

# Antitrust and the Internet

BBA Antitrust Committee  
and Computer and Internet Committee

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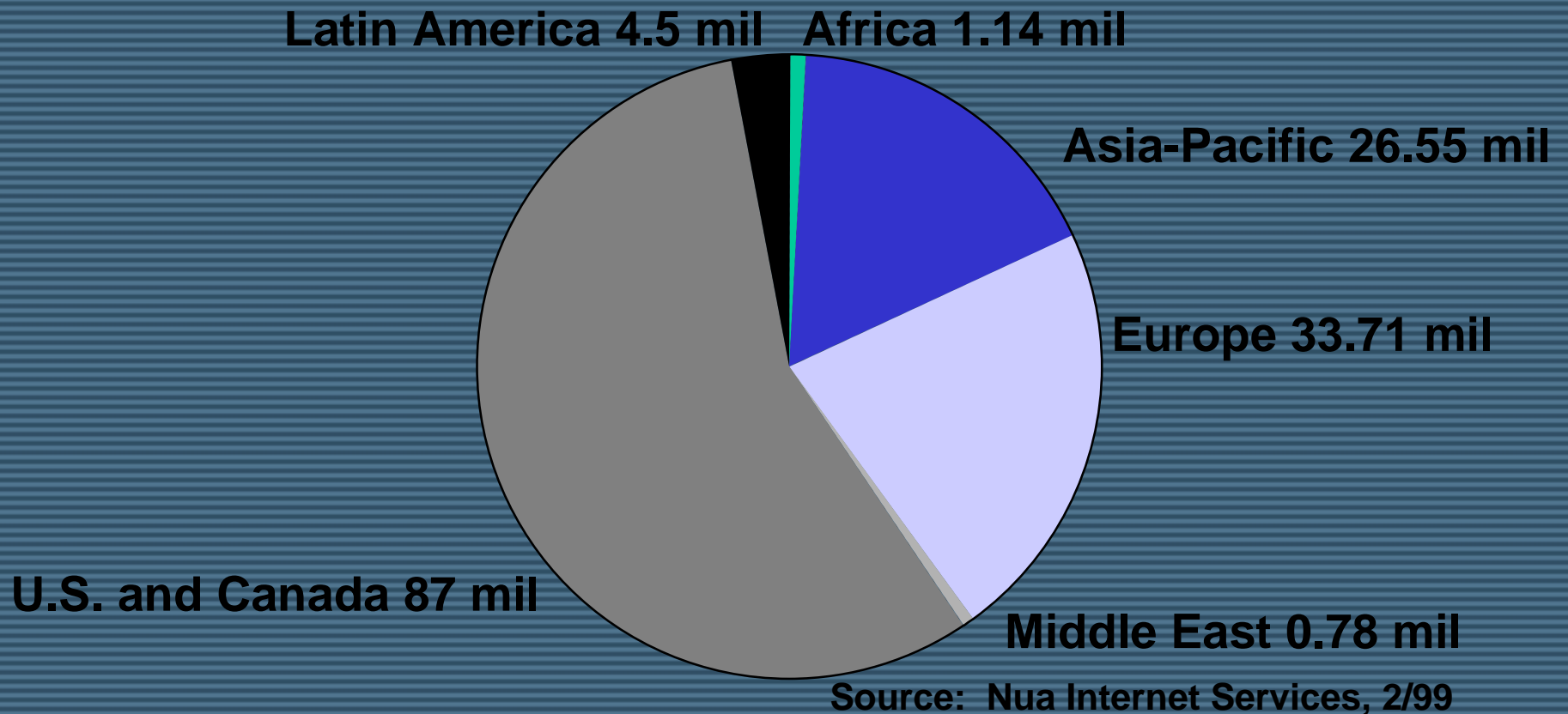
# Overview - What We will be Talking About

- Introduction
- Internet access issues
  - consumer access
  - merchant access
- Antitrust implications of Internet industry standards
- Merger and market definition issues

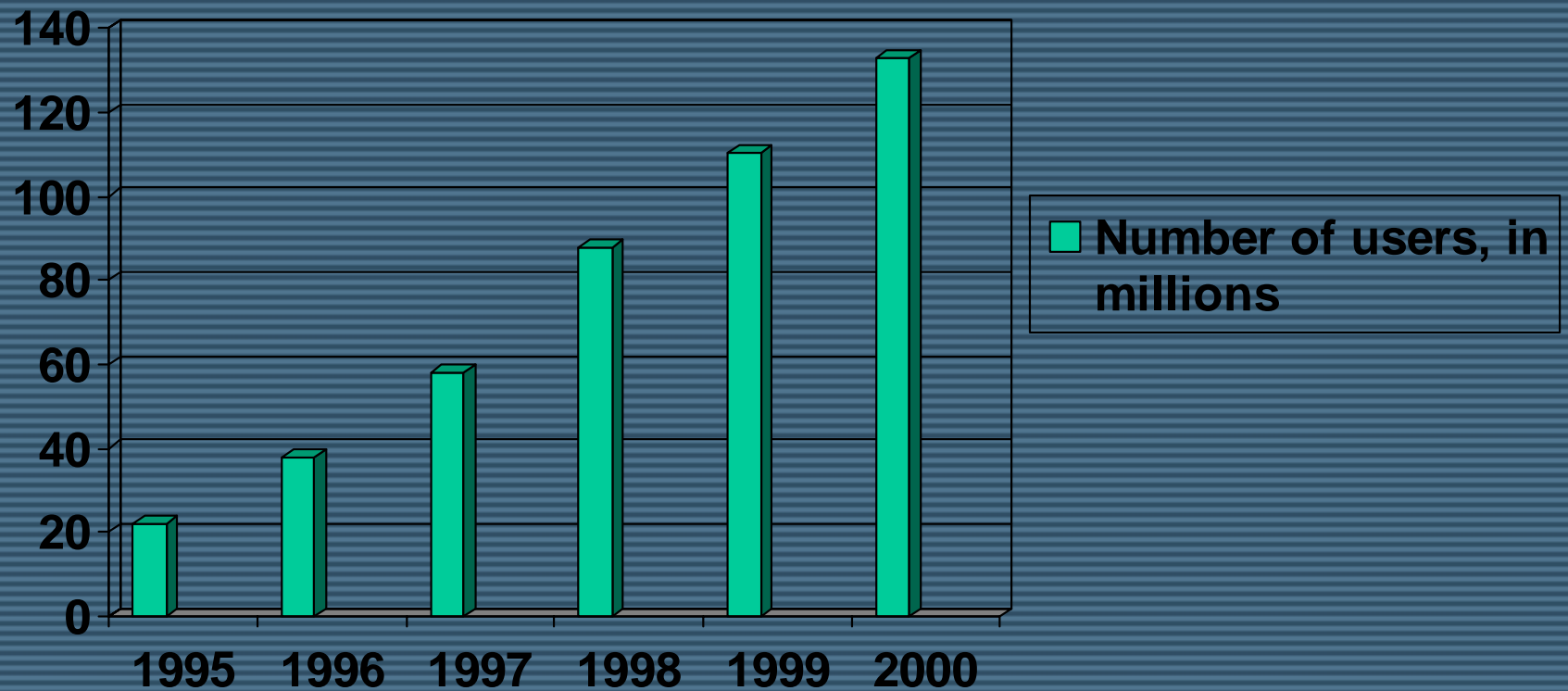
# What We Will Not Be Talking About

- Microsoft case (at least not too much)
- New Competitor Collaboration Guidelines
- Antitrust issues without peculiar Internet twists (e.g., price fixing, market allocation)
- David Balto's November 12 speech

# Estimated Geographic Distribution of 153.5 Million Online Users



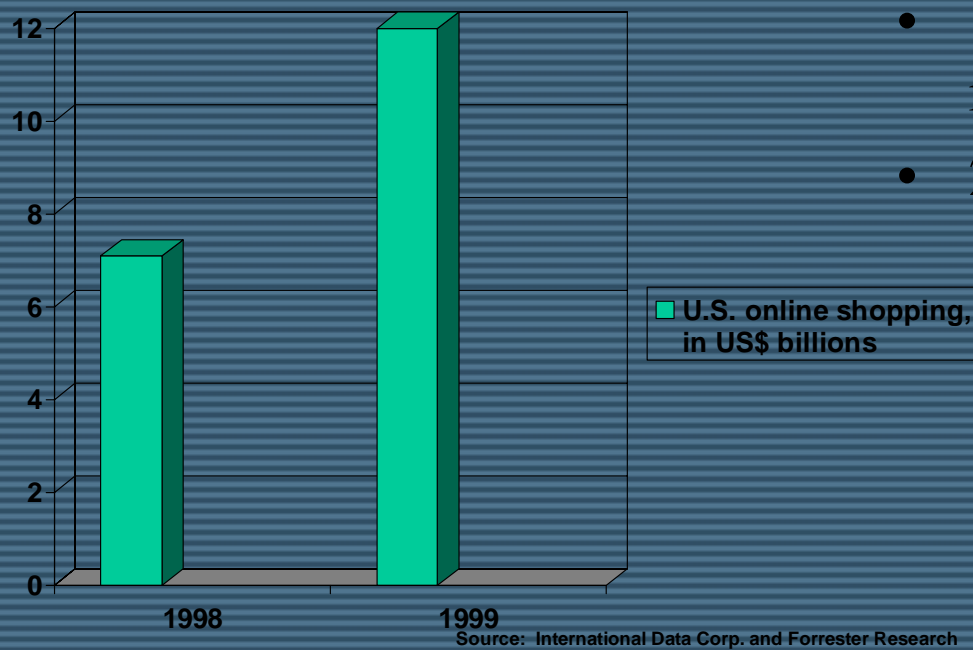
# Growth of Internet Population in the United States and Canada



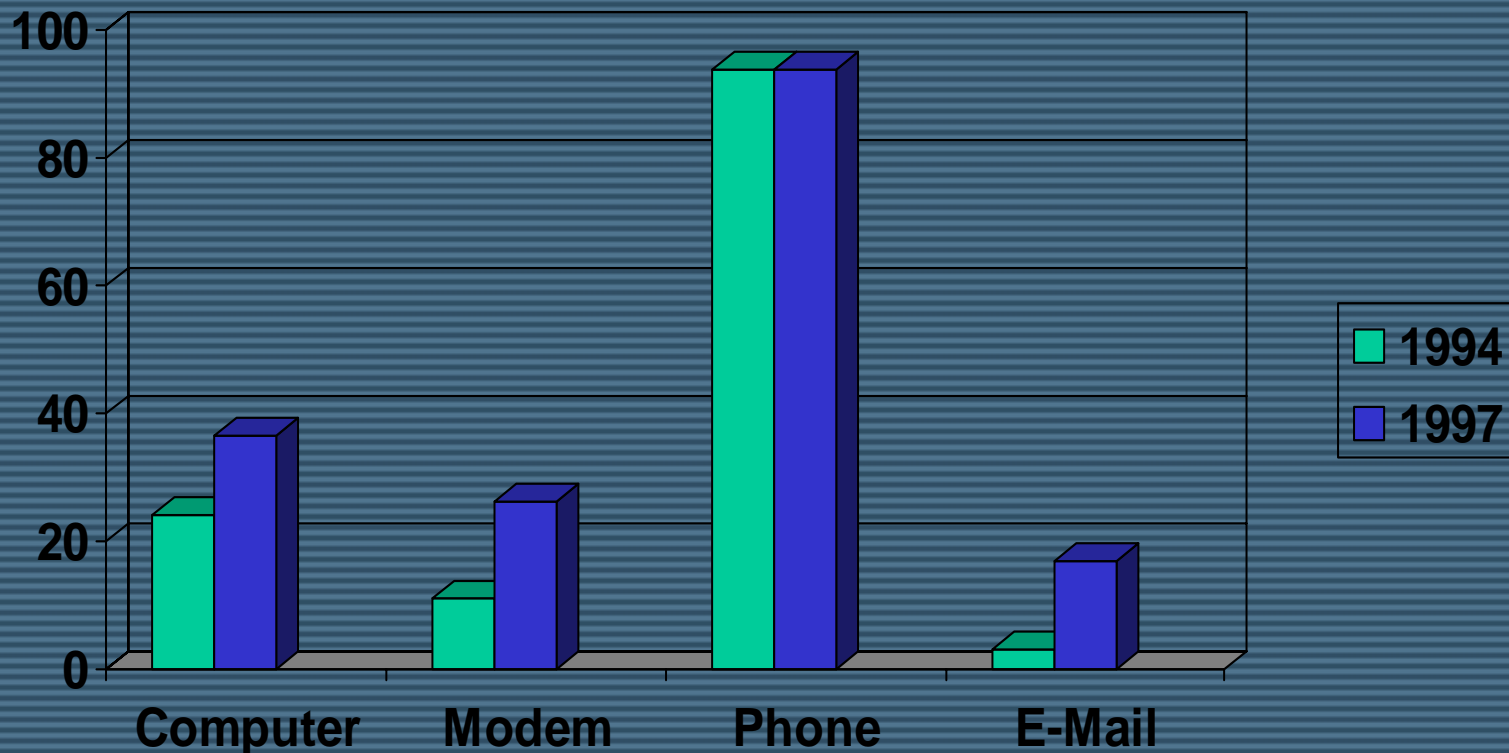
Source: 1997 CommerceNet/Nielsen Internet Demographic Survey

# Volume of U.S. Online Shopping

- 1998: US\$7.1 billion
- 1999: US\$12.0 billion (59% increase over 1998)
- 2004(est): \$US185 billion

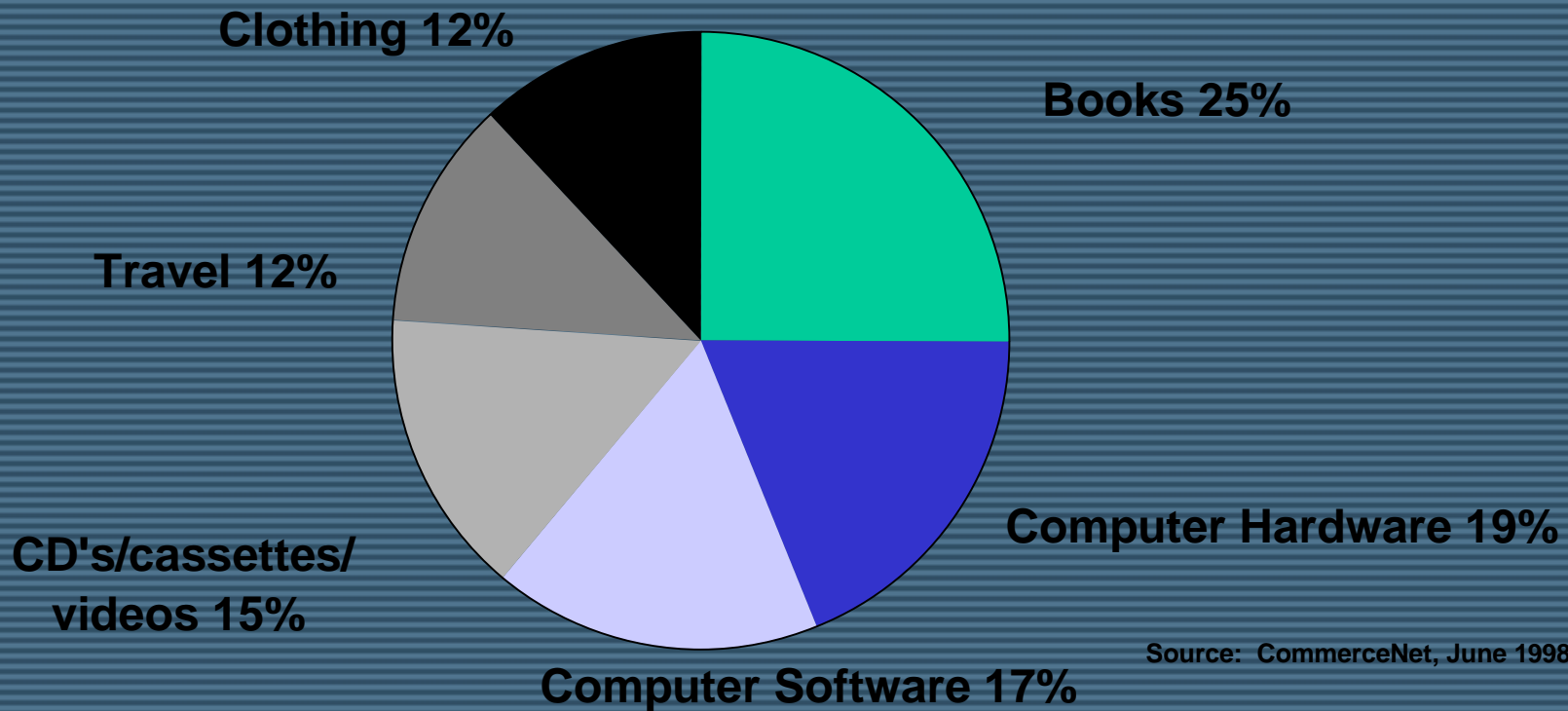


# Percent of U.S. Households with Computer, Modem, Telephone and E-Mail



Source: Nat'l Telecommunications and Information Admin, 1997

# Types of Retail Products Purchased by U.S. Internet Users



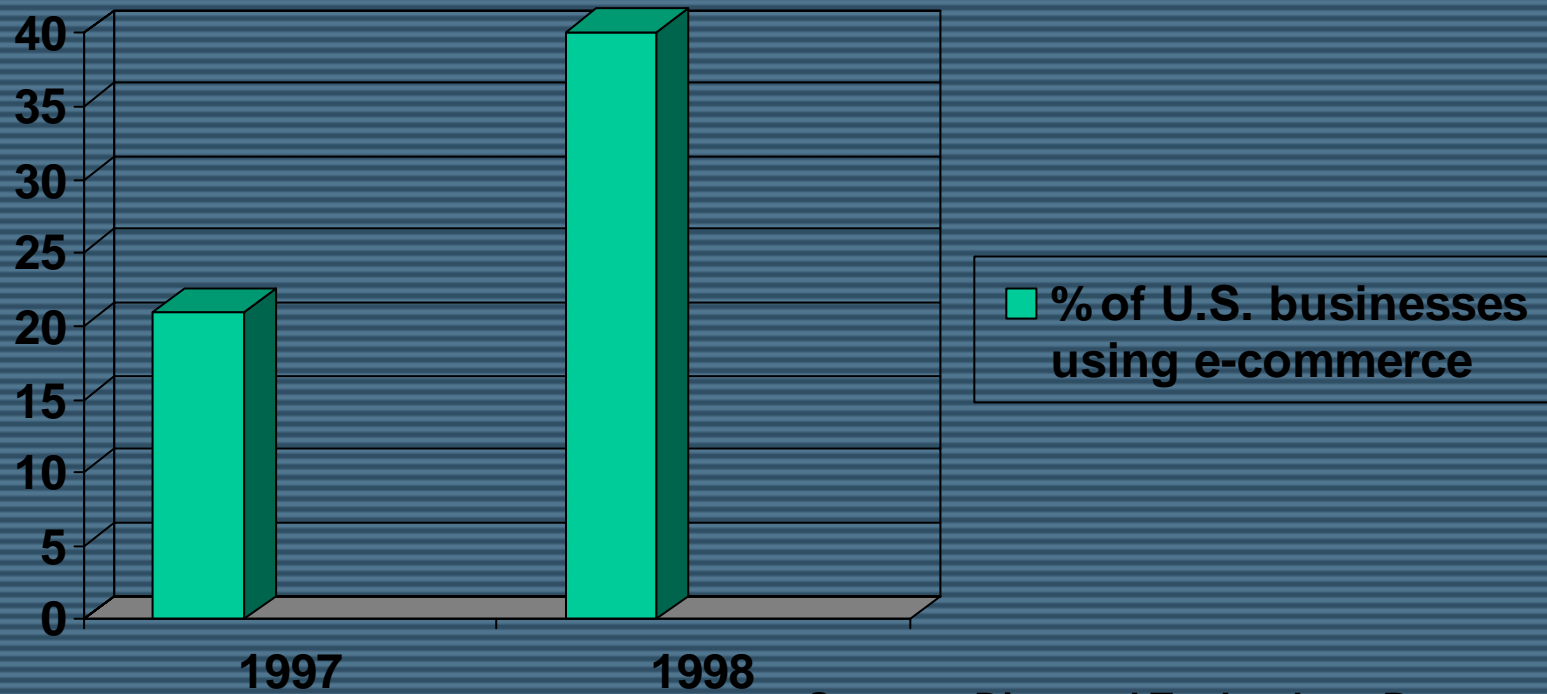


# Snapshot of Growth of Internet Use by Consumers in the United States

- median income for online households is 57% higher than the average American household
- 27 million women now online, accounting for 46% of all U.S. net users.
- Teens average 8.5 hours online per week
- 87% of college students are currently online
- seniors account for 19% of total consumer online spending

(Source:  
[http://www.  
Infobeads.com/Insider/Pages/Main/Main.asp?sid=10  
2199](http://www.Infobeads.com/Insider/Pages/Main/Main.asp?sid=102199))

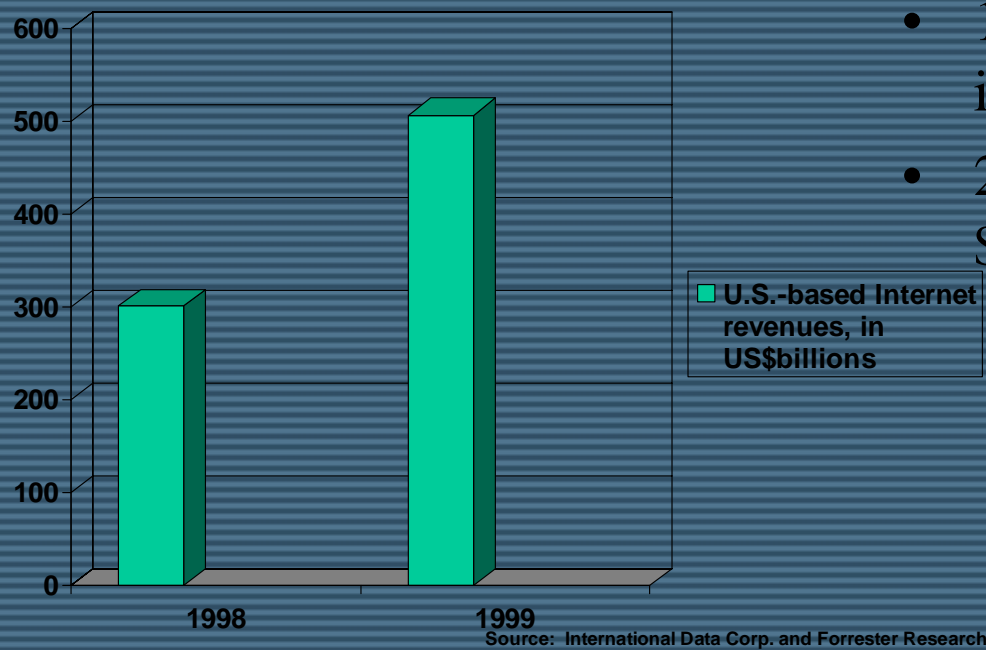
# Percentage of U.S. Businesses Using e-Commerce



Source: Diamond Technology Partners

# Volume of U.S.-Based Internet Revenue

- 1998: US\$301 billion
- 1999: US\$507 billion (68% increase over 1998)
- 2003 (est worldwide): \$US2.8 trillion

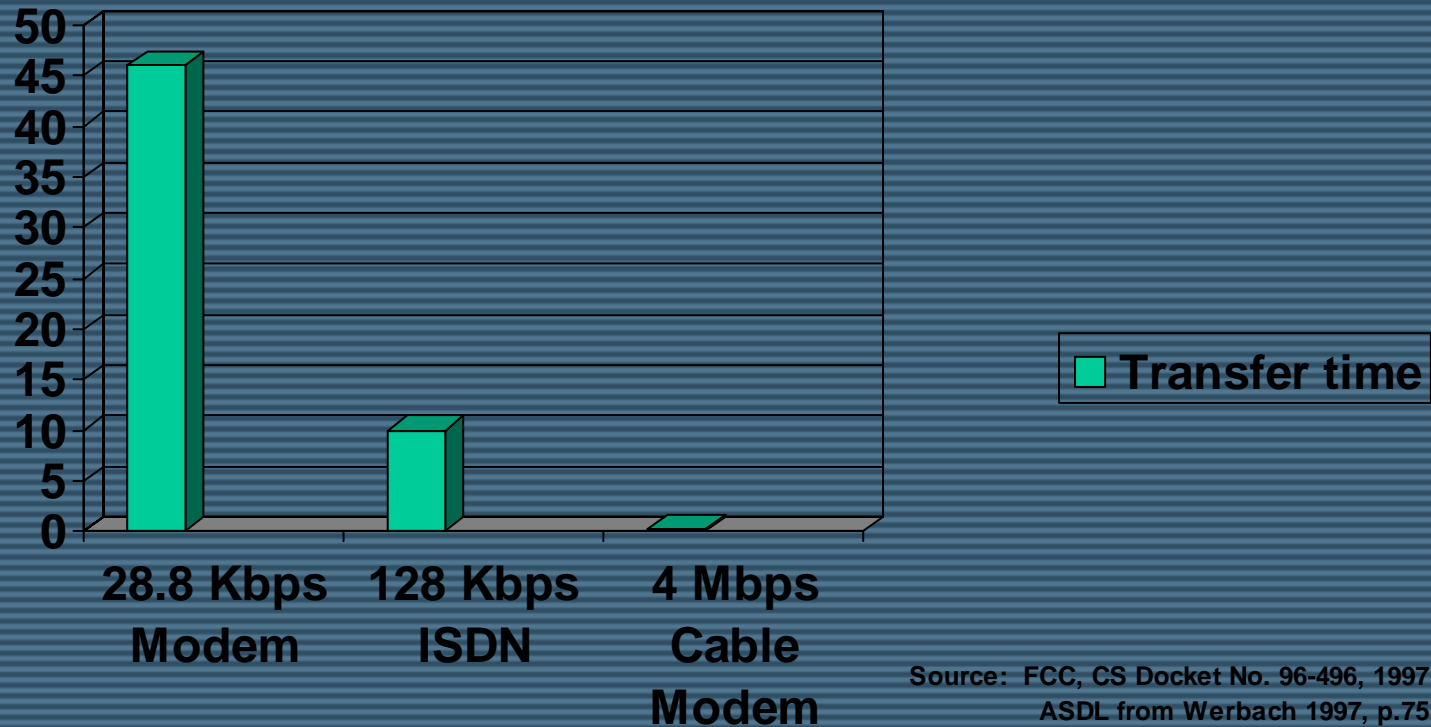


# POP QUIZ:

## Glossary of Internet Jargon

- search engine
- backbone
- IETF
- ISP's
- NSI, NSF and ICANN
- broadband
- cable modem
- DSL
- encryption
- content providers
- merchants
- portals
- mega portals

# Broadband: Fight Over Internet Access Speeds (e.g., time to download 3.5 min. video clip)



Source: FCC, CS Docket No. 96-496, 1997;  
ASDL from Werbach 1997, p.75;  
The Emerging Digital Economy Report

# Broadband: Open Access for ISP's?

- "open access" to an essential resource vs. demand for "forced access" to the investments made by the cable companies
- Some policy arguments for open access
  - cable offers greater coverage
  - AT&T and MediaOne are building a new monopoly
  - competing technologies do not yet exist

# Broadband: Open Access for ISP's?

- Some policy arguments against open access
  - forced access will decrease investment in broadband
  - competing technologies do exist
  - regulation of cable access will be burdensome
- as of Sept. 17, 1999, Federal Trade Commission adopts “wait and see” policy

# Internet Access Issues -- Consumers

- AT&T v. City of Portland - D. Oregon, and Ninth Circuit
  - open access requirement for AT&T/TCI cable modems
  - Internet access through cable modem is an “essential facility” for ISP’s
  - regulate as telecommunications or cable?



# Internet Access Issues -- Consumers

- GTE v. AT&T - W.D.Pa.
  - AT&T/Comcast exclusive deals with affiliated ISP, ExciteAtHome -- challenged as unlawful tying
  - AT&T response that cable modems compete with GTE's DSL's
  - Telecommunications law prevents GTE from exclusive ISP arrangements for its DSL service, since DSL uses local telephone lines

# Internet Access Issues -- Merchants

- Fair Allocation System Consent Order -  
FTC
  - Chrysler dealers threaten Chrysler with boycott unless it limits allocation to competing dealer who sold over Internet
  - reminiscent of General Motors dealers case in 1966 (384 U.S. 999)
- Future issues regarding merchant (or other content provider) foreclosure from most important portals through exclusive dealing

# Antitrust Implications of Internet Industry Standards

- Factors that lead to development of standards
- Different categories of joint standard setting arrangements
- How standards are developed
- Antitrust implications

# Factors that Lead to Development of Standards

- Network externalities arise when the value of a product to consumers is enhanced by its acceptance by other consumers
- Path dependence arises when past decisions about a product dictate future choices

# Different Categories of Joint Standard Setting Arrangements

- Technical safety and quality standards allow firms to control design and/or performance characteristics which products must meet to obtain approval
- Interface standards control how one technology interconnects with other technologies

# Technical Safety and Quality Standards

- Internet security
  - encryption programs that provide security for information in transit
  - particularly important to the Internet banking and financial services sector

# Interface Standards

- Internet services, applications, protocols and infrastructure
  - need for connectivity of users and interoperability underlies the basic functionality of the Internet
- e-commerce
  - cannot be transacted without interface standards
  - e.g., electronic cash
- Domain names

# Domain Name System

- Used to route traffic on the Internet
- Currently a government-imposed standard administered by a private company, Network Solutions, Inc. (NSI) under contract with the National Science Foundation (NSF)



# Increasing Trade in Domain Names

- over 5 million registered domains; principally “dot coms”
- more purchases and sales of names
- rising prices:
  - mall.com: \$250,000
  - computer.com: \$500,000
  - wallstreet.com: \$1,000,000
  - altavista.com: \$3,000,000

# Domain Name Litigation

- Several companies seeking to register domain names have brought claims against NSF and NSI
- PG Media Inc. v. NSI - SDNY
  - NSF, as part of U.S. Government, has been held immune from antitrust liability
  - NSI has been held immune because it acts in compliance with a clearly articulated government policy and program

# Domain Name Litigation

- Thomas v. NSI - D.C. Circuit
  - dismissed a similar domain name case brought by an Internet domain name registrant
  - plaintiff was not a competitor of NSI
  - thus it lacked standing to bring an “essential facilities” claim

# End to Domain Name Litigation? Revamped Domain Name Registration System

- Coordinated by ICANN
- NSI will recognize ICANN's authority; will enable all ICANN-accredited registrars to access NSI's master domain name registry
- NSI will allow non-registrars to access registry data and to develop competing Internet directory services

# How Standards are Developed

- De facto standards
  - may develop as a result of market forces
  - also may arise as result of the intellectual property rights of a dominant firm
- Standard setting bodies
  - competitors work cooperatively to develop both technical safety and quality standards and interface standards
- Government set standards

# De Facto Standards that Require Use of Proprietary Technology

- Standards may be used to leverage a company's intellectual property rights and to exclude rivals or raise barriers to entry
- Examples
  - 1970's IBM antitrust litigation
  - 1990's Microsoft findings of fact

# Standards Developed by Industry Associations

- Actions of standard setting bodies are analyzed under the rule of reason
  - Inquiry is whether the standard setting activity is likely to have anti-competitive effects, and if so, whether the activity is reasonably necessary to achieve pro-competitive benefits that outweigh those anti-competitive effects. See, e.g., DOJ and FTC Guidelines for the Licensing of Intellectual Property, Section 3.4
  - This is consistent with new Draft Antitrust Guidelines for Collaborations Among Competitors, Section 3.3

# Standards Developed by Industry Associations

- In reviewing joint standard setting activity, courts focus on whether procedural defects exist in the standard setting process
- Another important factor is whether the standards set are voluntary



# A Final Word About Antitrust Risks

- Quality and safety standards which carry a “certified” or “not certified” outcome have the potential to exclude rivals
- Interface standards may not exclude rivals altogether, but have the potential to raise rivals’ costs

# Merger and Market Definition Issues

- Worldcom/MCI - FCC/DOJ and EU
  - Internet backbone services market
  - Concentration of power in interconnection services (combined 50%)
  - Divestiture to Cable & Wireless
- Internet sales as a potentially separate market
  - Staples/Office Depot as precedent

# Merger and Market Definition Issues

- New frontiers in barriers to entry
  - issues of scale and scope more complicated
  - short industry history means greater dependence on theory than historic examples

# Conclusions

- Many different antitrust issues effect Internet companies in many different contexts
- Given explosive growth of Internet use and e-commerce, coupled with the Government's apparent victory in pursuit of Microsoft, these issues will receive increasing attention from federal and state enforcement agencies, the courts and Congress

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