



NORTH CAROLINA LAW REVIEW

Volume 47 | Number 4

Article 3

6-1-1969

Antitrust -- Cross Media Ownership and the Antitrust Laws -- A Critical Analysis and a Suggested Solution

William H. Lewis Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

William H. Lewis Jr., *Antitrust -- Cross Media Ownership and the Antitrust Laws -- A Critical Analysis and a Suggested Solution*, 47 N.C. L. REV. 794 (1969).

Available at: <http://scholarship.law.unc.edu/nclr/vol47/iss4/3>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

a public policy against unconscionability and overreaching in any credit transaction.¹⁹⁴ A trial court could weigh all the circumstances surrounding a transaction in light of current economic conditions and thus determine whether the profit reserved was palpably unfair as well as the result of unconscionable activity by the creditor. The court's finding of unconscionable usury should carry a penalty severe enough to make such practices unprofitable, but not so severe as to make the courts reluctant to impose them.

Such a statutory scheme of complete disclosure, of continuing regulation where most needed and of flexible enforcement of public policy would not become a stultified vestige of the past, as has the present law, but would conform itself to the changing economic needs of the future.

DAVID McDANIEL MOORE II

Antitrust—"Cross-Media" Ownership and the Antitrust Laws— A Critical Analysis and a Suggested Solution

INTRODUCTION

For many years newspapers have owned broadcast stations¹ competing in the same metropolitan area, but only recently has concern been ex-

¹⁹⁴ Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. . . . The manner in which the contract was entered is also relevant to this consideration. . . .

Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). Corbin suggests the test should be whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." 1 A. CORBIN, *CONTRACTS* § 128 (1963). In this connection, it should be noted that the North Carolina General Assembly omitted U.C.C. § 2-302, which enacts the unconscionability doctrine as to sales, from the North Carolina version of the Uniform Commercial Code, N.C. GEN. STAT. §§ 25-1-101 to -10-107 (1965), and that the North Carolina Supreme Court has never explicitly applied the unconscionability doctrine. An early decision stated that equity would set aside a contract "grossly against conscience or grossly unreasonable." *Barnett v. Spratt*, 39 N.C. 171, 174 (1845) (dictum). A later case has produced a result, based upon consideration theory, which seems justifiable only upon grounds of unconscionability. *Swift & Co. v. Aydtlett*, 192 N.C. 330, 135 S.E. 141 (1926).

¹ The broadcast media under consideration will be AM and FM radio and VHF and UHF television. The "duopoly" rules adopted by the FCC restrict ownership by one person of AM, FM, and television stations to one station of each type in

pressed² about such "cross-media" ownership.³ As the inclusion of the freedom of press in the Bill of Rights indicates, the American people have long realized that truth has its best chance of emerging in the "market-

any one area. 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (1968). Since community antenna television (CATV) does not generally compete for local commercial advertising, it will not be directly considered. However, as a potential competitor with the other media, the consequences of its entry will be noted. Although the FCC has issued no "duopoly" rules for CATV, it is doubtful that a party will operate competing systems since CATV can offer several channels within a single system.

The FCC has proposed a rule to prohibit ownership of more than one television or radio station of any kind in the same market. FCC Dkt. No. 18110 (1968). Since its application would be prospective, it would affect only future applicants for licenses and not current licensees applying for renewal. The Justice Department, however, has urged that the Commission consider the possibility of extending the policy to renewal proceedings. BNA ANTITRUST & TRADE REG. REP. No. 369 (1968).

² Although there have been a few antitrust cases involving newspaper ownership of broadcast media, it was not until 1968 that the Antitrust Division urged the FCC to consider possible antitrust violations in an upcoming hearing. The occasion for this intervention was the proposed transfer of a license for a television station in Beaumont, Texas, to the publisher of the city's only newspaper. BNA ANTITRUST & TRADE REG. REP. No. 357 (1968).

Antitrust litigation involving the problem of concentration of newspaper ownership has been a much more frequent occurrence. See, e.g., *Citizen Publishing Co. v. United States*, 37 U.S.L.W. 4208 (U.S. Mar. 10, 1969). For a general discussion of the problem, see Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968).

³ "Cross-media" ownership for purposes of this comment is defined as newspaper ownership of one or more broadcast media. Statistics show that the problem is not insubstantial.

[I]n 85 cities . . . the only daily newspaper owns an interest in the only AM station. In 78 cities newspapers own majority interests. Only 14 of these 85 cities are in metropolitan areas where listeners receive some measure of local radio service as an alternate. . . .

B. RUCKER, *THE FIRST FREEDOM* 192 (1968) [hereinafter cited as RUCKER]. In another fifty-one cities the only daily newspaper holds ownership in one of two AM stations. *Id.* On a national level 9.5 percent of all AM stations are affiliated with a newspaper, and 13.5 percent of all FM stations are affiliated with a newspaper. *Id.* 237. Of course, the affiliated newspapers included in these percentages are not necessarily in the same market as the broadcast media.

Furthermore, newspaper-television monopolies exist in twenty-seven cities, and in seventeen of these twenty-seven cities, unless the cities' residents installed tall outside antennas or subscribed to CATV, residents received no other television service. *Id.* 195. In another seventeen cities, the only daily newspaper owned a share of one of the only two local television stations. *Id.* In the top ten television markets, which, incidentally, include almost forty percent of all television households, thirty-seven of the forty VHF stations are owned by chain broadcasters and ten of the forty are licensed to companies that own newspapers. *Id.* 196. Nationally, 29.4 percent of all television stations are owned by newspapers. *Id.* 237.

In 1966, out of 1,503 franchises for CATV that had been granted, newspapers had interests in approximately 225, and 300 more newspapers were seeking franchises. *Id.* 176, 181.

place of thought." Yet the ownership of institutions charged with providing this competition—the mass media—has become so concentrated that the free interchange of ideas may no longer be possible.⁴ In such a situation, inadequate news coverage seems a likely result, and even blatant news management a distinct possibility.⁵ Further, there is elimination of competition not only in the market of ideas, but also in the market for commercial advertising. Offering package rates at a large discount may become common;⁶ and, even more seriously, tying arrangements could develop whereby to advertise in a newspaper it would be necessary to confine advertising in broadcast media to those owned by the newspaper.⁷ Regardless of whether there are anticompetitive practices, when a well-known newspaper commences operations of a broadcast station, it will necessarily get a competitive advantage over other media through "transferred good will."⁸ Furthermore, in the aesthetic realm, cross-media ownership creates the possibility of less imaginative programming by broadcast stations and less innovative reporting by newspapers.

The purpose of this comment is to discuss how cross-media ownership has been handled in the past by the Federal Communications Commission, to point out and discuss possible modes of attack under the existing anti-trust laws, and to suggest a possible solution to this major problem.⁹

FCC CONSIDERATION OF NEWSPAPER OWNERSHIP

The FCC is charged with the administrative task of licensing and supervising telecommunications facilities under the mandate of serving "public convenience, interest, or necessity."¹⁰ Its determinations are made

⁴ Ernst, *Introduction* to RUCKER at xvi.

⁵ On issues of local importance, it would be disturbing if there were a common editorial policy by substantially all the local media, especially in cities where all the newspapers are controlled by one company.

⁶ Comment, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365, 367 (1957) [hereinafter cited as Comment, *Diversification and the Public Interest*].

⁷ See, e.g., *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), cert. denied, 354 U.S. 923 (1957). Cross-media ownership could create rather strong psychological barriers to new entry into the market because of the combined power and advantages, the threat of tie-ins, and the possibility of package rate discounts.

⁸ P. AREEDA, *ANTITRUST ANALYSIS* 534-35 (1967).

⁹ Except to the extent that they affect cross-media ownership, the potential anticompetitive effects of chain ownership of the mass media will not be discussed. Similarly, concentration of ownership of the daily newspapers in a metropolitan area will be germane to this comment only with respect to the effects on cross-media ownership.

¹⁰ 47 U.S.C. § 307(a) (1964).

on three basic occasions: when granting licenses;¹¹ when renewing licenses;¹² and when approving license transfers.¹³ Consideration of newspaper ownership of an applicant station has depended on whether there was a sole applicant or a comparative proceeding.¹⁴ Satisfying only the minimum statutory requirements and the multiple ownership rules¹⁵ virtually assured the sole applicant of success.¹⁶ When granting a license in a comparative proceeding, however, the Commission has repeatedly stated that diversification of media ownership is a factor to be considered.¹⁷ Yet diversification has apparently never been considered when approving license transfers,¹⁸ and until recently was given little weight in license renewal hearings.¹⁹

Though the importance of the diversification factor in granting licenses has been uncertain,²⁰ during the 1950's and 1960's some relatively stable

¹¹ *Id.*

¹² *Id.* § 307(d).

¹³ *Id.* § 310(b).

¹⁴ The comparative proceeding is an administrative hearing wherein selection between competing applicants for a single license authorization is made. Comment, *Diversification and the Public Interest* 373; cf. 47 U.S.C. §§ 309, 409 (1964).

¹⁵ Multiple ownership rules are of two types: "duopoly" rules, discussed in note 1 *supra*, and "concentration of control" rules. The latter provide that no party may operate, hold, or control an interest in more than seven AM, seven FM, and seven television stations, no more than five of the television stations being VHF. 47 C.F.R. §§ 73.35(b), 73.240(a)(2), 73.636(a)(2) (1968). The "concentration of control" rules, though espousing diversification policy, are concerned only with intramedium holdings and abuses.

¹⁶ Comment, *Diversification and the Public Interest* 382. *But cf.* *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950) (refusal to enfranchise sole applicant because of flagrant predatory practices).

¹⁷ *E.g.*, *Cherokee Broadcasting Co.*, 25 F.C.C. 92 (1958). See generally Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?*, 42 *Geo. L.J.* 378, 380 (1954); Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 *Fed. Com. B.J.* 44, 45 (1966). The first reference to the question of newspaper ownership of broadcast facilities in Commission cases was in the dissenting opinion in *United States Broadcasting Corp.*, 2 F.C.C. 208, 240 (1936).

¹⁸ See Comment, *Diversification and the Public Interest* 386.

¹⁹ *WHDH, Inc.*, 37 U.S.L.W. 2429 (FCC Jan. 23, 1969), was apparently the first renewal hearing wherein diversification was instrumental in denying a license renewal. See also Comment, *Diversification and the Public Interest* 379.

²⁰ The newspaper owner prevailed in many cases. *Town Talk Broadcasting Co.*, 11 F.C.C. 919 (1947); *Capitol Broadcasting Co.*, 11 F.C.C. 859 (1947); *Orlando Daily Newspapers, Inc.*, 11 F.C.C. 760 (1946).

On the other hand, the unaffiliated applicant was frequently successful. *Sandusky Broadcasting Co.*, 11 F.C.C. 1383 (1947); *Central Broadcasting Co.*, 11 F.C.C. 1310 (1947); *City of Sebring*, 11 F.C.C. 873 (1947); *Voice of Augusta, Inc.*, 11 F.C.C. 733 (1946); *Daytona Beach Broadcasting Co.*, 11 F.C.C. 679 (1946); *Nashville Radio Corp.*, 11 F.C.C. 639 (1946); *Royal Miller Radio*, 11 F.C.C. 236 (1946); *Southern Tier Radio Serv., Inc.*, 11 F.C.C. 171 (1946).

policies developed.²¹ In a comparative proceeding newspaper ownership is a discrediting factor,²² but not a disqualifying one.²³ Its importance will depend upon the nature and extent of newspaper interests of the applicant.²⁴ It will be decisive only where the other comparative criteria have been equally met by the applicants.²⁵ Furthermore, where a single party applies for a particular license, there will be no hearing except where collateral public interest matters, such as suppression of competition, are material.²⁶

Apparently the first renewal hearing where the diversification criterion was recognized as bearing substantially on the public interest was *WHDH, Inc.*²⁷ in January, 1969. There the FCC in a totally unprecedented move²⁸ said that since the incumbent's operating record did not demonstrate "unusual attention to the public's needs or interests,"²⁹ it would

²¹ The conclusions stated in this paragraph were reached in Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 *FED. COM. B.J.* 44, 52 (1966).

²² The other factors traditionally considered in a comparative proceeding are: local ownership; integration of ownership and management; diversification of the backgrounds of the owners; participation in civic affairs; proposed programming; proposed program policies; carefulness of operational planning; relative likelihood of effectuation of proposals; broadcast experience; past broadcast record; technical facilities; staffing; violations of law and other reflections on character; and areas and populations to be served. W. JONES, *REGULATED INDUSTRIES*, 1081-84 (1967).

²³ *Cherokee Broadcasting Co.*, 25 *F.C.C.* 92 (1958); *WHEC, Inc.*, 24 *F.C.C.* 147 (1958); *Hi-Line Broadcasting Co.*, 22 *F.C.C.* 891 (1957); *Indianapolis Broadcasting, Inc.*, 22 *F.C.C.* 421 (1957).

²⁴ *Greater Princeton Broadcasting Co.*, 32 *F.C.C.* 389 (1962); *Florida Gulfcoast Broadcasters, Inc.*, 32 *F.C.C.* 197 (1962); *WIBC, Inc.*, 31 *F.C.C.* 835 (1961); *Madison County Broadcasters*, 30 *F.C.C.* 694 (1961); *Veterans Broadcasting Co.*, 29 *F.C.C.* 83 (1960); *Monocacy Broadcasting Co.*, 28 *F.C.C.* 301 (1960); *Historyland Radio*, 28 *F.C.C.* 69 (1960); *Enterprise Co.*, 24 *F.C.C.* 271 (1958); *Television East Bay*, 22 *F.C.C.* 1477 (1957).

²⁵ *Community Telecasting Corp.*, 32 *F.C.C.* 923 (1962); *Sucesion Luis Pirallo-Castellanos*, 26 *F.C.C.* 109 (1959); *Great Lakes Television, Inc.*, 25 *F.C.C.* 470 (1958); *Toledo Blade Co.*, 25 *F.C.C.* 251 (1958).

There have been aberrational cases, however, where diversification played a more significant role. For example, in *McClatchy Broadcasting Co. v. FCC*, 239 *F.2d* 15 (*D.C. Cir.* 1956), *cert. denied*, 353 *U.S.* 918 (1957), the Commission awarded a non-newspaper applicant a television construction permit even though it felt that the competing newspaper-affiliated applicant held a definite technical advantage by reason of its vast experience and record of public service.

²⁶ *Grants Broadcasting Co.*, 3 *P & F RADIO REG.* 2d 657 (1964); *Lewistown Broadcasting Co.*, 3 *P & F RADIO REG.* 2d 23 (1964); *Burlington Broadcasting Co.*, 21 *P & F RADIO REG.* 786 (1961); *Louis W. Skelly*, 18 *P & F RADIO REG.* 34 (1959); *Universal Broadcasting Co.*, 11 *P & F RADIO REG.* 569 (1956); *Birney Imes, Jr.*, 10 *P & F RADIO REG.* 1192 (1954); *Southern Newspapers, Inc.*, 10 *P & F RADIO REG.* 59 (1954); *Radio Fort Wayne, Inc.*, 9 *P & F RADIO REG.* 1221 (1954).

²⁷ 37 *U.S.L.W.* 2429 (*FCC Jan.* 23, 1969).

²⁸ See Comment, *Diversification and the Public Interest* 379-80 n.88.

²⁹ 37 *U.S.L.W.* at 2429.

be disregarded in comparing the application for renewal with competing applications for construction permits.³⁰ Granting the license to the successful contestant—a citizens group—was based on the grounds that it was superior in diversification³¹ and integration of ownership with management.³²

POSSIBLE THEORIES FOR CHALLENGE UNDER THE ANTITRUST LAWS

Independent of the "public interest" requirement of the Communications Act, newspaper ownership of broadcast facilities may be subject to challenge under section 2 of the Sherman Act³³ and section 7 of the Clayton Act.³⁴ Section 2 proscribes, *inter alia*, "attempting to monopolize" or "monopolizing" any part of interstate commerce.³⁵ Each of these offenses consists of two elements. The necessary requisites for "monopolizing" are (1) monopoly power and (2) the wilful creation, protection, or extension of that power;³⁶ whereas, for "attempts to monopolize," (1) monopoly as a goal and (2) a "specific intent" to monopolize must be shown.³⁷ Cross-media ownership may violate one of these provisions of the Sherman Act: (1) where a newspaper applies for a broadcasting license; (2) where a newspaper that already owns a broadcast medium is guilty of predatory behavior;³⁸ or (3) where a newspaper that owns a broadcast medium controls a substantial part of the cross-media market

³⁰ *Id.*

³¹ 37 U.S.L.W. at 1113.

³² *Id.* The FCC ruling is the latest in a prolonged legal battle that has continued since 1957 when the license was originally granted to WHDH, a subsidiary of the Boston Herald-Traveler Corporation. See, e.g., Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958), *cert. denied*, 366 U.S. 918 (1961).

The dissent in the latest Commission proceeding argued that the reasons for refusing WHDH's renewal should only be applicable to consideration of original applications. Commissioner Lee concluded that

[t]o hold otherwise would permit a new applicant to submit a "blue sky" proposal tailor-made to secure every comparative advantage while the existing licensee must reap the demerits of hand-to-hand combat in the business world, and the community it serves. . . .

37 U.S.L.W. at 2429.

³³ 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964).

³⁴ 38 Stat. 730 (1914), as amended 15 U.S.C. § 18 (1964).

³⁵ 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964).

³⁶ *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

³⁷ Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 304 (1956) [hereinafter cited as Turner].

³⁸ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957).

and attempts to continue its domination even if by generally acceptable practices.³⁹

Section 7 of the Clayton Act prohibits all mergers and other acquisitions that may either substantially lessen competition or tend to create a monopoly.⁴⁰ Those cross-media mergers between two companies marketing the same product in the same geographic market, *i.e.*, horizontal mergers,⁴¹ would seem most susceptible to Clayton 7 challenge.⁴²

³⁹ *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964). In *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), Judge Wyzanski, relying on the opinion of Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), condemned practices that, though "honestly industrial," were not "economically inevitable."

⁴⁰ 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 18 (1964).

⁴¹ For the traditional definition of a horizontal merger, see Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231, 1232 (1968).

⁴² Since the same geographic market is involved, there could, of course, be no truly conglomerate cross-media acquisitions. But certainly the three general types of anticompetitive consequences most often condemned in conglomerate mergers—alteration of the market structure, potential advantages, and an increased opportunity for anticompetitive behavior—might be considered. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

Courts have expressed concern about altering the market structure by loss of a potential competitor. This concern, however, is primarily directed toward situations where the merging company is either one of a few potential entrants or is for some reason unique. *Cf. FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967). Entry into a lucrative cross-media market would probably be open to any party so long as licenses are available. But it is arguable that the local newspaper, because of potential efficiencies, is a somewhat unique entrant. Although there would be many media companies outside the local area that might like to come into the market, they would not have the local newspaper's inherent advantages. Further, in most conglomerate cases, the courts emphasize that entry into the market would be better if done independently. *Id.* In the cross-media context, however, it is probable that if a merger should be barred, independent entry, by applying for a different license, should likewise be prohibited.

Cross-media mergers may create advantages for both of the merging companies. No longer will it be necessary for the two merging media to purchase advertising in the other's medium. Further, capital costs may be less, and efficiencies may be realized by joint use of many physical facilities and personnel. Attractiveness to certain advertisers may be enhanced since they can get package rate discounts.

The opportunity for anticompetitive behavior will be increased substantially. Where a newspaper and a television station merge, predatory pricing, and its milder counterpart, disciplinary pricing, may result because of the usually high profits of television stations that could offset newspaper losses from dropping prices. Also, tie-ins, threatening the loss of a favorable position in the newspaper, and other pressures may be adopted in order to win advertisers.

For a discussion of conglomerate mergers, see generally Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231 (1968); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

Relevant Market

For antitrust purposes, and in particular for purposes of section 2 of the Sherman Act and section 7 of the Clayton Act, the impact of restrictive economic activity is generally measured in the context of some relevant product and geographic market.⁴³ The starting point here is the identification of the interests affected by the common ownership of newspapers and broadcast stations. There are two primary interests: the consumer's interest in competition in the presentation of ideas and editorial viewpoints and the advertiser's interest in competition among the media for his business. A further breakdown is possible in terms of local news and advertising on one hand and national and regional news and advertising on the other. The latter problem is obviously less significant since there are alternative means of reaching the market, and the need for advertisers to do so by locally oriented media is not as crucial. Furthermore, courts have uniformly found that the needs of the local market constitute a sufficient entity for antitrust purposes and have consequently paid little attention to this problem.⁴⁴

For local advertisers the newspaper is clearly the preferred and therefore dominant medium, and it usually commands a very high percentage of the local advertising expenditures.⁴⁵ In addition, broadcast news is usually brief and condensed and as a result the newspaper offers the only source of detailed coverage that can be leisurely consumed. For these reasons, it is generally held that the local newspaper market is itself a suitable market or submarket.⁴⁶ This does not mean, of course, that newspaper ownership of, and anticompetitive practices directed at, broadcast media are immune from antitrust scrutiny, or even that a broader

⁴³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (horizontal merger); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (monopolizing); *United States v. Johns-Manville Corp.*, 231 F. Supp. 690 (E.D. Pa. 1964) (attempt to monopolize).

⁴⁴ *See, e.g., Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957).

⁴⁵ In 1962, newspapers considered as a whole controlled 80.2 percent of all local advertising revenues received by all newspapers, radio, and television stations. *See* H. HEPNER, *ADVERTISING—COMMUNICATION WITH CONSUMERS* 250 (4th ed. 1964). Radio controlled 11.9 percent and television 7.9 percent. *Id.* In the same year, there were 4,653 radio stations, 563 television stations, and approximately 1,749 newspapers. RUCKER 7, 237.

⁴⁶ *Citizen Publishing Co. v. United States*, 37 U.S.L.W. 4208 (U.S. Mar. 10, 1969); *United States v. Times Mirror Co.*, 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd per curiam*, 390 U.S. 712 (1968).

market of local advertising or local news presentation is not an appropriate market. Since local newspaper competition is frequently monopolistic and almost invariably oligopolistic, it is most important that any substitute competition be kept viable and independent, even though it offers only an outside limit to the newspaper's margin of competitive freedom. Thus, it has been held that predatory practices by a newspaper against broadcast media constituted attempted monopoly of the broader market,⁴⁷ and presumably it would be held that any non-economically inevitable behavior that interfered with or discouraged such substitute broadcast competition could be considered "monopolizing" in violation of section 2.⁴⁸

The question of whether local news and advertising is a single market would be directly confronted in cross-media mergers or acquisitions either under section 7 of the Clayton Act or section 2 (and maybe even section 1) of the Sherman Act.⁴⁹ In theory the question involved is whether broadcast media are a viable alternative to or offer a sufficient limitation on the newspaper's competition decisions. If the answer is in the affirmative, the market can be defined to include newspapers and broadcast media;⁵⁰ if it is not, the contrary will be true.⁵¹ Obviously either decision is inaccurate in this area, since the broader definition probably overstates the broadcast media's importance; whereas, the narrower one ignores it entirely.⁵² Thus, for large local advertisers like department stores or food stores, the broadcast media offer no realistic alternative to the newspaper, but for other businesses they may. Actually the decision is not crucial for merger cases since mergers between significant firms in separate markets that have competitive overlap may still violate section 7.⁵³ Nevertheless, the United States Supreme Court has, for other reasons to be discussed below,⁵⁴ tended recently in such situations to merge the firms

⁴⁷ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

⁴⁸ *Cf. United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (discouraging competition in used machinery market by a restrictive leasing policy).

⁴⁹ 15 U.S.C. § 1 (1964).

⁵⁰ *Cf. United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

⁵¹ *Cf. United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

⁵² *See generally* Turner.

⁵³ In *United States v. Continental Can Co.*, 378 U.S. 441 (1964), Justice Harlan, in his dissenting opinion, noted that the Court was accepting the Government's argument that wherever there is competition there is a "line of commerce." *Id.* at 471 n.6.

⁵⁴ See the "numbers game" discussion, pp. 807-08 *infra*.

into a single line of commerce for section 7 purposes, and there is some likelihood it would do so here.⁵⁵

The geographic market is generally the local metropolitan area. Usually it is of no consequence that newspapers and broadcast media from nearby cities reach the local market since they will not carry substantial amounts of local advertising and will not offer significant local news coverage.⁵⁶

Section 2 of the Sherman Act

Monopolizing

Monopoly power has often been defined as the power "to raise prices or to exclude competition when it is desired to do so."⁵⁷ This means that a firm has freedom, without regard to competitive restraints in the markets, to choose within some range the price it will set and thus maximize its profits. By contrast, in the truly competitive situation the price is determined by the interaction of market forces, and it will ordinarily yield the minimum profit that justifies the investment and labor.

Monopoly power is not legally measured by this criterion. Instead it is generally inferred or presumed from the share of the market controlled by a firm.⁵⁸ Judge Learned Hand once suggested in dictum that a ninety percent market share clearly constituted monopoly power, that sixty percent was doubtful, and that thirty per cent was clearly not sufficient.⁵⁹ Where the numbers are close, such factors as ease of entry, the size of other competitors, and the existence of foreign competition may influence the determination.

The mere possession of monopoly power is not a violation of section 2.⁶⁰ Otherwise natural monopolies—those existing by operation of

⁵⁵ *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964).

⁵⁶ *Citizen Publishing Co. v. United States*, 37 U.S.L.W. 4208 (U.S. Mar. 10, 1969) (joint venture between two newspapers); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957) (attempt to monopolize and monopolizing in a cross-media market); *United States v. Times Mirror Co.*, 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd per curiam*, 390 U.S. 712 (1968) (merger between two daily newspapers).

⁵⁷ *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

⁵⁸ *See, e.g., United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

⁵⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

⁶⁰ *See United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920). *See generally Levi, The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947); Rostow, *Monopoly*

law, such as a patent monopoly, and those that emerge victorious from honest competition—would be in violation. Any abuse of the power, however, is illegal.⁶¹ Thus, predatory behavior or violations of other antitrust laws that preserve or enhance the power will constitute monopolizing if engaged in by a firm with monopoly power. Such behavior could consist of tie-in arrangements,⁶² refusals to deal with anyone patronizing a competitor,⁶³ and non-cost-justified package rate discounts.⁶⁴ The cases go further, however, and hold that any non-economically inevitable market behavior that has the same effects, even though “honestly industrial” and engaged in by the monopolist’s competitors, will also constitute monopolizing.⁶⁵ Finally, the cases suggest that such behavior by a monopolist with respect to a substitute product will similarly constitute monopolizing of his own market.⁶⁶

Preventing the creation of cross-media monopolies is equally as important as attacking existing monopolies. This may be done on two

Under the Sherman Act: Power or Purpose, 43 ILL. L. REV. 745 (1949); Turner 281.

Recently the Antitrust Division intervened in a license renewal hearing for a television station in Cheyenne, Wyoming, and urged that the FCC deny the application. It alleged that the applicant, the owner of almost all the local media, had monopoly power, but apparently not finding any abuse of such power, it did not charge that the applicant was guilty of monopolizing. Nevertheless, the Antitrust Division maintained the license should be denied since it was improper for the FCC to further a monopolistic situation. BNA ANTITRUST & TRADE REG. REP. No. 391 (1969).

⁶¹ See, e.g., *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

⁶² *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), cert. denied, 354 U.S. 923 (1957).

⁶³ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

⁶⁴ *Radio Fort Wayne, Inc.*, 9 P & F RADIO REG. 1221 (1954).

⁶⁵ E.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Although cost-justified package rate discounts may constitute honestly industrial but non-economically inevitable behavior, such conduct may be difficult to demonstrate. In *Alcoa*, the Court considered the company’s constant expansion of capacity in anticipation of increased demand and before others could enter the field to be sufficient. 148 F.2d at 430-31. Of course, it is arguable that in the cross-media context increasing the size of a newspaper or the length of time on the air for a broadcast station would be similar to the behavior in *Alcoa*. Furthermore, enlarging the staff of advertising salesmen is arguably adequate. The three latter types of activity, however, seem to be in reality economically inevitable. The size of the paper or the length of time on the air will probably not be increased until advertising revenue so justifies. With respect to the advertising salesmen, they probably will be employed only after the demand demonstrates the need for enlarging the staff.

⁶⁶ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

occasions—when newspapers merge with broadcast media and when newspapers apply for broadcast licenses. Of course, a cross-media merger may also be vulnerable to challenge as a combination to monopolize under section 2,⁶⁷ a combination in restraint of trade under section 1 of the Sherman Act,⁶⁸ and as a horizontal merger unlawful under section 7 of the Clayton Act.

In 1962, newspapers controlled 80.2 percent of all newspaper, radio and television local advertising; whereas radio controlled 11.9 percent and television 7.9 percent.⁶⁹ Assuming the existence of a hypothetical metropolitan area with these percentages, if there were only one newspaper and it merged or applied for a broadcast license, it would have monopoly power. Although this is probably the only instance where the application alone will be subject to a monopolizing charge, there would probably have to be a competing applicant for there to be an abuse of such monopoly power. Where a city has several newspapers controlled by different parties with approximately equal local advertising revenues, a merger between one newspaper and a broadcast station will probably not give it monopoly power because even if the newspaper already controls all other broadcast media, the maximum share of the market it could control would be approximately sixty percent. Of course, if monopoly power is found, the act of merging with the broadcaster would probably constitute a sufficient "plus" element.

Attempt to Monopolize

If the newspaper ownership of broadcast facilities does not constitute a sufficient share of the market to presume monopoly power, the charge of attempting to monopolize might offer an alternative basis for challenge. Here the attention will be focused on whether there is some chance of achieving a monopoly and the existence of a "specific intent" to monopolize.⁷⁰ A showing of non-economically inevitable behavior will be inadequate to demonstrate such intent.

In a metropolitan area with the percentage shares for each of the media assumed above—newspapers 80.2 percent, radio 11.9 percent, and television 7.9 percent—numerous types of egregious behavior could be practiced effectively by the newspaper-owned media. In most cities there

⁶⁷ 15 U.S.C. § 2 (1964).

⁶⁸ 15 U.S.C. § 1 (1964).

⁶⁹ See H. HEPNER, *ADVERTISING—CREATIVE COMMUNICATION WITH CONSUMERS* 250 (4th ed. 1964).

⁷⁰ See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

will rarely be more than two competing newspapers. Often the two will be a morning and an afternoon and therefore even if they are not owned by the same party certain advertisers of necessity will have to advertise in both. Such advertisers might be pressured into accepting tie-in arrangements that force them to advertise with the broadcast media to be able to advertise in the newspaper.⁷¹ Further, the advertisers may be told that advertising with competing media may result in a refusal to sell by the newspaper,⁷² or there may be threats of loss of favorable position in the newspaper.⁷³ To assure the effectiveness of such behavior, the media may offer rebates on advertising⁷⁴ or non-cost-justified package rate discounts.⁷⁵ Finally, the cross-media owner may engage in blatant predatory pricing to drive the media competitor, whether newspaper or broadcaster, out of business.⁷⁶

The combination of reprehensible behavior sufficient to constitute the requisite "specific intent" is uncertain. In *Lorain Journal Co. v. United States*,⁷⁷ the Court found an attempt-to-monopolize violation where the only local newspaper refused to sell advertising to businesses that advertised with a neophyte radio station. The Court realized that since the newspaper had such a strong competitive position, the newspaper's conduct would eventually lead to the extinction of the radio station. Of course, the newspaper could presumably have further been charged with monopolizing. Generally, in the attempted monopoly cases, where the market share is not large enough to presume monopoly power, the conduct evidencing the attempt and the market share must be sufficient to demonstrate a "dangerous probability"⁷⁸ of successfully obtaining monopoly power. Furthermore, it seems that, notwithstanding the general rule that the market share is relatively insignificant in attempt cases, the seriousness

⁷¹ *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957).

⁷² *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

⁷³ *Kansas City Star Co. v. United States*, 240 F.2d 643, 656 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957).

⁷⁴ *See Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *aff'd as modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

⁷⁵ *See Radio Fort Wayne, Inc.*, 9 P & F RADIO REG. 1221 (1954).

⁷⁶ *See United States v. Lindsay-Schaub Newspapers, Inc.*, 1967 Trade Cas. ¶ 72,085 (E.D. Ill.).

⁷⁷ 342 U.S. 143 (1951).

⁷⁸ *See American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946). Professor Turner reasons that a refined analysis of the market is unnecessary in attempt cases because the type of conduct sufficient to show the requisite "specific intent" is without "social or economic justification." Turner 305.

and the extent of egregious behavior must increase as the market share decreases in order to demonstrate the requisite probability of success.

Section 7 of the Clayton Act—Horizontal Mergers

Section 7 of the Clayton Act requires a predictive judgment as to the probability that a merger may substantially lessen competition.⁷⁹ But the difficulties that could result from attempting factually to justify such a conclusion are numerous. A gigantic record might be produced and after several months of trial it might not be clear whether the trial judge could say competition would be substantially lessened. Thus, the Supreme Court has developed a short-hand approach. Where a market is already heavily concentrated, a merger between leading firms therein that produces a firm with a large percentage of the market will presumptively lessen competition or make out a prima facie case with the difficult burden to demonstrate the contrary on the defendant.⁸⁰ The idea is that competitors in a concentrated market eschew price competition and adopt a "live and let live" attitude. The higher the concentration, the greater the chance they will cooperate and behave like monopolists to achieve the highest possible profit consistent with other objectives, such as discouraging entry or avoiding governmental scrutiny. Mergers facilitating such concentration are presumptively anticompetitive.⁸¹

Furthermore, even where there are numerous small firms in a market, the Court might not undertake a detailed consideration of the economic results of a merger because approving such a merger might lead to requests for authorization of mergers creating a firm of a similar size.⁸² Allowing such a pattern of mergers would tend to create a tight oligopoly wherein the parties, realizing that any price decrease or increase will be followed by their competitor, would individually maximize profits.⁸³

Although the minimum percentage market share for a merger to be held presumptively unlawful is not known, the Supreme Court has held that 30 percent is sufficient.⁸⁴ Obviously the identification of the market is of utmost importance here. Presumably, as noted earlier, a market could be defined to include all local commercial advertising.⁸⁵ Applying

⁷⁹ 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

⁸⁰ United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

⁸¹ *Id.*

⁸² Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

⁸³ *Id.* See generally Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967).

⁸⁴ United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

⁸⁵ See pp. 801-03 *supra*.

the 30 percent test in such a market would make many cross-media mergers *prima facie* unlawful.

Since it is very rare that a metropolitan area is served by more than three newspapers, in the hypothetical market that we assumed above, where newspapers controlled 80.2 percent of the local advertising, radio 11.9 percent and television 7.9 percent, it would be impossible for newspapers in most cities to merge with a broadcast medium. Obviously, because of the paucity of the media, almost all are leading firms, and even if a city had three newspapers with approximately equal revenue, the acquired broadcaster would only have to control about 3 percent of the market for the percentage to be "undue."⁸⁶ In cities with only one or two significant newspapers, all mergers by these papers would usually create a firm that would exceed the thirty percent line. It is arguable that the courts either might be stricter in finding the required percentage, because the products are substitutes, or might be less concerned because of the oligopoly and entry problems.⁸⁷ Of course, though the total percentage after the merger is sufficient, the acquired broadcast media, especially radio

⁸⁶ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

⁸⁷ Entry into the local advertising market is generally very difficult because of either economic or technical problems. Radio and VHF television entry is often limited because the spectrum has become crowded. RUCKER 82, 91-93. Furthermore, the future establishment of newspapers, AM and FM radio stations, and UHF television stations will probably be inhibited because many of these media do not realize a profit.

Though CATV is not generally a competitor for local advertising, as a potential entrant its entry problems should be noted. Obtaining a franchise from the municipality's governing body is the primary requirement. In some cities, franchises are granted for the exclusive right to wire a part or all of a city for CATV. Of course, in such cities there will be no competition for strictly CATV advertising. Even where the franchises are not exclusive, most cities will be unable to support more than one system. RUCKER 176. The FCC, which assumed jurisdiction over virtually all CATV systems in 1966, is responsible for an entry barrier of a different nature. A CATV system that intends to import signals from distant stations into the primary service area of a station which is in the top one hundred markets is required to obtain permission from the FCC. RUCKER 178. As a result, in the larger cities without CATV, one of the few potential competitors that can enter and compete effectively with existing media is significantly handicapped. Furthermore, even though a non-exclusive CATV system may be approved, the FCC ruling will present a substantial barrier to additional entries into a market which can support more than one CATV system. Regardless of whether the FCC continues this policy, it should accept the responsibility of preventing the creation of further cross-media complexes involving CATV. Statistics indicate that the newspapers are rapidly developing such systems. See note 3 *supra*. Of course, even more objectionable than newspaper ownership of CATV would be television ownership of CATV. Such ownership would eliminate competition for advertising between technically identical media and would circumvent the duopoly rules that restrict ownership to one television station in the same market. 47 C.F.R. § 73.636(a)(1) (1968).

stations, might control such a small market share that the effect of the merger may be de minimis.⁸⁸ In such instances the merger would probably be immune to challenge.

In markets where newspapers do not control such a high percentage of the local advertising revenue, it is arguable that the market may be juggled to include only the two types of merging media in order to show the necessary combined market share. In *United States v. Continental Can Co.*,⁸⁹ the Court identified a submarket of only glass and can containers even though there were other types of containers that competed for the same end uses. Probably the use of this analysis would be most desirable in challenging newspaper-radio mergers. Yet the two media are not as substantially interchangeable as in *Continental Can*, and thus modifying the market definition might not be a viable alternative.

Although a cross-media merger may not be susceptible to challenge under the so-called "numbers game" approach, the courts may still block the merger if future approval of similar cross-media mergers might further the creation of an oligopoly.⁹⁰ But to apply this reasoning, the newspapers would have to be merging with broadcasters whose portion of the local advertising revenue is not de minimis. Of course, only small radio stations and UHF television stations would likely have such an insignificant revenue from advertising. For example, if in the local market there were three newspapers and three television stations with substantial advertising revenue and one of each were merging, the first merger might not produce a firm with thirty percent of the market, but the courts would probably deny approval.⁹¹

Once a cross-media merger is found vulnerable to Clayton 7 challenge, it is very unlikely that the acquiring company can avail itself of a successful defense. Usually the courts will feel the potential evils outweigh any benefits engendered by such mergers.⁹² The only possible defense available might be that one of the merging media is a "failing company."⁹³ Recent cases, however, show that this is difficult to demonstrate,⁹⁴ and the un-

⁸⁸ See *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (Rome Cable).

⁸⁹ 378 U.S. 441 (1964).

⁹⁰ See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 343-44 (1962).

⁹¹ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁹² *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962).

⁹³ See generally Comment, *An Updating of the "Failing Company" Doctrine in the Amended Section 7 Setting*, 61 MICH. L. REV. 566 (1963).

⁹⁴ *Citizen Publishing Co. v. United States*, 37 U.S.L.W. 4208 (U.S. Mar. 10, 1969).

successful firm must be on the verge of bankruptcy before it can take advantage of this defense.⁹⁵ Mere unprofitability is not sufficient, and even if a company is in the required financial condition, it must show that it has fully explored the possibilities of self-help.⁹⁶

SUGGESTED SOLUTION

The foregoing analysis has indicated that in a substantial number of cities, newspaper ownership of broadcast facilities may constitute a violation of the antitrust laws. Though the Antitrust Division has primary responsibility for enforcement of the antitrust laws, the FCC in applying the "public interest" requirement of the Communications Act should analyze the competitive effects of cross-media ownership by application of the economic analysis and tests developed under section 2 and section 7.⁹⁷ It should do this when granting new licenses, renewing existing licenses and approving license transfers.⁹⁸ The Commission has expertise in the communications area that uniquely qualifies it as the forum to consider the antitrust implications. In addition, the costs of bringing separate antitrust actions against the media owners would probably limit

⁹⁵ See Dept. of Justice, *Antitrust Div. Merger Guidelines*, BNA ANTITRUST & TRADE REG. REP. No. 363 (1968).

⁹⁶ *Id.*

⁹⁷ Senator Clarence Dill, who wrote the Communications Act, recently stated:

If I had dreamed that newspapers would acquire radio and television stations, I would have written a prohibition into the act. Certainly newspapers which occupy monopoly positions in a city should not be permitted also to own radio and television stations. This country cannot afford to have monopoly over public opinion any more than it can afford to have monopoly in industry.

Pearson & Anderson, *Washington Merry-Go-Round*, News and Observer (Raleigh, N.C.), Mar. 26, 1969, at 4, col. 7.

⁹⁸ The FCC could apply the antitrust laws either by administrative decision or by using its statutory rule-making powers. 5 U.S.C. §§ 1001-1009 (1964).

The Antitrust Division filed memoranda recently in two instances urging that the FCC adopt this procedure. In Beaumont, Texas, the owner of the only two daily newspapers sought permission from the FCC to acquire the television license of the largest of three stations in the area. The Antitrust Division brief argued that the acquisition would be invalid under Clayton 7. BNA ANTITRUST & TRADE REG. REP. No. 357 (1968). The Division also sought to block the television license renewal of Frontier Broadcasting Company in Cheyenne, Wyoming. The company controls most of the local media in that city—an AM station, the only daily and Sunday newspapers, and a construction permit for the city's second FM station—in addition to the television station. The Antitrust Division argued that the licensee had monopoly power, but did not argue that the monopoly power was in violation of section 2. It based its opposition to renewal on the impropriety of perpetuating a monopoly in the licensing procedure. BNA ANTITRUST & TRADE REG. REP. No. 391 (1969).

suits to larger metropolitan areas. Scrutiny by the FCC would virtually eliminate the necessity of the Antitrust Division's originating actions in the courts.⁹⁹

Such a procedure seems consistent with *United States v. Radio Corporation of America*,¹⁰⁰ where Chief Justice Warren wrote: "[I]n a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met"¹⁰¹ Moreover, the Supreme Court has recently emphasized that where the principles and goals of antitrust policy and the public interest requirement applied by a regulatory agency are closely related, it is both permissible and desirable for the agency to refer to antitrust guidelines.¹⁰²

After the FCC determines that there is an antitrust violation, the question arises as to what it should do. By combining the usual antitrust remedies¹⁰³ with the Commission's statutory powers to grant,¹⁰⁴ modify,¹⁰⁵

⁹⁹ An action by the Antitrust Division before consideration of the matter by the FCC would raise the issue of primary jurisdiction. *Cf. Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The doctrine of primary jurisdiction is applied to determine whether a matter shall be considered by a regulatory agency before the matter comes under judicial scrutiny. Broadcasters are not specifically exempted from the antitrust laws, and it has been held that they are subject to prosecution under them. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959). Furthermore, if an antitrust proceeding is pending, *California v. Federal Power Comm'n*, 369 U.S. 482 (1962), seems to hold that action by an agency is invalid. That case involved the Natural Gas Act, but the dissent said:

The holding . . . is not limited to Federal Power Commission proceedings . . . and the Court appears to lay down a pervasive rule . . . that seemingly will henceforth govern every agency action involving matters with respect to which the antitrust laws are applicable and antitrust litigation is then pending in the courts.

Id. at 491.

¹⁰⁰ 358 U.S. 334 (1959).

¹⁰¹ *Id.* at 351.

¹⁰² *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *accord, Sabre Shipping Corp. v. American President Lines, Ltd.*, 37 U.S.L.W. 1005 (U.S. 1969); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

¹⁰³ Sherman Act § 4 and Clayton Act § 15 confer jurisdiction on the federal courts "to prevent and restrain violations of this act. . . ." 15 U.S.C. §§ 4, 25 (1964). The Supreme Court has understood its power under this statute to embrace "such orders and decrees as are necessary or appropriate" to enforce the statute. *Northern Sec. Co. v. United States*, 193 U.S. 197, 344 (1904). The types of remedies ordered under these sections of the Sherman and Clayton Acts are: (1) enjoining the bad practices; (2) depriving the defendant of the fruits of his anticompetitive actions; and (3) divestiture. *See, e.g., United States v. United Shoe Mach. Corp.*, 88 S. Ct. 1496 (1968), *United States v. Aluminum Co. of America*, 91 F. Supp. 333 (S.D.N.Y. 1950).

¹⁰⁴ 48 Stat. 1083 (1934), *as amended*, 47 U.S.C. § 307 (1964).

¹⁰⁵ 66 Stat. 718, 47 U.S.C. § 316 (1964).

or revoke¹⁰⁶ licenses, a satisfactory solution balancing public and private interests can be reached in most situations.

Original Applications

Designing a remedy for the problem of granting new broadcast licenses to newspaper owners where such an award would violate antitrust laws can best be handled by considering separately the situations where there is a sole applicant and where there is more than one applicant.

Generally the approach of the FCC has been to grant a license to the sole applicant without considering other media connections.¹⁰⁷ As in the comparative proceeding, it has adhered to the "relatively best" orientation, and since there is no rival with which the applicant is compared, this party invariably "wins."¹⁰⁸ Where there are antitrust violations, however, the license generally should not be granted even if there is only one applicant.

Of course, concededly, under some circumstances a party should still be permitted to expand its holdings in the mass media. In those few communities of the country, for example, which presently enjoy no television services or receive but one station, there are cogent factors in favor of enfranchising an affiliated¹⁰⁹ party that alone applies for an outlet. As an existing operator in the mass media field, with established news gathering and advertising placement facilities, this party can rely upon substantial economies of dual operation when embarking upon the television venture. If other outlets are technically allocable to the community, when the advertising revenue increases, other unaffiliated applicants can come in.¹¹⁰

In a comparative proceeding where an unaffiliated applicant is competing, the obvious solution is to award the license to this party. Of course, if the unaffiliated contestants are unqualified the same considerations apply as when there is a sole applicant.

Renewals

Until recently the FCC gave little weight to diversification principles in determining whether to renew the license of an established party or

¹⁰⁶ 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 312 (1964).

¹⁰⁷ Comment, *Diversification and the Public Interest* 382.

¹⁰⁸ See, e.g., Birney Imes, Jr., 10 P & F RADIO REG. 1192 (1954).

¹⁰⁹ An affiliated party is one who has local newspaper connections. An unaffiliated party does not.

¹¹⁰ Comment, *Diversification and the Public Interest* 395.

to enfranchise competing applicants.¹¹¹ However, as noted previously, in *WHDH, Inc.*¹¹² the statutory requirement that the renewal applicant serve the "public interest" was used as a basis to deny renewal when the incumbent had only an average record of serving the public interest, and the license was awarded to one of the contestants partially because it had no affiliations with other media.¹¹³

Although the result reached in this one instance was satisfactory, it apparently was unprecedented¹¹⁴ and there is no reason to believe that a massive assault on newspaper owned stations will follow if the diversification criterion continues to be looked upon as only one consideration. Again, a full scale inquiry by the FCC into antitrust implications would be more suitable, and when violations are found, appropriate action in the form of either denial of the renewal application or contingent renewal should be taken.

Where the incumbent is competing with other applicants for a particular license, and the comparative proceeding indicates that an unaffiliated contestant is qualified, this party should receive the license. This result occurred in *WHDH* and apparently no consideration was given to the potential economic burden to the incumbent owner. At any rate, a better result would be to design a decree whereby the unaffiliated contestant would purchase the physical facilities from the former holder of the license at a reasonable price set by the FCC. Of course, the incumbent would have the option not to sell.

Where there are no other applicants and in effect the incumbent is the sole applicant, even more difficult problems arise. It would clearly be inequitable to require that, regardless of whether there was a buyer, the incumbent abandon operations. Furthermore, even if there were a buyer, the price offered would probably be unconscionably low since the broadcast owner would be selling at a "forced" sale. An equitable solu-

¹¹¹ For example, in *Hearst Radio, Inc.*, 6 P & F RADIO REG. 994 (1951), the Commission was confronted with the choice of renewing a party with a mediocre past programming record or enfranchising a highly qualified newcomer. Although finding that the newcomer was superior on major comparative criteria, and that, in contrast to the newcomer's unaffiliation, the incumbent controlled one television, three AM, and two FM stations, plus vast newspaper interests, the Commission renewed on the basis of the "clear advantage of continuing the established [party]. . . ." *Id.* at 1034. Of course, not all of the incumbent's media were in the same city, but the situation was nevertheless deplorable.

¹¹² 37 U.S.L.W. 2429 (FCC Jan. 23, 1969).

¹¹³ *Id.*

¹¹⁴ See Comment, *Diversification and the Public Interest* 379-80 n.88.

tion would seem to be to renew the license for three years¹¹⁵ or until the operator can sell the station to a qualified purchaser at a reasonable price, whichever is sooner.¹¹⁶ Where questions arise, as they inevitably will, as to what is a reasonable price and who is a qualified purchaser, the FCC will be the final arbiter. Of course, the result might be that the newspaper owner may continue to operate the station forever, but at least there is a chance that his cross-media ownership might be severed.

Transfers

Although the "public interest" standard also governs the transfer section of the Act,¹¹⁷ a 1952 amendment provides that a transferee must be considered as if it were the sole transferee.¹¹⁸ But since no comparisons to other possible transferees are required, this should not inhibit the application of section 7. Of course, denial of the transfer application will prevent the completion of the transaction and is therefore an adequate solution.¹¹⁹

CONCLUSION

The FCC, acting under the mandate of serving the "public interest," should forthrightly assert that future grants, renewals and transfers of broadcast licenses will be scrutinized in the light of section 2 of the

¹¹⁵ Licenses are generally renewed for a period of three years. See Hale & Hale, *Competition or Control II: Radio and Television Broadcasting*, 107 U. PA. L. REV. 585, 587 (1959).

¹¹⁶ The FCC can accomplish this by use of its statutory right to renew licenses for up to three years. 47 U.S.C. § 307(d) (1964). A similar remedy was suggested by the Antitrust Division when the television license of Frontier Broadcasting came up for renewal. BNA ANTITRUST & TRADE REG. REP. No. 391 (1969). For the factual context of this request, see note 98 *supra*.

¹¹⁷ 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

¹¹⁸ [T]he Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

In the past the Commission had considered the relation of the price paid to the value of the station, the qualifications of the transferee, and benefits to the public deriving from the grant. Much of this scrutiny had been dropped, however, even prior to the 1952 amendment. See Note, *Radio and Television Station Transfers: Adequacy of Supervision Under the Federal Communications Act*, 30 IND. L.J. 351 (1955). Some writers have felt that the amendment may limit inquiry to the broadcast qualifications of the transferee. Wall & Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 153 (1953).

¹¹⁹ This was the remedy suggested by the Antitrust Division when a newspaper-owned company in Beaumont, Texas, sought to have a license transferred to it. BNA ANTITRUST & TRADE REG. REP. No. 357 (1968).

Sherman Act and section 7 of the Clayton Act. Certainly in the past it was somewhat intimidated by Congress into its passivity,¹²⁰ but it is not too much to say that the time has come for the FCC

to show some intestinal fortitude and protect the linchpin of any democratic society from private domination by insuring a free, competitive, and independent multitude of voices in the communications industry.¹²¹

Furthermore, should the FCC not accept this responsibility, the Congress should formally amend the Communications Act thereby directing the Commission to dispose of licenses in light of the antitrust laws and decisions. Many may retort that the expense of such inquiries will be too great, but the reply must be that the cost cannot be too great if it insures the freedom of the press.

WILLIAM H. LEWIS, JR.

An Analysis of the Enforceability of Marital Contracts

I. INTRODUCTION

This comment will analyze the treatment of marital contracts by the North Carolina courts. The focus is upon contracts in the context of a marriage rather than upon either contracts or domestic relations alone. A broader question, however, is posed: Is the law of contracts the most meaningful method available for the analysis and expression of public policy concerning marital contracts?

A recent example of the judicial approach to marital contracts is found in *Matthews v. Matthews*.¹ The issue was the enforceability of an alleged marital contract entered into after twelve years of marriage. Fourteen years after the date of the purported contract an absolute divorce had been entered, and the plaintiff-husband had petitioned for a sale and partition of lands that he and his defendant-wife had held as tenants in common. She produced the alleged contract signed by plaintiff in which plaintiff

¹²⁰ In the early 1950's, Congress considered amending the Communications Act to prohibit discrimination against newspapers when considering applications for broadcast licenses. See, e.g., H.R. Rep. No. 2326, 82d Cong. 2d Sess. (1952). Fortunately, no such law was ever enacted.

¹²¹ Flynn, *Antitrust and the Newspapers: A Comment on S. 1312*, 22 VAND. L. REV. 103, 125 (1968). See generally Johnson, *The Media Barons and the Public Interest*, THE ATLANTIC MONTHLY, June 1968, at 43.

¹ 2 N.C. App. 143, 162 S.E.2d 697 (1968).