

Rethinking Media Policy in the Age of New Media

Quello Center Communications Law and Policy Symposium, May 19, 2009

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I am pleased that the Quello Center has invited me to be part of the discussion today. I will talk about some of the problems facing newspapers and other advertising supported media in the age of the Internet. Right now, the Internet is very much on the “problem” side of the balance sheet for traditional media, particularly newspapers. A number of ideas are floating around about possible solutions. Some of these are good, some not so good. We’ll talk about a few of them. As a disclaimer, the views I express today are my own.

I’ll start with a few general observations from my experience as antitrust lawyer. First (and I hope this is obvious), antitrust applies to media for the same reasons it applies to other parts of the economy. It is a check on market power. When firms have market power, prices tend to go up, quality tends to go down, and firms spend energy trying to hold onto what they’ve got and keep others out. Excessive concentration in any industry is a reason for concern. Media is no exception.

Second, antitrust enforcement is important whether times are good or bad. In a recent speech, FTC Commissioner Tom Rosch said that competition laws need to be implemented at least as strictly during a time of economic crisis as they are otherwise. Indeed, he suggested that antitrust may have an even bigger role to play than usual when there are widespread concerns about unemployment and increased prices for consumers.¹ The new head of the Antitrust Division, Christine Varney, echoed this sentiment in a speech last week.² Many decisions we make today will continue to be felt as the economy improves.

Third, when times get tough for an industry, as they clearly have for newspapers, there is a natural inclination for companies to seek antitrust exemptions. This tendency may be greater when an industry has operated under an exemption in the past, as is true for newspapers because of the Newspaper Preservation Act of 1970. That Act allowed joint operating agreements between competing daily newspapers. Mainstream antitrust thought considers exemptions usually to be a bad idea. They further diminish competition in an industry. As the Antitrust Modernization Commission noted, exemptions frequently end up harming consumers and the economy.³

The Newspaper Industry in Distress

Most of us in this room understand that many newspapers are in trouble. We have seen journalists write stories about the demise of their own newspaper, and there is even a website called “Newspaper Death Watch” keeping tabs on bankruptcies, closures, and the move away from print editions.

Let’s take a quick look at the trends. According to the Newspaper Association of America, weekday newspaper circulation declined from about 55 million in 2003 to less than 49 million in 2008. During that period, total print advertising revenue decreased from \$45 billion to less than \$35 billion, a 23% decline. Newspaper revenue from classified advertising has been dropping much faster, from about \$16 billion in 2003 to \$10 billion in 2008, a 37% decline. For many newspapers, shrinking revenue has been accompanied by heavy bank debt incurred by the owners.⁴ There have also been significant layoffs. By the end of 2009, the total job loss since the beginning of 2001 will likely pass 14,000 – roughly 25% of the industry’s news workforce lost in nine years.⁵

What has changed in the past year, according to the Pew Project for Excellence in Journalism (PEJ), is that the pace of audience migration from print to the Internet has accelerated, while advertising revenues have taken a nose-dive because of the bad economy.⁶

Advertising income is newspaper's bread and butter, yet advertisers have been unwilling to pay newspapers for online readers at anywhere near the rates they have paid for print readers. Online advertising continues to represent a small fraction of the overall advertising pie for newspaper companies, even as readers flock to the internet for their news.⁷ The industry has now reached the point where knowledgeable people assert that the existing advertiser-supported business model may no longer be sustainable.

Antitrust and Newspapers

So the industry is in transition. How does antitrust apply to industries in transition? If newspapers were just another commodity, the answer would be that antitrust applies pretty much the same way it does to healthy industries with a couple of exceptions. First, the antitrust agencies recognize a "failing firm" defense in horizontal merger cases, and allow some mergers that would otherwise be challenged in order to keep assets in the market. Second, because new business models may be emerging, the antitrust agencies try to be alert to efforts by incumbents to nip these new business models in the bud.

If newspapers were just another declining industry, you would expect some additional consolidation as strong firms buy up by weak firms, plus some vigilance to protect experiments with new business models.

But news is not just another commodity. Newspapers are more than just ways to deliver advertising. As the publisher of the Philadelphia Inquirer recently told Congress: “The newsgathering resources and investigative reporting arsenals commanded by daily newspapers typically dwarf those of any other local media. In many markets, the local newspaper has more reporters on the street than all other local media combined. As a result, newspapers are often the most effective—and in some cases may be the only credible—watchdogs of business and local government.”⁸

It is this watchdog function that has made newspapers different from other media.

It is this watchdog function that needs to be protected and preserved until newspapers regain firm footing or until a viable new business model comes along.

Ironically, it is also this watchdog function, the very thing that makes newspapers unique, that is in jeopardy today as newspapers around the country continue to lay off journalists. And there are real world consequences to this thinning out of newsrooms. One of the more disturbing conclusions in the recent PEJ report has to do with the coverage of the presidential election. The authors concluded that the press was more reactive and passive than it has been in the past.⁹ Much of what we learned about the candidates came from the campaigns, not from journalists. A newspaper with too few journalists and editors is easier to spin.

Perhaps the most pessimistic conclusion of all is that news reporting itself is at risk because of the shift of audiences and advertisers to the Internet, as “the economic base supporting the most difficult and expensive journalistic undertakings is eroding.”¹⁰

The Internet is Not a Cure All

Does the proliferation of sources on the Internet allay concerns about concentration in traditional media? I don't think so.

There is no question that the Internet has lowered some of the traditional entry barriers facing media firms. It has reduced some of the fixed costs. It has allowed consumers to select what content they want, when they want it, and often from a variety of sources. And it certainly has unleashed the brave new world of citizen journalists.

But despite its increasing prominence as a place where people get news and advertisers spend money, the Internet remains a distribution medium, not a source of original news content. Although Internet companies invest in this medium, the investment has tended to be in technology and not in journalists. Internet sites unaffiliated with traditional media typically aggregate stories from newspapers and wire services, or comment on the news, but do little original local news coverage or investigative reporting. Anecdotes exist of bloggers breaking a news story, but the available survey data suggest that “most Americans have yet to accept them as significant news sources.”¹¹ And citizen journalism business models “remain deeply uncertain.”¹²

The most popular Internet sites for news remain in the domain of large media conglomerates. In 2008, 22 of the 25 most popular online news sites were owned by one of the 100 largest media companies.¹³ And, in most communities, the local newspaper's web site is by far the most visited Internet source of local news.

The Wrong Solution: Relax the Antitrust Laws

In view of these adverse changes to the newspaper industry, some have proposed that antitrust laws should be relaxed – specifically, that the antitrust product market

definition should be broadened to include other media. Rupert Murdoch recently put it this way: “No longer can we afford to take the naïve and outdated view that newspapers exist in a ‘separate market’ from the media they in fact compete with, including TV, radio, cable and the Internet.”¹⁴ Relaxing the antitrust laws would pave the way for additional newspaper mergers. Speaker of the House Nancy Pelosi recently raised the possibility of a merger in the San Francisco Bay area as a way to save the San Francisco Chronicle.¹⁵

There is a common misconception that if two products compete in any way, they are in the same “market.” But in antitrust, a “market” includes only that set of competing products that act as some kind of constraint on price, quality or service. As an example, both cars and bicycles allow you to go places and in that sense they compete. But if Ford drops the price of its cars, Schwinn is not going to be forced to lower the price of its bikes or face the risk of a loss of sales. Ford doesn’t constrain Schwinn’s pricing. Similarly, the Antitrust Division has asserted – and been able to prove in court – that newspaper advertising prices have not been constrained by other media.

As economist Carl Shapiro recently explained to Congress: “In past newspaper mergers, the Division has performed a factual analysis to determine whether other media outlets, such as radio, television and new media, are in the same relevant market as local daily newspapers. In those past investigations, we have found sufficiently strong competition among local daily newspapers to define these products as a relevant market. These conclusions are perfectly consistent with the observation that newspapers have been losing subscription and advertising revenues to other media.”¹⁶

Proponents of additional consolidation in newspapers would do well to consider the experience of broadcast radio. The claim was frequently made in the 1990s that consolidation would allow radio owners to offer a more diverse array of formats in local markets. But it is not evident that concentration of radio ownership led to greater program diversity. According to one FCC study, between 1996 and 2007, the average number of formats available to consumers pretty much held steady.¹⁷

Also telling are the comments of Mel Karmazin, the former head of Infinity Broadcasting and the current CEO of Sirius XM. Mel characterized commercial radio after the 1996 Act as “totally homogenized.” He said that he advocated radio consolidation strictly for business reasons. “No one asked me if it was good for consumers.”¹⁸ Similarly, it is not clear that additional newspaper consolidation would lead to more or better newsgathering.

Radio consolidation also resulted in fewer minority and women owners as large groups bought up stations from smaller businesses.¹⁹ Joel Waldfogel argues that in industries with high fixed costs like broadcasting or newspapers, the market already tends to favor the tastes of the majority over “preference minorities.” Media markets turn out to be more like winner-take-all political contests than is generally supposed.²⁰ Waldfogel also shows that there is a relationship between the presence of group-targeted local media (like Spanish language local television news) and higher voting turnout.²¹

Finally, it bears noting that a consequence – intended or unintended – of relaxing market definition would be to allow more media mergers of all kinds, not just newspaper mergers.

The Wrong Solution: A New Exemption

A second proposal that has been floating around lately is to create an antitrust exemption that would allow newspapers to jointly charge for content. Tim Rutten, in a column in the Los Angeles Times, wrote that as long as some newspapers provide free access to information, “nobody can risk charging for theirs.” With an exemption in hand, newspaper companies could collectively agree on how prices should be set and then “begin imposing them simultaneously.” And after that, Rutten proposes that they collectively go after Google and other aggregators and do something similar.²²

Sounds like price fixing, doesn't it? Sounds like a collective effort to make sure that everybody charges and nobody “cheats.” So let's say they got an exemption, a “get out of jail free card.” What price would newspapers agree to charge for the news? My guess is it would end up being more than just some measure of costs.

Now, there are ways for newspapers to work together that would not require an exemption and would not violate antitrust laws. An example is “Careerbuilder.com,” which is jointly owned by Gannett, the Tribune Company, McClatchy, and Microsoft. Many other cooperative arrangements would also not raise serious antitrust issues. If there are questions, companies can ask the DOJ for a statement of its enforcement intentions in a business review letter. But an exemption is the wrong way to go. As I said at the beginning, antitrust exemptions may start with good intentions but frequently end up being used to hurt consumers. Moreover, the movement in the past two decades has generally been away from exemptions, not creating new ones.

A Better Solution: A Unified Policy (and Maybe Some Federal Money)

A number of years ago, Maurice Stucke and I published an article arguing that the

antitrust laws were flexible enough to protect the marketplace of ideas.²³ In that article, we argued that the antitrust analysis could take non-price factors such as editorial competition into account, and there was good historical and legal precedent for doing so. Although that may be theoretically true, we have come to believe that what is needed is a more unified national media policy. Aside from fluctuations in the level of antitrust enforcement because of political factors, conventional antitrust policy is not easy to apply in media markets. In a media merger, an economic analysis of advertising rates can offer a sense of the competitive interaction between the merging firms. This is very helpful to market definition. But it is harder to factor in the loss of editorial competition or to predict a merger's impact on the quality of the merged firm's products. And even if one accepts that antitrust in the media sphere should aim at promoting consumer choice, it is difficult to say how much choice is enough.

So there should be a national policy on media. What that policy turns out to be ought to be the subject of vigorous debate. But it should include strengthened, not weakened antitrust protections. And some additional legislation. From the standpoint of merger policy, we might want to require more extensive pre-merger review of large media mergers or apply presumptions against media mergers in certain circumstances. We might want to explicitly take editorial independence into account and perhaps allow journalists to have a say or even a veto right.²⁴

In terms of newspapers, there is a need for some bold new thinking. Perhaps we need a "newspaper stimulus bill" similar to the broadband stimulus now underway. John Nichols and Bob McChesney recently proposed a tax deduction for people who subscribe to daily newspapers.²⁵ Ed Baker recently suggested a tax credit to cover part of

journalists' salaries.²⁶ Both of these proposals are bold attempts to do more than merely forestall the inevitable through another exemption. What makes the proposals attractive is that they support newsgathering while keeping the government's hands off of the editorial function. That seems like the right approach to me.

Endnotes

¹ "Implications of the Financial Meltdown for the FTC," Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, New York Bar Association Annual Dinner, New York, NY, January 29, 2009.

² "Vigorous Antitrust Enforcement in this Challenging Era," Christine Varney, Assistant Attorney General for Antitrust, Remarks as Prepared for the Center for American Progress, May 11, 2009.

³ "While the beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces." Antitrust Modernization Commission, Report and Recommendations, at 335.

⁴ See Statement of Carl Shapiro before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives, "A New Age for Newspapers: Diversity of Voices, Competition, and the Internet," April 21, 2009.

⁵ Newspapers, 2009 PEJ Report.

⁶ Project for Excellence in Journalism, Overview, The State Of The News Media 2009 [hereinafter 2009 PEJ Report].

⁷ Newspapers, 2009 PEJ Report.

⁸ Written Statement of Brian P. Tierney before the House of Representatives Committee on the Judiciary, Subcommittee on Courts and Competition Policy, April 21, 2009.

⁹ Lessons of the Election, 2009 PEJ Report.

¹⁰ Online, 2005 PEJ Report, quoted in C. Edwin Baker, Media Concentration And Democracy: Why Ownership Matters (2006), at 117.

¹¹ Online, 2008 PEJ Report.

¹² Paul Farhi, *Rolling the Dice*, AJR, June/July 2007.

¹³ Online, 2009 PEJ Report.

¹⁴ Statement of Rupert Murdoch, Chairman and Chief Executive Officer, News Corporation, before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Courts and Competition Policy April 21, 2009.

¹⁵ “Pelosi ignites talk of Bay Area newspaper merger,” *ContraCostaTimes.com*, March 17, 2009.

¹⁶ Statement of Carl Shapiro before the Subcommittee on Courts and Competition Policy, *supra*.

¹⁷ George Williams, Federal Communications Commission, *Review Of The Radio Industry*, 2007.

¹⁸ Phil Rosenthal, *Homogenized Radio Stations Bottle Up Growth*, *Chicago Tribune*, Nov. 11, 2007,

¹⁹ *Off The Dial: Female and Minority Radio Station Ownership in the United States* (June 2007).

²⁰ “In spite of the liberation rhetoric often used to describe the market, the same kinds of groups disadvantaged by majority rule – small groups with different preferences – can find themselves at a disadvantage in product markets as well. This raises a challenge to the common exhortation ‘let the market decide.’” Joel Waldfogel, *The Tyranny of the Market* (2007), at 6.

²¹ *Id.* at 74-86.

²² Tim Rutten, *Newspapers need an antitrust exemption*, *Los Angeles Times*, Feb. 4, 2009.

²³ *Antitrust and the Marketplace of Ideas*, 69 *Antitrust L.J.* 249 (2001).

²⁴ *Baker*, *supra*, at 163-89.

²⁵ *The Death and Life of Great American Newspapers*, *The Nation*, April 6, 2009.

²⁶ *A not-so-radical idea for preserving journalism’s society-building role*, *Seattle Times*, Jan. 16, 2009.