The Antitrust Analysis of Network Joint Ventures

by

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I. The Antitrust Problems of Network Joint Ventures

This Article explains the current confusion in the federal courts' antitrust analysis of network joint ventures and proposes a means by which that confusion may be resolved. A new judicial approach is particularly important because networks are critical to the operation of many markets today. The credit card, Automatic Teller Machine ("ATM"), on-line computer, telecommunications and electronic banking services enjoyed by Americans today could not be provided without sophisticated electronic networks. Advances in semiconductor technology make it possible for such networks to increase both their processing speed and capacity. Now, more users can be linked through networks that complete transactions within shorter periods of time than ever before. Firms in many markets are taking advantage of this new technology by forming joint ventures to operate industry-wide networks.¹ Both Congress and the federal courts are struggling to adapt the federal antitrust and regulatory framework to this new electronic world. Congress is considering a telecommunications bill that

would deregulate many of the markets currently dominated by electronic networks.\(^2\) The courts are trying to apply the "essential facilities" doctrine, developed by the judiciary before the advent of electronics, to the membership rules of these new network joint ventures.\(^3\)

The first cases defining the essential facilities doctrine were decided during the first half of this century. At that time, physical networks were predominant as the United States built an infrastructure of fixed assets. Railroads conducted traffic at commonly owned facilities and utilities constructed transmission wires and pipelines to deliver electricity, oil, and natural gas to customers throughout the country.\(^4\) In recent years, electronic networks have supplanted many physical networks in economic power and prominence. Companies such as Microsoft, AT&T, the Baby Bells, IBM and Apple are building software to connect televisions, personal computers, and other devices to high speed electronic networks.\(^5\) The National Information Infrastructure (often called the "Information Superhighway") makes innovations such as electronic mail and on-line home banking and shopping possible.\(^6\)

Like railroads in the late nineteenth century and interstate highways in the mid-twentieth, electronic networks have become critical facilities to which firms must have access in order to reach certain markets. The new network joint ventures pose a critical dilemma to Congress and the courts. On the one hand, consumer welfare, the main objective of antitrust regulation,\(^7\) is promoted by these joint ven-

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2. See Daniel Pearl, Senate, in 81-18 Vote, Clears Overhaul of the Nation's Communications Law, WALL ST. J., June 16, 1995, at A3. The Bill permits the seven regional Bell companies to sell long-distance telephone services in competition with AT&T, MCI, and Sprint, allows cable and local telephone companies to compete with each other, and lets electric utilities compete in local telecommunications markets. Id.

3. See infra notes 28-60 and accompanying text.


7. In several recent cases, the federal courts make it clear that the goal of the antitrust laws is to enhance consumer welfare by ensuring competitive markets that provide consumers with the maximum possible output of goods and services at the lowest possible prices. See Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 228 (D.C. Cir. 1986); see also Robert Bork, The Role of the Courts in Applying Economics, 54
tures which make new products and services available to American consumers. On the other hand, network joint ventures have achieved monopoly power in many markets because of their technological superiority. Monopolies, of course, are anathema to antitrust regulators because they tend ultimately to exact higher prices and reduce output. Network monopolies can have a particularly pernicious effect on competition because they constitute gateways through which a firm must pass before it can enter the relevant market. By denying access to particular firms, networks can completely exclude those firms from a market, thereby retaining monopoly power over prices and output.

In recent years, several network joint ventures have used their monopoly power to exclude aggressive and innovative rivals from the marketplace. Real estate multiple listing services have excluded brokers who charged commissions below the prevailing rate; the VISA credit card system denied Sears the opportunity to issue a lower-cost version of the VISA credit card; and professional sports leagues have artificially reduced the number of available franchises so that they can continue to exact monopoly profits from local municipalities and sports fans.

Courts have found it difficult to balance the beneficial and adverse competitive effects of network joint ventures. Indeed, the standards used by courts in their antitrust analysis of networks have generally been inadequate. Traditionally, courts have analyzed agreements among joint venture partners to determine whether they constitute a "contract, combination . . . or conspiracy, in restraint of trade" in violation of section 1 of the Sherman Act. Courts have viewed such agreements among competitors to exclude third parties from their markets as illegal "group boycotts" under section 1. Indeed, group boycotts have been classified as a type of conduct so pernicious

ANTITRUST L.J. 21, 24 (1985) (arguing that courts must be guided solely by the need to protect consumer welfare).

8. For example, in the cable television area, fewer than one per cent of cable systems currently face significant competition in their local markets. Studies by the Federal Communications Commission in 1993 indicated that cable systems with local monopoly power charged, on average, thirty per cent more than the handful of systems that had competitors. See Edmund L. Andrews, From Communications Chaos, Order?, N.Y. TIMES, June 17, 1995, §1, at 1, 36.


11. See infra notes 220-24 and accompanying text.

that it should be deemed per se illegal on its face. Under the per se rule, courts have refused to consider any justifications offered by defendants or any market conditions that might mitigate the adverse competitive effects of group boycotts. Once a court classifies an agreement among competitors as a group boycott, it will decline any further consideration and summarily find the agreement illegal.

In recent years, courts have become confused in applying the group boycott doctrine. Indeed, the Supreme Court has stated that "[t]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." This confusion has been compounded by the fact that courts have begun to apply the "rule of reason" with increasing frequency in section 1 cases. Under the rule of reason, courts examine all of the circumstances surrounding a particular restraint of trade, and in particular the parties' market power, before determining its legality. During the last two decades, antitrust law has become more integrated with and influenced by economic theory. As courts have become more attuned to the importance of economics, they have become more likely to use a rule of reason rather than a strict per se approach.

However, the increased use of the rule of reason has exacted a heavy cost in terms of legal certainty and judicial efficiency. It is now difficult to predict whether a court will apply a rule of reason or per se approach to particular conduct. Furthermore, under the rule of reason, antitrust cases are much more complex and their outcome is more uncertain. Instead of deciding the legality of the conduct on its face under a per se approach, the rule of reason requires that a court consider the market impact of the conduct as well as any justifications.

14. See, e.g., FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 436 (1990) (holding that per se rule should apply to group boycotts even in absence of any proof of the defendants' market power).
15. See cases cited supra note 13.
17. As the court recently stated, "[a]n essential element of every rule of reason claim is a showing that the defendants exercised market power in some relevant market." Ad-damax Corp. v. Open Software Found., Inc., 888 F. Supp 274, 283 (D. Mass. 1995).
18. See infra note 61 and accompanying text.
19. See infra notes 62-105 and accompanying text.
advanced by the defendants.\textsuperscript{20} To date, courts have not been able to devise an effective method of analyzing network access restrictions under the rule of reason.\textsuperscript{21} As a result, businesses have become confused about the antitrust standards for network access. This uncertainty has deterred the formation of networks that could create new products and services for consumers.\textsuperscript{22}

This Article proposes a new antitrust approach that would clarify the standards for judging network access restrictions. Modern network joint ventures enhance consumer welfare. Because of their economic efficiencies, such joint ventures should not be prohibited under the antitrust laws, even when they hold monopoly power. It would do more harm than good to break up many network monopolies. Indeed, it is often the monopoly power of networks that makes them so efficient.\textsuperscript{23}

Although network joint ventures should not be per se illegal, they also should not be free from regulation under the antitrust laws. Indeed, the monopoly power of many modern networks makes antitrust regulation essential.\textsuperscript{24} Such networks act as gateways through which a new entrant must pass in order to enter a particular market.\textsuperscript{25} As long as a network constitutes a critical path to the relevant market, it should not be permitted to deny entry to qualified firms. Antitrust enforcement must ensure that the network gatekeepers permit access to the relevant market, on equal terms, to all parties who are capable of participating in that market.\textsuperscript{26}

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  \item \textsuperscript{20} See infra notes 72-79 and accompanying text.
  \item \textsuperscript{21} See infra notes 77-105 and accompanying text.
  \item \textsuperscript{22} See infra notes 81-82 and accompanying text.
  \item \textsuperscript{23} See infra notes 110-112 and accompanying text.
  \item \textsuperscript{24} The pending deregulation of telecommunications markets will make it possible for firms to obtain even broader network monopolies in those markets. One firm in a particular city, for example, could conceivably own each of the television and radio stations, cable systems, and newspapers, thus controlling all of the local media outlets. See Andrews, supra note 8, at 36. Under such circumstances, appropriate antitrust regulation will become even more essential.
  \item \textsuperscript{25} The relevant gateway may be a telephone line, on-line network, pipeline, or a software program.
  \item \textsuperscript{26} The concept of open access to an essential network has been recognized in various regulatory areas outside the antitrust field. The 1992 Cable Act prohibits cable companies from denying "fair access" to their programs by competing delivery systems, such as direct broadcast satellites. 47 U.S.C. § 548(b) (1988 & Supp. V 1994). The Clinton Administration has proposed regulations to ensure universal access to the Internet. See Knable & Gotts, supra note 6, at 3. The new telecommunications bill pending in Congress requires local telephone companies to allow their rivals to interconnect with their phone systems so that competing companies are able to link calls between each other's customers. See Edmund
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The new approach proposed in this Article provides an effective means by which the judiciary can regulate access to network joint ventures. This approach is neither a traditional per se nor a rule of reason standard. The proposed approach relies on presumptions and burdens of proof to simplify the courts' analysis. Instead of the complex market power inquiry required by the rule of reason, courts will be able to focus on a few easily determinable factors that will be decisive in their analysis. Under this approach, the party seeking access to an existing network joint venture must rebut an initial presumption that open access need not be compelled. The excluded party can only rebut the presumption by proving that "but for" access to the network, it would be unable to compete effectively in the relevant market. If the excluded party is successful in rebutting this presumption, the burden shifts to members of the network to justify any restrictions on access that are imposed by the venture. Network members must then demonstrate that such restrictions are necessary to promote the efficiency of the venture. This approach protects the property rights of the network members while ensuring open access in those cases where it is necessary to preserve competition in the market served by the network. Adoption of this approach would simplify the courts' antitrust analysis of network joint ventures, thus conserving judicial resources and giving businesses better guidance on the antitrust standards for network access.

II. Precedent for Compelled Network Access: The Essential Facilities Doctrine

The "essential facilities" doctrine has a long history in antitrust law. The doctrine arose out of the courts' recognition that certain assets are so critical to effective competition in a relevant market that all qualified parties should be allowed access to such assets on equal terms. Under this precedent, essential networks have been required to maintain open membership policies. This affirmative obligation is similar to the "duty to deal," which courts have imposed on monopolists in cases brought under section 2 of the Sherman Act.27

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A. Monopolists' Duty to Deal Under Section 2

Courts have acknowledged that, in general, a business has no legal obligation to deal with third parties; it can deal, or refuse to deal, with whomever it chooses. However, courts have also determined that the right to refuse to deal is not unqualified. The antitrust laws impose an affirmative duty to deal on monopolists because of their special position in the relevant market. A monopolist cannot refuse to deal with its competitors in a way that unreasonably excludes them from the monopolized market. Thus, in several cases, the Supreme Court has required monopolists to deal with all interested parties on nondiscriminatory terms.

In Otter Tail Power Co. v. United States, the Supreme Court held that an electrical company's refusal to sell electric power in the wholesale market to municipalities that operated their own retail distribution systems violated section 2 of the Sherman Act. Lorain Journal Co. v. United States involved the refusal by the publisher of the only newspaper in Lorain, Ohio to sell advertising to parties who patronized a local radio station. The publisher argued that it had the right to refuse to accept advertisements from whomever it pleased. The Court, however, held that this right was qualified and found that the publisher's refusal to deal was an illegal attempt to monopolize the mass dissemination of news and advertising in the local area. Finally, in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., defendant, who controlled three of the four skiing mountains in the Aspen area, refused to cooperate with the owner of the fourth mountain in marketing a multi-day, multi-mountain ski ticket. The Tenth Circuit characterized the special ticket as an "essential facility," and the Supreme Court affirmed the verdict, which found that the defendant violated section 2 by refusing to cooperate in the issuance of the ticket.

29. Id.
32. 342 U.S. 143 (1951).
33. Id.
34. Id. at 149.
35. 738 F.2d 1509 (10th Cir. 1984), aff'd, 472 U.S. 585 (1985).
36. Id. at 1512-13.
37. Id. at 1520-21.
38. 472 U.S. at 605-11.
The lower federal courts have also found a duty to deal under section 2 when a monopolist controls a facility to which access is necessary in order to compete. In MCI Communications Corp. v. AT&T,\(^{39}\) the Seventh Circuit affirmed an order directing AT&T to allow MCI to interconnect its long distance lines with the local Bell telephone facilities, which, at that time, were still owned by AT&T. Delaware & Hudson Railway Co. v. Consolidated Rail Corp.\(^{40}\) involved a railroad that wanted to ship newsprint from Eastern Canada to the mid-Atlantic states.\(^{41}\) The product could not reach its destination without passing over Conrail’s tracks.\(^{42}\) Pointing out that physical duplication of Conrail’s tracks would be impractical and inefficient, the Second Circuit found that Conrail may have violated section 2 in demanding an 800% price increase for the use of the tracks.\(^{43}\)

**B. The Section 1 Essential Facilities Cases**

The essential facilities cases brought under section 1 of the Sherman Act involve joint ventures to which third parties have sought access in order to compete in the relevant market. The issue in such cases has been whether the members of a joint venture illegally conspired among themselves to deny third parties the right to participate in the venture.\(^{44}\) In the essential facility cases, courts have had to consider the antitrust implications of multi-firm conspiracies rather than the single-firm conduct at issue in the section 2 monopolization cases. The results, however, have been similar. As in the section 2 cases, courts have imposed a duty to deal on joint ventures that control facilities essential for effective competition in the relevant market.\(^{45}\) Indeed, once the courts have found a joint venture to be essential, they have traditionally deemed its members’ refusal to deal to be a per se illegal group boycott.\(^{46}\)

The first, and perhaps the most influential, section 1 essential facilities case was United States v. Terminal Railroad Ass’n,\(^{47}\) which was decided by the Supreme Court in 1912. Fourteen railroads jointly

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40. 902 F.2d 174 (2d Cir. 1990).
41. Id. at 176.
42. Id.
43. Id. at 177, 179-80.
44. See infra notes 47-60 and accompanying text.
47. 224 U.S. 383 (1912).
owned the Terminal Railroad Association. The Association controlled the only means of access across the Mississippi River to the city of St. Louis (two bridges and a car ferry). No railroad could access St. Louis, then a major railroad hub, from the east without using the Association's facilities. The cost for competitors to acquire similar means of access was prohibitive. Although the Government sought dissolution of the Association, the Court did not opt for such a severe remedy. Instead, the Court required that the Association allow all other railroads to use the bridges and ferry "upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies."\(^{48}\)

Other Supreme Court cases have followed *Terminal Railroad Ass'n* in compelling access to joint venture facilities that are essential for effective competition in the relevant market. In *Silver v. New York Stock Exchange*,\(^ {49}\) the New York Stock Exchange ("NYSE") disapproved a broker-dealer's application for connection to a private wire system among stock exchange members.\(^ {50}\) The wire permitted brokers to receive "instantaneously available" market information and to trade with other brokers in the market.\(^ {51}\) The Court concluded that "[t]he concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market."\(^ {52}\) Similarly, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*\(^ {53}\) concerned the refusal of an industry-wide standards-setting organization to provide its "seal of approval" to plaintiff's gas burner.\(^ {54}\) The burner was not approved despite its apparent safety and efficiency. Without the seal of approval, the plaintiff was effectively excluded from the market. The Court characterized the association's conduct as a group boycott and applied the per se rule.\(^ {55}\)

The railroad association in *Terminal Railroad Ass'n*, the NYSE in *Silver*, and the standards-setting organization in *Radiant Burners* all had monopoly control over the means of access to the markets that

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48. *Id.* at 411-12.
50. *Id.* at 344.
51. *Id.* at 348.
52. *Id.* at 347.
54. *Id.* at 658.
55. *Id.* at 659-60.
they served. However, in certain cases, courts have required open access to a joint venture facility where the venture did not constitute a monopoly and potential entrants had other alternatives by which to enter the relevant market. For example, in *Associated Press v. United States*, the Supreme Court compelled open access to the Associated Press ("AP") wire service. At the time of the suit, the AP was a joint venture that included 1200 newspaper publishers as members. The association's bylaws allowed a member newspaper to veto the admission of another nonmember newspaper operating in the same city and field (morning, evening, or Sunday). The AP competed with United Press and International News Service in providing wire service news. Although the AP was not the only means through which newspapers could obtain such news, the Supreme Court voided the bylaw provision that allowed members to veto the admission of competitors.

C. Descent into Confusion: The Current Rule of Reason Approach

Recently, the Supreme Court and lower federal courts have moved away from the per se approach to joint venture access restrictions. Courts are beginning to use the rule of reason more frequently to analyze collective refusals by a group of firms to deal with their competitors. The effect of this trend has been to inject greater uncertainty into this area of antitrust law. The trend began with the Supreme Court's 1985 decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* ("Northwest Stationers"). Plaintiff claimed that its expulsion from a joint buying cooperative of one hundred office supply retailers constituted a per se illegal group boy-

56. 326 U.S. 1 (1945).
57. *Id.* at 3-4.
58. *Id.* at 4.
59. *Id.* at 13.
60. *Id.* at 21.
61. The greater use of the rule of reason coincided with the federal courts' increased receptivity to economic arguments in antitrust cases. Beginning in the late 1970s, the federal courts began to emphasize the economic over the populist goals of antitrust. Relying on the writings of the "Chicago School" of academic commentators, many of whom were appointed to the federal bench, several courts concluded that antitrust enforcement should be aimed at guaranteeing consumer welfare through lower prices and enhanced output rather than at such populist goals as the protection of small dealers or the fairness of the competitive process. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 228 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).
cott. The buying cooperative generated several efficiencies including economies of scale in purchasing and warehousing and ready access to inventory. Given such potential beneficial effects, the Court concluded that a rule of reason, rather than a per se approach, was most appropriate. However, in remanding the case, the Court provided little guidance on how the rule of reason analysis should be carried out. The Court simply stated that, “[w]hen the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.”

In the term following Northwest Stationers, the Court continued to emphasize the plaintiff’s need to prove market power in group boycott cases. Federal Trade Commission v. Indiana Federation of Dentists involved an association of dentists who refused to supply patient x-rays to insurance companies seeking to evaluate benefit claims. Although ultimately finding this practice illegal under the rule of reason, the Court declined “to resolve this case by forcing the Federation’s policy into the ‘boycott’ pigeonhole and invoking the per se rule.” The Court concluded that the per se rule should be “limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.”

Neither Northwest Stationers nor Indiana Federation of Dentists resolved the question of what role, if any, the per se rule should play in the analysis of joint venture access restrictions. Are there circumstances under which the denial of access to a facility controlled by a joint venture should be illegal on its face? Or is the fuller analysis required by the rule of reason always appropriate? The distinction between the per se and rule of reason approaches is critical because, traditionally, the outcome of a case has turned on the approach chosen by the court. Generally, application of the rule of reason has

63. Id. at 285.
64. Id. at 295.
65. Id. at 295-98.
66. Id. at 298.
68. Id. at 451.
69. Id. at 458.
70. Id.
meant a decision for the defendant, and application of the per se rule, a victory for the plaintiff.\textsuperscript{71}

Increased application of the rule of reason to joint venture access restrictions is likely to lead to longer, more complicated trials and more ambiguous outcomes. The classic formulation of the rule of reason, set forth by Justice Brandeis in 1918, includes a long list of factors that might conceivably reveal the purpose or effect of a section 1 agreement, but it assigns no priority or weight to any particular factor.\textsuperscript{72} Later Supreme Court cases failed to refine this open-ended formula. In \textit{Continental T.V., Inc. v. GTE Sylvania, Inc.},\textsuperscript{73} for example, the Court cited Justice Brandies' formulation without any indication of the weight to be afforded certain factors.\textsuperscript{74} Similarly, in \textit{Business Electronics Corp. v. Sharp Electronics Corp.}\textsuperscript{75} the Court simply cited \textit{GTE Sylvania}'s broad definition without any further explanation.\textsuperscript{76}

In the absence of any guidance on the relative weight to be given to the various factors of its open-ended formula, the rule of reason has lost most of its utility in antitrust analysis. Indeed, the confusion generated by the approach is currently "one of the more vexing problems of antitrust law."\textsuperscript{77} The checklist approach puts so many factors at issue that none is dispositive.\textsuperscript{78} The absence of clear standards makes it difficult to predict the outcome of particular cases. The only certainty under the rule of reason is that courts will be required to engage in a

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\bibitem{72} Board of Trade v. United States, 246 U.S. 231, 238 (1918) (considering such factors as circumstances peculiar to the defendant's business, conditions before and after the restraint, the nature and purpose of the restraint, and the competitive effects of the restraint).
\bibitem{73} 433 U.S. 36 (1977).
\bibitem{74} \textit{Id.} at 49-50 n.15.
\bibitem{75} 485 U.S. 717 (1988).
\bibitem{76} \textit{Id.} at 723. In 1992, the American Bar Association Antitrust Section concluded: "[a]lthough the rule of reason has been part of Sherman Act jurisprudence for almost eighty years, the specific analysis for determining whether particular restraints of trade unreasonably restrict competition under this standard still is not clearly established." AMERICAN BAR ASSOCIATION ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 41-42 (1992).
\bibitem{77} David A. Clanton, Horizontal Agreements, the Rule of Reason and the General Motors-Toyota Joint Venture, 30 WAYNE L. REV. 1239, 1249 (1984).
\bibitem{78} Frank H. Easterbrook, Vertical Arrangements and the Rule of Reason, 53 ANTITRUST L.J. 135, 153-55 (1984) ("A global inquiry invites no answer; it puts too many things in issue . . . . Of course judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive.").
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complicated and prolonged investigation into market impact before determining the legality of a particular restraint. Determination of the relevant market and the parties' market power is particularly burdensome. Proof of market power is "difficult, complex, expensive and time-consuming," involving a fact-intensive assessment of the relevant product and geographic markets, each party's shares of those markets, and their competitors' market shares.

Defendants, as well as plaintiffs, incur greater costs in defending cases under a standard that gives so few guidelines for judges and juries to follow. Both parties may be more inclined to prolong litigation because of the rule of reason's uncertain outcome. The time and expense involved in rule of reason cases are an added burden on the federal courts, which, with their current backlog of cases, can ill afford to waste their limited resources. In addition, the traditional rule of reason standard provides little guidance to firms in planning their conduct. Antitrust enforcement relies primarily on self-policing by the business community, but voluntary compliance is impossible when antitrust standards are unclear. The "gray area" between permissible and illegal conduct is much broader under the vague rule of reason approach that has supplanted the per se rule for many types of group boycotts. Given the high costs of litigation and potential liability under the antitrust laws, businesses are likely to take a conservative approach and avoid any conduct that falls within a gray area. Such hesitancy may prevent firms from entering into network joint ventures that enhance productivity and benefit consumers, consequences that are ultimately harmful to society as a whole.

80. Maxwell M. Blecher, The "New Antitrust" As Seen by a Plaintiff's Lawyer, 54 ANTITRUST L.J. 43, 45 (1985) ("The increased focus on case facts under the rule of reason will . . . increase the uncertainty involved in litigation, and this uncertainty will increase the number of cases litigated because parties are unsure of what the outcome of a particular case will be."); see also Easterbrook, supra note 78, at 155 ("Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the rule of reason.").
81. One commentator has noted how antitrust law has moved from the clear standards of the past "into a gray area where it is possible for a case to come out one way—or another." Betty Bock, Is ANTITRUST DEAD? 10 (The Conference Board ed., 1989). Another commentator has reflected on the high cost to the business community resulting from the confusion over antitrust standards: "[u]ncertainty is a high-cost commodity. Indeed, the business community . . . might find uncertainty more costly than clear and wrong rules." Sims, supra note 71, at 440.
82. For example, many American firms have been deterred from entering into joint ventures for the production of new products out of a fear of antitrust liability. See Thomas Jorde & David Teece, Innovation, Cooperation and Antitrust, 4 HIGH TECH. L.J. 1, 36
One commentator has pointed out that the courts’ current approach to joint venture access restrictions is “little more than a jurisprudential bog.”\textsuperscript{83} Recent cases in which courts have used the rule of reason to analyze access restrictions confirm this view. Indeed, many of these cases appear to reach inconsistent results. In \textit{United States v. Realty Multi-List Inc.},\textsuperscript{84} the Fifth Circuit found a real estate multiple listing service to be an essential facility and thus prohibited it from adopting subjective membership rules that could be used to exclude qualified entrants.\textsuperscript{85} Recently, however, in \textit{Montgomery County Ass’n of Realtors, Inc. v. Realty Photo Master Corp.},\textsuperscript{86} a federal district court reached the opposite conclusion in a similar case. Plaintiff sought access to a real estate multiple listing service database to provide potential buyers with photographs of homes listed for sale.\textsuperscript{87} The court held that plaintiff could not prevail under an essential facilities theory because it could not prove that it was impractical to duplicate the multiple listing service.\textsuperscript{88}

The standard for analyzing network access restrictions has been further confused by the recent rule of reason litigation concerning credit card networks. In particular, cases have reached opposite conclusions on two critical issues: the method for defining the relevant market and the standard for determining the parties’ market power. \textit{National Bancard Corp. v. VISA U.S.A., Inc.}\textsuperscript{89} ("NaBanco I") involved a suit by a third-party processor of credit card transactions that alleged that an interchange fee charged by the VISA credit card system to credit card-issuing banks inhibited its ability to compete with VISA. The plaintiff argued that the relevant market included only credit card services. The court, however, agreed with VISA’s position that the market encompassed other methods of payment besides credit cards, such as cash and checks. The court ultimately concluded that VISA did not possess market power in that market.\textsuperscript{90} On appeal,
the Eleventh Circuit refused to reevaluate the district court's determination of the relevant market. 91

A subsequent case, SCFC ILC, Inc. v. VISA U.S.A., Inc. 92 ("VISA I"), came to the opposite conclusion concerning the relevant market in which to analyze credit card networks. In VISA I, Sears sued the VISA credit card system for denying it entry to the network. 93 Sears marketed its own proprietary credit card, called the "Discover Card," and applied for the right to issue a VISA card as well. 94 VISA rejected Sears' original application after adopting a rule that denied membership to any firm that marketed Discover Cards, American Express Cards, or any other card "deemed competitive" by VISA's Board of Directors. 95 Sears then tried to enter VISA by purchasing MountainWest Financial, a bank that was already a VISA issuer. 96 Sears planned to launch an aggressively priced new VISA card program, to be called "Prime Option," which would carry no annual fee and would offer discounted finance charges. After VISA refused to allow MountainWest to issue additional VISA cards, Sears sued VISA under section 1. 97

In the case, VISA abandoned its position taken in NaBanco I that the relevant market included credit cards as well as other forms of payment. VISA agreed to stipulate that credit cards constituted a separate market. 98 In 1992, a jury in the district court reached a rule of reason verdict in favor of Sears, focusing on the issuance of credit cards as a relevant market. 99

In addition to confusing the relevant market standard, the VISA II case sent mixed signals with regard to the manner for determining the market power of network joint ventures. VISA argued that it did not possess market power in the credit card market because finance charges and other fees were set independently by the six thousand member banks that issued VISA cards. The district court in VISA I disagreed with this argument and found that the members of the

91. National Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592, 603-04 (11th Cir. 1985) ("NaBanco II").
93. Id. at 964.
94. Id. at 963-64.
95. SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958, 961 (10th Cir. 1994) ("VISA II").
96. Id.
97. Id.
98. Id. at 966.
99. 819 F. Supp. at 967.
VISA network used their market power collectively to exclude Sears from the VISA market.\textsuperscript{100} The Tenth Circuit Court of Appeals in \textit{VISA II} reversed.\textsuperscript{101} In its decision, the court of appeals relied on the fact that the "intrasystem market" (i.e., the market among the six thousand VISA credit card issuers) was "remarkably unconcentrated."\textsuperscript{102} Given this lack of concentration, the court believed that VISA could not have exercised market power in a manner that could harm consumers.\textsuperscript{103}

These recent cases provide little guidance to business executives attempting to design reasonable membership rules for modern networks. Based on the \textit{NaBanco II} and \textit{VISA II} cases, it will be difficult for antitrust practitioners to determine the relevant market in which to analyze network access restrictions. Is the relevant market only the market for the specific products covered by a network (e.g., credit cards)? Or does the market encompass all other networks marketing similar products (e.g., credit cards, check-cashing services and electronic funds transfers)? These cases also fail to answer how the market power of the parties should be assessed once the relevant market is determined. When the members of a joint venture act to exclude third parties, should their market power be analyzed on a collective or individual basis? The district court in \textit{VISA I} determined that the collective market power of the joint venture members was relevant,\textsuperscript{104} while the Tenth Circuit, despite the collective action within the joint venture, analyzed the members' market power on an individual basis in \textit{VISA II}.\textsuperscript{105}

It is time for the courts to adopt a new approach that clarifies these and other relevant standards for analyzing network access restrictions. Any such approach must begin with an understanding of the economic effects of network joint ventures in the American economy today.

\textbf{III. The Economic Effects of Network Access Restrictions}

\textbf{A. The Efficiencies of Network Joint Ventures}

Network joint ventures generate significant economic efficiencies. Indeed, in many cases, such networks create the conditions that make

\begin{itemize}
  \item \textsuperscript{100} Id. at 963-64.
  \item \textsuperscript{101} 36 F.3d at 969.
  \item \textsuperscript{102} Id. at 968.
  \item \textsuperscript{103} Id. at 968-69.
  \item \textsuperscript{104} 819 F. Supp. at 963-64.
  \item \textsuperscript{105} 36 F.3d at 968-69.
\end{itemize}
certain markets possible. Credit card and ATM networks, electronic funds transfers, professional sports leagues, real estate multiple listing services and stock and commodities exchanges are all examples of products and services that could not exist without networks.

Pure interchange is one of the most important efficiencies of a network joint venture. Networks provide the rules and facilities that allow members to effectively interchange traffic or transactions with each other. The interchange provided through a network can make markets more efficient. A stock exchange or real estate multiple listing service, for example, matches the maximum number of "buy" and "sell" orders. By concentrating transactions in one place, the network ensures the narrowest spread between bids and offers.\textsuperscript{106} Network joint ventures are also effective at setting and enforcing standards for certain markets. Such standards-setting is particularly important for high-tech industries. Computer networks require a high degree of coordination in order to operate effectively. A network joint venture can establish common standards for communication among the different terminals of its members as well as common measures for security and protection against errors and fraud.\textsuperscript{107} Standards-setting may also be critical to the operation of other types of markets. A sports league, for example, is a type of network joint venture that, by setting the rules of play (such as team schedules, player eligibility rules, team salary caps, and rules for free agency), provides a foundation for the operation of amateur and professional sports.\textsuperscript{108}

Network joint ventures may generate substantial economies of scale. By combining all of the transactions in a particular market, networks can decrease per unit costs for their members. Membership in a network often allows smaller competitors to receive products or services that they could not afford on their own. The Associated Press, for example, permits small-town newspapers to receive the same international wire stories as the New York Times and Washington Post. The VISA and Mastercard networks allow small banks to issue credit cards that can be used by their customers on an international basis.

Due to these substantial efficiencies, the legality of network joint ventures themselves usually should not be an issue in antitrust cases.

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\textsuperscript{106} Baker, supra note 4, at 1011-12.  \\
\textsuperscript{107} See Dennis W. Carlton & J. Mark Klamer, The Need for Coordination Among Firms, With Special Reference to Network Industries, 50 U. Chi. L. Rev. 446, 463 (1983).  \\
\textsuperscript{108} See NCAA v. Board of Regents, 468 U.S. 85, 101-02 (1984) (declining to apply the per se rule to certain rules adopted by NCAA on grounds that the organization established certain competitive restrictions which were necessary in order for the relevant product, amateur collegiate athletics, to be available at all).
\end{flushleft}
Unlike certain merger cases, courts and regulatory agencies should not be attempting to break up network joint ventures. Courts should regulate the conduct rather than the structure of such organizations. In particular, courts should carefully review the membership restrictions imposed by network joint ventures to ensure that they do not unduly limit competition in the markets affected by the network.

B. Effects in Primary and Secondary Markets

Antitrust analysis of restrictions on access to network joint ventures would be greatly clarified if the courts recognized that such restrictions affect competition in two distinct markets. The "primary" market is the market served, and in many cases made possible by, a network joint venture. In the primary market, firms that are members of a network joint venture compete among themselves to provide products and services to the ultimate users. Banks offer credit cards and ATM services to consumers, brokers sell securities or real estate to clients, and professional sports teams market their tickets to sports fans.109 The "secondary" market, at a level once removed from the ultimate consumer, is the market in which network joint ventures compete among themselves to provide network services. In the secondary credit card market, for example, VISA, MasterCard, Discover Card and other proprietary credit card systems compete to provide credit card services to the banks that issue the cards and the merchants who honor the cards. However, in many secondary markets, there is no actual competition because a single network joint venture holds monopoly power. For example, within their markets, there are no rivals for the major professional sports leagues or for most telephone, utility, and cable television networks.

Many of these monopoly networks have arisen because they are the most efficient means of serving the relevant market. Indeed, many secondary markets constitute "natural monopolies" in which it is not feasible for more than one network to operate effectively.110 The economies of scale involved in telephone, utility, or cable networks, for example, usually make it impractical for a rival exchange to duplicate the necessary network infrastructure. The per user costs of such

109. See Baker, supra note 4, at 1007.
110. "Natural monopoly refers to a situation where a single firm can supply all of the market demand for a product at [a] lower cost than could two or more firms." Margaret E. Guerin-Calvert, Network Merger Analysis, Paper Presented to the 43d Annual Spring Meeting of the American Bar Association Antitrust Law Section (Apr. 6, 1995) (on file with author).
networks usually decline as they increase in size and add new customers.\textsuperscript{111} Monopoly networks also result naturally from the requirements of certain high-tech markets. Such markets often cannot function without a single industry-wide standard, such as a computer operating system or particular hardware specification. A single network can develop and enforce such a standard more effectively than can multiple networks.\textsuperscript{112}

Because of these natural monopoly characteristics, denial of access to a network joint venture is likely to substantially lessen competition in the primary market. A network can be visualized as a gateway through which a firm must pass in order to enter the primary market. Often the only means of entry to the primary market is through the network gateway. A firm will therefore not be able to participate in the primary market if it is denied access to such a network. A firm, for example, cannot field a sports team or sell stock, bonds, or real estate without participating in the network that serves such markets. When a firm is excluded from an essential network, consumers in the primary market are deprived of the benefits that may result from the addition of new entrants, such as increased output, lower prices, and technological innovations. By requiring open access to an essential network, courts can avoid such adverse competitive effects.

Although open access protects competition in the primary market, it may limit competition in the secondary market. Indeed, in the absence of an open access decree, exclusionary membership rules can

\textsuperscript{111} An antitrust commentator has pointed out that "[t]he critical characteristic of a natural monopoly is that it is only as more output is concentrated in a single supplier that unit cost will decline. For example, one company can supply electricity to an entire city at less cost than two companies providing the service. Once the first firm sets up its plant and wires the city, it is much cheaper for it to add additional homes to its network than for a second firm to set up a completely separate plant and network." Stephen F. Ross, Monopoly Sports Leagues, \textit{73 MINN. L. REV.} 643, 716 (1989) (citing A. KAHN, \textit{THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS} 119 (1971)). \textit{But see Wired?}, \textit{WALL ST. J.}, Jan. 16, 1995, at A14 (arguing that local telephone service is not a natural monopoly and that "[m]onopolies like . . . the Baby Bells . . . can only exist if the coercive power of government keeps out competitors").

\textsuperscript{112} Companies can gain a monopoly rather quickly if they are able to develop a new standard for a high-technology industry. For example, Microsoft has been able to dictate the operating system standards for the personal computer industry, and Intel has established the standard for the microchips used in the processing "brain" of a personal computer. \textit{See} Steve Lohr, \textit{Ground Rules for the Great Global Connection}, \textit{N.Y. TIMES}, May 7, 1995, at E1, E16. As Charles F. Rule, a partner at the law firm of Covington & Burling and former chief of the Antitrust Division of the Department of Justice, has stated, "[i]n high-tech markets where standards are important, the big get bigger . . . . That's how these markets work, and there's nothing necessarily wrong with it." \textit{Id.} at E16.
enhance secondary market competition. Firms that are excluded from an existing network will be forced to form their own networks or to compete individually in the secondary market. Furthermore, exclusionary rules tend to promote innovation in the secondary market. Firms will have a greater incentive to assume the risks of forming a new network joint venture if they believe that they can exclude potential future entrants and thereby retain the fruits of the venture's success for themselves. Thus, some commentators have argued that, because of the incentives to innovation promoted by network access restrictions, the courts should only compel access to a network under unusual circumstances.\textsuperscript{113}

Compulsory access can therefore have opposite effects in the primary and secondary markets. In the primary market, open access enhances competition and benefits consumers by allowing new firms to enter the market. In the secondary market, compulsory access may limit competition by discouraging the formation of new networks.\textsuperscript{114}

(1) Beneficial Effects of Open Access in Primary Markets

When access to a network joint venture is open, consumers benefit from enhanced competition in the primary market. New entrants to a market controlled by a network joint venture may have a lower cost structure than the incumbents and may develop more efficient means of delivering products or services to consumers. If such firms are permitted to enter the primary market, they may increase output and lower prices;\textsuperscript{115} if they are excluded, consumers lose the benefits of their presence. As the Fifth Circuit stated in \textit{Realty Multi-List}, "[by virtue of access restrictions,] the public is denied the incentive to competition that new entry may bring . . . . A new entrant into the market might, for example, be more aggressive and willing to accept a lower

\textsuperscript{113} See, e.g., Baker, supra note 4, at 1080-83.

\textsuperscript{114} Thus, in \textit{VISA I}, both Sears and VISA could argue that competition would be enhanced if they prevailed. Sears pointed out that its admission to the VISA system would enhance competition in the primary market, and VISA argued that such admission would reduce competition in the secondary market. SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956, 966 (D. Utah 1993), rev'd, 36 F.3d 958 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995) ("\textit{VISA I}").

\textsuperscript{115} See Dennis W. Carlton & Steven C. Salop, \textit{You Keep on Knocking but You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures} 28 (University of Chicago Center for the Study of the Economy and the State Working Paper No. 111, 1995) ("[S]uppose the joint venture had admitted the new, low cost members and those new members caused market output to expand. If these new members increase total output in the market, that increase in output would lower output prices and benefit consumers. Even though the collective market share of the joint venture would rise, it would be erroneous to condemn this procompetitive admission of new members.").
commission rate. Exclusion of such a [new entrant] would tend to reduce the amount of price competition in the market.\textsuperscript{116}

The competitive harm of access restrictions often comes not from increases in prices (as might occur if current members of a network joint venture were expelled) but from exclusionary conduct that prevents prices in the primary market from falling.\textsuperscript{117} In the VISA I case, for example, there was evidence that Sears' entry into the VISA network would have caused credit card prices to fall.\textsuperscript{118} Sears intended to charge no annual fee for its Prime Option VISA card, as opposed to the $15 to $20 fee being charged by other issuers.\textsuperscript{119} Sears also planned to charge interest under an "innovative schedule" that would have substantially lowered interest rates.\textsuperscript{120} Sears also had the "marketing muscle" to make its new card successful.\textsuperscript{121} Indeed, there was evidence that the VISA members' opposition to Sears' entry was based, at least in part, on their own expectations that such entry would lead to lower prices.\textsuperscript{122} As a result of the VISA members' exclusionary action, a "large, innovative, low-cost price-cutting producer" was excluded from the relevant market.\textsuperscript{123} Had Sears been allowed to introduce its Prime Option card within the VISA market, prices paid by consumers for credit card financing might well have been substantially lower.\textsuperscript{124}

Despite evidence of the potential consumer welfare advantages resulting from admitting Sears to the VISA system, the Tenth Circuit in VISA II reversed the jury's verdict for Sears.\textsuperscript{125} The court's decision

\textsuperscript{116} United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1371 (5th Cir. 1980).
\textsuperscript{117} Carlton & Salop, supra note 115, at 27.
\textsuperscript{119} Id.
\textsuperscript{120} See Carlton & Frankel, supra note 118, at 666.
\textsuperscript{122} See Carlton & Frankel, supra note 118, at 663.
\textsuperscript{123} Id. at 654.
\textsuperscript{124} See Carlton & Frankel, supra note 118, at 667 ("[Sears'] large-scale, heavily promoted introduction of the Prime Option VISA card would have allowed it to provide millions of credit card members with relatively low cost credit cards."). Sears was prepared to offer a VISA card with an initial interest rate of only 12.9% (compared to the annual rate of 19.8% charged by VISA's ten largest bank card issuers). See Lee Richardson, Let A Thousand Credit Cards Bloom, WALL ST. J., May 23, 1995, at A22. The entry of such a low-price card may have caused a general decline in prices in the credit card market, where profits have been inexplicably high. See Lawrence M. Ausubel, The Failure of Competition in the Credit Card Market, 81 AM. ECON. REV. 50, 53-56 (1991).
\textsuperscript{125} SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958, 972 (10th Cir. 1994) ("VISA II").
was based on its conclusion that VISA was unable to exercise market power because the credit card market was so unconcentrated (i.e., there were over six thousand credit card issuers in the VISA system). This reasoning overlooks the fact that the VISA members had effectively used their collective market power to exclude Sears from the VISA system. Because the members acted collectively through the VISA network joint venture, their market power should have been analyzed on an aggregate basis.

The Tenth Circuit in VISA II failed to appreciate the importance of maintaining competition within the primary market served by a network joint venture. The members of such ventures remain independent competitors despite their affiliation with the venture. Indeed, the existence of competition among joint venture members is what distinguishes a network joint venture monopoly from a single firm monopolist. The members of a network joint venture are not simply stockholders or partners in the venture; they are competitors whose continued rivalry benefits consumers. As such, they should not be allowed to conspire among themselves to prevent potential competitors from entering the primary market. In establishing and enforcing membership rules such as those at issue in VISA II, the members of a joint venture are acting in a collective manner. The district court correctly recognized that a jury could have legitimately concluded that this collective exercise of market power unduly harmed consumers and that an open access order was appropriate to redress that harm.

(2) Adverse Effects of Open Access in Secondary Markets

Competition in the secondary market, as in the primary market, can generate many economic benefits. Networks are more likely to lower their prices and implement improvements when they have to compete with other networks for potential members. The VISA and MasterCard credit card networks, for example, must compete with each other and with the "proprietary" credit cards (e.g., Discover, American Express, and Diners Club) for the business of merchants and card-issuing banks, and ATM systems must work to make themselves attractive to the issuers of ATM cards. When a network has monopoly power, the absence of competition in the secondary market has "the same detriments associated with monopolies generally: poor service, discrimination, lack of innovation, and high

126. Id. at 968.
128. See Baker, supra note 4, at 1010.
prices.” Network monopolies, such as cable television and sports leagues, would likely be forced to provide their services more efficiently and at a lower price if they faced competition at the network level.

A court runs the risk of preserving a network monopoly when it requires open access to an existing network joint venture. Once it has gained entry to a successful network joint venture, a firm may have no need to participate in a rival venture because it will already have access to the primary market. Furthermore, members of joint ventures may not be interested in competing with their own venture because such competition reduces their profits as members of the venture. Thus, commentators have pointed out that “joint ventures sometimes can reduce competition by becoming overly inclusive.”

A compulsory access rule encourages conservatism rather than innovation. Firms have less incentive to invest in open access start-up ventures under compulsory access rules. The original investors in a new network joint venture face substantial risks and uncertainties. The up-front investment required to develop a new network is significant, and firms may not be willing to risk such an investment if they perceive that a court will dilute their gains by ordering open access to the venture. Firms may also be more likely to hold back at the outset and refrain from a risky investment in a new network if they believe

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129. *Id.* at 1015.
130. Many local cable networks have a “reputation for poor customer service.” Mark Landler, *The Dishes Are Coming: Satellites Go Suburban*, N.Y. TIMES, May 29, 1995, at 37, 40. Direct-broadcast satellite television, or DBS, allows televisions to receive multi-channel broadcasts directly from satellites and thus bypass cable systems. DBS became nationally available in the fall of 1994 and has more than one million subscribers. With such a viable competitor in the secondary market, the cable networks may be forced to improve their customer service. *Id.* Professor Stephen Ross argues that the government should break up Major League Baseball and the NFL; he states that the resulting competitive market will “correct the harms that the monopoly sports leagues inflict on taxpayers and fans.” Ross, *supra* note 111, at 646. Professor Ross believes that, if there were competing leagues in these professional sports, the leagues would be more eager to add expansion teams and “would vie against each other for the right to play in public stadiums, driving rents up and tax subsidies down.” *Id.*
131. The Supreme Court has recognized the tendency of joint venture partners not to compete with their own affiliates, pointing out that “[r]ealistically the parents would not compete with their progeny.” United States v. Penn-Olin Chem. Co., 378 U.S. 158, 168 (1964).
that, after the venture becomes successful, they can obtain access to it in any event.\textsuperscript{133}

The Associated Press litigation reveals the extent to which open access can reduce competition in the secondary market. In Associated Press, the Supreme Court required AP to abandon a bylaw provision through which local member newspapers could veto the admission of their competitors.\textsuperscript{134} In his dissent, Justice Roberts pointed out that the Court's decree might lead to a monopoly,\textsuperscript{135} and that is exactly what happened. AP became an open-entry network after the decree and, preferring the services of AP, newspapers began to abandon other wire service networks. AP's rival networks, United Press ("UP") and International News Service ("INS"), became less viable competitors as they lost members to AP. UP and INS merged in 1958 to form United Press International ("UPI"). UPI's client base continued to move to AP, and UPI ultimately filed for bankruptcy, leaving AP as the dominant news-gathering network.\textsuperscript{136}

C. Balancing the Effects of Access Restrictions in Primary and Secondary Markets

Compelled access, then, often has opposite effects in the primary and secondary markets affected by a network joint venture. Competition in the primary market is enhanced when networks are required to admit all qualified firms. In such a case, aggressive firms with innovative ideas for delivering products and services to consumers will be able to enter the primary market. Compelling such access, however, is also likely to reduce competition in the secondary market. When open access is compelled, new entrants will be more likely to concentrate their energies on the primary market rather than on forming a new network joint venture to compete in the secondary market. Incentives for investing in new networks in the secondary market will be reduced as market participants become aware that early investors will not have a significant advantage over late-comers.

\begin{itemize}
  \item \textsuperscript{133} As Donald Baker points out:
    \[\text{[a]re we sure that successful network founders would do it again—or so aggressively—if they knew that their 'differentiated' product would end up being "universal"?... Is differentiation not the type of incentive... which is likely to be blunted if the would-be innovators believe that, upon the success of the venture, the advantage can be usurped by late-comers?}\]
  \begin{flushright}
    \textit{Baker, supra} note 4, at 1073.
  \end{flushright}
  \item \textsuperscript{134} \textit{Associated Press v. United States}, 326 U.S. 1, 21-22 (1945).
  \item \textsuperscript{135} \textit{Id.} at 48 (Roberts, J., dissenting).
  \item \textsuperscript{136} Baker, \textit{supra} note 4, at 1035.
\end{itemize}
It is possible for the courts and regulatory agencies to balance effectively the trade-off between these beneficial and adverse effects in the primary and secondary markets. Indeed, the Supreme Court has required the federal courts to use a similar balancing approach in analyzing the legality of vertical restrictions imposed by a manufacturer on its distributors. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court adopted a rule of reason standard that balances the adverse effects of such restrictions on intrabrand competition (i.e., competition among the distributors who resell the manufacturer’s products) against the beneficial effects on interbrand competition (i.e., competition among manufacturers of different brands). If the courts can balance the intrabrand and interbrand effects of vertical restraints, they should also be able to balance the beneficial and adverse effects of open network access in primary and secondary markets.

Indeed, in most cases, it should be obvious whether the balance falls in favor of compelled access to a network joint venture. Courts should recognize that competition in the primary market is more important than competition in the secondary market because primary market competition directly benefits consumers. Firms in the primary market deal at first hand with consumers, and innovations in that market are more likely to lead to lower prices. Thus, whenever

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138. Unfortunately, the federal courts have failed to recognize this fact. The Supreme Court in *GTE Sylvania* found that, because it involves different manufacturers, interbrand competition is more likely than intrabrand competition to lead to innovations and efficiencies in quality and pricing, 433 U.S. at 52 n.19. In network cases, the courts have equated secondary market competition with interbrand competition and primary market competition with intrabrand competition. Confused perhaps by *GTE Sylvania*’s praise of interbrand competition, both the district court and the Tenth Circuit in *VISA I* and *VISA II*, erroneously concluded that competition in the secondary market should be accorded a higher status than competition in the primary market. SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956, 983-84 (D. Utah 1993), rev’d, 36 F.3d 958 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995) ("VISA I"). ("[Sears’ admission to the VISA system] may provide short-term intrasystem competitive benefits within the VISA system, but in the long run, in the court’s judgment, the damages from such inclusion will outstrip the benefits."); see also SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958, 966 (10th Cir. 1994) ("VISA II") ("Interbrand competition . . . is the primary concern of antitrust law.” (citing 433 U.S. at 52 n.19)).

139. Competition in the primary market affected by a network is more similar in effect to interbrand than to intrabrand competition. The members of networks are usually independent firms that compete in a manner similar to that of the manufacturers of industrial products referred to by the Court in *GTE Sylvania*. This analogy holds even when members of a network sell their products under a common trademark. The card-issuing banks in the VISA and MasterCard networks, for example, compete with each other on annual fees, finance charges, and credit limits despite the fact that they market their cards under a common name. Indeed, the domestic credit card industry is “increasingly competi-
a network controls a resource necessary for effective competition in the primary market, the balance should be struck in favor of open entry to the network. In such a case, the beneficial effect of open access to the primary market should outweigh any adverse effect in the secondary market.

Denial of access to an essential network joint venture completely eliminates a firm from the primary market. By requiring open access, a court can ensure that consumers are not deprived of the advantages of enhanced competition, including lower prices and higher quality products and services. On the other side of the ledger, compulsory access to an essential joint venture should not have significant adverse effects in the secondary market. While open access to an essential network enhances actual competition in the primary market, it merely reduces potential competition in the secondary market. When a network is essential for entry to the primary market, there will, by definition, be no alternative means of competing effectively with the network. A potential entrant can only compete with an existing network if a comparable network is formed in the future. Certainly, a firm that gains access to an essential network joint venture will have less incentive to join a future network. In exchange for a reduction of potential future competition, however, actual competition in the primary market will be immediately enhanced by the entry of the new firm.

Because the benefits of open access in the primary market are so much greater than the adverse effects in the secondary market, the courts should be willing to regulate the membership restrictions of all essential networks. Once access to a network has been found to be essential to effective competition in the primary market, the courts should review the network's membership rules to determine whether they are unduly exclusionary.

Open access, however, should not be compelled to non-essential networks. When access to a network is not required to enter the primary market, the balance shifts in favor of protecting competition in the secondary market. In such a case, primary market competition will...
not be significantly reduced by exclusionary membership rules. If a firm is denied access to a non-essential network, it can still enter the primary market on its own or through an alternative network.

Furthermore, in requiring open access to a non-essential network, a court may significantly harm competition in the secondary market. Under such circumstances, a compulsory access decree will reduce actual, rather than merely potential, competition in the secondary market. A firm may elect to access a predominant network simply because it has the most members or the lowest fees. In doing so, the firm would forego other alternatives, such as entry de novo or through a smaller rival network, which would have enhanced actual competition in the secondary market. Therefore, when access to a particular network in the secondary market is not necessary for entry to the primary market, the courts should not interfere with the membership rules adopted by the network. In such cases, consumer welfare is better served by allowing the networks to compete for members in the best manner they see fit, free of judicial regulation.

IV. A Proposed Approach to Network Access Restrictions

A. An "Ancillary Restraints" Approach

Courts and regulatory agencies need to adopt a new form of analysis that will allow them to balance the beneficial and adverse effects of restrictions on access to network joint ventures. None of the approaches developed by the courts to date have been effective. A per se approach is too harsh—it fails to consider the potential adverse effects of compelled access on competition in the secondary market. A rule of reason approach is too vague—it provides little guidance to courts or to business executives on the types of access restrictions that should be permitted or prohibited.\(^\text{141}\)

Traditionally, courts and antitrust commentators have assumed that they must choose between two divergent methods of analyzing conduct under section 1 of the Sherman Act.\(^\text{142}\) At one extreme, the per se rule summarily condemns certain practices on their face without any consideration of their competitive effects or possible justifications. At the other extreme, the rule of reason requires an exhaustive

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141. For a discussion of the per se and rule of reason approaches, see supra notes 46-60, 61-105 and accompanying text.

142. See Edward Brunet, Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction, 60 WASH. L. REV. 1, 22 (1984) (referring to the "all-too-popular misunderstanding that the rule of reason and per se approaches are polar opposites").
inquiry into every conceivable circumstance bearing on the competitive implications of a particular restraint. There are, however, methods of analyzing section 1 restraints between the extremes of the per se and rule of reason approaches. Indeed, section 1 conduct is best evaluated under a continuum. In all cases, the courts should be attempting to determine the likely competitive effects of the restraint at issue. In certain cases, such effects will be obvious on the face of the conduct at issue, and the legality of the conduct can be determined after a minimal factual inquiry similar to a traditional per se approach. Other cases, lying between the per se and rule of reason extremes, require courts to inquire into certain market conditions but do not necessitate full-blown investigation under the rule of reason. Finally, in a few instances, the competitive impact of the conduct at issue will be so ambiguous that the entire investigation required by the rule of reason will be necessary.\(^\text{143}\)

The best approach for analyzing network joint venture access restrictions lies within the section 1 continuum between the per se and rule of reason extremes. Courts should use an "ancillary restraints" approach to consider the legality of a network joint venture's membership rules. An ancillary restraints approach equates the legality of a restraint with its relationship to the needs of a separate efficiency-enhancing arrangement, such as a joint venture. If a restriction on competition is no broader than required to promote the efficiency of a joint venture, it is upheld as an ancillary restraint. However, if the restraint is broader than necessary to meet those objectives, it is deemed a "naked," and thus illegal, restraint of trade. Such an approach permits a court to enjoin particular aspects of joint ventures that are harmful to competition without precluding the entire joint venture. There is considerable precedent supporting an ancillary restraints approach to network access restrictions. In several network joint venture cases, the federal courts have concentrated on the legality of certain ancillary restraints implemented by the venture rather than on the legality of the venture itself.\(^\text{144}\)

\(^{143}\) For a discussion of how section 1 conduct can be arranged along a continuum rather than divided arbitrarily into the per se and rule of reason extremes, see Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vand. L. Rev. 1753 (1994); see also Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685 (1991).

\(^{144}\) In *Terminal Railroad Ass'n*, the Supreme Court emphasized the efficiencies of the terminal system. Rather than requiring its dissolution, the Court's decree simply mandated that the terminal provide equal access to all qualified parties. United States v. Terminal
Unlike a per se approach, an ancillary restraints analysis does not summarily condemn network joint ventures that have restrictive membership rules. Such ventures generate too many efficiencies to be precluded on their face. Yet many network joint ventures have too much market power to escape antitrust scrutiny altogether. It is therefore appropriate for the courts to regulate the conduct of network joint ventures to ensure that they do not abuse that market power. An ancillary restraints approach, unlike the traditional rule of reason, provides a means of regulating such conduct without an exhaustive inquiry into all the circumstances surrounding the defendants’ conduct. Under such an approach, courts can avoid a complicated analysis of the parties’ market power and can focus on the extent to which particular membership rules are necessary to preserve a network’s efficiency.

B. Proving the Legality of Access Restrictions

Courts can allocate the burden of proving the legality of access restrictions in a manner that will simplify their analysis. A potential entrant should have the initial burden of proving that access to a network joint venture is essential to effective competition in the primary market. If the plaintiff fails to meet that initial burden, the membership rules adopted by a network joint venture would not come into

Railroad Ass’n, 224 U.S. 383, 411-12 (1912). In NCAA v. Board of Regents, 468 U.S. 85, 117 (1984), the Court pointed out that the NCAA should be allowed to establish certain limited restrictions on competition, such as requirements for the number of players on each team, in order to maintain the efficiency of amateur collegiate athletics. In Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 127 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974), the Eighth Circuit assumed the legality of the VISA credit card system and focused on the issue of whether an exclusivity provision was necessary to ensure the system’s effectiveness. In NaBanco II, the court upheld the interchange fee established by the VISA system, characterizing it as an ancillary restraint that contributed to the effectiveness of the system. National Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592, 601, 604 (11th Cir. 1986), cert. denied, 479 U.S. 923 (1986) (“NaBanco II”). The Tenth Circuit in the VISA II case expressly adopted an ancillary restraints approach to VISA’s membership restrictions, stating that the relevant issue was whether “the alleged restraint is reasonably related to VISA U.S.A.’s operation and no broader than necessary to effectuate the association’s business.” SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958, 970 (10th Cir. 1994) (“VISA II”) (citing NaBanco II, 779 F.2d at 601). In Realty Multi-List, the Fifth Circuit found that a real estate multiple listing service’s membership rules must “have legitimate justifications in the competitive needs of the association itself [and] must be reasonably necessary to the accomplishment of the legitimate goals [of the association] and narrowly tailored to that end.” United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1375 (5th Cir. 1980).

145. For a discussion of such efficiencies, see supra notes 106-08 and accompanying text.
issue. Thus, a court would only have to determine the reasonableness of a joint venture's membership rules if the plaintiff proved that the venture constituted an essential facility. Once the plaintiff made such proof, however, the issue of the membership rules would be in play. The network joint venture would then be required to introduce its own proof that the membership rules were ancillary to the venture's efficiency objectives. The venture may, for example, argue that the rules were necessary to prevent the venture from exceeding its capacity, to ensure the technical qualification of network participants, or to protect against free-riding on the original partners' investments or know-how. A court could then decide whether the venture's membership rules should be retained, voided, or modified in some way.

Such an approach to network access restrictions can be undertaken without the usual deficiencies associated with the rule of reason because it provides triers of fact with appropriate guidelines and objective benchmarks to follow. The traditional rule of reason has not failed because of the courts' inability to balance the positive and negative aspects of defendants' conduct. In nearly every area of the law, courts must balance the relative equities of conduct before rendering a final judgement. The rule of reason is deficient as a tool of antitrust analysis simply because it gives so little guidance on the standards for balancing the competitive trade-offs of section 1 restraints. Few decisions have identified the types of presumptions, burdens of proof, and other evidentiary tools that could help the courts to achieve a workable and consistent method of evaluating section 1 conduct under the rule of reason.146

The use of presumptions would provide an effective framework for the courts' analysis of network access restrictions. Through presumptions, courts can focus their attention on critical issues that determine the ultimate outcome of their analysis. Presumptions force the parties with greatest access to the relevant evidence to come forward with their proof. Accordingly, there should be an initial presumption against open access to a network. In order to rebut this presumption, the party seeking access should be required to prove that the network controls a resource without which it could not compete effectively in the primary market. Specifically, the plaintiff must prove that, "but for" access to the network, it would not be able to compete on an equal basis in that market. If the plaintiff is able to meet this "but for" test, the presumption against open access would be rebutted and the

146. See supra notes 61-105 and accompanying text.
burden would shift to the network joint venture to prove that the membership restrictions at issue were reasonable. In order to meet its burden, the joint venture would have to show that it excluded the plaintiff under membership rules that were necessary to ensure the efficiency of the network. The network might, for example, have already reached its maximum potential capacity, or the plaintiff might lack the necessary qualifications to participate in the network.

Some commentators believe that judicially imposed open access rules can significantly harm network markets. The federal judiciary must be particularly careful not to harm high-technology markets by undue intervention because such industries are currently one of the greatest sources of well-paying domestic jobs. Under the proposed approach, the initial presumption against open access would protect network joint ventures against over-regulation. The membership restrictions of many, if not most, network joint ventures will not be at issue under such an approach. The initial "but for" test is a substantial hurdle for potential plaintiffs to meet. Unless the plaintiff can show that it must participate in a network joint venture in order to compete effectively in the primary market, the plaintiff's case would be dismissed on summary judgment. In the absence of such proof, the network would not have to prove the reasonableness of its membership restrictions and would be free to adopt any access rules it wished.

The presumption against open access ensures that access to a network joint venture will only be granted when it is necessary to promote competition. Courts and commentators have pointed out that the antitrust laws are designed to protect competition, not individual competitors, and that open access should not be compelled simply because a particular plaintiff is disadvantaged by its inability to use a network. Once a plaintiff meets the "but for" test, a court may be confident that the plaintiff's admission to the network will enhance competition in general and not just the plaintiff's individual business.

147. See Lohr, supra note 112, at E1; see also Baker, supra note 4, at 1076 ("Compulsory access is highly regulatory: the antitrust court is required to act as if it were a public utility commission setting the precise terms for membership or particular access charges. Yet the court lacks any special expertise or staff to do this kind of job.").

148. See Carlton & Salop, supra note 115, at 32 ("General allegations of boycott and exclusion often confuse injury to a competitor with injury to competition."). In denying Sears' admission to the VISA credit card system, the Tenth Circuit pointed out that the basic objective of the Sherman Act is to bring "to consumers the benefits of lower prices, better products, and more efficient production methods." 36 F.3d at 963. The court concluded that "a practice ultimately judged anticompetitive is one which harms competition, not a particular competitor," and held that Sears' exclusion from the VISA system was not actionable because Sears could not demonstrate such an adverse competitive effect. Id.
interests. Under these circumstances, consumer welfare is enhanced by an open access requirement. Indeed, the plaintiff in such cases will be acting, in effect, as the representative of all firms who may want to access the network in the future. The plaintiff's individual interests, then, coincide with the general interests of consumers. Once the plaintiff wins an open access decree, consumers will benefit from the ability of future entrants to provide better prices and higher quality products in the primary market.

When the "but for" test is met, the beneficial effect of compelled access in the primary market outweighs any adverse effects in the secondary market. Under such circumstances, a firm would only be able to participate in the primary market as a member of the relevant network. Thus, an open access decree ensures an immediate enhancement of primary market competition. At the same time, such a decree will not have a significant adverse effect in the secondary market. Once a plaintiff has prevailed under the "but for" test, it will be clear that there are no comparable alternative gateways in the secondary market. Because the plaintiff could not have entered the primary market on its own or through another network, its admission to the network at issue will not eliminate any immediate secondary market competition that would otherwise have existed.

This new approach to network access restrictions conserves judicial resources and provides better guidance to practitioners and business executives on how they can design networks to comply with the antitrust laws. The issues of market power and market definition, which have complicated so many rule of reason cases, will no longer be a source of confusion.\textsuperscript{149} The relevant market will become obvious as courts begin to view the primary and secondary markets separately. Courts will recognize that the primary market is simply the group of products or services delivered to consumers by a particular network (e.g., credit cards by the VISA and MasterCard networks) and that the secondary market includes the area, if any, in which different networks compete to provide the same products and services. The market power inquiry would be subsumed in the "but for" test. The market power of the parties would become irrelevant as the courts concentrated on the issue of whether access to a network is necessary to compete in the primary market. Either access is essential, in which case it should be compelled, or reasonable alternatives are available, in

\textsuperscript{149} For a summary of the confusion in the case law, see supra notes 61-105 and accompanying text.
which case the joint venture should be free to institute any membership rules it desires.

Under the proposed approach, the ultimate outcome of the courts’ analysis is determined by objective, readily identifiable factors. The plaintiff’s ability to prevail under the “but for” test depends upon the existence of alternative networks and the uniqueness of the resources controlled by the network. The strength of a network’s rebuttal evidence concerning its membership rules would be apparent from the technical requirements for participation, the capacity of the network, and its history of enforcing the membership rules. The following Sections describe how courts and regulatory agencies should evaluate each of these factors under the proposed analysis.

V. Proving the Plaintiff’s Right of Access

A potential entrant to a network joint venture should have the burden of proving its right of access. Indeed, in order to avoid summary dismissal of its case, the plaintiff should be required to rebut an initial presumption against compelled access. Such a presumption is necessary to ensure that a court only interferes in a network’s operations when it is absolutely necessary to protect competition. A plaintiff can rebut the presumption by demonstrating that, “but for” access to the network, it could not compete effectively in the primary market.

Courts and antitrust commentators have been unable to agree on a consistent definition of an essential facility. Some commentators argue that a facility should not be deemed essential unless it possesses a monopoly in the relevant market. On the other hand, certain courts have held that monopoly power is not a prerequisite and that a facility may be deemed essential simply because it possesses certain unique characteristics. Some commentators have suggested that open access to joint ventures should be compelled solely on the basis of their members’ market power.

The “but for” test proposed in this article will help courts in adopting a consistent standard for compelling access to particular network joint ventures. Courts are very familiar with “but for” tests, having used them for years as proof of cause-in-fact in tort actions.

150. See, e.g., Baker, supra note 4, at 1106.
151. See infra notes 45-60 and accompanying text.
152. See Carlton & Frankel, supra note 118, at 661-62.
“But for” tests focus the courts’ attention on possible alternative explanations for the harm allegedly caused to a plaintiff. In network access cases, the test forces a court to consider the alternative means by which a firm could enter the primary market other than through the network at issue. When there are no other effective means of entry to the market, the “but for” test is satisfied, and the presumption against open access rebutted. However, if the plaintiff can feasibly enter the market individually or through an alternative network, the presumption against open access will continue to apply, and the plaintiff’s case should be dismissed.

A potential entrant should prevail under the “but for” standard whenever it can show that a network possesses monopoly power in the relevant market. In such a case, there are no alternative gateways through which the plaintiff can enter the market. There are, however, other circumstances in which a firm should be able to satisfy the “but for” test. In certain non-monopoly cases, the plaintiff should be able to demonstrate that, “but for” access to a network, it could not compete effectively in the relevant market. A network may not be the only gateway into the primary market, but it may be so superior to other available networks that it confers a significant competitive advantage that cannot be duplicated. However, the market power of the joint venture members should not be sufficient, in and of itself, to classify a joint venture as an essential facility.

(1) Monopoly Networks

A plaintiff should prevail under the “but for” standard whenever it can demonstrate that a network is the only practical alternative through which it can enter the primary market. The plaintiff must show that no other current networks exist and that it is impractical for it to form another network or to enter the market on its own. If, for example, a network controls a large share of the primary market, there may not be enough volume available to support another network.\textsuperscript{154} Geographic conditions (such as the terrain on the west side of the Mississippi River in \textit{Terminal Railroad Ass'n})\textsuperscript{155} may make it impossible to construct a competing network, or a government entity may have granted monopoly rights to a particular network (such as a cable television franchise). Finally, a network may provide a type of service that can only be made practically available to a particular industry through a single entity. For example, it is usually only feasible

\textsuperscript{154} See Baker, \textit{supra} note 4, at 1095.
\textsuperscript{155} United States \textit{v.} Terminal Railroad Ass'n, 224 U.S. 383, 390-94 (1912).
for a single standards-setting organization to serve a particular industry. Professional sports leagues also provide a type of service that can only be effectively made available through a single organization.\textsuperscript{156}

Alternative means of entry to the primary market may be impractical because the costs of duplicating an existing network are prohibitive. In \textit{MCI Communications Corp. v. AT&T},\textsuperscript{157} the Seventh Circuit ordered AT&T to allow an interconnection between its local phone lines and MCI's long-distance facilities.\textsuperscript{158} The court pointed out that it would "not be economically feasible" for MCI to duplicate the Bell companies' "millions of miles of cable and line to individual homes and businesses."\textsuperscript{159} At the time of the suit, those lines were still owned by AT&T.\textsuperscript{160} In \textit{Fishman v. Estate of Wirtz},\textsuperscript{161} the Seventh Circuit held that the Chicago Stadium was an essential facility to which a potential bidder for the Chicago Bulls should have been granted access.\textsuperscript{162} A new arena would have cost $19 million and it was not economically feasible for the potential bidder to incur such an expense.\textsuperscript{163} Consequently, the court held that the owners of the stadium violated section 1 when they refused to commit to lease the Stadium to the bidder.\textsuperscript{164}

\textbf{(2) Non-Monopoly Networks}

In certain cases, open access should be granted to networks that do not possess monopoly power in the relevant market. A plaintiff might be able to access another network, but if that network is inferior, the plaintiff will not be able to compete on an equal basis in the primary market. As the Fifth Circuit pointed out in \textit{Realty Multi-List}, "the question before us is not whether [the multiple listing service] has a monopoly in the relevant market; rather, we must determine whether [it] is of 'sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively' on equal

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{156} In \textit{Fishman v. Estate of Wirtz}, 807 F.2d 520 (7th Cir. 1986), the Seventh Circuit pointed out that professional sports teams hold monopoly power within their metropolitan areas: "[T]he Chicago metropolitan area, like virtually all of the cities in which the NBA has franchises, cannot as a practical matter support two professional basketball franchises." \textit{Id.} at 532 (citing Liability Opinion, 1981-2 Trade Gas. (CCH) \# 64,378, at 74,757 (N.D. Ill. Oct. 28, 1981)).
\item \textsuperscript{157} 708 F.2d 1081 (7th Cir. 1982), \textit{cert. denied}, 464 U.S. 891 (1983).
\item \textsuperscript{158} \textit{Id.} at 1133.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} 807 F.2d 520 (7th Cir. 1986).
\item \textsuperscript{162} \textit{Id.} at 541.
\item \textsuperscript{163} \textit{Id.} at 540.
\item \textsuperscript{164} \textit{Id.} at 543.
\end{enumerate}
\end{footnotesize}
The district court in the VISA I case upheld the jury's finding that Sears should be allowed to access the VISA credit card system despite the fact that there were other available means of entering the national credit card market—Sears, in fact, was already marketing its own national credit card.166

Indeed, the Supreme Court has compelled access to facilities which lack monopoly power. In Associated Press, the Court found that the wire news reports provided by the AP gave "many newspapers a competitive advantage over their rivals."167 The Court concluded that such an advantage was sufficient to justify an open access rule, despite the fact that there were other wire services available to newspapers.168 The Court in Northwest Stationers stated that a purchasing cooperative's membership restrictions could be held per se illegal if the venture "possesses market power or unique access to an element essential to effective competition."169 The Court's addition of the second alternative indicates its belief that a venture need not have monopoly power in order to be essential.170

It is reasonable to require access to certain networks even though they are not the sole means of entry to the primary market. Under the "but for" test, a plaintiff should prevail if it can demonstrate that a network has unique cost advantages, economies of scale, or conveniences that are impossible for the plaintiff, or other networks, to duplicate. A network may possess these characteristics without being the only gateway to the primary market. Both the VISA and MasterCard systems, for example, are viable gateways to the national credit card

166. SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956, 979 (D. Utah 1993), rev'd, 36 F.3d 958 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995) ("VISA I"). However, in reversing the district court's decision, the Tenth Circuit found that Sears' ability to market its own card was sufficient and that Sears' exclusion from the VISA system therefore would not unreasonably restrict competition in the credit card market. SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958, 971-72 (10th Cir. 1994) ("VISA II").
168. Id. at 18.
170. Professor George Hay has criticized the Northwest Stationers standard, pointing out that "the case ought to end if the co-op has no market power, because there is no possibility that consumers can suffer any significant harm as a result of the boycott." George Hay, Market Power in Antitrust, 60 ANTITRUST L.J. 807, 812 (1992). Donald Baker also believes that open access should only be required to networks which possess monopoly power. See Baker, supra note 4, at 1106.
market. A bank, however, would not be able to participate effectively in the market without access to at least one of those systems. Each of these systems possesses unique cost advantages and economies of scale that an individual bank could not duplicate.

Courts should evaluate the "but for" test from the plaintiff's perspective. The relevant inquiry is not whether, "but for" access to the relevant network, any firm could participate effectively in the primary market, but whether the plaintiff, in light of its own unique size and competitive abilities, would be capable of participating. The Tenth Circuit in VISA II, as well as certain commentators, argued that Sears' entry to the VISA system need not have been compelled because Sears had the financial and marketing muscle to enter the credit card market on its own.\textsuperscript{171} Sears, in fact, was already marketing its own proprietary charge card. However, this argument overlooks the fact that access to the VISA and MasterCard networks is necessary, even for large financial institutions.\textsuperscript{172} The VISA and MasterCard networks are essential not only because of their cost advantages and economies of scale, but also because they offer consumers unique conveniences. VISA and MasterCard are accepted by merchants and banks throughout the world. Indeed, these systems have created a special identity for each of their brands that cannot be duplicated, even by firms with the resources of Sears.\textsuperscript{173}

A new on-line computer service developed by Microsoft is another example of a non-monopoly network whose unique convenience cannot be duplicated, even by relatively large firms. Microsoft plans to provide a gateway to its on-line service for home banking and shopping (the "Microsoft Network") through its new "Windows 95" operating system. Personal computer users can access the Microsoft Network simply by clicking on an icon in the Windows 95 operating system.\textsuperscript{174} Operators of other on-line networks, including America Online, Prodigy, and CompuServe, can provide consumers with alternative means of accessing their on-line services. They can, for example, mail users free floppy disks containing access codes, give disks

\textsuperscript{171} See 36 F.3d at 972; Evans & Schmalensee, \textit{supra} note 132, at 883-85.

\textsuperscript{172} Citicorp, in fact, is a member of the VISA system. See 36 F.3d at 967.

\textsuperscript{173} It could be argued that the VISA and MasterCard credit cards should each be treated as separate markets because of their brand differentiation. In a recent case, the FTC held that there are distinct markets for branded soft drinks separate from generic brands. See Coca-Cola Bottling Co., No. 9213, 1994 FTC LEXIS 185 (Aug. 31, 1994) (finding that branded carbonated soft drinks do not compete with non-branded drinks).

away at retail stores, or provide the relevant code on the Internet.\textsuperscript{175} Despite these alternatives, however, the Microsoft Network is likely to be preferred by consumers because it can be accessed as a part of the Windows operating system, which is already used on more than eighty-five percent of all personal computers.\textsuperscript{176} The Justice Department is thus investigating Microsoft’s plans to “bundle” the Microsoft Network with Windows 95.\textsuperscript{177} The Department may rely on the essential facilities doctrine to argue that the Network should be offered separately from the operating system or that the other on-line services should be allowed equal access to Windows 95 for their own networks.\textsuperscript{178}

Although certain non-monopoly networks may be deemed essential for effective competition in the relevant market, market power alone should not be sufficient to satisfy the “but for” test.\textsuperscript{179} Access should not be compelled to a non-essential network, even if its members collectively have a large market share. In such cases, the beneficial effects of compelled access in the primary market do not outweigh the adverse effects in the secondary market. There would, by definition, be alternative gateways to the primary market. Instead of joining the network with market power, a potential entrant could join a smaller network or enter the primary market on its own. Indeed, in such a case, a rule of compulsory access would exacerbate market power concentration problems. Firms would be more likely to seek access to the dominant network, thereby further increasing its market power, rather than entering the primary market through an alternative gateway. For example, following the Supreme Court’s open access decree in \textit{Associated Press}, newspapers abandoned other wire service networks in favor of AP, ultimately giving AP a near monopoly over international wire service news.\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{175} Id.
\item \textsuperscript{176} \textit{See Justice Takes New Tack in Microsoft Inquiry}, CLEV. PLAIN DEALER, June 23, 1995, at 3C.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} The President of America Online has characterized Windows 95 as an essential facility: “[i]n the new digital world, the operating system for computers is similar to the dial tone for telephones. You can’t call anybody without going through the dial tone, and you can’t use software or a service without going through the operating system.” Steve Lohr, \textit{Microsoft Defends Its On-Line Plans}, N.Y. TIMES, June 10, 1995, at 3, 15.
\item \textsuperscript{179} Some commentators have argued, however, that the members’ collective market power should be sufficient to require a network joint venture to justify its access restrictions. \textit{See} Carlton & Frankel, supra note 118, at 661-62.
\item \textsuperscript{180} \textit{See supra} notes 134-36 and accompanying text.
\end{itemize}
The collective market power of the members of a network joint venture may, however, have some relevance under the "but for" test. It may, for example, indicate whether a potential entrant can duplicate certain unique features of a non-monopoly network. If there are few firms in the market that are not already included in the venture, it will be difficult for a potential entrant to find enough partners to form a viable competing venture. If, however, several relatively large firms remain outside a particular network, they may be able to combine their resources effectively to duplicate the network joint venture.

A potential entrant, therefore, should be able to rebut the initial presumption against open access by proving either that a network is the only gateway to the primary market or that the network possesses certain unique advantages of cost, scale, or convenience which make it impossible for the entrant or other networks to duplicate. If the potential entrant fails to rebut the presumption against open access, the court's inquiry need go no further, and the case should be dismissed. If, however, the potential entrant is able to rebut the presumption, a court should proceed to consider the reasonableness of any membership rules that preclude the entrant from joining the network joint venture.

VI. Proving the Reasonableness of Access Restrictions

A. The Courts' Ability to Fashion Appropriate Remedies

Most networks are not essential for effective competition in the relevant market and can therefore adopt any membership rules they like without running afoul of the antitrust laws. When a network is not an essential gateway, competition is unaffected by exclusionary membership rules. Members who are excluded from such a venture can simply choose to enter the relevant market in another way, either on their own or through an alternative network.

However, once a court determines that access to a network is necessary in order for a firm to compete effectively in the relevant market, the network's membership rules become relevant. The court must then review those rules to ensure that they are no broader than necessary to promote the venture's legitimate objectives. In the course of that review, a court may void inappropriate membership rules and determine the terms of new membership rules that should apply to the network.
Contrary to the views of certain commentators, courts and antitrust regulatory agencies are well-equipped to determine the appropriate membership rules for essential networks. Regulation has long been considered an appropriate response to monopoly power. Antitrust regulation of network monopolies is preferable to the industry-specific regulation undertaken by such administrative agencies as the Federal Communications Commission, Interstate Commerce Commission, and Department of Transportation. The goal of antitrust regulation is to promote general consumer welfare. No particular competitor is favored over another, as is often the case with traditional statutory regulation. Furthermore, in contrast to administrative regulations, which continue indefinitely, antitrust judgments and consent decrees can be tailored to last only as long as a need for open access exists. A judgment or consent decree can provide that it will expire when the relevant technology changes or when other circumstances cause a particular network to lose its status as an essential gateway. Alternatively, a court can retain jurisdiction over a network and review a decree at a later date to determine whether it should be modified due to changes in markets and technologies.

Courts can use their broad equitable powers to fashion flexible remedies that leave the maximum possible discretion with the joint venture partners to determine the specific terms for admission of new members. In Terminal Railroad Ass'n, for example, the Supreme Court's decree was general enough to permit the joint venture to implement its own membership rules. The decree gave the association's members the discretion to admit members "upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies." The Supreme Court's decree in Associated Press allowed the AP to place conditions on membership as long as they did

181. See, e.g., Lohr, supra note 112, at E16 (citing antitrust specialists who oppose excessive government intervention in high-tech markets); Baker, supra note 4, at 1076.
182. See Guerin-Calvert, supra note 110, at 6 ("In many cases where natural monopoly characteristics have led to a single provider of services in a network industry, some form of price or entry regulation has been adopted at the state or federal level.").
183. Administrative agencies often become the captives of the industries they were designed to regulate and end up defending them from competition. The FCC, for example, attempted to keep television networks out of the motion picture business until a federal court overturned the FCC's rules. Telephone and cable companies have lobbied the FCC to block rules exposing them to competition. See Edmund L. Andrews, Has the FCC Become Obsolete?, N.Y. TIMES, June 12, 1995, at D1, D6.
185. Id. at 411.
not preclude admission simply on the basis of a firm's status as a competitor of a current member.\textsuperscript{186} The lower federal courts have followed the Supreme Court in decreeing flexible terms of network access. In \textit{Realty Multi-List}, the Fifth Circuit interpreted \textit{Terminal Railroad Ass'n} as demonstrating that courts may determine reasonable means of ensuring open access to essential facilities.\textsuperscript{187} The Fifth Circuit found that it could require the multiple listing service to reform its bylaws to permit applicants to become members upon "just and reasonable terms."\textsuperscript{188}

In several recent cases involving mergers and joint ventures, the federal antitrust regulatory agencies have negotiated consent decrees providing for a flexible means of ensuring equal access by all competitors to resources critical to competition in particular markets.\textsuperscript{189} The decrees do not impose traditional structural remedies such as divestment or dissolution.\textsuperscript{190} They permit the transactions at issue to proceed but require that the parties engage in certain conduct on an ongoing basis to ensure that third parties can use essential facilities on equal terms.\textsuperscript{191} In industries where competitive conditions are rapidly evolving, the decrees expire within a relatively short period.\textsuperscript{192} These

\textsuperscript{186} Associated Press v. United States, 326 U.S. 1, 21 (1945).
\textsuperscript{187} United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1386 (5th Cir. 1980).
\textsuperscript{188} Id. at 1387.
\textsuperscript{189} See Tele-Communications, Inc., 59 Fed. Reg. 24,723 (Dep't Justice 1994) (proposed final judgment and competitive impact statement) (permitting merger of companies controlling cable television and programming operations on condition that, during five-year period, merged company not discriminate against unaffiliated programmers; according to the Antitrust Division, "the length of this term reflects the Department's recognition that this industry is one that has experienced major changes in technologies"); Eli Lilly & Co., No. C-3594, 1995 FTC LEXIS 225 (July 28, 1995) (permitting acquisition of pharmacy benefit manager by pharmacy company, on condition that merged company maintain an "open formulary," which would recommend to pharmacies, physicians, and third-party payors the purchase of any drugs recommended by an independent committee of health care professionals); AT&T Corp., 59 Fed. Reg. 44,158 (Dep't Justice 1994) (proposed final judgment and competitive impact statement) (permitting merger between AT&T and McCaw Cellular Communications on condition that, for ten years, merged company provide long-distance competitors of AT&T with equal access to McCaw's cellular telephone subscribers; decree may be modified upon a showing that "certain types of services have developed as effective competitive alternatives to cellular services"); United States v. MCI Communications Corp., 1994-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994) (permitting a joint venture between MCI and British Telecommunications on condition that, for five years, joint venture provide regular reports to the Department of Justice so that Department can monitor whether any of MCI's competitors are being discriminated against with respect to access to the joint venture facilities).
\textsuperscript{190} See cases cited supra note 189.
\textsuperscript{191} See decrees cited supra note 189.
\textsuperscript{192} See supra note 189.
consent decrees demonstrate that antitrust regulators can devise effective means of ensuring open access to essential facilities without unduly interfering in legitimate network operations.

Thus, once a plaintiff has proven that open access is necessary to preserve competition in the primary market, courts and regulatory agencies should not hesitate to order remedies that appropriately address the access issue. After a court determines that open access is appropriate, it should undertake two remedial steps. First, it should void any membership restrictions that are not ancillary to a network joint venture's efficiency objectives. Second, it should impose certain affirmative obligations on a network joint venture to ensure that it is operated in an open manner in the future.

B. Voiding Improper Membership Rules

A court should preclude any membership rules of an essential network that are broader than required to ensure the network's efficiency. If access to a network is required in order for a firm to compete in the primary market, the network should not be able to exclude third parties for any reason other than to maintain its efficiency or to protect its members' proprietary rights. Membership rules that are broader than necessary for a network's efficiency objectives may simply be designed as a direct or indirect means of excluding competitors from the primary market.

Rules setting forth the technical qualifications for joint venture members should be the easiest to justify. In order to preserve their efficiency, network joint ventures must be allowed to adopt and enforce objective qualifications for their members. A firm should not be allowed into a network if it does not have the necessary technical abilities or financial wherewithal. A new member must be capable of paying any reasonable admission fees as well as its continuing share of the cost of operating a network. It must also possess the technical abilities and professional licenses and qualifications required to participate effectively in the network. For example, a real estate broker must be licensed by a state before it can join a multiple listing service, a television station must have approval from the FCC before it can broadcast over a cable television network, and a bank must have Federal Reserve approval to participate in certain electronic funds transfers.193

A network may also require that there be technical compatibility between its systems and those of a potential entrant. A network

193. See Baker, supra note 4, at 1081 n.312, 1097.
should not be required to change its systems to accommodate new members. If a bank, for example, wishes to join a national credit card system, it must ensure that its computer systems will interchange effectively with those of the credit card network.

In order to be upheld, however, technical qualifications for joint venture membership should contain objective standards that can be applied equally to all potential entrants. Vague and subjective standards that leave wide latitude for interpretation by the members of the network joint venture should not be acceptable. In Realty Multi-List, for example, the Fifth Circuit voided a real estate multiple listing service's vague requirement that a member have a "favorable credit report and business reputation."\(^{194}\)

Limits on the number of firms that can join a network joint venture are reasonable when they are designed to prevent the venture from exceeding its natural capacity. If a joint venture's membership levels are already at or near capacity, compelled access could cause the network's efficiency to decline or could require the network to build costly new facilities.\(^{195}\) In such cases, a network has a compelling argument against the plaintiff's admission.\(^{196}\) Many network joint ventures, however, do not have inherent capacity limitations and can admit new members with minimal disruption. Indeed, some networks become more valuable when their membership increases. In a telephone network, for example, users can make more calls as more customers are added to the system. Since the necessary infrastructure is already in place, the incremental cost of adding a new member is less than the incremental benefit of having an additional user of the network.\(^{197}\) Credit card and ATM systems also benefit from the admission of new members. An ATM system is more attractive to consumers if several different charge cards can be used at a single access point. The district court in *NaBanco I* pointed out the advantages of credit card systems with large memberships: "[T]he more cardholders in the system, the more attractive the system is to merchants . . . . [T]he more merchants in the system, the more attractive the card is to cardholders."\(^{198}\)

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194. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1381 (5th Cir. 1980).
195. See Baker, supra note 4, at 1110.
196. Id.
197. See Guerin-Calvert, supra note 110, at 4-5.
A network joint venture should be allowed to charge its members reasonable fees. In order to prevent free-riding, admission fees should be calculated to pay the original partners a reasonable premium for their up-front risk. Members can also be charged for their share of the network’s continuing operating costs. Unreasonably high fees that are unrelated to such costs, however, should not be permitted. In *Realty Multi-List*, for example, the Fifth Circuit voided a rule requiring members of a real estate multiple listing service to purchase a share of stock at a price determined by the service’s Board of Directors.199 The court pointed out that the requirement bore no relationship to the costs of operating the service.200

A bald prohibition against the admission of competitors of current network members is difficult to justify.201 A network should not be allowed to exclude a potential entrant on the ground that it would be disruptive or that the current members would find it difficult to work with the firm.202 Indeed, it is often the disruptive newcomer who has the most innovative ideas for reducing costs, improving quality, and otherwise enhancing consumer welfare in a particular market. A network may argue that a prohibition on the admission of competitors is necessary to prevent them from accessing the confidential information and know-how of the current members. In many cases, however, there are less restrictive alternatives for protecting such information. A network may, for example, be able to create internal “firewalls” to prevent competitors from obtaining each other’s proprietary information.

However, in certain cases, members may require access to each other’s confidential information in order to participate in the network joint venture, and there may not be any way to protect that information from disclosure to new entrants. In those cases, rules against the admission of competitors may be justified. The members of a purchas-

199. 629 F.2d at 1386-88.
200. Id. at 1387
201. Courts have voided rules that expressly prohibit the admission of competitors or grant current members the right to veto the admission of new members. In *Associated Press*, the Supreme Court voided a bylaw giving newspapers a veto right over the admission of competitors. *Associated Press v. United States*, 326 U.S. 1, 21-23 (1945). The district court in *VISA I* held that the VISA credit card system could not adopt a bylaw prohibiting the owner of a competing proprietary credit card from joining the system. *SCFC ILC, Inc. v. VISA U.S.A., Inc.*, 819 F. Supp. 956, 986 (D. Utah 1993), rev’d, 36 F.3d 958 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995) ("VISA I").
202. But see *Baker*, supra note 4, at 1077 (arguing that “[a] compulsory access order simply moves the business conflicts between the joint venture partners and the ‘outsider’ to the joint venture’s governance institutions”).
ing network, for example, may need to share proprietary information on suppliers, purchasing costs and requirements for certain types of items. The members of the network may have legitimate reasons for denying access to such information to competitors who could use it for their own benefit.

However, it will be extremely difficult for a network joint venture to justify exclusivity rules that prohibit its members from joining competing networks. Such rules can significantly limit competition in the secondary market. Under such circumstances, new members may have to abandon their current membership in other network joint ventures and, in the future, will be "locked in" to an incumbent network.

203. See Carlton & Salop, supra note 115, at 29. Some commentators argue, however, that network exclusivity provisions actually promote competition between networks. They point out that, in the absence of such provisions, networks will have overlapping memberships and thus will be more likely to enjoy a cooperative rather than a competitive relationship. See David S. Evans & Richard L. Schmalensee, The Economics of the Payment Card Industry, NAT'L ECON. RESEARCH ASS'N, INC. (1993); David A. Balto, Antitrust and Credit Card Joint Ventures, 47 CONSUMER FIN. L.Q. REP. 266 (1993). In the VISA I case, VISA argued that allowing Sears to join the VISA system while marketing its own proprietary Discover Card would reduce competition between the VISA system and Discover Card. See Carlton & Salop, supra note 115, at 41. The district court pointed out that competition would not be eliminated, since Sears would continue to vigorously market the Discover Card. 819 F. Supp. at 996. Furthermore, as illustrated by the credit card market, non-exclusivity rules promote rather than eliminate competition between networks. Since 1973, most members of the VISA and MasterCard systems have been able to join both networks. As a result, card-issuing banks may now "shift their card-issuing efforts from one brand to another as relative costs change," thus giving each system a greater incentive to provide better service to bank members at a lower cost. Carlton & Frankel, supra note 118, at 666. "PLUS" and "Cirrus," the two largest national ATM networks, currently allow a single ATM to be accessed by holders of PLUS cards and Cirrus cards, and such duality does not appear to have reduced competition between these two ATM networks. See Daniel I. Prywes, ATM-Related Antitrust Developments, 46 BUS. LAW. 1063, 1064-65 (1991).

204. Although the VISA system does not prohibit membership in the MasterCard network, it does preclude its members from developing their own proprietary charge cards. 819 F. Supp. at 977. The district court in the VISA I case pointed out that, because a VISA membership is highly profitable, a bank is not likely to risk losing that membership by developing its own proprietary card. Id. at 977, 986; see also North American Soccer League v. National Football League, 670 F.2d 1249, 1261 (2d Cir. 1982), cert. denied, 459 U.S. 1074 (1982) (striking down NFL rule that prohibited its members from obtaining ownership in competing leagues on grounds that the rule restricted ability of league members to engage in competition in the sports market).

See also Carlton & Salop, supra note 115, at 29 ("Exclusivity requirements force members of the venture to make all-or-nothing choices between obtaining their inputs from the venture or from input market competitors. This can make the decision to obtain inputs from alternative sources more costly, and thereby decrease demand for the inputs supplied by these alternative competitors.") (footnote omitted)).
The pace of technological change is very rapid in many markets controlled by networks. Electronic networks are particularly likely to be superseded as a result of technological innovations. The accelerating pace of improvements in semiconductor capacity and speed can rob dominant networks of their market share rather quickly.\textsuperscript{205} Exclusivity rules preclude members of a joint venture from forming networks to take advantage of new technology. Indeed, several types of networks have already lost their monopoly power as a result of new developments in electronic technology.\textsuperscript{206} As long as the members of a network are not expressly foreclosed from joining a competing network, they will have a natural incentive to participate in new networks designed to develop or commercialize a superior technology.\textsuperscript{207} The rewards, both in terms of "in-house" use by the members and the ability to charge a fee for use by third parties, are so great that firms are not likely to forego the opportunity to participate in the development of a promising new network. By precluding the members of a network joint venture from taking advantage of such an opportunity, exclusivity rules limit competition that would otherwise exist in secondary markets.

Exclusivity rules are usually not necessary to ensure a venture's efficiency. The VISA and MasterCard networks, for example, have operated quite effectively without such rules since 1973.\textsuperscript{208} A network may argue that an exclusivity rule is justified by the need to protect its

\textsuperscript{205} Because of the importance of common technical standards, industries based on technology can spawn monopolies quickly and, just as quickly, eliminate them. IBM was able to decree the technical standards for most personal computers when they first came into general use in the early 1980s. See Edmund L. Andrews, Technology Monopolies Are Big, but Often Brittle, N.Y. TIMES, Jan. 26, 1995, at E6. IBM permitted Microsoft to develop the MS-DOS operating system for all of its personal computers and, as other companies in the industry followed suit, MS-DOS became the standard for personal computers. The continuation of the current market dominance of Microsoft, however, is no more assured than that of IBM ten years ago. As new computer programs are developed to take advantage of enhanced computing capacity, new standards, ten times or even one hundred times better, are likely to supplant the current standards. \textit{Id.}

\textsuperscript{206} New technology allowing for direct broadcasts from satellites to living rooms has the potential to break up the monopolies of local cable companies, and cellular telephone technology is providing a wireless alternative to the monopolies of the Baby Bells. See Landler, \textit{supra} note 130, at 19.

\textsuperscript{207} Thus, the absence of an exclusivity requirement has helped to save joint ventures from antitrust liability in certain cases. For example, in Broadcast Music, Inc. v. CBS, 441 U.S. 1, 24 (1979), the Supreme Court upheld a blanket licensing arrangement for copyrighted musical compositions. The Court emphasized that the arrangement did not prohibit the composers from licensing their compositions separately from the association. \textit{Id.} at 12, 24.

\textsuperscript{208} \textit{See infra} note 210 and accompanying text.
proprietary know-how from disclosure to a rival network. There are, however, less restrictive means of protecting a network’s know-how, such as rules requiring members to maintain the confidentiality of such information.

A network’s history of enforcing membership rules may affect the persuasiveness of its arguments in favor of such rules. Courts should give greater deference to rules that have been maintained consistently by a network since its inception. However, courts should look with suspicion on exclusionary rules adopted shortly after a potential entrant’s application for membership. If a network was previously structured in an open manner, it suggests that the members are probably not concerned about problems such as free-riding, capacity limitations, or technical qualifications. When restrictive access rules are implemented in response to a potential entrant’s membership application, a court may conclude that members are not attempting to ensure the efficiency of the network but are merely trying to exclude a potential competitor from the primary market.

C. Imposing Affirmative Obligations

In addition to voiding improper membership rules, a court can affirmatively require a network joint venture to implement new rules that will ensure that the network is operated in an open manner in the future. For example, a court may simply require, as the Supreme Court did in Terminal Railroad Ass’n, that a network admit new members on the same terms as the original members. Such decrees are the least intrusive and leave the maximum discretion with the parties to determine the specific membership rules to use in the future. In certain cases, however, courts may need to be more specific in order to ensure that a network and its members are not unduly harmed by an open access decree. A court could, for example, provide that, as a condition of membership, a network may charge a fee calculated to reimburse current operating costs and to give the original members a reasonable premium on their initial investments. In order to ensure

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210. In the VISA I case, for example, VISA’s largest member, Citibank, issued its own proprietary cards, and VISA had never complained about Citibank’s free-riding. SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956, 966 (D. Utah 1993), rev’d, 36 F.3d 958 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995) (“VISA I”). VISA only adopted an exclusionary rule when Sears applied for admission to the network. Id. at 963-64.
212. Professor Ross has suggested that, for major league baseball, Congress could adopt a regulatory standard that allowed a new team to join the league if it compensated
that competition in the secondary market is not unduly precluded as a result of an open access order, a court may require that a network expressly allow its members to join competing networks.213

Courts should, however, avoid imposing certain onerous obligations on network joint ventures. A network, for example, should not usually be required to make costly changes in its systems and operating procedures to accommodate a potential entrant that operates on different standards. In most cases, the entrant, not the network, should implement the technical changes required to participate in the network. In any event, few courts have the expertise to dictate the specific technical standards and tolerances that a network must follow in order to maintain open access.214

Finally, in certain cases, a court should distinguish between compelled access to a network's facilities and to its trademarks. While certain trademarks may constitute an inseparable part of a network (e.g., the VISA and MasterCard marks), in other cases it may be feasible to allow a potential entrant to use a network’s facilities without its trademark. In such cases, a court should protect the goodwill that partners have created in the trademark and decline to order the compulsory licensing of the trademark.215

VII. Examples of Access Decrees Under the Proposed Approach

It should not be difficult for courts to determine when open access to a network joint venture should be allowed under the approach proposed in this Article. In many cases, it will be obvious that a potential entrant should prevail under the “but for” test. The “but for” test

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213. For a discussion of how exclusivity rules can restrict competition in the secondary market, see supra notes 112-27 and accompanying text.

214. See Baker, supra note 4, at 1118.

215. Compulsory trademark licensing has not been accepted as an antitrust remedy because it unfairly deprives the owner of the goodwill created in the mark. See 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 31.26(6), at 31-154 (3d ed. 1992) (“[I]n no reported private antitrust litigation has a plaintiff received the sanction of compulsory trademark licensing.”); see also Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300, 303 (S.D.N.Y. 1956), appeal dismissed, 243 F.2d 795 (2d Cir. 1957) (rejecting compulsory licensing of “Canada Dry” trademark as remedy for section 1 violation).
should always be met when a network has monopoly power in the relevant market. Even in non-monopoly cases, it should be clear from the type of resources controlled by a network whether it will be deemed essential to competition in the primary market.

The balance should usually shift in favor of open access to telecommunications and utility networks. Such networks often possess a monopoly in the relevant market, resulting from either an outright grant of a monopoly by a government entity or the impracticality of duplicating the network’s facilities. A potential user of a natural gas pipeline, electrical transmission system, or telephone or cable television system should usually be able to prove that, “but for” access to the network, it could not compete in the relevant market. Telecommunications and utility networks will also find it difficult to prove that restrictive membership rules are necessary to promote their efficiency. Indeed, in the cable television market, open access usually promotes the business interests of cable systems as well as providers of programs. Providers such as film studios and television producers “want to sell their products through as many pipelines as possible,” while cable television systems, in order to increase their value to customers, want to have access to as many different types of programs as their capacity will permit. Thus, in most cases, cable television systems should not be allowed to deny access to providers of programming. Such systems should only be able to exclude a quali-

216. The monopolies of the Bell companies over local telephone service may, however, be ending, as MCI builds local fiber-optic networks to bypass the local lines of the Bell companies. John J. Keller & Laura Landro, MCI Agrees to Inject As Much As $2 Billion in News Corp. in Data Highway Venture, WALL ST. J., May 11, 1995, at A3, A7. The monopoly power of local cable television may also be threatened by direct satellite broadcast systems and by the possible entry of telephone companies into local cable markets. See supra note 206. If the telecommunications bill currently pending in Congress is enacted, local utilities could also end up competing with local telephone and cable television networks. See supra note 2 and accompanying text.

217. Indeed, under the essential facilities doctrine, courts have traditionally required such networks to make their facilities available on non-discriminatory terms. See Otter Tail Power Co. v. United States, 410 U.S. 366, 377-79 (1973), reh'g denied, 411 U.S. 910 (1973) (holding electric utility’s refusal to transfer power per se illegal); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1133 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983) (stating local Bell companies have a duty to provide telecommunications interconnection to MCI).

218. See Keller & Landro, supra note 216, at A3.

219. There are an increasing number of network joint ventures in the cable television area to which access would likely be compelled under the approach proposed in this Article. Time-Warner and U.S. West, for example, have formed a joint venture that will combine their cable and programming capabilities in a new communications network. See Mary Lu Carnevale et al., Cable Phone Link Is Promising Gamble: U.S. West Move Puts Pressure
provider when they have reached their practical capacity limits.\textsuperscript{220}

Sports leagues are another type of monopoly network for which the balance is likely to fall in favor of open access. The NFL, NBA, NHL, and Major League Baseball all possess monopoly power within their area of professional sports.\textsuperscript{221} Free of any real threat of entry from rival leagues, these organizations have been able to create an artificial scarcity of professional teams. As a result, fans in many major cities have lost the opportunity to have their own teams. In cities that already have teams, the leagues have been able to use their monopoly power to extract enormous subsidies. Because of the scarcity of teams, cities realize that they will probably not be able to replace a team that relocates. They are therefore willing to divert scarce resources to build new stadiums and provide other taxpayer-supported subsidies to induce the teams to remain in their current homes.\textsuperscript{222}

Under the approach proposed in this Article, courts could require the NFL, NBA, NHL, and Major League Baseball to grant franchises to qualified cities.\textsuperscript{223} If such a rule of open access prevailed, the leagues would no longer be able to extort monopoly profits from cities desperate to acquire or maintain a major league franchise. Cities desiring a franchise could easily prove that, "but for" access to a league, they could not participate in the relevant sport. In order to avoid the granting of a franchise to a city, the league would have to prove the reasonableness of its rules limiting the number of teams. A league


\textsuperscript{220} Given the new fiber-optic technologies that make it possible to deliver up to 150 channels by cable, such capacity limits may not be exceeded for some time by most cable systems. \textit{See} Landler, \textit{supra} note 130, at 19.

\textsuperscript{221} \textit{See} Ross, \textit{supra} note 111, at 660-61 (noting that the NFL and Major League Baseball are able to create artificial scarcity because of their monopoly power). The NFL, for example, achieved a monopoly when it eliminated its only rival, the American Football League, through a 1970 merger. \textit{See} Jon Morgan, \textit{Ancient Architecture: Booming Business Has Turned Once-Heralded 2-Sport Stadiums into Cities' Discarded Dinosaurs}, CLEV. PLAIN DEALER, July 3, 1995, at 6D.

\textsuperscript{222} Ross, \textit{supra} note 111, at 656-57. During the last three years, American cities have spent more than $1 billion on building or renovating sports stadiums, and they are expected to spend another $6 billion during the next five years. \textit{See} Morgan, \textit{supra} note 221, at 6D.

\textsuperscript{223} Because the Supreme Court granted baseball an antitrust exemption in the case of Federal Baseball Club v. National League, 259 U.S. 200, 209 (1922), Congress would have to remove the exemption before this approach could be applied to professional baseball.
might argue that not all cities have a sufficient population or economic base to adequately support a team. However, a recent study indicates that at least eleven more metropolitan areas in the United States could support major league baseball teams.\textsuperscript{224} A league may also argue that expansion would dilute player quality and thus decrease fan interest. Such interest, however, appears to be more a function of the competitive balance in a league than of the level of the average quality of play. Indeed, overall attendance at NFL, NHL and Major League Baseball games increased after each league expansion, despite the decrease in player quality that might be expected from such an expansion.\textsuperscript{225}

Credit card networks do not possess monopoly power in their markets, and yet the balance should usually tip in favor of compelled access to such systems. There are two national credit card systems and several types of proprietary cards that are issued by single firms. Although neither the VISA nor the MasterCard systems holds a monopoly in the credit card market, a prospective issuer cannot participate effectively in the market without access to at least one of these systems. Both the VISA and MasterCard systems have achieved economies of scale and scope that cannot be duplicated. Because of their universal acceptance, the VISA and MasterCard credit cards are also uniquely convenient to consumers. It would be impossible for a prospective card issuer, whether it be a small bank or a large financial institution, to match those advantages. Therefore, a potential entrant should prevail easily under the "but for" test. Furthermore, the credit card systems' arguments in favor of restrictive membership rules are not strong. There are no apparent limits to the ability of a credit card system to admit new members. There are approximately six thousand current members of the VISA and MasterCard systems,\textsuperscript{226} and admission of additional members should not strain the systems' capacities. A credit card network, in fact, becomes more valuable to its members

\textsuperscript{224} The study identified the following criteria as indicative of a metropolitan area's ability to support a team: a population over one million, a high percentage of men between 18 and 54, a per capita income above the national average, high population growth, and a high proportion of businesses with more than 500 employees. Using these criteria, the study concluded that at least 39 metropolitan areas should be able to support a team, as compared to the 28 that currently have a major league franchise. See Ty Ahmad-Taylor, Who Is Major Enough for the Major Leagues?, N.Y. Times, Apr. 2, 1995, at E5. Additionally, Professor Ross argues that baseball should expand to any market in which an average team can draw at least 1.5 million fans per season. See Ross, supra note 111, at 663-64.

\textsuperscript{225} Ross, supra note 110, at 664-65.

as more merchants and issuers are added to the system. Finally, the VISA and MasterCard systems have traditionally operated with open admission policies, indicating that current members have not been concerned with any free-rider problems that might result from the admission of new members.

The arguments in favor of open access to a new joint venture for on-line use of credit cards are also quite compelling. VISA, MasterCard, and Microsoft recently announced the formation of a joint venture designed to establish an industry-wide standard for electronic credit card transactions. Under the new system, consumers will be able to register their credit card numbers and use their cards to order merchandise or information through the Internet. Unlike the Microsoft Network, for which alternatives are available, the new credit card joint venture would constitute a monopoly. Since the new venture will establish the standard for on-line credit card transactions, there will be no other means by which credit card issuers can participate in the on-line credit card network. Furthermore, the joint venture would not have a strong case for excluding new members. The joint venture should be able to establish security procedures that prevent other card issuers from accessing proprietary information of VISA or MasterCard (such as the names and billing histories of credit card customers). Thus, under the proposed approach, the issuers of the Discover, American Express, Diner's Club, Carte Blanche, and other proprietary credit cards should be able to gain access to the new joint venture.

In the case of ATM networks, the balance is more likely to shift against open access. It may be difficult for a potential entrant to prove that it must be admitted to a particular ATM system in order to compete in the market for ATM cards. ATM networks have not achieved economies of scale and scope as great as those of credit card networks. It may therefore be possible for a potential ATM card issuer to join

227. See supra note 199 and accompanying text.
228. See 819 F. Supp. at 962-64.
229. See Hansell, supra note 1, at 19.
230. See supra notes 174-176 and accompanying text.
231. Initial indications are that the joint venture will be open to other card companies. See Hansell, supra note 1, at 9. Recently, several joint ventures have been formed to establish new electronic technologies. If successful, these ventures may be deemed essential to effective competition in their markets, and access would have to be granted to qualified participants under the approach proposed in this Article. Such ventures include a consortium attempting to develop a new form of "high definition" digital television and an alliance to establish a new technical standard for videodisks. See Andrews & Brinkley, supra note 1, § 3, at 1, 6; Jared Sandberg, Don't Get Up, WALL ST. J., June 19, 1995, at R8.
with others to form a new network rather than accessing an existing network. ATM networks may also have better arguments in favor of restrictive membership rules. Unlike credit card systems, ATM networks have not consistently followed an open access policy since their inception. The members of an ATM network may thus have a stronger case that access limitations are necessary to protect their investment and to prevent free-riding by third parties on their know-how.

Microsoft would also have a strong argument against its competitors' access to the Microsoft Network. America On-Line, Prodigy, and CompuServe might be able to prevail under the "but for" standard by pointing out Microsoft's dominance in computer operating systems. Since Microsoft's "Windows" system is currently used on over eighty-five percent of personal computers, the Microsoft Network may become the most convenient gateway to the market for online services. The burden would therefore shift to Microsoft to justify any access restrictions. Microsoft has some compelling arguments in favor of limiting access to its network. It may, for example, be difficult for Microsoft to grant access in a manner that protects its proprietary know-how from disclosure to its competitors. Microsoft could also point out the unfairness of allowing its competitors to free-ride on its investment in the new on-line network. If Microsoft implemented restrictive access rules from the inception of the network, its free-rider arguments would be even stronger.

Despite the many instances in which open access would prevail under the approach proposed in this Article, compelled access to a network joint venture would remain the exception rather than the rule. Today, American firms are entering into joint ventures at an unprecedented rate, and most of those ventures would not be classi-
fied as essential facilities. Garden variety ventures for research and development or for the purchasing, production, or marketing of products do not usually possess the special characteristics that make them essential to effective competition in the relevant market. Very few of such ventures have monopoly power or unique cost advantages, economies of scale, or conveniences that make them impossible to duplicate. Thus, in most cases, a plaintiff would not be able to rebut the initial presumption against open access. Indeed, most network joint ventures would not have to face the costs and risks of defending an antitrust lawsuit because it would be clear to potential entrants that they could not meet their initial burden of proof under the “but for” standard.237

Conclusion

The essential facilities doctrine, conceived in an era in which physical facilities such as railroads and utilities were dominant monopolies, has much relevance to the access problems raised by today’s electronic networks. Unfortunately, most courts and antitrust commentators have been unable to devise an effective way of applying the essential facilities doctrine to such networks. The rule of reason approach applied to date has complicated trials and increased uncertainty over the types of access rules that can be adopted by modern networks.

This Article proposes a new approach to network access restrictions that will conserve judicial resources, provide better guidance to businesses, and adequately protect competition in network markets. By placing the initial burden on a potential entrant to rebut a presumption against open access, this approach ensures that courts do not overregulate networks. Under the proposed approach, courts will only compel access to a network when it is absolutely necessary to preserve competition in the primary market. Network members will be protected from frivolous lawsuits and, in cases that survive summary judgment, will have the opportunity to present efficiency arguments

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237. Potential entrants would not, for example, be likely to sue for access to the types of buying consortiums that firms in many industries are using today to reduce their costs for purchasing and warehousing. The Supreme Court made it clear in *Northwest Stationers* that purchasing joint ventures will not ordinarily be deemed essential facilities. *See supra* notes 62-66 and accompanying text. The courts are likely to conclude that a firm does not need to access an existing buying group in order to compete effectively in the relevant market. The barriers to the formation of such groups are not substantial, and a potential entrant should usually be able to convince other firms to join it in forming a separate buying group.
against open access. In those cases in which open access is deemed necessary, courts will be able to use their equitable powers to fashion flexible decrees that give adequate access to potential entrants while protecting networks from undue harm resulting from the admission of new members. Ultimately, this approach would allow the courts to reconcile competitors' needs for open access with networks' requirements for exclusivity in a manner that best promotes the welfare of American consumers.