Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color

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RACE, MEDIA CONSOLIDATION, AND ONLINE CONTENT:
THE LACK OF SUBSTITUTES AVAILABLE TO MEDIA
CONSUMERS OF COLOR

Leonard M. Baynes*

In its 2003 media ownership proceedings, the FCC relied on the existence of the Internet to provide justification for radically relaxing the FCC ownership rules. These rules limited the national audience reach of the broadcast licensees and the cross-ownership of different media properties by broadcasters and newspapers. In relaxing these rules, the FCC failed to recognize that a media submarket for African Americans and Latinos/as existed. This separate market is evidenced by the different television viewing habits of African Americans and Latinos/as as compared to Whites and Billboard magazine’s delineation of R&B/urban music radio stations as a separate radio station format. The FCC reliance on the Internet for these communities was misplaced because these communities are plagued by the Digital Divide, whereby African Americans and Latinos/as have lower Internet penetration rates than their White counterparts. The Internet fails to serve these minority submarkets. Access to the Internet at schools and libraries provides second-class access for Internet users of color. People are limited by the hours of operation of the schools and libraries. They are likely to be subjected to the budgetary limitations of the government institution. They may have to wait on long lines to gain access. Over-expansive filters may restrict Internet users from accessing important health information. Once the Internet user of color gains access to the Internet, he will find the web sites of the traditional media may have the same stereotypes and absences that exist on their broadcast channels. For all these reasons, the Internet fails as a substitute available to media consumers of color.

I. Introduction

The Federal Communications Commission (FCC) has historically attempted to foster competition by limiting the number and types of media that any one individual could own. Generally, these regulations have limited (1) the audience reach: The number of broadcast licenses that one owner could own in any given

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geographical market and the size of the national audience that any one owner could reach; and (2) the cross-ownership rules: These rules limit an owner from owning different types of communications services, e.g. cable, telephone, broadcast, and/or newspapers.

In 1978, the United States Supreme Court, in *FCC v. National Citizens Committee for Broadcasting*, uphold these FCC rules. The Court found that the rules furthered the diversification of the media and, as a consequence, served the public interest. It specifically found that the FCC's diversification policy was grounded in First Amendment and antitrust values.

Although at first blush the argument that media ownership limits increase media diversity and competition might seem counterintuitive, the theory behind these strict ownership limits was premised on the belief that more owners would produce more diverse opinions. I often explain the concept to my classes by asking the following two questions: If Rupert Murdoch, the owner of the *New York Post* and the Fox Broadcasting Empire, owned all media, could the public expect to be presented with a variety of different views on crucial issues? Instead, might the public be presented with news programming that resembled the *New York Post's* very successful entertainment page, *Page Six*? These questions allow the students to see the danger in media concentration: A few concentrated owners have no market driven competition to provide an incentive to program innovative or different content.

On June 2, 2003, the FCC issued a decision that changed this prior understanding and precedent. In its opinion, the FCC radically relaxed the cross ownership rules and market audience reach. The FCC voted three-to-two to loosen several long-standing rules that govern media concentration in the national and local broadcast markets and cross-ownership restrictions between broadcasters and newspapers. The FCC amended the rules to raise the audience reach cap from 35% to 45%. It found that the 35% audience reach was no longer necessary to promote diversity or localism, but found that the new 45% limit was necessary to pre-
serve a balance between affiliates and networks to promote localism.\(^8\) The FCC took into account that if an ownership reach was totally eliminated, independent affiliated stations might all be purchased by big media companies, thereby eliminating a source of local content. In addition, the FCC order allowed for a single company in some larger markets to own a local newspaper and several television, radio, and cable stations.\(^9\) In response, Congress passed a statute that rolled back the audience reach to 39% but left unaltered the cross ownership rules.\(^10\)

Several public interest advocacy groups brought suit in the Third Circuit and challenged the FCC’s deregulation order. The Third Circuit found that the challenge to raise the ownership cap to 45% became moot when Congress passed a statute modifying the national television ownership cap to 39%.\(^11\) However, the Court remanded the cross ownership numerical limits because it found that the FCC failed to adequately support its decision in the record.\(^12\) The Third Circuit found that a blanket ban on cross-ownership was not justified by the public interest.\(^13\) In constructing its diversity index, the FCC counted the Internet as a substitute in the local markets for newspapers and broadcast stations.\(^14\) However, the court found that although it was reasonable for the FCC to conclude cable and the Internet contributed to viewpoint diversity, the FCC nevertheless gave them too much weight because they were not complete substitutes for newspapers and broadcast stations.\(^15\) The court found the FCC record contained little persuasive evidence that the Internet contained a significant presence of local news sites.\(^16\) Moreover, the court noted the FCC’s analysis concerning the Internet was “irrational,” especially considering the FCC discounted the substitutability of cable because of the dearth of

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8. Id. See generally Stuart Benjamin et al., Telecommunications Law and Policy 23 n.2 (2001) (“Localism in broadcasting serves two goals: (1) by restricting the number of stations in large markets, it increases investment in the broadcast revolution; and (2) to the extent localism means local owners, localism helps to ensure that broadcasters will be part of, and thus perhaps responsive to, the local community.”).


12. Id. at 402.

13. Id. at 401. The Court also found that the cross-ownership rules do not violate the First Amendment rights of broadcasters or newspapers. Id. at 401–02.

14. Id. at 403.

15. Id. at 405.

16. Id. at 406.
local cable channels. The court ordered the FCC on remand to "either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable." Finally, the court found that the FCC was inconsistent in drawing lines between acceptable and unacceptable diversity scores. It found this line drawing to be arbitrary and capricious and also remanded this matter back to the FCC.

In making its initial deregulatory decisions, the FCC principally relied on market convergence in which one broad media market encompassed broadcasting, the Internet, cable, and Direct Broadcast Satellite (DBS). The FCC believed that a more consolidated broadcast market would better meet the challenges posed by competing media substitutes, and broadcast consolidation would leave the media consumers unharmed, free to enjoy competing media substitutes.

This Article analyzes how the FCC failed to appropriately use antitrust theory in its deregulation order by failing to examine and take into account the insufficient media substitutes available to consumers of color. In Part II, this Article uses antitrust theory to examine how the media market is divided into different markets such as broadcast, cable, and Internet, and how the FCC should have analyzed access to each of these markets by different demographic groups before allowing for media consolidation. This Part concludes that a minority media consumer market exists and is underserved. Part III examines the persistence of the "Digital Divide" in computer and Internet usage by African Americans and Latinos/as. The Article concludes that as a result of this Digital Divide, the Internet is an insufficient media substitute for minority consumers.

II. Media Markets

In its recent order deregulating the broadcast market, the FCC relied on the media content offered by the Internet and cable technologies to offset broadcast concentration resulting from de-

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17. *Id.* at 405 (noting that there were only twenty-two local news cable channels in the country).
18. *Id.* at 408.
19. *Id.* at 411.
21. *Id.*
In essence, the FCC held that the submarkets—broadcasting, Internet, cable, and Direct Broadcast Satellite (DBS)—should be treated as one broad market in which media consumers can readily substitute one media technology for another. The FCC's analysis misapplies antitrust theory and woefully neglects media consumers of color.

A. Brown Shoe

An instructive case in determining economic markets is Brown Shoe Co. v. United States. In Brown Shoe, the Department of Justice brought a civil antitrust action challenging the merger of two manufacturers and sellers of shoes. The government argued that the merger would violate § 7 of the Clayton Act. The Supreme Court affirmed the District Court's demarcation of the market as "men's, women's, and children's shoes" separately and independently. The Supreme Court found that product markets are to be determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." According to the Court, the submarkets are determined "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." If a reasonable probability exists that a merger will substantially lessen

\[\text{References}\]


23. \textit{See id.} at 13,667.


25. \textit{Id.} at 296.

26. \textit{Id.; see also} Clayton Act § 7, ch. 1184, 64 Stat. 1125, 1125–26 (1950) (current version at 15 U.S.C. § 18 (2000)) (original version at ch. 323, § 7, 38 Stat. 730, 731–32 (1914)) ("[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

27. \textit{Brown Shoe}, 370 U.S. at 326.

28. \textit{Id.} at 325 (internal citations omitted).

29. \textit{Id.}
competition in each substantially significant submarket, the Court concluded that the merger could then be prohibited.30

Some commentators, such as the late Phillip Areeda, have argued that the submarket concept is “confusing” and “superfluous” because it uses economic criteria simply to create narrower markets.31 This view suggests that the most important factor in determining a market is the potential power the market has over prices and output.32 Instead, these same academic commentators have argued that “submarkets” are merely misnamed. They assert that if the smaller market is economically important, then the larger “market” cannot be significant in antitrust analysis, and the smaller market is the “relevant market.”33 A key factor is whether, from the consumer’s standpoint, a separate demand exists and whether the media are interchangeable. As seen below, the industry and the FCC have long acknowledged—and in the case of the FCC, encouraged the growth of—the media market for consumers of color.34

B. Media Consumers of Color Constitute a Separate Broadcast Market

Broadcast consumers of color are a separate submarket of the mainstream media. This separate market is evidenced by the different television viewing habits of African Americans and

30. Id.
31. PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 533c (2d ed. 2002).
Latinos/as. Often, the top twenty most watched shows for these two racial groups differs starkly from the overall top ten viewing list. In 1987, the Congressional Research Service Study found that minority-owned radio stations provided programming more suitable to the needs of minority audience members. In 1994, Dubin and Spitzer concluded that "minority ownership has a distinct and significant impact on minority programming, even after [controlling] for the composition of minorities in the market place." University of Santa Clara researchers found that minority station owners were more likely to present racially diverse programming and focus on the minority community. These stations chose program formats that "appeal more to minority audiences" and "provide more diverse programming" than their majority-owned counterparts. In surveying the popularity of radio stations formats, Airplay Monitor, a division of Billboard Magazine, includes a format called "R&B/Urban," that is geared toward minority listening tastes. The nationally recognized existence of a survey


40. Id.

category disaggregating minority consumers demonstrates the existence of this important submarket.

The FCC traditionally has employed a variety of different policies and programs to encourage the development and licensing of minority broadcast owners. These policies suggest that the FCC considered the minority broadcast market as a separate market with unique programming.\textsuperscript{42} General programming fails to provide a sufficient substitute for this minority-oriented programming.\textsuperscript{43}

The FCC policies have been woefully unsuccessful in developing and encouraging the growth of this separate market because the communications industry, capital markets, and advertisers have discriminated against minority broadcasters.\textsuperscript{44} Only 2.8\% of broadcast stations are minority owned.\textsuperscript{45} The National Association of Black Owned Broadcasters reported that "the number of minority owners of broadcast facilities has dropped by 14 percent since 1997" when the FCC loosened the FCC radio ownership rules.\textsuperscript{46} Consolidation resulting from the further loosening of the concentration and cross-ownership rules will have a deleterious effect on the viability of small minority-owned broadcasters. It is also likely to make it more difficult for small entrepreneurs of color to obtain an


\textsuperscript{44} See Leonard M. Baynes, Making the Case for a Compelling Governmental Interest in Broadcast Media Ownership, 57 Rutgers L. Rev. 235, 284-90 (2005).


FCC license and enter the broadcast market\(^4\) as the prices of stations will skyrocket due to media mergers.\(^4\)

At the present time, no minority-owned broadcast networks exist.\(^4\) All broadcast networks are majority owned.\(^5\) As a result, minority media consumers may try to rely on the majority broadcasters for diverse content, but such reliance is usually misplaced.\(^5\)

**C. Majority Broadcast Entertainment Programming Fails to Provide Media Consumers of Color with Diverse Content**

The majority-owned television networks fail to provide sufficient diversity. In the fall of 1999, the major networks made their annual television schedule announcements. Of the twenty-six new shows, none featured a person of color in a starring or secondary role.\(^5\) Recognizing this problem, the major networks—FOX, CBS, ABC, and NBC—agreed to hire more actors, producers, writers, and


\(^{48}\) The Wall Street Journal noted that minority ownership issues were the last elements to be finalized in the recent FCC deregulation order. Yochi J. Dreazen, **FCC Set to Relax Rules that Limit Media Ownership**, WALL ST. J., June 2, 2003, at B3. This last-minute focus is worrisome. As Commissioner Copps stated, these issues "should not be relegated to a Further Notice at some indeterminate time" because they may never be addressed. **2002 Biennial Regulatory Review**, 18 F.C.C.R. at 13,966.


\(^{50}\) Bob Johnson, an African American, sold his ownership in Black Entertainment Television (BET) to Viacom for $2 billion. Unlike the broadcast networks, BET is a cable network, which requires subscribers to pay a monthly fee in order to receive the service. Unfortunately, many African Americans have been dissatisfied with BET's offerings. See Baynes, supra note 36, at 328.

\(^{51}\) See infra Part II.C-D.2.

\(^{52}\) Gary Williams, **Don't Try to Adjust Your Television—I'm Black: Ruminations on the Recurrent Controversy over the Whiteness of TV**, 4 J. GENDER RACE & JUST. 99, 100 (2000); see also Liz Leyden, **NAACP's Mfume Warns of TV Boycott**, WASH. POST, Nov. 4, 1999, at C7.
directors of color, and all four networks hired a vice president of diversity to monitor their progress.

Despite the major networks’ diversity attempts, the major civil rights organizations found the efforts of the major broadcast networks insufficient. Minority organizations gave the broadcast networks poor grades for diversity in their programming: ABC a D-minus, CBS a D-plus, FOX a C-minus, and NBC a C. The 2001–2002 season featured an increase in diversity over the previous season, but in the form of racially segregated casts that were either all Black or all White. Most of the “gains” in diversity resulted from an increase in non-recurring and secondary roles, not in starring roles.

Over a recent two-year period, the number of Latino/a characters portrayed on television improved. The percentage of prime-time Latino/a characters rose from 4% in 2001 to 6.5% in 2003. Moreover, the percentage of Latino/a characters appearing in opening credits increased from 2% in 2001 to 6% in 2003. However, Latino/a characters were still more likely to be depicted in a low socioeconomic status. The Latino/a characters were four times more likely to portray domestic workers than other racial or ethnic groups. Despite the “progress,” fewer scripted all-African American or all-Latino/a shows were broadcast in the 2004–2005 season than in the previous season.


54. NAACP, OUT OF FOCUS—OUT OF SYNC 39 (2001), http://www.naacp.org/news/2001/2001-08-16.pdf (noting that FOX and CBS had established diversity advisory boards that were actively involved in various stages of development and sometimes influenced casting decisions, while neither ABC nor NBC had established a comparable institutional structure to promote diversification).

55. Greg Braxton, Mfume Appears to Delay Boycott, L.A. TIMES, Oct. 17, 2001, at F1 (noting that the NAACP believed that a economic boycott was justified); NAACP Reports Little Progress in Network Diversity, TELEGRAPH HERALD (Dubuque, Iowa), Aug. 17, 2001, at B8.


58. Id. at 36.


60. Id.

61. Id. at 6.

62. Id.

During the same two-year period, the percentage of Asian/Pacific Island characters on primetime television remained small and unchanged. Arab American, Asian Indian, Pakistani, and American Indian characters were virtually nonexistent. Moreover, nearly one-half of the Arab American characters were portrayed as criminal, as compared to 15% of Latino/a and Asian/Pacific Islander characters, 10% of African American characters, and only 5% of White characters.

D. Majority Broadcast News Stereotypes People of Color and Fails to Provide Diverse Content

1. African Americans and Crime—Like entertainment programming, the broadcast news media also stereotype people of color. For example, Professor Romer of the University of Pennsylvania found in a study that:

1. People of color (African Americans and Latinos/as) were two times more likely to be shown in local crime stories than in human-interest stories;

2. People of color were more often shown as perpetrators than as victims. Stories with non-White offenders and White victims were given more emphasis. Since intra-group crime (i.e., White-on-White and Black-on-Black) is more common in reality, viewers received a distorted view of the local crime.

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65. *Id.*
66. *Id.* at 6.
68. Romer et al., supra note 67, at 294.
69. *Id.* at 294-96.
3. Crime stories were accompanied with a picture about 70% of the time, and the ethnicity of the person was identifiable.\(^{70}\)

Professor Romer concluded that the local media portrayed Philadelphia as a city of White victims and non-White perpetrators even though only 6% of reported homicides in Philadelphia involved a White victim and an African American perpetrator.\(^{71}\) The overemphasis on the perpetrator of color is exacerbated by an overemphasis on crime. Crime coverage on the network evening news rose by 721% from 1993 to 1996 even though the homicide rate in the U.S. declined by 20% during the same period.\(^{72}\)

2. African Americans and Poverty—A study conducted by Martin Gilens found that the media disproportionately portrayed African Americans as poor.\(^{73}\) Although African Americans comprise 24.1% of America’s poor,\(^{74}\) ABC, CBS, and NBC evening newscasts had portrayed 65% of the poor people as African American.\(^{75}\)

3. African Americans, Latinos/as, and Illegal Drugs—In 1996, David Jernigan and Lori Dorfman analyzed each of the major network news programs’ coverage of illegal drugs in 1990.\(^{76}\) They found that the news media framed the illegal drug problem as a foreign (namely Mexican) or African American problem.\(^{77}\) The media used a routine practice of broadcasting (often unidentified) file footage of African American suspects, dealers, and users in drug stories to provide a visual backdrop for America’s “drug prob-

\(^{70}\) Id. at 293. Viewers easily are able to ascertain the racial identity of the alleged perpetrators. \(\text{Id.}\)

\(^{71}\) Id. at 302. In his study, Professor Romer also discussed the possibility that TV journalists may think of people of color as symbols of conflict in society and non-White offenders as more newsworthy than White offenders. \(\text{Id.}\)


\(^{75}\) Gilens, supra note 73, at 516–18.


\(^{77}\) \(\text{Id.}\)
The news media broadcasted unidentified footage of an unidentified Latin American country for the same purpose.79

4. Latinos/as, Asian Americans, and American Indians—The news media fail to provide any meaningful news coverage of Latinos/as, Asian Americans, or American Indians. The National Association of Hispanic Journalists issued a report that found that only 1% of all stories reported on network news involved Latinos/as even though they comprise 13% of the U.S. population.80 The stories covered were overwhelmingly negative, involving crime, affirmative action, or welfare.81

III. ONLINE CONTENT AVAILABLE TO AFRICAN AMERICAN AND LATINO/A MEDIA CONSUMERS FAILS AS A SUBSTITUTE

A majority of media consumers do not have home access to the Internet. Many rely on inferior access at schools and libraries, which provide second-class opportunities to access the web. Lastly, accessing information from the web, unlike changing the channel on a television, is not easy and requires a certain degree of technological proficiency.

A. The Digital Divide Persists

Between 1994 and 2000, Americans substantially increased their access to home computers and their access to the Internet.82

78. Id.
79. Id.
81. Id.
During this same time period, African Americans and Latinos/as had starkly lower computer ownership rates than Asian Americans and Whites. Some commentators attribute the Divide to: (1) The inability to afford access to computers, cable modems, dial-up or advanced networks; (2) The unavailability of infrastructure necessary to gain access; and (3) The unavailability of user friendly technology.

The National Telecommunications and Information Administration (NTIA) estimates that in 1997, 40.8% of White households owned a personal computer as compared to 19.3% and 19.7% of African American and Latino/a households, respectively. All ethnic groups experienced comparable increases in computer penetration since 1998... However, a significant disparity still existed between Whites, Asian Americans, African Americans, and Hispanics:

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<tr>
<td>Per</td>
<td>24.1%</td>
<td>36.6%</td>
<td>42.1%</td>
<td>51.0%</td>
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84. The NTIA reports do not specifically chart the computer or Internet penetration rates of American Indians. However, those American Indians who live on reservations probably have the lowest computer and Internet penetration rates of any racial or ethnic group, especially considering that American Indians have the lowest penetration rates for basic telephone service. See Leonard M. Baynes, Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications, 56 ADMIN. L. REV 263, 269 (2004).


86. Hammond, supra note 85, at 141-42.


88. Toward Digital Inclusion, supra note 82, at 17.
"[A]ll ethnic groups experienced comparable increases in computer ownership [again] in 2000. However, a significant disparity among Whites, Asian Americans, African Americans, and Hispanics persisted."

### Table 2

**Percentage of Racially Diverse Households with Computers**

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<tr>
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<tbody>
<tr>
<td>White Not Hispanic</td>
<td>27.1%</td>
<td>40.8%</td>
<td>46.6%</td>
<td>55.7%</td>
</tr>
<tr>
<td>Black Not Hispanic</td>
<td>10.3%</td>
<td>19.3%</td>
<td>23.2%</td>
<td>32.6%</td>
</tr>
<tr>
<td>Other Not Hispanic</td>
<td>32.6%</td>
<td>47.0%</td>
<td>Asian Amer/Pac. 55.0%</td>
<td>Asian Amer/Pac. 65.6%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>12.3%</td>
<td>19.4%</td>
<td>25.5%</td>
<td>33.7%</td>
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"[A]ll ethnic groups experienced comparable increases in computer ownership [again] in 2000. However, a significant disparity among Whites, Asian Americans, African Americans, and Hispanics persisted."

### Table 3


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<th></th>
<th>Income over $75,000</th>
<th>Income less than $15,000</th>
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<tbody>
<tr>
<td>White Not Hispanic</td>
<td>87%</td>
<td>22.8%</td>
</tr>
<tr>
<td>Black Not Hispanic</td>
<td>83.4%</td>
<td>11.5%</td>
</tr>
<tr>
<td>Asian Amer./Pac.</td>
<td>86.9%</td>
<td>39.4%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>76.1%</td>
<td>12.5%</td>
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</table>

Income may play a factor in computer ownership, but a disparity in demographic ownership rates exists even at the highest income levels. The size of the divide between and among the racial and ethnic demographic groups increased between 1997 and 2000. In 2000, the NTIA issued another report that found improved home access for African American and Latino/a Internet users, but an

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89.    *New Data on the Digital Divide*, supra note 82, chart 12; *Toward Digital Inclusion*, supra note 82, at 17.
90.    In 1998, the NTIA replaced "Other Not Hispanic" with "Asian American."
92.    *Id.* p. 213 tbl.2.
93.    *Id.*
94.    *Id.* at 16.
increased disparity in access as compared to their White counterparts:

**Table 4**

<table>
<thead>
<tr>
<th>Percentage of Racially Diverse Households with Internet Access</th>
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<tbody>
<tr>
<td>White Not Hispanic</td>
</tr>
<tr>
<td>Black Not Hispanic</td>
</tr>
<tr>
<td>Asian Amer/Pac. Hispanic</td>
</tr>
<tr>
<td>Hispanic</td>
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</tbody>
</table>

**Table 5**

<table>
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<tr>
<th>Percentage of Households with Internet Access by Race and Income (2000)</th>
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<tbody>
<tr>
<td>Income Over $75,000</td>
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<tr>
<td>---------------------</td>
</tr>
<tr>
<td>White Not Hispanic</td>
</tr>
<tr>
<td>Black Not Hispanic</td>
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<tr>
<td>Asian Amer/Pac. Hispanic</td>
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<tr>
<td>Hispanic</td>
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</table>

The 2000 study shows that as income goes up, all demographic groups reach almost universal access. However, a gap still remains for African American and Latino/a households even at these high incomes levels. Similarly, as income goes down, Internet access rates also go down, though Asian Americans at very low incomes have far larger percentages of Internet access than other groups. The NTIA found that disparities in income and educational levels of African Americans and Latinos/as failed to explain the lower levels of Internet access in these two groups. The NTIA found:

96. The figures for 1997 were designated for the demographic group "Other Not Hispanic," which probably was comprised primarily of Asian Americans.
97. Toward Digital Inclusion, supra note 82, at 99.
98. Id. at 15.
that African Americans and Latinos/as had home Internet disparities eighteen percentage points below the national average.\footnote{99} Moreover, disparities in income and education of these groups as compared to Asian Americans and Whites explained only eight percentage points of the difference for African Americans and eleven percentage points for Latinos/as.\footnote{100}

In a 2002 report, the NTIA tracked these access issues more broadly than in the past by surveying whether individuals had access from any location, not just home access, i.e., school, work, library, home, or a friend’s house.\footnote{101}

Despite this new methodology of determining access, the NTIA acknowledged that demographic differences in computer and Internet use “persist.”\footnote{102} The 2002 NTIA Report shows that the computer use rate for Whites was 70% as compared to 55.7% for African Americans and 48.8% for Latinos/as.\footnote{103} Meanwhile, Internet use from any location was 60% for Whites as compared to 39.8% for African Americans and 31.6% for Latinos/as.\footnote{104}

\begin{table}
\centering
\caption{Computer and Internet Use Rates by Race\footnote{105}}
\begin{tabular}{|c|c|c|}
\hline
 & Computer Use Rates & Internet Use Rates \\
\hline
White Not Hispanic & 70.0\% & 59.9\% \\
\hline
Black Not Hispanic & 55.7\% & 39.8\% \\
\hline
Asian American/Pac. Isl. & 71.2\% & 60.4\% \\
\hline
Hispanic & 48.8\% & 31.6\% \\
\hline
\end{tabular}
\end{table}

For Latinos/as who speak only Spanish in the home, Internet use was a paltry 14.1\%.\footnote{106} On the other hand, for Latinos/as who

\begin{footnotes}
\item[99] Id. at 16.
\item[100] Id. at 15.
\item[102] Id. at 21.
\item[103] Id.
\item[104] Id.
\item[105] Id.
\item[106] Id. at 23.
\end{footnotes}
lived in bilingual households, 37.6% reported using the Internet. Some speculate that this disparity exists because most Internet commercial content is written in English and solely Spanish-speaking households often have very low incomes, which strongly correlates with low Internet usage.

The NTIA's new measurement of access makes it impossible to compare and contrast household access to the Internet over the past decade because the later study is based on the fallacy that computer use and Internet access is the same irrespective of where it originates. Moreover, it is contrary to most other measures of penetration rates—telephone, broadcast television, and cable television—that calculate penetration rates based on home usage. This expanded notion of tracking access is highly unusual. This new measurement makes the FCC's predisposition to compare broadcast access to the Internet particularly specious since most individuals have easy access to broadcasting in their homes whereas the Internet is still not readily available in many Americans' homes.

Even though the NTIA fails to disclose household penetration rates, it maintains that the household distribution of computers and Internet use has narrowed the divide among African Americans, Latinos/as, and Whites "in the direction of lower inequality." However, even with the NTIA's more expanded definition of access, many African Americans and Latinos/as are unable to substitute the Internet for deregulated broadcast television. If the NTIA released the "real" home penetration rates for these groups, we might very well see even greater disparity.

In its latest report, the NTIA totally ignores the issue of the Digital Divide. In fact, the text of the report focuses on other disparities such as geography. Only in the appendices can one discern that a Digital Divide remains:

107. Id.


111. Id. at 11-15.
TABLE 7
INTERNET USE BY RACE\textsuperscript{112}

<table>
<thead>
<tr>
<th>Race</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>White not Hispanic</td>
<td>65.1%</td>
</tr>
<tr>
<td>Black not Hispanic</td>
<td>45.2%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>37.2%</td>
</tr>
<tr>
<td>Asian American</td>
<td>63.0%</td>
</tr>
</tbody>
</table>

It appears that the Federal government now plans to ignore this disparity among African Americans and Latinos/as and their demographical counterparts. By ignoring the continuing problem, they make it invisible.\textsuperscript{113}

Broadband is the cutting edge for Internet access, allowing the computer to search web-based information at faster speeds. As we have seen with basic Internet and computer access, there exists a significant disparity between African American and Latino/a access to broadband services as compared to their demographic counterparts:

TABLE 8
LIVES IN A BROADBAND HOME\textsuperscript{114}

<table>
<thead>
<tr>
<th>Race</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>White not Hispanic</td>
<td>25.7%</td>
</tr>
<tr>
<td>Black not Hispanic</td>
<td>13.9%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>12.6%</td>
</tr>
<tr>
<td>Asian American</td>
<td>34.7%</td>
</tr>
</tbody>
</table>

The NTIA fails to provide an explanation of these divides. This makes the overall report less reliable, and the FCC's reliance and analysis on the Internet as a substitute for broadcast television less credible.

The Pew Internet & American Life Project has the most recent demographic study of Internet access and use.\textsuperscript{115} Like the NTIA

\textsuperscript{112} Id. at A-1, A-4.

\textsuperscript{113} See generally RALPH ELLISON, INVISIBLE MAN (Vintage 2d ed. 1995) (depicting the life of an African American who, after attaining some success while trying to avoid the prejudices of a segregated America, discovers that he has often been "invisible" in his relations with Whites, who tended to look past people of color).

\textsuperscript{114} ENTERING THE BROADBAND AGE, supra note 110, at A-1.

\textsuperscript{115} AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, THE EVER-SHIFTING INTERNET POPULATION: A NEW LOOK AT INTERNET ACCESS AND THE
study, the Pew Study shows that every demographic group has increased access, but that the size of the gap between most demographic groups has remained the same:

**Table 9**

<table>
<thead>
<tr>
<th>Internet Use Rates by Race (^{116})</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Not Hispanic</td>
</tr>
<tr>
<td>Black Not Hispanic</td>
</tr>
<tr>
<td>Hispanic</td>
</tr>
</tbody>
</table>

Like the NTIA studies, the Pew Study found that the gap in Internet use narrowed for Latino/as at high-income levels, but still existed for African Americans:

**Table 10**

<table>
<thead>
<tr>
<th>Internet Use Rates by Race and Household Income (^{117})</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>White, Not Hispanic</td>
</tr>
<tr>
<td>Black, Not Hispanic</td>
</tr>
<tr>
<td>Hispanic</td>
</tr>
</tbody>
</table>

The Pew Study found that "being [W]hite is a strong predictor of whether a person is online, controlling for all other demographic variables."\(^{118}\) In fact, the Pew Study concluded: "In sum, race and ethnic origin matter. Holding all other factors constant, [B]lacks and Hispanics are less likely to go online than [W]hites."\(^{119}\) Although information on American Indian access is

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\(^{116}\) Id. at 8.

\(^{117}\) Id. at 7.

\(^{118}\) Id. at 8.

\(^{119}\) Id.; see also Hammond, supra note 85, at 145–48; Andrew G. Celli, Jr. & Kenneth M. Dreifach, Postcards from the Edge: Surveying the Digital Divide, 20 CARDOZO ARTS & ENT. L.J. 53,
scant, one study found that only 26.8% of rural American Indian households have access to computers, and only 18.9% have access to the Internet.\textsuperscript{120}

Of those individuals who were not now online, many said that they would never use the Internet, although African Americans and Latinos/as are more likely than Whites to anticipate going online in the future:

\textbf{Table 11}

\textbf{Intentions of Internet Non-Users by Race}\textsuperscript{121}

<table>
<thead>
<tr>
<th></th>
<th>Will Use Internet</th>
<th>Will Never Use the Internet</th>
</tr>
</thead>
<tbody>
<tr>
<td>White not Hispanic</td>
<td>35%</td>
<td>62%</td>
</tr>
<tr>
<td>Black Not Hispanic</td>
<td>56%</td>
<td>39%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>57%</td>
<td>38%</td>
</tr>
</tbody>
</table>

The Pew Internet & American Life Project found that 17% of those who do not use the Internet are "Net Dropouts."\textsuperscript{122} The "Net Dropout" group is overrepresented with African Americans and Latinos/as. The reasons why most of these minority group members "dropped out" of using the Internet are that they no longer have a computer, they lost internet connectivity, and because they describe the web as "unhelpful and uninteresting."\textsuperscript{123} Members of minority groups are also disproportionately represented among intermittent Internet users.\textsuperscript{124} These individuals periodically stop using the Internet for a variety of reasons. But like the Net Dropouts, many cite to the fact that the Internet was not useful or interesting to them.\textsuperscript{125} Given that approximately half of African Americans and Latinos/as are not online, and approximately forty percent of those not online plan never to go online, the Internet fails as an available substitute to broadcast television for these groups.

\begin{footnotes}
\footnoterule
\footnotesize
\footnotetext[120]{120. Thomas Davis & Mark Trebian, \textit{Shaping the Destiny of Native American People by Ending the Digital Divide}, EDUCAUSE REV., Jan.–Feb. 2001, at 38, 40.}
\footnotetext[121]{!}
\footnotetext[122]{122. \textit{Id.} at 21.}
\footnotetext[123]{123. \textit{Id.} at 21–22.}
\footnotetext[124]{124. \textit{Id.} at 23.}
\footnotetext[125]{125. \textit{Id.} at 24.}\\
\end{footnotes}
B. Schools and Libraries Provide Second-Class Access to Internet Users of Color

1. The E-Rate Discount for Schools and Libraries—The FCC defined "universal service" to include the Internet and implemented a program called E-rate, by which schools and libraries could receive discounted telecommunications and Internet service. The program established a fund to help close the Digital Divide. The FCC has spent close to four billion dollars per year through the E-rate program. Pursuant to this program, schools and libraries could receive discounts from twenty to ninety percent for these services. The discounts are based on the measures of income disadvantage for each school and library.

a. Schools—Approximately 91% of public schools in the United States have Internet access. Ninety-two percent of instructional rooms were connected to the Internet. No significant differences exist between public schools with the highest minority enrollment and those with the lowest. However, schools with the highest concentrations of poverty had the highest ratio of students to instructional computers with Internet access (5.5:1 as compared to 4.6:1 in schools with lower concentrations of poverty). Similarly, schools with greater percentages of minority students had higher ratios of students to computers than schools with much fewer minority students (5.1:1 as compared to 4.0:1). Thirty-eight percent of public schools employed a full-time, paid school technology director or coordinator.

Significant demographic differences exist in the employment of these technology professionals. Forty-nine percent of the public schools with the lowest minority enrollment employed full-time technology directors in contrast to only 32% of public schools with the largest minority enrollment. Therefore, if computer prob-

129. Id. at 4.
130. Id. at 20.
131. Id. at 30.
132. Id.
133. Id. at 6.
134. Id.
lems exist, it may be more difficult to have them repaired in the public schools with higher minority enrollment.

Given the Digital Divide, many of these public school students probably do not have Internet access at home. In 2001, most students across demographic lines used computers at school more than at home. Moreover, only 47% of children living in poverty were likely to use a computer at home as compared to 82% of children living above the poverty line. Poor children rely on their school to provide them with access to this technology. Approximately 53% of the public schools attempt to remedy this divide by making the computers available outside regular school hours. Secondary schools are more likely than elementary schools to provide this increased access. However, 62% of the schools with the highest minority enrollment make Internet access available to students before the start of the school day as compared to 80% of the schools with the lowest minority enrollment. No demographic differences existed for after school Internet access or weekend access.

In summary, many African American and Latino/a children do not have Internet access in their homes. Like most other public school students, they have Internet access in school. However, for many of them, they have less quality in-school access because more of them may have to share computers. For doing homework after school, a majority of the African American and Latino/a public school students are fortunate to have access after regular school hours. However, before-school access is significantly lower for minority schools than other schools, making it difficult for some to do their homework with the aid of a computer. Moreover, for those that do have after-school, before-school, or weekend access, the quality of the access might be deficient because the student’s access is contingent on the school’s hours of operation.

b. Libraries—Minorities also have the option of using computers with Internet access in public libraries. However, this alternative access still fails to remedy the Digital Divide. Approximately 95% of libraries provide Internet access, and about 10% of Internet users

135. Id. at 7 (citing Matthew Debell & Chris Chapman, U.S. Dep’t of Educ., Computer and Internet Use by Children and Adolescents in 2001 (2003)).
136. Id. at 8 (citing Debell & Chapman, supra note 135).
137. Id. at 8.
138. Id. at 8–9.
139. Id. at 9.
use the Internet through public libraries.  Libraries rank fourth as a location where users most frequently access the Internet.  African Americans and Latinos/as use public library computers at rates of 18.7% and 13.8% as compared to 8.6% for Whites.  American Indians use public library computers three times more than Whites.  African American and Latino/a children are more dependent on the use of public library computers than their White counterparts at rates of 29%, 20%, and 12%, respectively.  As a consequence, minority use is more likely to be affected by government budget cuts to these programs. Moreover, even though 95% of libraries have computers and Internet access, the quality of access will vary between middle class and low-income communities. As such, libraries in more affluent (mostly White) communities might have higher connectivity speeds, more computer terminals, and better hardware and software.

2. Second-Class Access at Schools and Libraries Fails as a Substitute for African Americans and Latinos/as—The NTIA Report indicates that access to the computers and the Internet in schools, libraries, and at work tends to equalize the disparity.  The Report concludes that “[o]ver time, however, declining prices, increased availability in schools and libraries, and wider applications in many occupations have combined to reduce inequality in both computer and Internet use.”  The NTIA Report fails to provide an estimated timeline of when the inequality will diminish. While this important new technology has reached the hands of the “haves,” the Report smugly expresses little concern about the differential timing of access.

For the past ten years, many more White families have had access to the computer and the Internet in their homes. Minority families are provided with “second-class” access in schools and libraries. More White children will grow up technologically savvy in a way that their demographic counterparts will not. By having

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141. How Americans Are Expanding Their Use of the Internet, supra note 101, at 40 (noting that schools, work, and someone else’s home ranked above libraries).
142. Id.
143. Toward Equality of Access, supra note 140, at 20.
144. Id.
145. How Americans Are Expanding Their Use of the Internet, supra note 101, at 85.
146. Id.
147. Id.
computers and the Internet in their homes, White children will be able to explore and experiment with how to use this technology so that it becomes second nature. They have the luxury of using the technology safely and comfortably from their homes. They can use this technology after their schools and public libraries close. They can use it on their own time. They need not wait in long lines. Their home computers probably will not have over-expansive filters designed to limit access to indecent material, but unintentionally screening out important health and science information. When the White students become adults, their use of computers and the Internet will be an integral part of their lives and more easily applied in their career objectives. Meanwhile, many of their African American and Latino/a counterparts, especially those from low-income families, will lack these opportunities and will suffer the consequences.

Despite the fact that 98% of Americans have at least one television in their homes, the FCC found that broadcast consolidation is unimportant because the consumers have access to the Internet. Therefore, according to the FCC, media consumers will be able to turn to the Internet for additional sources of information and entertainment. However, second-class access to the Internet fails for African Americans and Latinos/as—the same groups the media consolidation rules were meant to protect. Many African Americans and Latinos/as are not Internet users, as only 45% and 54%, respectively, use the Internet from “any location,” including school, work, or home. Those African Americans and Latinos/as who use the Internet from non-home locations must often endure Herculean efforts for it to serve as a substitute for broadcast television. Consequently, for the vast majority of African Americans and Latinos/as, the Internet fails as a substitute for broadcast television.

C. For Internet Users of Color, the Internet Fails to Provide Them with Sufficiently Diverse Content

1. Internet Functionalities and Use by People of Color—About one-half of Internet users predominantly use the Internet to send e-mails or write instant messages. 148 About one-third of the Internet users use the Internet to search for products and services, and about one-third of Internet users search for weather, news, and

148. Id. at 30.
Arguably, the only Internet activities which resemble the offerings of broadcast television are the search for product and services, and for weather, news and sports. For most individuals, the principal use of the Internet for e-mails is more a substitute for telephone service than for broadcast television.

African Americans and Latinos/as use the Internet in lower percentages than Whites for each of these three Internet function groups. Recent data suggests, however, that while fewer online African Americans and Latinos/as use e-mail on a daily basis than Whites, they are more likely to search for news in particular online. This may be because such minorities find the news presented by the traditional broadcast networks and newspapers to be unsatisfactory. Online African Americans and Latinos/as are more likely than Whites to participate in chat rooms, instant messaging, and online discussions. This higher participation rate actually coincides with African American and Latino/a higher use rates for basic telephone service and other telecommunications technology.

Online African Americans and Latinos/as are less likely than Whites to use the Internet to search for health information, to seek out information on government websites, or to participate in online auctions. African Americans and Latinos/as are more likely than Whites to browse the Internet just for fun, download music, listen to music, seek sports information, or play games.


150. How Americans Are Expanding Their Use of the Internet, supra note 101, at 33.


152. Id. at 21 (sixty-five percent of Whites, 76% of African Americans 76%, and 68% of Latinos/as). But see Online News Audiences Larger, More Diverse, supra note 149, at 17 (finding that Whites and Latinos/as access the news online more often than African Americans).

153. Madden, supra note 151, at 15, 77 (forty percent of English-speaking Latinos/as, 35% of African Americans, and 22% of Whites).

154. Baynes, supra note 84, at 343-44.

155. Madden, supra note 151, at 24.

156. Id. at 30.

157. Id. at 56.

158. Id. at 63.

159. Id. at 66.

160. Id. at 68.

161. Id. at 70.
African Americans are less likely than other demographic groups to use the Internet for work activities, and the least likely of other demographic groups to make online purchases, seek financial information on the web, or seek out hobby information. In contrast, African Americans are more likely than Whites to use the Internet to search for religious information, and to do research for school or some other training.

Not only do African Americans and Latino/as have less access to the Internet than Whites, those who are online use the Internet in ways very distinct from Whites. Assuming arguendo that the Internet can substitute for broadcasting for Whites, given the distinct and different use of the Internet by minorities, it is difficult to make the gross generalization that the Internet is a substitute for broadcast television for members of these minority groups.

2. The Internet Is an Extension of Traditional Media—The Internet is an extension of traditional media. Many of the largest telephone and cable companies own high-speed networks. Because the Internet is a commercial venture, these companies likely will aim their information and services to those consumers whom they believe have the most money. In addition, Internet sites have to pay for inclusion in the corporate search engines that direct most Internet users. These practices disadvantage minority-owned or minority-focused content providers, making it more difficult for Internet users of color to access racially diverse content.

In 2002, Nielsen reported that 56% of Americans get most of their news from television, and only 6% get it from the Internet. By 2004, a Pew Research Center Study indicated that approximately 59% get their news from local broadcast television stations and about 26% get their news from online sites, including the news

162. Id. at 39 (noting that this difference is a recent phenomenon).
163. Id. at 44.
164. Id. at 49.
165. Id. at 58.
166. Id. at 26.
167. Id. at 54.
168. Id. at 57.
171. Cf. id. (referring to small groups and individual owners as being disadvantaged).
172. Id. at 118.
pages of Internet service providers, network or local news websites, newspaper sites, and online magazines. Sixty percent of Americans reported that on a typical day, they watch television news as compared to only 24% who go online for news. Moreover, 51% of Americans reported that they spend one-half hour watching television news as compared to only 7% who spend one-half hour online.

The Internet is often not an independent source of news. Those who used the Internet were more likely to believe and use the websites of existing broadcast and newspaper firms. Moreover, respondents in a UCLA study reported that they spent only four minutes per day gathering news on line. For those who access the Internet for some news content, they use the Internet in a distinctly different way than traditional broadcast media.

3. The Internet Has No Easy Way to Find Diverse Content

a. The Internet Has Some Diverse Content—Some minority-related content exists on the web. For instance, Quepasa.com, NetNoir.com, and BlackPlanet.com provide Latinos/as and African Americans with diverse content. David Ellington, the founder of NetNoir, found that his in-house tracking indicated that people wanted more entertainment and less serious content. “Seventy percent of [NetNoir’s] subscribers sign on for the chat rooms and programmed events.” Mr. Ellington’s figures seem to support the Pew Internet studies that show online African Americans and Latinos/as are more likely to use the Internet for fun than Whites.

b. Internet Users of Color May Have Difficulty Finding Diverse Content—Using the Internet requires a certain degree of technological literacy. Andy Carvin of the Benton foundation has said: “Am I going to know how to use Netscape in order to go on the Web? Do I have any clue how to use a search engine successfully?” A report by the Bill & Melinda Gates Foundation stated that “forty-six percent of non-users indicated that ‘the Internet is too complicated and hard to understand’ . . . . Embarrassment over lack of knowl-

173. ONLINE NEWS AUDIENCES LARGER, MORE DIVERSE, supra note 149, at 5, 9.
174. Id. at 19.
175. Id.
176. COOPER, supra note 170, at 121.
177. Id.
179. Id.
edge and fears over personal ability to learn new skills also surfaced in the study." 181

With broadcast television, a media consumer can determine the dates, times, and programs aired simply by reading TV Guide. In addition, many local newspapers have extensive coverage of television programming. Both have extensive descriptions of the upcoming programming. If the media consumer has cable, he or she can view the scrolling TV Guide Channel, which provides a preview of upcoming programming. Lastly, with a remote control, the media consumer can channel surf to determine whether he or she wants to watch certain programming. The Internet, on the other hand, can be much more complicated, making it less likely to be used. If minority news sites already are hard to find, then people with less computer literacy who make the attempt to use the Internet will still have great difficulty finding the sites, thereby further limiting access to diverse content.

IV. Conclusion

Media consumers of color are a separate submarket of the mainstream media. This separate market is evidenced by the different television viewing habits of Whites and people of color, as well as the Billboard magazine delineation of R&B/urban music radio stations as a separate radio station format. However, several failed FCC policies inhibit this submarket from growing. Moreover, the mainstream broadcasters fail to provide media consumers of color diverse content. The little diversity that is offered is often stereotypical.

The FCC failed to take this important market into account in its recent deregulation order relaxing the cross-ownership and audience cap rules. Instead, the FCC perfunctorily pointed to the Internet as a substitute for consolidated broadcasting. For media consumers of color, the Internet fails as a substitute for broadcasting. A Digital Divide persists. African Americans and Latinos/as use the Internet "at any location" and at home at lower rates than Whites.

Access at schools and libraries provides second-class access for Internet users of color. People are limited by the hours of

181. TOWARD EQUALITY OF ACCESS, supra note 140, at 9 (citing THE EVER-SHIFTING INTERNET POPULATION, supra note 115). The report also noted that "another 48 percent indicate that 'cost' is a reason they are not online." Id. at 9.
operation of the schools and libraries. They are likely to be subjected to the budgetary limitations of the government institution, including limited technical assistance. They may have to wait on long lines to gain access. Over-expansive filters may restrict Internet users from accessing important health information. Once the Internet user of color gains access to the Internet, they will find the web sites of the traditional media may have the same stereotypes and absences exhibited on broadcast channels. Lastly, use of the Internet—particularly accessing minority content—requires a technological literacy, which some low-income members of minority groups do not have. For all these reasons, the Internet fails as a substitute available to media consumers of color.