rarely refuse to accept the panel’s decision. In 1993, for the first time in its history, the NARB referred a matter to the Federal Trade Commission following an advertiser’s refusal to modify a commercial in accordance with an NARB decision.

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In 1996, of the 96 NAD investigations, 16 ad claims were substantiated, 5 were referred to the government, and 75 were modified or discontinued.²⁷³

An example of one challenge was Malt-O-Meal’s use of the phrase “Betcha Can’t Taste the Difference” in 2007 advertisements. The phrase was questioned by NAD who found that Malt-O-Meal’s testing was sufficiently flawed.²⁷⁴ Perdue Farms was also scrutinized in 2007, with the NARB recommending that the company discontinue placing “no preservatives” and “fresh” labels in advertising for meat and poultry products that contained sodium diacetate or sodium lactate.

Children’s Advertising Review Unit

The Children’s Advertising Review Unit (CARU) of the Council of Better Business Bureaus was established in 1974 to deal with children’s advertising. CARU is financed by the children's advertising industry. It reviews advertising in all media directed to children under 12 years old as well as online privacy practices involving children under 13 years of age, in order to ensure that advertisements comply with CARU’s guidelines on information collection and the federal Children’s Online Privacy Protection Act.²⁷⁵

²⁷⁵ http://www.us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=24783d03-2c4b-4b0e-b46f-5fb29117b7c6
4. Internet Self-Regulation

Internet companies generally prefer self-regulation to government involvement. The Better Business Bureau, TrustE, and the Direct Marketing Association are all industry organizations that work to self-regulate the Internet. To get a “seal of compliance,” websites must agree to disclose their data privacy practices and be monitored for adherence about:

- what personal information is being gathered,
- how it will be used,
- with whom it will be shared, and
- whether the user can control its dissemination.

However, usually a consumer needs to opt-out to enforce their Internet privacy. Opt-out customers choose not to have their information recorded. This option is often unclear, lengthy and placed in an obscure spot on the site. Most people choose to waive it rather than read it carefully. Eighty percent of users stay opt-out, while twenty percent do opt-in.

5. Press Self-Regulation

The United States has had many failed industry-wide self-regulation experiments. There was a movement for nationwide “Press Council” ombuds. This
started in 1913 at the New York World, but there was little follow up by other newspapers.

In many democratic countries, Press Boards self-police newspapers. In the UK, the UK Press Council became the Press Complaints Commission (PCC). The PCC investigates complaints about content, such as the accuracy of an article. It also regulates and enforces press activity with its Code of Practice.\textsuperscript{279} The PCC stipulates reasonable privacy violations and defines protected groups whose anonymity must be preserved, such as victims of sex crimes, hospital patients, or individuals who may face discrimination.\textsuperscript{280} The PCC cannot impose fines, but it requires that all breaches be publicized by editors.\textsuperscript{281} Some State Press Councils still exist in the U.S., and are modeled on the European press council model, such as the Minnesota News Council, still exist.\textsuperscript{282}

\textsuperscript{279} http://www.pcc.org.uk/

\textsuperscript{280} http://www.pcc.org.uk/

\textsuperscript{281} http://www.pcc.org.uk/faqs/index.html#faq1_18

\textsuperscript{282} http://usinfo.state.gov/usa/infousa/media/files/media3cd.htm
C. Managing the Self-Regulation Process: Setting Technical Standards

Technical standards and protocols are a mix of industry self-regulation and governmental/intergovernmental encouragement and at times, enforcement.\(^{283}\)

There are official and private standards bodies.

For a firm to join a standard committee it may cost between $10,000 and $50,000 in membership fees. While official standard bodies are slow and broad, private consortia can be fast and narrow. It is not clear which approach works better. Practically speaking, a company’s standards director must deal with both the international standard bodies as well as private technology development consortia.\(^{284}\)

How Do Companies Organize Their Standards Activities?

The internal organization of how standards function inside media and tech companies varies considerably depending on size, age and the tech savviness of a company.\(^{285}\) Some companies have full-time employees devoted to standards, usually at the VP level such as a “Director of Standards and Industry Group.” However, it is more common for employees across the company, typically from

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\(^{283}\) http://www.flickr.com/photos/itupictures/4190132034/

\(^{284}\) Interview with Dr. Ken Wacks, July 2, 2007.

\(^{285}\) Interview with Dr. Ken Wacks, July 2, 2007.
the R&D department, to devote part of their time towards standards, depending on
the technology in question. In addition, sometimes companies bring in late-career
engineers to monitor standards. Even though some may not be as up to date on the
latest technology, they can be better at playing the politics of standards game. But
many smaller companies pay no attention to standards until they are forced to.286

Companies need to estimate the costs of their standards activities. For
example, a company might need two engineering employees to devote two months
to attend committee meetings and travel, plus two weeks of part-time attention.287
Based on two salaries at $100K and $175K, respectively, and based on 2.5 months
of work for each, the personnel cost alone would be around $60,000 a year.288

Larger companies expend several hundred thousand dollars per year on
influencing and monitoring standards. A big standards battle, such as Sony Blue-
Ray vs. Matsushita’s HD-DVD, costs many millions just in the standards body
process. A mid-size tech company, of a more modest budget could easily spend
$60,000 a year just on monitoring standards process affecting it.289

286 Interview with Dr. Ken Wacks, July 2, 2007.
287 Interview with Dr. Ken Wacks, July 2, 2007
288 Interview with Dr. Ken Wacks, July 2, 2007
289 Interview with Dr. Ken Wacks, July 2, 2007
Suppose a company has an interest in seeing a standard adopted internationally. How should it proceed? The first step is to find out if anyone else is working on developing this standard. It must ask:

- Is a standard body already working to develop a standard?
- Are there consortia for this standard?
- What other companies have an interest in this standard? For or against?
- What group would be working on the standards?
- What group within one’s country is working on the standards?
- Do ISO and IEC, among other international groups have liaisons between committees to avoid duplication of standards?

The next step is to influence one’s own country. Within an international committee, standards are written by delegated experts appointed by each country. These experts often have “marching orders” from their country as well as their company. Some countries, such as China, allocate state money to the standards process - the U.S. does not. The American National Standards Institute (ANSI) delegates the power to various industry trade groups like the Telecommunications Industry Association (TIA) to actually write standards for international proposals.

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290 Interview with Dr. Ken Wacks, July 2, 2007
291 Interview with Dr. Ken Wacks, July 2, 2007
TIA allows companies to join and charge memberships fees that are based on revenue. Typical fees range from a low $1000 to over $70,000 a year. Any company with a U.S. presence can participate, so the “American” group working the U.S. proposals may include many non-US firms. Once a company is a member of the appropriate committee, it tries to find other companies with similar views, if possible.

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

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293 Interview with Dr. Ken Wacks, July 2, 2007
majority of countries must agree that discussion on the topic is worthwhile, and at least five countries must agree to vote for it.\textsuperscript{294}

Countries then choose to either endorse the NWIP or not endorse it (which requires comments and revision). The old draft and comments then become a new draft that is circulated again to countries. At this stage, companies often try to influence countries other than their home country, because each country in international standards bodies receives one vote. This involves behind-the-scenes lobbying, usually by government consultants or employees. The EU countries are generally savvier at this than the U.S., and they have many more votes.\textsuperscript{295}

When multiple companies want to see a certain standard implemented, they may pool their efforts, even if they are competitors.\textsuperscript{296} Each subsequent phase takes about 3 to 6 months. The Final Draft International Standard is then published, placed in a library and sold. This whole process is very political. Companies and countries often call in favors from others companies or countries. They debate not only on the merits, but also on procedures, rules and paperwork. Companies may hire consultants who are specialists that represent the company in negotiations and committee meetings. The consultants can argue, propose, and monitor the process

\textsuperscript{294} Interview with Dr. Ken Wacks, July 2, 2007
\textsuperscript{295} Interview with Dr. Ken Wacks, July 2, 2007
\textsuperscript{296} WiMax Forum website. http://www.wimaxforum.org/about/
on a company’s behalf.\footnote{Interview with Dr. Ken Wacks, July 2, 2007} In order to set standards tactics, a company should try to know other participants’ objectives beforehand, who its allies are, and what compromises it might have to make.\footnote{Shapiro, Carl, Varian, Hal, “Waging a Standards War,” Information Rules, Boston: Harvard Business School Press, 1999. p228-233, 238-242, 273-276}

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

- low cost licensing,
- multiple sourcing,
- giving back patents for improvements,
- assuring future participation on joint tech development on this and future products, and
- future deals.

Companies may also attend standards meeting to prevent an adverse “consensus” developing against their interest.\footnote{Shapiro, Carl, Varian, Hal, “Waging a Standards War,” Information Rules, Boston: Harvard Business School Press, 1999. p228-233, 238-242, 273-276} Determining the optimal level of investment in the standards process may be difficult. Benefits are hard to define, measure and value. For some companies, failure to have technology adapted as a
standard can be fatal. In cases, conformance to standards is more of a marketing tool.\textsuperscript{300}

III.2 Direct Government Regulation

A. Role of Government Regulation

In the U.S., vital infrastructure industries are private but regulated. A decisive step in that direction took place after a bitter debate in the early 20\textsuperscript{th} century in New York. It pitted Republican Charles Evan Hughes (late chief Justice of the U.S. Supreme Court) against Democrat William Randolph Hearts, the newspaper mogul depicted in “Citizen Kane.” Hearst favored European-style nationalization of public utilities. Hughes won the election and established the New York Public Service Commission (PSC) to regulate privately owned infrastructure. In most countries communications infrastructure industries like telecommunications, TV, or electric power were under state ownership for a long time. The goals of state ownership over these industries were:

- public control over vital services,
- state influence over politics and culture,

\textsuperscript{300} Interview with Dr. Ken Wacks, July 2, 2007
- redistribution to economically weaker regions and individuals
- technological development

In many countries, the government system changed after 1980. Telecom companies were privatized, and private competitors were allowed to enter in telecom and television. Semi-independent regulatory agencies now regulate and control licensing of these companies.

In the U.S., it is mostly the federal government that regulates the media industry. The states have some powers over intra-state telecom, and local government issues over cable TV franchises. The U.S Congress passes broad laws and delegates details to the specialized regulatory agency, the Federal Communications Commission (FCC). The FCC operates as an independent regulatory commission, i.e. it is not subject to direct control by the White House or Congress. However, the appointment and budget process and other methods, provide tools for pressuring the agency.

Other independent commissions deal with other issues central to media companies like competition and advertising (Federal Trade Commission), company stock transaction and financial reporting (Securities and Exchange Commission). These independent commissions have broad powers that set general rules (quasi-
legislative powers), decide specific cases (quasi-judicial powers), implement law such as select TV licenses (executive powers), and enforce compliance (executive powers). The members of these commissions are appointed by the President and confirmed by the Senate.

There are also executive agencies subject to direct Presidential authority. The Antitrust Division of the Department of Justice (DOJ) provides a competitive market structure. Within the Commerce Department there are two organizations that regulate the media. The National Telecommunications and Information Administration controls frequencies, while the National Institute of Standards and Technology oversees the standards setting process.  

The U.S. Trade Representative deals with international trade issues. The US Patent and Trademark Office, Registrar of Copyrights, and the Copyright Royalty Tribunal regulate intellectual property. Additionally, various courts and local and state agencies exert some rules over media issues under their jurisdiction.

Similar but distinct regulatory structures exist in many other countries. A common trend is a move toward “converged” agencies that deal with media as well as telecom. Below is an organizational chart of the FCC. 

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302 http://www.fcc.gov/fccorgchart.html
The FCC’s regulatory staff of lawyers, economists, accountants and financial assistants work in bureaus, offices and working groups.\(^\text{303}\) The FCC licenses nongovernmental spectrum by allocating blocks of frequencies (bands), allotting channels within bands, assigning licenses to applicants and monitoring compliance with conditions of licenses.\(^\text{304}\) The FCC licenses broadcasters, sets price regulation of some telecommunication and cable TV activities, makes entry

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\(^{304}\) Source: Law and Regulation
conditions for competitors and interconnection prices, and controls ownership limits on broadcasters and cable, among other activities.

The Canadian Radio-television and Telecommunications Commission (CRTC) enforces Canadian content rules, which requires a certain amount of content aired to be created by Canadians, using a point system.\textsuperscript{305}

In South Korea, the Korean Broadcasting Commission (KBC) enforces restrictions on the licensing of new broadcasters. In India, the Ministry of Information and Broadcasting enforces content code.\textsuperscript{307} In China, The Television Regulatory Agency is controlled by the State Administration of Radio, Film, and Television. There is state ownership of television. The Propaganda Department influences the content on the China Central Television (CCTV). Local stations are also state-owned and state censored.\textsuperscript{308}


B. The Strategic Use of the Regulatory Process

The AT&T and BellSouth merger in telecom provides a good example of a strategic use of the regulatory process. In 2006, AT&T announced a plan to merge with BellSouth. This new company would control about 40% of U.S. telephones. This proposed merger was opposed by a group of new entry telecom providers and interest groups. They were worried about the potential loss of market power and loss of network neutrality. Realizing that the FCC was unlikely to block the merger, opposition groups and competitors tried to at least delay the merger’s approval. They succeeded for a while. There was a disagreement under the FCC about what conditions to attach to the merger, and a vote for the merger’s approval was repeatedly delayed. Finally, AT&T made several concessions in order to hasten the FCC’s approval of the merger.

The Regulatory Game: Game Theory

How can one analyze a firm’s behavior in the regulatory environment?

Game theory is one approach to analyze such behavior.

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Game theory models analyze the behavior of companies as they make strategic moves and counter-moves. A firm (in an oligopolistic market) can use this approach to take into account the reasoning of other firms. Game theory is popular as a conceptual tool. However, since the analysis usually works for only two or three player scenarios, game theory does not provide answers for many situations. Most circumstances deal with multiple players and call for more complicated analysis.\textsuperscript{312}

\textbf{VI. Substantive Media Law}

\textbf{VI.1. Content Restrictions}

The First Amendment of the U.S. Constitution protects free speech and other democracies have similar provisions. However, there are some restrictions as to what the media can publish or show.

\textbf{A. Defamation – Libel and Slander}

Defamation includes any publication or broadcast of \textit{false} information that exposes an individual to social or occupational harm.\textsuperscript{315} In the US, the

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classification of a plaintiff as a public or private figure is a crucial question. If the plaintiff is a private figure, the media must have acted with negligence in publishing the false statement. But for public figures, the statement must not only be false, it must also be shown that it was published with malicious intent or with reckless disregard afterwards. This is difficult to do. The 1964 *NY Times v. Sullivan* case set this standard. It gives the media considerable protection. In America, the burden of proof that the statement is both false and made with reckless disregard to the truth is on the plaintiff. In other countries, in contrast, the defense, the media company, must prove that the statement was correct and made responsibly.

There is a large division between American and British libel law. The UK is more pro-plaintiff and anti-media, while American law allows more room for the media to make mistakes, as long as they were not intentional or reckless. In Britain, libel defendants, such as the press, have the burden of proof, and the loser is liable for court costs and damages of the winner. In Singapore, restrictive libel laws are regularly used against critics of government. Critics and journalists have been bankrupted by court decisions, which found that the criticisms were false and therefore libelous. In the U.S, since it is crucial for a publication not to be careless or lacking in verification process, media managers must ensure that internal

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317 [http://medialibel.org/cases-conflicts/](http://medialibel.org/cases-conflicts/)
controls and safeguards are in place. Also, libel insurance to cover claims for libel, slander, and breach of privacy or publicity provides protection.

Can a publication be sued by a public figure? Yes, in the U.S when the criticism is true. And even if it is not true, when it is a satire. In 1983, *Hustler Magazine & Larry C. Flynt v. Jerry Falwell*, the prominent Fundamentalist Protestant minister Falwell sued *Hustler*, a sleazy magazine, for having created a fictitious advertisement of a popular liquor that described him as having an incestuous encounter with his mother. However, the Supreme Court held that the parody did not amount to libel.

In *Texas Cattlemen v. Oprah Winfrey* (1998), several cattlemen sued the TV star Oprah Winfrey for having a show that discussed the potential risk of contracting “Mad Cow” disease in America. Beef prices fell for two weeks after the show’s airing, and the cattlemen claimed a collective loss of more than $12 million under the Texas “veggie libel” law, which holds people liable for falsely disparaging food products.\(^\text{318}\) (Thirteen US states have passed a similar “veggie libel” laws to protect farmers and food companies from criticism of perishable agricultural products.) However, the Court ruled against the ranches because they

\(^{318}\) http://medialibel.org/cases-conflicts/
failed to prove that Winfrey had deliberately or recklessly made false statements that hurt their business.\textsuperscript{319}

1. Internet Libel Cases

A related question is who is responsible for libelous statements, is it the writer/speaker, or the medium in which it appears, which may have nothing to do with the statement?

This standard becomes particularly nebulous when applied to the internet and reckless online users who post libelous statements.\textsuperscript{320} Suppose a defamatory message is posted on an electronic bulletin board or blog. Should the ISP or the portal be held liable?

In \textit{Statton Oakmont v. Prodigy} (1995), an investment bank sued Prodigy, an ISP, for statements posted on its “MoneyTalk” bulletin board that claimed that Stratton had engaged in fraudulent activity. Since Prodigy used software to screen out obscene or offensive language, it acted more like a phone network than as a passive distributor, and it was held liable. This case led Congress to pass a “Good

\textsuperscript{319} \url{http://medialibel.org/cases-conflicts/}
\textsuperscript{320} Marty Behn, “Defamation on the Internet” Schwartz, Cooper, Greenberger, Kraus 1998
“Samaritan” provision in the 1996 Telecom Act which limited the liability of internet service providers for defamation.\(^{321}\)

In 1997, in *Matt Drudge & AOL v. White House Communication*, White House aide Sydney Blumenthal sued Matt Drudge, the creator of the much-rating Drudge Report, for libel and defamation because he posted a false story alleging that Blumenthal had beat up his wife.\(^ {322}\) He also sued AOL for displaying the report.\(^ {323}\)

Even though Drudge apologized and retracted the story, Blumenthal filed a $30 million libel lawsuit two weeks later.\(^ {324}\) The courts ruled that AOL was not liable for the allegedly defamatory comments posted by Drudge, based on the 1996 Telecom Act,\(^ {325}\) which states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider.”\(^ {326}\) In order to deal with libel, media companies now get Errors and Omissions (E&O) insurance.

\(^{321}\) [http://www.citmedialaw.org/threats/stratton-oakmont-v-prodigy](http://www.citmedialaw.org/threats/stratton-oakmont-v-prodigy)
\(^{323}\) [http://medialibel.org/cases-conflicts/](http://medialibel.org/cases-conflicts/)
\(^{326}\) [http://medialibel.org/cases-conflicts/](http://medialibel.org/cases-conflicts/)
B. Obscenity and Indecency

Many people, ranging from conservative watchdogs to liberal feminists, pornography in media, and seek to have it banned. But what is it? Does it include Michelangelo’s *David* or Goya’s *Naked Maja*, both of which led to controversies?

When the courts were stuck trying to define obscenity, Supreme Court Justice Potter Stewart famously stated, “I know it when I see it.”\(^\text{327}\) In *Miller v. California* (1973), the Supreme Court created a hugely complex test.\(^\text{328}\) Judges must consider the following elements when defining obscenity. It must:

a) applying contemporary community standards,

b) that the dominant theme of the material taken as a whole appeals to prurient interest,

c) that is patently offensive as defined by state law, and

d) that it lacks serious literary, scientific, political, or artistic merit.

One problem with this definition is that it is difficult to define both a community (local, national) and its standards. Material that is sent from one community to another is subject to the standards of the receiving community. On the whole, convictions for obscenity have to become rare.

\(^{327}\) [http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202428923955](http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202428923955)

A lower standard of obscenity exists for broadcasting. In the U.S, and typically around the world, anything that is “patently offensive” is prohibited, which is much less than the test for indecency in print. The reason, as the U.S Supreme Court held in *FCC v. Pacifica Foundation* (1978), that a radio station’s broadcast of the comedian’s George Carlin’s “Filthy Words” monologue was seen as only partly protected by the First Amendment, is because of the “pervasive presence” of radio broadcasts and their easy accessibility by children. Following this rationale, the FCC prohibits the presence of broadcasts of obscenity and indecency, such as non-sexual nudity and offensive words.

Some people question why free speech rights of broadcasters are more limited than those for print or the internet. The argument is that because there were a limited number of broadcasting licenses, government can protect the “public interest.”

In 2004, the singer Janet Jackson partly revealed her breast in the Super Bowl half-time show produced by MTV and aired by CBS. There were many complaints, because parents were not warned in advance. The FCC fined CBS but the network appealed. Twenty CBS-owned local TV stations were each fined the

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\textbf{FCC Indecency Complaints}

People do register their disagreements. Just in the few months of 2009, the FCC received 181,080 complaints. A single episode of Fox’s animated show The Family Guy generated over 100,000 complaints.\footnote{http://abcnews.go.com/Entertainment/wireStory?id=9974325}

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

Congress raised the maximum fine of indecency from $27,500 to $500,000 for single indecency violation. This means that a network with 20 stations could
have to pay fines of $10 million for a single impromptu use of the word “bullshit.” In addition the FCC encouraged time delay on live broadcasts, and requested display ratings for violence, nudity and language.

Under pressure from the U.S Congress alone, in 2006, the National Association of Broadcasters along with all the networks and major cable groups, spent $300 million for a marketing effort to help educate parents about the V-chip and other technology to block programs. The V-chip blocks out shows with owner’s opinion of unacceptable ratings. The different ratings are:

The American Civil Liberties Union argued against the law, whose popular mnemonic VDSL (for violence, suggestive dialogue, sexual content, and coarse language), became popular known as “very stupid dumb law.” It argued that the recommendations were political pandering and that the “government should not parent parents.” The V-chip, which can be used to block channels, has not been especially effective. Studies show that relatively few households use V-chip blocking. Morality groups now advocate “a la carte” choices of cable users to drop undesirable channels rather than block them.

Language

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

Broadcasters generally do not challenge fines because they do not want to antagonize the FCC and Congress and even jeopardize their licenses. But in 2006, Fox and then other networks challenged the FCC’s new standard on such “fleeting” expletives used by Bono. After an appropriate court, the Second Circuit Court in New York ruling in favor of the networks, the matter is still under court review. The FCC Chairman under President George W. Bush, advocated an extension of the broadcasting restrictions to cable and satellite channels, which are not licensed. It was not adopted, and it was unlikely to be upheld by Supreme Court.

1. Obscenity on the Internet

There have been persistent congressional attempts to “clean up” the Internet by several organizations. Some of these laws include:

The Communications Decency Act (CDA) of 1996 allowed the FCC to criminalize indecency on the Internet. In *Reno v. ACLU* (1997), the Supreme Court struck down the CDA as a violation of the freedom of speech protected by the First Amendment. Undeterred in 1998, Congress passed the Child Online Protection Act (COPA), which was instantly struck down. Congress also passed the Children’s Internet Protection Act (CIPA) which required libraries and schools to install blocking if they accepted federal funds.\(^{342}\) This decision, in contrast, was upheld by the Supreme Court because children have less protected rights.

The EU “Television Without Frontiers” (TWF) Directive (1989) set minimum standards that must be met by any television program so that it can “freely circulate within the EU without restrictions, provided that it complies with the legislation of the country of origin.”\(^{344}\)

### 2. TV Content

Earlier, the FCC has defined several components of the public interest which broadcasters must follow:

1. balance of opposing viewpoints,
2. localism, and

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\(^{342}\) [http://www.fcc.gov/cgb/consumerfacts/cipa.html](http://www.fcc.gov/cgb/consumerfacts/cipa.html)

3. diversity in terms of programming, services, and ownership.\textsuperscript{345}

The “Fairness Doctrine,” which existed from 1949-1987, was upheld by \textit{Red Lion Broadcasting v. FCC} (1969) and required cable operators and broadcasters to discuss important controversial public issues. In contrast, in a case called \textit{Miami Herald v. Tornillo} (1974), the US Supreme Court ruled that a newspaper has an exclusive right to determine which messages to carry and which to refuse, and there is no outside right of reply to mistakes in the paper. However, the FCC abandoned the Fairness Doctrine in 1987. In 2000 the FCC also suspended its “personal attacks” and political editorials.

In 1996, the FCC required all television stations to air at least three hours of educational programming per week. However, there is no consensus regarding what constitutes “educational” programming and some stations made spurious claims that certain shows are educational. For instance, Univision TV broadcasting company was fined $24 million for labeling telenovelas “educational.”

\textbf{Advertising Aimed at Children}

Since children cannot easily distinguish between programming and advertising and are easily influenced, the Federal Trade Commission, tried, mostly

\begin{footnotesize}
\textsuperscript{345} Napoli, Philip M. \textit{Handbook of Media Management & Economics}. Albaran, Chan-Olmstead, and Wirth Erlbaum 2006
\end{footnotesize}
unsuccessfully, to limit advertising aimed at children. Then in 1990, another agency, the FCC establishing standards regarding the amount of children’s programming that could air and limited amount of advertising during children’s programming to 10.5 minutes per hour on weekdays and 12 minutes per hour on weekend days.346 “Safe Harbor” established that television programs up till 9pm should be children-friendly shows.

C. Government Restrictions of Publication

In the U.S., material endangering national security cannot be censored. There cannot be “prior restraint,”347 meaning the government cannot prevent the material from being published. In the “Pentagon Paper Case” against The New York Times and The Washington Post, restraint was not accepted by the US Supreme Court.

The only exception in U.S history was when a lower court used prior restraint on The Progressive against its publishing a guide describing how to build an H-Bomb. Even though the government dropped the case, this prior restraint would likely be held unconstitutional had it reached a higher court.

A court-mandated restraint against a publication is very difficult to obtain. The government would have to prove that a publication would “intentionally incite imminent violence or other great harm, with the likelihood that it will occur, and which cannot be prevented except by suppression.” Such “strict scrutiny” also applies to the violation of privacy and other disclosures.

**Judicial “Gag” Orders**

In the U.S, a judge may issue a “gag” order on repeating a case, in order to ensure a fair trial. Such an order, which is much more prevalent in the UK, aims at preventing press to be influenced, and lawyers grandstanding to the press.

The UK’s Official Secrets Act of 1989 prohibited the disclosure of confidential material from government sources by employees and journalists. There is no defense based on the “public interest” in a publication. Even disclosure of information that is already in the public domain can be deemed a crime.\(^\text{348}\)

**Private “Prior Restraints” by Private Parties**

Private parties can try to obtain “prior restraints”. The Motion Picture Association of America (MPAA) got a prohibition on an online hacker magazine, 2600, to publish how to break a DVD encryption. In 1999, this action was ruled legal based on copyright rules, rather than the right to free speech.

\(^{348}\) [http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0011381.html](http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0011381.html)
A major country’s restriction can affect a film world-wide, since the distributors must follow the censorship rules of many countries. Depending on the country, there may be restrictions on the portrayal of political, cultural, or religious movements. Even the depiction of particular kinds of violence can be proscribed. For example, the British government has banned head butts in fight scenes.349

When governments contribute to films through approval of shoots on location financing they can impose restrictions on scripts like any major investor. Since films about China and Vietnam require script approvals, some films are shot in Thailand or Philippines instead.350 The government of India had script approval and exercised it on the film *Ghandi* – a fact the producers tried to hide.

D. Regulating Advertising

On the US federal level, the Federal Trade Commission is in charge of unfair competition and false advertisement. The FTC also regulates contests, sweepstakes, premiums, trade allowances, and direct marketing.351

In 1938, the U.S Congress passed the Wheeler-Lea Amendment which bans unfair competition. It gave the FTC the power to issue cease-and-desist orders and levy fines on violators. A plaintiff who is awarded damages for false advertising can receive profits from the offending advertisement, attorneys’ fees, and three times the damages if actual harm is proven.

The FTC may require advertisers to include certain types of information in their ads so that consumers are aware of all the consequences, of the use of a product or service. This may include fuel mileage information in car ads or warnings about cigarettes. The FTC has an advertising substantiation requirement. Advertisers must have a reasonable basis for ad claims and substantiation. In addition, the volume and cadence of visual disclosures must be of sufficient duration.

There are three main types of false advertisements:

- Misrepresentation
- Bait and switch (advertising a product with no intention of selling it, then switching to a higher-priced item)
- False price comparison
The FTC requires that advertisements on the internet contain disclosures that are clear conspicuous and understandable to the intended audience.

**Deception**

Deception is a material representation or omission that can easily mislead a reasonable consumer. Many media outlets, advertisers, and advertising agencies check and review ads before showing them to ensure that they are not deceptive, offensive, or illegal.

The law allows competitors to bring civil suits against one another for deception and false advertising. Messages do not need to be literally false if they are deceptive and can create a false impression.

**Commercial Speech**

Although there is a good number of public policy reasons to prohibit false advertisement, there are also good reasons to ban lies amongst acquaintances. Yet, we do not so. The reason is that we consider the formal “commercial speech” and the latter as the personal or political speech whose banning would require various restrictions on vigorous speech.

Commercial speech is defined as speech on behalf of a profit-making activity. The US Supreme Court has given commercial speech less protection and it can be
regulated. A scientist may write a research article and claim that “Product X reduces baldness,” even if this may not be correct. However, if a company makes the same claim in an advertisement and it is wrong, it can be sued by a competitor or fined by government agencies.

There is a four part test for commercial speech restrictions to be constitutional

1. Speech that is inaccurate may be banned.

2. Even if speech is accurate, there can be a public interest in regulating it.

3. But the restriction must be effective.

4. There must be a “reasonable fit” of goal and restriction.

In *Nike v. Kasky* (2002), the sports equipment maker Nike had been criticized for its foreign labor practices. When it defended itself publicly it was accused to violating the commercial speech requirement of accuracy. The California Supreme Court ruled that according to California law, Nike’s speech was an example of unprotected commercial speech. Though this holding was based on the California constitution, it affects all companies doing business in California, which is almost every major company. The US Supreme Court did not decide the case, but the ruling probably would have been overturned because it is so restrictive. The
Supreme Court has been increasingly reluctant to uphold restrictions on commercial speech.

IV.2 Anti-Competitive Behavior under Antitrust Law

A. Price Discrimination?

When a consumer needs to pay less for a good or service than what he is willing to pay, the difference between the two is known as the “consumer surplus”. In most cases market prices will be lower than the value to the consumer.

The history of media is the history of the fight over consumer surplus, the fight between consumers and media companies. Too high of a surplus may lower the financial base of media and its ability to provide content as well as distribution. Prices that are too low on the other hand will result in driving everyone out, and the “last man standing” becomes a monopolist.

Under the Clayton and Robinson-Patman Acts, there can not be any discrimination for commodities of like grade quality, but both acts do not apply to discrimination in services – e.g., medical doctors or TV cable service, for instance.
Legal defenses against price discrimination include cost justifications for such as discounts, as well as them being needed to meet competition. 353

B. Predatory pricing

Predatory pricing is defined as selling below a marginal cost in order to eliminate a competitor and then raising prices once the competition has been eliminated 354.

Predatory pricing is difficult to prove, especially since pro-competitive price cutting is a benefit to consumers. Traditionally US courts have been reluctant to rule against companies accused of predatory pricing by lowering prices. According to the US Supreme Court. “There is a consensus among commentators that predatory pricing schemes are rarely tried, and ever more rarely successful” 355.

In 2003 the internet service provider Wanadoo was fined 10 million Euros by the European Commission for predatory pricing. At the time Wanadoo was Europe’s largest ISP. Wanadoo, a subsidiary of France Telecom, had priced its


broadband services at a loss to drive out competition, resulting in its market share peaking at 72% \textsuperscript{356}.

The Wanadoo Case highlights some difficulties in applying predatory pricing laws to telecom companies as it is difficult to determine “below cost” in telecom service, since marginal costs are naturally so low \textsuperscript{357}. Also, for new products it is not unusual for a company to accept losses in the early years.

DT, the German telecom giant, sold telecom service to competitors on a wholesale basis, as well as to consumers as a retail service. Nine competitors claimed that DT was charging them higher wholesale prices than it was charging its own retail consumers. This type of pricing is also known as a “margin/price squeeze”, charging relatively high wholesale prices and low retail prices \textsuperscript{358}. The EC subsequently fined DT 12.6 million Euros.

\textbf{E. EU Antitrust policy}


\textsuperscript{357}Difficult to determine “below cost” in telecom service, since marginal costs are naturally so low

The EU Commissioner has opposed several major mergers on the basis of antitrust violations, among them MCI-WorldCom, WorldCom-Sprint, Bertelsmann-Kirch-Deutsche Telekom, Time Warner-EMI, Bertelsmann-EMI

When the American telecom companies MCI Worldcom and Sprint planned to merge in 2000, the US Justice Department blocked the merger, but the EC went ahead and blocked it too. The blocking of the MCI Worldcom/Sprint merger by the EC was unprecedented that both companies were US-based, with only minor business in Europe and the EC had not previously prohibited a merger of two US corporations. The EC claimed jurisdiction to prohibit the merger because several markets within its member states would have been adversely affected\(^{359}\). MCI Worldcom soon collapsed—maybe it would have survived in alliance with Sprint—and was merged into the much larger Verizon without an EC challenge.

### IV.3. Antitrust and Anti-Monopoly Law

Economists tend to believe that the market structure can determine a firm’s behavior and performance. Therefore, if there are problems with market power in

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an industry it is better for government to deal with its markets structure and make it more competitive rather than try to micromanage company behaviors.

Monopolies are not illegal “per se”, and there can be “innocent monopolies” as long as they behave in a reasonable manner. But monopolies obtained through acquisitions, predatory pricing, or exclusive dealing can be challenged.

Private antitrust lawsuits can be brought by competitors and customers. If successful, some company practices could be prohibited, or mergers blocked. A winning plaintiff in the U.S. can get three times the actual damages plus attorney’s fees. This creates a strong incentive for plaintiffs and their lawyers to challenge monopolies.

In private antitrust suits claims are made for hundreds of millions of dollars. Therefore, losing such a case can cost billions of dollars.\(^3^{60}\) Other remedies include the FTC ordering a firm to discontinue specific practices through a “cease-and-desist” order.

Antitrust laws may force a firm to split up. This happened to the Hollywood studios in 1948 when they were forced to spin off their movie theatres. NBC was forced to sell one of its two networks.\(^3^{61}\) It happened to the old AT&T when a


judge and prosecutor forced a breakup of the Bell System into eight pieces as a result of an antitrust case. The software giant Microsoft was nearly forced to split up.

The Clayton Act of 1914 prohibits horizontal agreements or cartels, where they restrict competition. It is illegal to engage in price-fixing, restriction of output, group boycotts, as well as market-division of territories or customers. A price fixing is an agreement between competitors to raise, lower, or stabilize prices, expect. But sometimes true competitors behave in the exact same way without any agreement, simply because it makes sense independently.

US courts have therefore held that parallel behavior alone is insufficient to prove a price conspiracy amongst competitors.

In the Matsushita case the court held that parallel pricing is legal as long as they are based on a independent business justification.

There are several tools available to governments to eliminate illegal price fixing. In the US, an amnesty program guarantees that any “whistleblower” who

362 http://www.seattlepi.com/business/wils05.shtml
cooperates with an investigation will not be prosecuted, although this offer only applies to “the first in the door”.

Specifically exempted from the antitrust laws, are professional baseball and football leagues, labor unions, regulated utilities, other closely regulated firms, as well as newspapers.

The “Newspaper Preservation Act” (NPA) of 1970 grants newspapers several exemptions from federal antitrust laws, making it legal for two newspapers within the same market to form a joint operating agreement (JOA) when one is in danger of financial failure.

JOAs allow competing daily newspapers to combine some business activities while none the less maintaining separate papers in editorial terms. An example would be sharing a printing press.

Major US cities with JOA’s between newspapers include Albuquerque, Cincinnati, Detroit, Las Vegas, and Salt Lake City\textsuperscript{366}.

Information Activism

- “Open source”
- “Copy left”
- Privacy protection
- Fight against governmental controls over encryption
- Community radio and TV
- The P2P community
- Unlicensed spectrum
- Municipal and free Wi-Fi
- Media reform fight against media concentration

Information Activism has affected non-commercial community radio and TV, the P2P community, “unlicensed spectrum”, municipal and free Wi-Fi, as well as the media reform fight against media concentration.

Many advocates look at media issues with a basic syllogism:
1. Many aspects of social and political life have deteriorated – whether political apathy, violence, consumerism, gender and racial stereotyping, neglect of the world's poor, poor nutritional habits, etc.

2. Information media play a central role in either creating or exacerbating these problems, or in preventing their alleviation.

3. Therefore, reforms of the information sector bring about social reform.

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

   In the industrial age, the control over the “means of production” led to revolutionary movements and the overthrow of governments as well as social systems. In Britain, the “commanding heights” of the economy – the coal and steel sector, were nationalized in the 1940s with dubious results. Today, a similar battle is emerging over control over the “means of information”.

   Although many people are familiar with various flash points they are nonetheless unaware that they are facing an incipient social movement similar to environmentalism.
During the industrial revolution when technology advanced at a very rapid pace while social institutions were stagnant, the results were upheavals and revolutions.

Now there is another Economic Revolution upon us, the information revolution. As with any change, there will always be winner and there will always be losers.

- Losing industries and companies, such as the music sector, photographers and filmmakers
- Losing workers, whose jobs are being outsourced of off-shored

VI Conclusion

Media and communications are vital. They are essential tools for political dialogue and the infrastructure for economy & society. They are the foundations of culture and personal expression, and the base for a high-tech economy.

In consequence, the role of government is large and is likely to continue though in updated ways. There is emphasis on competition, but it is often managed
competition. But so is the role of private law transactions. Economic rivalry and increased transactions lead to complex systems of private entertainment law, where protection of intellectual assets has to have a business, as well as a legal dimension, that requires clear contractual arrangements among the participants. On the private dimension of private transactions, the emerging industry structure of decentralized, networked, ad hoc production and distribution systems means that transactions are increasingly not inside firms, but among firms, leading to a significant increase in contractual deals. Therefore, it is most likely that the legal and regulatory function of media firms will keep growing, specifically with inter-film revolving taking on the role of non-market competition and senior managers having to integrate both non market as well as market strategies.375

Legal and government relations functions are a key part of successful management, both defensively as well as offensively; they are a tool for non-market competition. As the cost of non-market competition becomes more expensive, managerial oversight and decision calculus like any other business function is required.

The management process of non-market competition is made difficult by its constraints:

• There are frequently no decent analytical management tools yet.

• There is resistance by legal profession to be seen as a tactical strategic “input”

The public is concerned with economic and media power. And, they are especially concerned with a combination of the two. As a result, media and economic power will be an area of great importance, sensitivity, and expense.

For a time, many people thought that the pervasiveness of law and regulation in the media and communications sector was either temporary, induced by temporary bottlenecks, or induced by government itself. Now, they increasingly recognize that in this sector a role of government has much resiliency. Even under competition, let alone with partial competition.

**ISSUES COVERED**

Optimal investment in

– PR and public affairs

– Lobbying

– Litigation
– In house outside counsel

• Litigation strategy as an economic decision

• Compliance management

• Role of the General Counsel and outside counsel

• Litigation management

• Litigation as market strategy

• Organizing the lobbying, legal and PR functions

• Political spending

• Lobbying strategies

• Media activism

• PR management

• Self-regulation

• Government regulation

• Antitrust law and the media

• Price discrimination and regulation
• Content restrictions: libel, indecency, “prior restraint”

• False advertising

• Industrial policy

• Legal and public affairs function and techniques

• Antitrust and anti-monopoly

• Price regulation and rate-of-return

• Libel

• Indecency

• Investment regulation

• Internet regulation

• Media concentration

• Interconnection & unbundling

• Digital TV

• Spectrum allocation

• Net-neutrality
Management tools covered

- Calculation of financial settlements resulting from lawsuits
- Using a decision tree to determine whether to initiate a lawsuit
- Analyzing dynamic spending on a lawsuit
- Cost-benefit of investment in legal, regulatory, and public affairs
- Decision calculus for litigation and settlement
- NPV of delay
- Standards strategy vs. proprietary technology
- Cost-benefit of investment in legal, regulatory, and public affairs
- Decision calculus for litigation and settlement
- NPV of delay
- Standards strategy vs. proprietary technology
- Standards strategies
- Strategic use of standards and regulations