

Neeley Jr v FCC, et al, (5:12-cv-5208)(13-1506)  
Curtis J Neeley Jr  
2619 N Quality Ln  
Suite 123  
Fayetteville, AR 72703-5523

July 4, 2013

Federal Communications Commission 445 12th  
Street, SW  
Washington, DC 20554

To Commissioners and the public whom this WILL concern:

I am submitting this reply comment responding to “Professor”Lili Levi's 13-86 comment purporting to provide a the Introduction from a forthcoming article – “*Smut and Nothing But*”: *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 2 (forthcoming Sept. 2013) – as a Reply Comment in the Commission’s inquiry into broadcast indecency regulation in Docket 13-86. I have followed the form and modified the footnotes into end notes and modified and revised the Introduction to be consistent with the realities of United States law.

Failure is impossible,  
/s/ Curtis J Neeley Jr  
Curtis J Neeley Jr  
curtis@curtisNeeley.com  
4792634795

## ***Introduction***

For almost half-a-century, American RF-broadcasting has received less constitutional protection than the print medium as can easily be understood. Broadcasting of ANY communications to the unwitting public should have been subject to Federal Communications Commission (FCC or Commission) regulation for a public interest standard described in statutory laws.<sup>3</sup>

Changes in the media used for broadcasting, including the growth of cable television wires and other wire communications called [sic]“the Internet”, has increasingly intensified competitive pressures on RF-broadcasters. Media change now adequately highlighted the irrationality of RF-broadcast exceptionalism<sup>4</sup> and spotlights the clear need to regulate ALL media used to broadcast to the public, regardless of venue or the obvious Administrative FCC Duty not done since the eighties. The FCC’s common-sense attempt to begin §1464 indecent broadcast prohibition that forbade Bono’s expletive on a music awards show that was broadcast live<sup>5</sup> made broadcasters feel they had an opportunity to end FCC indecency enforcement via litigation to protect indecent broadcasting<sup>6</sup> though clearly against the law.

In the first challenge to FCC common-sense expletive banning policy the Supreme Court, in *Fox Broadcasting Company v. FCC (Fox I)*, rejected a challenge under the Administrative Procedure Act against the Commission’s process for changing its indecency policies as being neither arbitrary nor capricious.<sup>7</sup> This case on remand sought to force return to *Pacifica’s* “repeated sex-or-poop” type nonfeasance in *FCC v. Fox (Fox II)*<sup>8</sup> and failed. On June 21, 2012, in an opinion most legal scholars misconstrue, the Supreme Court refused to reach the constitutional issue of the First Amendment for broadcasting and vacated the liability for indecency on the narrow due process grounds of fair notice because the FCC had not recognized the full *Pacifica* reconsideration for justification the Supreme Court wished to address revisiingt the government duty to limit public broadcasting.<sup>9</sup>

The resistance to addressing broader constitutional questions in the *Fox* cases suggested clearly the majority is troubled by indecent broadcasting. The *Fox I* and *Fox II* opinions reveal a Court likely to reaffirm and expand the broadcast indecency precedent of *Pacifica*<sup>10</sup> and require FCC proscription ALL indecent broadcasts regardless of media including the [sic] “internet”. Lawyers and legal scholars tend to miss the forest due to all those darn trees.

The Court invited the Commission to reconsider and reassert a new approach in light of the massive public interest.<sup>11</sup> The FCC finally responded and issued a Public Notice requesting comments “*on whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are.*”<sup>12</sup> The FCC, therein, tried to warn broadcasters not to assume any predisposition to relax standards by asserting pursuing all “egregious cases” and reducing frivolous indecency complaints by 70%.<sup>13</sup> x?<sup>14</sup> The proceeding finally opened the issue for public discussion as well as “scholarly” debate. Over 100,000 responsive public comments with roughly 99.95% urging stringent indecency enforcement and roughly [659](#) supporting RF-broadcasts of porn were filed with the Commission as of July 4, 2013. Many groups mistakenly sought to put Congressional pressure on the FCC to oppose their misinterpretation of the order construing it as allowing nudity and expletives and weakening indecency enforcement.<sup>16</sup> This misinterpretation of the Public Notice began with Patrick Trueman Esq of Morality in the Media and Parents Television Council and an interview by the Washington Times.<sup>17</sup>

Incidents of *per se* indecency like Baltimore Ravens quarterback James Flacco’s declaration that his team’s victory “*is fucking awesome*” and his teammate’s audible “*holy shit*” after the game will keep the “normalization” of indecency in the public agenda.<sup>18</sup> Indecency complaints hold up license renewals and can for almost a decade.<sup>20</sup> Despite recent attention to addressing the high volume of clearly non-meritorious indecency complaints, the Commission still faces hundreds of thousands of repetitive complaints.<sup>21</sup>

The *2013 Indecency Notice* seeks comment on how best to describe appropriate treatment of expletives and nudity.<sup>22</sup> Recent Judicial attention focused on the Commission waking-up about expletives.<sup>23</sup> The Commission should and will, of course, take this opportunity to review the entirely inadequate indecency policy.<sup>24</sup> The reassessment must disclose how the Commission's regulation of indecency responds to the public reactions to media sea-changes over the past decades. These changes are far beyond those contemplated by any "legal scholar" and particularly Professor Lili Levi and were clearly recognized and encouraged by the Supreme Court in *Fox I* and *Fox II*.

Commitments by the FCC and broadcasters to "zero tolerance" of indecency have been likened inappropriately to an out-sourcing of FCC investigative and enforcement duty.<sup>26</sup> The enhanced attention to indecency has lent weight to the pressures felt from parents on advertisers. This results in democratic sponsor-based censorship as is constitutional. Though the Commission has not yet properly asserted jurisdiction to enforce indecency rules beyond RF-broadcasting to all broadcasting, this is demanded in current litigation faced in *Neeley Jr v FCC et al* that is being ignored by most. The real sea-change in content distribution in media today will lead to enforcement of US laws for ALL broadcasts including cable television wires and even mobile phones using [sic] "internet" wires using wire communications defined almost a century ago. The fact that most of this was encouraged via unrecognized judicial review is notable and troubling and speaks volumes about the inability of legal scholars to see forests due to all those trees.

The rationale for regulating indecent broadcasts on all media are assisting parents and protecting the clear government interest in protecting the public. The rationale of assisting parents has shifted from eliminating daytime indecency broadcasting to "moral zoning" and providing universally safe public media. The protection-of-children rationale has gradually resolved from the concern for protecting individual children to the current broader duty to prevent of harms to society.

The “Levi-law” Article introduction revealed that, whatever its mysterious constitutional status, this transformation was a sea-change to attorneys and scholars but not common citizens. This change was overly gradual and caused a great deal of stress for parents and spouses for decades of improper FCC policy. The FCC has finally begun to assert administrative discretion to define aesthetic and journalistic necessity when public safety is imperiled granted by Congress in 1934. The agency must now adopt clear standards and approaches to contextual assessment of indecency dependent on only common-sense and audience juries. The new policy will sacrifice irresponsible expressive freedom, as is clearly proper in the service of a moral national cultural policy. Confused “scholars” feel this will avoid judicial review. The current changes resulted from pressure by political groups or blunt democracy and will soon limit the negative effect of indecency broadcasting to the unwitting public. The common-sense indecency regime is far more extensive than lawyers could ever agree on and leaves the public in control of broadcasters’ decisions about obeying United States law.

Given the public benefit of programming created by entities unhampered by profit considerations, the continued behavior of the public broadcasting system is assured. Commercial broadcasters will find small-market stations choosing to avoid potentially indecent live local programming due to the current expense of time-delay technology. This result addresses the FCC’s touted commitments to local standards and should lead to reductions in the costs of time-delays in order to protect public safety and still allow nearly-live yet completely responsible reporting.

The gradual, moderate, or snail-paced response to technology change of today will create a safe-zone approach wrestling a pervasively safe moral cultural victory away from the defeat of scholarly over-legalization and debate married to past FCC §1464 nonfeasance.

As for the commitment to forestall social harms, the Commission's approach will finally result in protection of children and families resulting in government finally engaging in minimal cultural regulation by requiring "child-safe" media where morality is concerned. This choice is justified for 100% pervasively safe public broadcasting according to §1464 passed in 1948. The Commission's message about appropriate social discourse greatly offends scholarly/free speech parties. The use of indecency for justification of regulation demonstrates the decades long unrealized need for such decency. The government's articulation of regulatory justification garnered approval from the Court already in the *Fox* litigation.

The Commission should assert regulatory stances recognizing the clear enlargement of powers and duties. This subjects broadcasters to the potentially changeable whims of the public to censor but democracies are rarely quick to change, like with the right to abortion and same-sex marriage. Broadcasters claimed deregulation would not lead to increased indecency on public broadcastings. Regardless; The effectiveness of broadcaster self-regulation depends on the following three factors: 1) the competitive conditions in the industry as a whole, including cable and [sic] "internet"; 2)the broadcasters' assessments of the FCC's power and appetite for enforcement at any given point; and 3)the effectiveness over time of sponsor boycotts and punitive statutory penalties assessed.

Wholly non-regulatory solutions advocated by broadcasters and many unqualified “free speech”/ (porn) proponents have never been politically or legally viable. The FCC should return to a policy of restraint and engage in exploration of enforcement regimes that assign criminal sanctions to the indecency creating parties like Ms Jackson and Mr Timberlake and not the broadcasters who intended to act responsibly.

The Commission should make the forfeiture policies proportional in the amounts of forfeitures assessed for indecency violations based on the audience size exposed to the indecency. The Commission should: 1) improve transparent ways to processes indecency complaints; and 2) explore rules for counting and reporting only sworn assertions of complaints; and 3) establish audience juries to determine violations. With regard to substantive standards, the Article should have recommended the FCC consider: 1) adopting a presumption of innocence in all cases; 2) dismiss complaints not submitted by program viewers or parents of program viewers; 3) use common-sense and juries to determine contextual excuse; 4) adopt a live coverage broadcaster exemption; 5) adopt an individual criminal process for the next live breast pandering.

These suggestions should lead readers wondering about making recommendations for increasing efficiency when public safety must always be the priority. The article attempted to find ways to improve the regime and inappropriately lessen coercive impact on speech.

The *Pacifica to Fox I and II* Supreme Court rulings clearly implied the need to reaffirm the duty to protect the public interest in the most recent decisions. These policy changes addressed by the Supreme Court in the *Fox I, Fox II* cases admonished the FCC to reassert the public good foundation of the indecency scheme as are long-sought by the public. Fundamental changes in indecency enforcement have slowly occurred in light of competing free speech interests against which these evolutions have taken place. “Professor” Levi recommends a policy of continued FCC nonfeasance/restraint on RF-broadcast indecency enforcement and still makes a few helpful recommendations to guide to the new restraint in the interests of allowing select indecency broadcasts, improving the indecency regulation process, and avoiding truly empowering parents as in for some reason totally against the interests of elderly scholars and the elderly judicial oligarchy.

Failure is impossible,  
/s/ Curtis J Neeley Jr  
Curtis J Neeley Jr  
2619 N Quality Ln  
Suite 123  
Fayetteville, AR 72703-5523  
4792634795  
curtis@curtisneeley.com



## END Notes

1. Communications Act of 1934, Pub. L. No. 73-416, § 312(b), 48 Stat. 1064, 1087 (1934) (codified as amended at 47 U.S.C. §§ 151–613 (2000)).
2. For a recent argument that technological change has completely undermined justifications for lesser First Amendment protection for broadcasting, *see generally* Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).
3. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 FCC Rcd. 4975 (2004).
4. *See, e.g.*, John Eggerton, *Tech Policy Groups Call on Supreme Court to Overturn Pacifica Decision*, BROAD. & CABLE (Nov. 14, 2011), [http://www.broadcastingcable.com/article/476688-Tech\\_Policy\\_Groups\\_Call\\_on\\_Supreme\\_Court\\_to\\_Overturn\\_Pacifica\\_Decision.php](http://www.broadcastingcable.com/article/476688-Tech_Policy_Groups_Call_on_Supreme_Court_to_Overturn_Pacifica_Decision.php); *see also* Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747 (2011) (suggesting that the *Fox II* Court “will finally be in a position to address the underlying First Amendment issues” and offering “a qualified defense of the libertarian vision of free speech associated with classical liberal theory” in support of revising the First Amendment status of broadcasting); *cf.* Brief for Amici Curiae Former FCC Officials in Support of Respondents, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5544813 [*hereinafter* Brief for Former FCC Officials].
6. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502 (2009).
7. *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307 (2012).
8. *Id.*
9. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
10. *Fox II*, 132 S. Ct. at 2310 (“[T]his opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.”)
11. *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, DA 13-581, 2013 WL 1324503 (Apr. 1, 2013) (*2013 Indecency Notice*). The *2013 Indecency Notice* was published in the Federal Register on April 19, 2013. 78 Fed. Reg. 23,563 (Apr. 19, 2013). Thereafter, at the request of the National Association of Broadcasters, the Commission extended the deadline for filing comments in the proceeding. *FCC Extends Pleading Cycle for Indecency Cases Policy*, Public Notice, DA 13-1071, GN Docket No. 13-86 (May 10, 2013).

12. *2013 Indecency Notice*, supra note 12. [LL: Kyle, I don't know why Word isn't creating a footnote 13 here. It'll mess up all my supra numbering, I'm afraid!!] (The agency had originally made an unofficial statement that the Chairman had asked the staff to focus on the most egregious cases. Doug Halonen, *FCC to Back Away From a Majority of Its Indecency Complaints*, THE WRAP (Sept.24, 2012), [www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766](http://www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766).) The *2013 Indecency Notice* explained that more than a million complaints had been dismissed “principally by closing pending complaints that were beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent.” *Id.*
13. On the place of indecency on former Chairman Julius Genachowski's agenda, see Brendan Sasso, *FCC Shows Little Interest in Policing Indecency on TV*, THE HILL (Feb.2, 2013), <http://thehill.com/blogs/hillcon-valley/technology/280679-fcc-shows-little-interest-in-policing-tv-indecency> (suggesting that Chairman Genachowski “will leave the issue for his successor to handle”); Kenneth Jost, *Indecency on Television*, 9 CQ RESEARCHER 965, 982 (Nov. 9, 2012) (reporting media lawyers' views that “the indecency issue ranks low on the FCC's list of priorities.”). Indeed, after a Boston Red Sox player responded to the Boston Marathon massacre by saying “[t]his is our f—ing city, and nobody is going to dictate our freedom,” at a broadcast game, Chairman Genachowski tweeted “David Ortiz spoke from the heart at today's Red Sox game. I stand with Big Papi and the people of Boston - Julius.” Elizabeth Titus, *FCC Chairman Julius Genachowski tweets on David Ortiz f-bomb*, POLITICO, Apr. 20, 2013, available at <http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html>
14. In addition, the Department of Justice dismissed a case against Fox for an episode of the “reality” show *Married By America* featuring pixelated nudity and sexual situations in bachelor and bachelorette parties John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, BROAD.& CABLE (Sept. 21, 2012), [www.broadcastingcable.com/article/489505-DOJ\\_FCC\\_Drop\\_Pursuit\\_of\\_Fox\\_Married\\_by\\_America\\_Indecency\\_Fine.php](http://www.broadcastingcable.com/article/489505-DOJ_FCC_Drop_Pursuit_of_Fox_Married_by_America_Indecency_Fine.php)
15. [www.fcc.gov](http://www.fcc.gov)
16. John Eggerton, *PTC, Others Push Hill to Pressure FCC on Indecency*, Broadcasting & CABLE ONLINE, May 8, 2013, available at [http://www.broadcastingcable.com/article/493336-PTC\\_Others\\_Push\\_Hill\\_to\\_Pressure\\_FCC\\_on\\_Indecency.php](http://www.broadcastingcable.com/article/493336-PTC_Others_Push_Hill_to_Pressure_FCC_on_Indecency.php) (describing letter sent by groups to committee overseeing FCC).
17. See Tim Winter, *Opposing view: Kids need protection from broadcast indecency*, USA Today, January 10, 2012, <http://usatoday30.usatoday.com/news/opinion/story/2012-01-10/FCC-decency-Supreme-Court/52488728/1>.; See Cheryl Wetzstein, *Parents plea with FCC to keep TV's decency rules*, Washington Times, June 19, 2013,

18. See, e.g., Brendan Sasso, *Parents Group Urges FCC to Crack Down on CBS over Super Bowl Profanity*, THE HILL (Feb. 4, 2013), <http://thehill.com/blogs/hillicon-valley/technology/280871-parents-group-urges-fcc-to-crack-down-on-cbs-over-super-bowl-profanity>; John Eggerton, *Ravens On-Air Swearing Comes During Live Portion of Super Bowl Coverage*, BROAD & CABLE (Feb. 4, 2013), [www.broadcastingcable.com/article/491679-Ravens\\_On\\_Air\\_Swearing\\_Comes\\_During\\_Live\\_Portion\\_of\\_Super\\_Bowl\\_Coverage.php](http://www.broadcastingcable.com/article/491679-Ravens_On_Air_Swearing_Comes_During_Live_Portion_of_Super_Bowl_Coverage.php)
19. Complaints were also raised with the FCC over rapper M.I.A.'s obscene gesture during the halftime show of Super Bowl XLVI in 2012. See, e.g., Amy Schatz & Christopher S. Stewart, *Super Bowl's Big TV Score*, WALL ST. J., Feb. 7, 2012, <http://online.wsj.com/article/SB10001424052970204369404577206571361934132.html>.
20. See Lili Levi, *The FCC's Regulation of Indecency*, FIRST REPORTS (First Amend. Ctr., Nashville, Tenn.), Apr. 2008, at 4, 28, 36, 45 [hereinafter Levi, FIRST REPORTS]; Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM.L.J. 1, 19 (2008), [www.law.indiana.edu/fclj/pubs/v60/no1/Levi\\_Forum\\_Final.pdf](http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf) [hereinafter Levi, *Chairman Kevin Martin*]; see also Parents Television Council, *Broadcast Indecency Campaign*, available at <http://w2.parentstv.org/main/Campaigns/Indecency.aspx> (last visited May 8, 2013).
21. See, e.g., David Oxenford, *As License Renewal Cycle Approaches - Dealing With Last Cycle's Applications Held Up By Indecency Complaints*, BROADCAST LAW BLOG (March 2, 2011, 6:43 PM), available at <http://www.broadcastlawblog.com/2011/03/articles/indecency/as-license-renewal-cycle-approaches-dealing-with-last-cycles-applications-held-up-by-indecency-complaints/>. See also n.\_\_\_\_, *infra*.
22. Former Commissioner McDowell testified before a Congressional committee that the agency its pending backlog of approximately 1.5 million complaints against 9,700 programs, and had remaining 500,000 complaints about 5,500 programs. *Before the H. Comm. on Energy and Commerce Subcomm. on Comm'ns and Tech., Oversight of The Fed. Comm'ns Comm'n*, Dec. 12, 2012, at 7, available at 2012 WL 6202231 (statement of Commissioner Robert M. McDowell, Fed. Comm'ns Comm'n). More recently, the 2013 *Indecency Notice*, supra note 12 asserted a 70% reduction in the Commission's indecency backlog, leaving 30% of the complaints in play. The *Notice* also explicitly stated that the Enforcement Bureau was "actively investigating egregious indecency cases and [would] continue to do so." *Id.*
23. 2013 *Indecency Notice*, supra note 12.

24. A Westlaw search on January 17 revealed over 1,200 articles mentioning “FCC” and “indecenty.” For a sampling of post-2004 scholarship on indecenty, see, for example, CHRISTOPHER M. FAIRMAN, *FUCK* (2009); Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency With its President, Tim Winter*, 33 HASTINGS COMM. & ENT. L.J. 293, 312 (2010–2011); Jerome A. Barron, *FCC v. Fox Television Stations and the FCC's New Fleeting Expletive Policy*, 62 FED. COMM. L.J. 567 (2010); Robert D. Richards & David J. Weinert, *Punting the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 Alb. L. Rev. 631 (2012-2013); Jessica C. Collins, Note, *The Bogeyman of "Harm To Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225, 1244 (2010); Terri R. Day & Danielle Weatherby, *Bleeeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469 (2012); W. Wat Hopkins, *When Does F\*\*\*\* Not Mean F\*\*\*\*?: FCC v. Fox Television Stations and a Call for Protecting Emotive Speech*, 64 FED. COMM. L.J. 1 (2011).
25. Statement of Commissioner McDowell, *supra* note 22 (“We owe it to American families and the broadcast licensees involved to carry out our statutory duties by resolving the remaining complaints with all deliberate speed. Going forward, the Commission must ensure that its indecenty standards are clear, that broadcasters have the requisite notice and that Americans, especially parents such as myself, are secure in their knowledge of what content is allowed to be broadcast.”); *see also* Statement of FCC Commissioner Ajit Pai on the U.S. Supreme Court's Decision in *FCC v. Fox Television Stations, Inc.*, June 21, 2012, *available at* 2012 WL 2366333 (“Today's narrow decision by the U.S. Supreme Court does not call into question the Commission's overall indecenty enforcement authority or the constitutionality of the Commission's current indecenty policy. Rather, it highlights the need for the Commission to make its policy clear.”)
26. *See, e.g.*, Levi, FIRST REPORTS, *supra* note 16, at 17–27.
27. *Id.* at 32 (citing to Clear Channel “zero tolerance” policy).
28. *See, e.g.*, Parents Television Council, Press Release, *PTC Releases Annual Ranking of Best and Worst TV Sponsors*, Nov. 19, 2012, *available at* <http://w2.parentstv.org/Main/News/Detail.aspx?docID=2609> (last visited May 8, 2013).
29. There are lessons to be learned, for example, from the fact that PBS advised its producers to self-censor after the FCC found indecent *The Blues: Godfathers and Sons*, a Martin Scorsese documentary on blues musicians. Notices of Apparent Liability And Memorandum Opinion and Order, 21 FCC Rcd. 2664 ¶ 72 (2006); Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t]. . . the Federal Communications Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 257 (2008). Only 14 of 300 public television stations aired an unedited documentary on the Iraq war because of soldiers swearing under fire. *See* J. Gregory Sidak & Hal J. Singer, *Evaluating Market Power with Two-Sided Demand and Preemptive Offers to Dissipate Monopoly Rent: Lessons for High-Technology Industries from the Antitrust Division's Approval of the XM–Sirius Satellite Radio Merger*, 4 J. COMPETITION L. & ECON. 697, 718 (2008).