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Should the Internet Exempt the Media Sector from the Antitrust Laws?

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SHOULD THE INTERNET EXEMPT THE MEDIA SECTOR FROM THE ANTITRUST LAWS?

*Thomas J. Horton & Robert H. Lande**

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INTRODUCTION

Suppose the twenty largest traditional news media companies in the United States, including the *Wall Street Journal*, *New York Times*, *Washington Post*, ABC, NBC, CBS, Fox, and CNN, announced the merger of their news operations.

They would likely claim that this merger would result in tremendous cost savings by eliminating duplicative news gathering expenses. They

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would be correct. They also would argue that prices would not be affected. After all, they compete for advertising dollars and personnel with many other TV and radio shows that are not in the news business. It would be difficult to demonstrate an adverse effect on the price of anything.¹ However, just in case the antitrust enforcers argue that some prices might be affected, suppose the media companies also announced that, if allowed to merge, they'd agree never to raise the price of anything—not of advertising rates, not of newspapers, not of anything.²

If this merger were challenged, surely the media companies would play their trump card: the Internet. They would point out that there are an almost infinite number of news sources on the Internet and that barriers to entry into the Internet news business are extremely low. They would argue that if the relevant market were defined to include the Internet, this merger should be permitted because competition via the Internet would prevent any exercise of market power in any relevant market. In light of the mystical and magical world of the Internet, how could the merger of even the twenty largest traditional—and also the twenty largest nontraditional—media companies pose a competitive problem?

Is there any principled basis by which such an arrangement could—or should—be blocked under the antitrust laws? Indeed, shouldn't almost any media merger, consolidation, monopolization scheme, vertical arrangement, or joint venture be approved automatically because, due to the rise of online media, it would be difficult or impossible for the antitrust enforcers to prove that any media firm has the requisite market power for an antitrust violation?³

Although this scenario is unlikely to occur, a harbinger of the future role of antitrust in the media sector occurred in Charleston, West Virginia from 2004 to 2010 in *United States v. Daily Gazette Co.*⁴ Ever since 1880, Charleston's citizens enjoyed the benefits of aggressive editorial and reporting competition between two local daily newspapers, the *Charleston Gazette* and the *Charleston Daily Mail*.⁵ The *Charleston*

1. It also would be difficult to demonstrate monopsony power over reporter and newscaster wages because they could instead seek employment in the new media or elsewhere.

2. Similarly, suppose they promised not to lower the price they paid for labor or any other input.

3. Only per se violations that do not require market power in a well-defined market, such as naked price fixing, would remain as antitrust violations. For an analysis of practices that constitute such violations, see LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 165–285 (2000) (discussing horizontal restraints).

4. 567 F. Supp. 2d 859, 861–62 (S.D.W. Va. 2008).

5. *See id.*; Complaint at 2, *United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859 (S.D.W. Va. 2008) (No. 2:07-0329), 2007 WL 2295551. An excellent example of the newspapers' diverging views is seen in the labeling of the *Daily Gazette's* former publisher W.E. "Ned" Chilton III, "as a firebrand liberal." *See generally The Charleston Gazette*,

Gazette generally appealed to more liberal readers while the *Charleston Daily Mail* had a more conservative base. Both papers aggressively pursued readers in West Virginia's capital city.⁶ Their intense daily editorial and reporting competition continued even after the newspapers' owners entered into, as partners, a Joint Operating Agreement (JOA) in 1958.⁷

On May 7, 2004, the *Charleston Gazette's* owner, the Gazette Company, decided to purchase and shut down the *Charleston Daily Mail*.⁸ The U.S. Department of Justice Antitrust Division later sued to rescind the transaction under § 7 of the Clayton Act⁹ and §§ 1 and 2 of the Sherman Act.¹⁰ The Antitrust Division alleged that the deal enabled the Gazette Company to monopolize the Charleston, West Virginia local daily newspaper market.¹¹

WIKIPEDIA, http://en.wikipedia.org/wiki/The_Charleston_Gazette (last visited June 27, 2013). Indeed, former West Virginia governor Arch A. Moore, Jr., a notable conservative, renamed the Charleston Gazette "The Morning Sick Call." *Id.* Ned Chilton's widow, Betty Chilton, has continued as the publisher of The Daily Gazette. *Id.*

6. *See Daily Gazette*, 567 F. Supp. 2d at 862; Complaint, *supra* note 5, at 7.

7. *Daily Gazette*, 567 F. Supp. 2d at 862; Complaint, *supra* note 5, at 2.

8. The Gazette Company acquired all the assets of the *Charleston Daily Mail*, including ultimate control over the budget, management, news gathering, and reporting of the *Charleston Daily Mail*. *Daily Gazette*, 567 F. Supp. 2d at 863; Complaint, *supra* note 5, at 2–3. Immediately after acquiring control of the *Charleston Daily Mail*, the Gazette Company began implementing a plan "to weaken the [*Charleston*] *Daily Mail* to the point where it would fail and could be eliminated as a competitor to the *Charleston Gazette*." *Id.* at 3. Affirmative steps included stopping all promotions and discounts for the *Charleston Daily Mail*; stopping the solicitation of new readers for the *Charleston Daily Mail*; stopping delivery to thousands of *Charleston Daily Mail* customers and converting other *Charleston Daily Mail* subscribers to the *Charleston Gazette*; ending the Saturday edition of the *Charleston Daily Mail*; and drastically cutting the *Charleston Daily Mail's* editorial and reporting staffs and budgets. *Id.* at 10. In less than a year, the *Charleston Daily Mail's* circulation dropped from 35,076 to 23,985. *Id.* at 10–11. The idea was to make the *Charleston Daily Mail* a failing newspaper, so that the Gazette Company could terminate it as being no longer economically viable or justified. *Id.* at 8–9; *see, e.g.,* Reilly v. Hearst Corp., 107 F. Supp. 2d 1192, 1211 (N.D. Cal. 2000) ("Parties to a JOA may lawfully merge and cease publication of one of the JOA newspapers if that newspaper meets the failing company standard. When that test is met, the parties to a JOA may discontinue the failing publication and may dispose of the assets associated with it . . .") (citation omitted). The Gazette Company planned to drive down the *Daily Mail's* circulation to the point where it could argue that the *Daily Mail* was failing, and should therefore be closed—leaving the *Gazette* with a monopoly. Complaint, *supra* note 5, at 3.

9. 15 U.S.C. § 18 (2006).

10. *Id.* §§ 1–2.

11. Complaint, *supra* note 5, at 17. The United States added:

As a result of defendants' actions, Gazette Company now possesses substantial monopoly power in the sale of local daily newspapers in the Charleston area. Gazette Company has willfully maintained, and unless restrained by the Court will continue to willfully maintain, this unlawful monopoly power through anticompetitive and unreasonably exclusionary conduct.

On its face, this challenge seemed like an easy victory for the United States. If, as the Antitrust Division alleged, the relevant market was the sale of local daily newspapers in Charleston, West Virginia, and the sale to advertisers of access to their readers, it was a 2-to-1 merger-to-monopoly, which was presumptively anticompetitive.¹²

But the defendants had a potential ace up their sleeve—an ace that media companies routinely play in antitrust cases involving a media company—the Internet. The defendants argued that local daily newspapers compete with “new media” that includes the Internet.¹³

Id.; see also *Daily Gazette*, 567 F. Supp. 2d at 863. The United States asked the United States district court to “rescind the May 7 transactions” and “direct the defendants to restore the *Charleston Daily Mail* to its pre-May 7, 2004 competitive condition.” Complaint, *supra* note 5, at 17–18. Author Horton was the lead trial attorney for the United States in both this case and in the United States’ 2000 review of Hearst’s acquisition of the *San Francisco Chronicle*.

12. See, e.g., 15 U.S.C. § 18 (prohibiting the acquisition of stock in a corporation by another where doing so would “tend to create a monopoly”). Of course, even in a 2-to-1 merger many additional factors must be examined carefully, including the failing company’s defenses, efficiencies, and barriers to new competition. For the current manner in which the government enforcers believe these issues should be analyzed, see U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

13. See Defendants’ Memorandum in Support of Their Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 5, *United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859 (S.D.W. Va. 2008) (No. 2:07-0329), 2007 WL 2295551 [hereinafter Trial Motion, Memorandum & Affidavit]. “Competition from other media caused newspapers to form joint operating arrangements to avoid business failure and to preserve editorial voices. . . . The rapidly developing . . . Internet[] placed increasing pressure on newspapers” *Id.*

Finally, although the complaint alleges that the [Charleston] Gazette has monopoly power in a “local daily newspaper market,” and although the Justice Department believed in 1970 that a JOA was an “absolute monopoly,” the world in which newspapers must compete and survive has changed radically. As the Attorney General found in approving the Denver JOA in 2001, over a thousand newspapers have closed, “driven off by a range of competitive forces including the introduction of radio, then television, and now the Internet.” But even though the Attorney General recognized the dramatic—indeed, often fatal—impact of these “competitive forces” on newspapers, the complaint in this case ignores them completely.

Id. at 43–44 (citations omitted).

The court never ruled on the product market issue in *United States v. Daily Gazette Co.* In 2010, the newspapers and the United States settled the case through a Final Judgment that required the parties to enter into a new contractual relationship that would “guarantee[] that the content of the *Charleston Daily Mail* will be independently determined solely by MediaNews and the staff of the *Charleston Daily Mail*.” Competitive Impact Statement at 13, *United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859 (S.D.W. Va. 2008) (No. 2:07-0329), 2010 WL 979118. In its Competitive Impact Statement accompanying the proposed Final Judgment, the United States observed that the two local daily newspapers constituted a relevant antitrust product market because “these newspapers have unique attributes (such as original, in-depth local news, local editorials and opinion, local display, and classified advertising, and other

According to the defendants, readers in Charleston had virtually unlimited access to online news sources, so it was impossible for any combination of newspapers to “substantially lessen competition” or “tend to create a monopoly”¹⁴ in any rigorously defined market.¹⁵ The merger should be permitted to continue with no conditions attached.¹⁶

Were the defendants correct? Even if this argument should not have been accepted in 2007, is the argument true today? Some courts have hinted in dicta that they are prepared to embrace such reasoning.¹⁷ Should the media sector be virtually exempt from the antitrust laws?

This Article seeks to answer this question. It will demonstrate that concern over the potential harms from media mergers can best be expressed not in terms of price, cost, savings or efficiency, but rather in terms of consumer choice with regard to the perspectives quality, and varieties of approaches to news coverage.¹⁸ Indeed, competition in terms of the quality and variety of offerings is crucial in this sector.¹⁹ These non-price attributes, rather than price or cost competition, should be the focus of market definition and other issues of antitrust concern for media cases. This Article focuses its analysis on newspapers, but much of the analysis also applies to parts of the “old” media.

This Article’s discussion of non-price competition demonstrates that “news” and “journalism” should be analyzed in two distinct ways. First, each aspect of a media organization’s operation, including its investigative reporting, local coverage, and editorial coverage, should be assessed separately. In other words, the impact of a merger should be separately analyzed for its likely impact on investigative journalism, local coverage, etc. The evidence demonstrates that the quality and variety of several specific media functions, such as investigative

features) that are not replicated by other local media.” *Id.* at 11.

14. 15 U.S.C. § 18.

15. See Trial Motion, Memorandum & Affidavit, *supra* note 13, at 43–44.

16. See *id.* at 44 (arguing that the Court should dismiss the complaint entirely and should not rescind the merger of the companies).

17. See, e.g., *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1201 (N.D. Cal. 2000) (arguing in dictum that “[w]hile a merger of the two dominant San Francisco dailies in 1965 might well have posed an unquestionable threat of undue concentration of market power under the old paradigm, that threat today is far from clear. All of the above-mentioned participants in the market for information and advertising have the actual and potential ability to deprive SFNA’s newspapers of significant levels of business”). Perhaps recognizing the folly of his unsupported dictum, Judge Walker went on to observe that most media operate in “a form of monopolistic competition.” *Id.*

18. See *infra* Part I.

19. As stated by Walter Lippman: “A great newspaper is a public service institution. It occupies a position in public life fully as important as the school system or the church or the organs of government.” Walter Lippman & Charles Merz, *A Test of the News*, NEW REPUBLIC, Aug. 4, 1920, reprinted in *KILLING THE MESSENGER: 100 YEARS OF MEDIA CRITICISM* 86, 92 (Tom Goldstein ed., 1989).

reporting and local reporting, are often much better in the “old” media that they should be considered distinct markets for antitrust purposes.²⁰ This Article presents newly collected empirical evidence, which demonstrates that the old media continues to win the vast majority of journalism awards. This evidence suggests that the new media often is doing a poor job of competing with the old media in certain crucial respects.²¹

Second, newspapers’ (and other media sources’) activities should be analyzed as a whole, because newspapers and other parts of the old media constitute a form of “one-stop shopping” for diverse, bundled journalism.²² They are a type of forum (rarely duplicated in the new

20. See *infra* Part III.

21. *Id.* For the specific journalism awards that we classified as being awarded to “old,” “new,” and “hybrid” media sources, and a more detailed analysis of this data, please visit the UF Law Scholarship Repository, available at <http://scholarship.law.ufl.edu/flr/vol65/iss5/5>.

22. See, e.g., *Cnty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995), *aff’d sub nom. Cnty. Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998). The court observed:

The local daily newspaper provides a unique package of information to its readers. Foremost, it provides national, state and local news. Many of the stories, such as those on high school sports and city council meetings, are of purely local interest. Readers also value other features of a local nature, including calendars of local events and meetings, movie and TV listings, classified advertisements, other local advertising, legal notices, and obituaries. The format of the newspaper allows its message to be timely and detailed. Moreover, a newspaper is portable and allows readers access to information at their own convenience.

The peculiar characteristics and uses of other media outlets are completely different.

Id. at 1155.

Similarly, in *United States v. Daily Gazette Co.*, the United States in its complaint described the diverse bundle and “unique package” of editorial and reportorial services provided by local daily newspapers:

Local daily newspapers, such as the *Charleston Gazette* and the *Charleston Daily Mail*, provide a unique package of attributes for their readers. They provide national, state, and local news in a timely manner and in a convenient, hardcopy format. The news stories featured in such newspapers are more detailed, when compared to the news reported by radio or television, and they cover a wide range of topics of interest to local readers, not just major news highlights. Newspapers, such as the *Charleston Gazette* and the *Charleston Daily Mail*, are portable and allow the reader to read the news, advertisements, and other information at his or her own convenience. Readers also value other features of local daily newspapers, such as calendars of local events, movie and TV listings, classified advertisements, commercial advertisements, legal notices, comics, syndicated columns, and obituaries.

Complaint, *supra* note 5, at 11.

media²³) that accumulates an impressive array of information while simultaneously filtering through the cacophony of marginally relevant, useless, or misleading material and “certifying” the remaining material. Only online media sources that offer these one-stop shopping functions truly compete with old media operations.²⁴

For both of these reasons, and because quality and variety competition is so crucial and the differences between the quality and variety of the old and new media are often significant, newspapers typically should continue to constitute separate product markets for antitrust purposes. If antitrust decision makers fail to recognize these differences, the existence of the Internet would virtually exempt the media sector from the antitrust laws. This would be a prescription for disaster.²⁵

I. THE IMPORTANCE OF NON-PRICE COMPETITION IN MARKET DEFINITION

A. *The Principle’s General Acceptance in Antitrust Law*

“The goal of market definition is to facilitate a prediction as to whether a given merger or acquisition is likely to result in the exercise of market power in an industry.”²⁶ Focusing “on the concept of buyer

23. With the notable exception of newspapers’ own online presence.

24. Moreover, with the exception of newspapers’ own websites, new media cannot readily duplicate newspapers’ one-stop shopping concept.

25. As Judge Learned Hand so aptly noted:

[The media] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all.

United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945); *see also* Times-Picayune Publ’g Co. v. United States, 345 U.S. 594, 602 (1953) (“A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society.”).

26. ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 491 (2d ed. 2008); *See generally* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 515–16 (2010) (“Under any plausible criterion for deeming one market definition to be better than another—the central question in any market definition analysis—the only way of applying the criterion presupposes that one has already formulated a best estimate of market power. However, since the only purpose of the market definition inquiry is to aid in making inferences about market power, the entire procedure is revealed to be pointless. . . . Worse, the most natural criterion, which also seems closest to what most analysts have in mind—choosing the market which fields the most accurate measure of market power—actually discards information and thus sometimes

substitution as the underlying principle for defining relevant [antitrust] markets,²⁷ the standard market question asks what is likely to happen to consumer demand for the product(s) in question if their prices rose by 5%–10% “lasting for the foreseeable future.”²⁸ Called the SSNIP test,²⁹ normally a price approach to market definition will identify any market power of concern.

The federal *Horizontal Merger Guidelines*, however, also express a heightened concern with “non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.”³⁰ This is fully consistent with a long line of court decisions holding that the antitrust laws protect competition in terms of non-price factors (such as quality, variety, innovation, and service) with no less vigor than they protect competition in terms of prices. Over a century ago, the Supreme Court recognized that one of the “evils” of monopoly is “[t]he danger of deterioration in quality of the monopolized article.”³¹ More recently, the Supreme Court observed that “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”³² Many other courts have reasoned similarly.³³

B. *How Non-Price Competition Applies to the Media Sector*

Astute commentators have observed that “market definition poses

leads to mistaken conclusions.”)

27. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 609–10 (7th ed. 2012). Of course, seller behavior also is crucially important: the courts want to know what sellers will do in response to a small but significant increase in price. *See* *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 916, 919 (10th Cir. 1975) (considering the possible actions of sellers of similar products in defining the relevant market).

28. GAVIL ET AL., *supra* note 26, at 493.

29. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 12, § 4.1. The New Guidelines maintain the hypothetical monopolist SSNIP market definition test prominent in the Old Guidelines. For an analysis of this and related merger and market definition issues, see Thomas J. Horton, *The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?*, 2 J. EUR. COMPETITION L. & PRAC. 158 (2011).

30. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 12, § 1.

31. *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911).

32. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

33. *See* *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (noting that anticompetitive effects can include a “reduction of output, [an] increase in price, or [a] deterioration in quality of goods and services” (citation omitted)); *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 406 (S.D.N.Y. 2001) (noting that non-price restraints on competition “affect consumer welfare in ways similar to those of price restraints”), *aff’d*, 344 F.3d 229 (2d Cir. 2003). For additional cases, see Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 *passim* (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

unusual difficulties in the mass media context.”³⁴ This is in part because “it is often particularly difficult to compare consumers’ relative preferences for alternative products or to measure the strength of those preferences, presenting a problem for defining media markets.”³⁵ “[A]ccurate and detailed price data” can be nearly impossible to obtain, and without such data, “it is hard to estimate ‘cross elasticities of demand,’ or the extent to which consumers substitute among different media as relative prices for those media alternatives change.”³⁶ As a practical matter, the standard 5%–10% price increase test³⁷ is not well-suited for media competition and makes little sense in the context of local daily newspapers because a 5%–10% price increase on a newspaper might be roughly \$.05. It would often be extremely difficult to demonstrate that many consumers would switch brands of newspapers over this small sum.³⁸ It is unclear whether many readers would switch to other media, such as an Internet source, if their local daily newspaper’s cost increased by 5%–10%.³⁹

Accurately defining antitrust product markets for daily newspapers is further complicated, because such media are marketed to “two sides”—to both consumers and advertisers—in a codependent and synergistic⁴⁰

34. Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 402 (2006).

35. *Id.* at 403.

36. *Id.*

37. In most contexts, “a small but significant and nontransitory increase in price” (a “SSNIP”) will be defined to be a price increase of five percent lasting for the foreseeable future. *See* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 12, § 4.1.2. In 2010, the Department of Justice and the FTC released comprehensive revisions to the 1992 version of the Horizontal Merger Guidelines, which had last been revised in 1997. Thomas J. Horton, *The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?*, 2 J. EUR. COMPETITION L. & PRAC. 158, 158 (2011). “The New Guidelines maintain the hypothetical monopolist SSNIP market definition test prominent in the [1992 Horizontal Merger] Guidelines. However, the New Guidelines’ overall approach to market determination is much more evidentiary-based than formulaic.” *Id.* at 160.

38. Indeed, the current Horizontal Merger Guidelines contemplate this difficulty. *See* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 12, § 4.1.2 (“[W]hat constitutes a [SSNIP] . . . depends upon the nature of the industry and the merging firms’ positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent.”).

39. Given the difficulties of precisely defining media markets using standard pricing analyses such as the SSNIP test, it was hardly surprising that the defendants in *United States v. Daily Gazette Co.* claimed they competed in the broadest possible new media market that includes virtually all media, including the Internet. *See* Trial Motion, Memorandum & Affidavit, *supra* note 13, at 5–6. Defendants alleged that the new media through the Internet and other technologies offered a virtually unlimited array of sources for news and information, so that the idea of a local daily newspaper holding any kind of market power was preposterous and absurd. *See id.*

40. *See* *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 610 (1953) (“But every newspaper is a dual trader in separate though interdependent markets; it sells the paper’s news and advertising content to its readers; in effect that readership is in turn sold to the buyers

relationship “where both sides more highly value the platform the more demand there is for it on the other side.”⁴¹ Perhaps because the economics of advertising are easier to calculate, “for the most part antitrust cases in the newspaper industry have focused on the impact of practices or transactions on advertisers.”⁴² This approach is incomplete, however, since advertisers’ sole intent is to reach the eyes (and ears) of media consumers. Therefore, “[a] full market definition exercise [must] consider the two-sided nature of demand for newspapers”⁴³ or other media.

Unsurprisingly, some believe that “[t]he media industry provides the most familiar example of the need for non[-]price competition.”⁴⁴ Following the Horizontal Merger Guidelines’ lead, media competition should be analyzed in terms of the quality and variety of news and editorial content generated. Rather than asking the standard SSNIP “5–10%” question, the more relevant question usually should be what will happen to the quality and variety of journalism following the merger. Under what circumstances will a change in the quality or variety of

of advertising space.”)

41. Seth Sacher, *Antitrust Issues in Defining Markets in the Newspaper Industry 5* (Dec. 2, 2011) (Fed. Trade Comm’n, unnumbered working paper, 2011), available at <http://ssrn.com/abstract=1967667>; see also CHRISTINE A. VARNEY, ASSISTANT ATT’Y GEN., ANTI-TRUST DIV., U.S. DEP’T OF JUSTICE, DYNAMIC COMPETITION IN THE NEWSPAPER INDUSTRY 20 (2011), <http://www.justice.gov/atr/public/speeches/268742.pdf> (“Defining a market can be particularly difficult in two-sided markets, an economic term describing a situation where a firm’s results in one market influence its results in another market. . . . The number of readers who subscribe to a newspaper directly affects the amount advertisers are willing [to] pay to advertise in the newspaper. Similarly, a robust set of advertisements attracts readers who value the information set forth in those advertisements.”).

42. Sacher, *supra* note 41, at 1.

43. See *id.* at 7; see also Charles J. Romeo, Russell Pittman & Norman Familant, *The Effect of Editorial Competition on Newspaper Circulation 5* (Econ. Analysis Grp., Working Paper No. 05-7, 2005), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=788704 (“Newspapers . . . are traditionally considered to operate in two separate product markets: the advertising market . . . and the editorial market Though these two separate markets are clearly related . . . [,] they are analytically separable, and their economic characteristics may be quite different.”) (footnote omitted).

44. Averitt & Lande, *supra* note 33, at 206. The authors add that “[a] healthy democracy benefits from having a range of opinions in the marketplace for ideas. Congruent with that social need, the marketplace also demands a range of opinion to satisfy the diverse preferences of individual readers and listeners.” *Id.* For example, “[n]ewspapers within a publishing family sometimes pursue a similar editorial policy,” a troubling set of circumstances in a world of growing media consolidation that editors and columnists “have expressed concern about.” *Id.* at 207; accord William Safire, Op-Ed., *The Five Sisters*, N.Y. TIMES (Feb. 16, 2004), <http://www.nytimes.com/2004/02/16/opinion/the-five-sisters.html?pagew> (“You don’t have to be a populist to want to stop this rush by ever-fewer entities to dominate both the content and the conduit of what we see and hear and write and say.”); see also Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTI-TRUST L.J. 249, 251–52 (2001) (arguing that the nation benefits from variety and diversity in the media).

journalistic offerings cause a significant percentage of readers to shift from the local daily newspaper (in either its hard copy or online form) to an Internet source?

As an example, instead of awkwardly trying to apply a SSNIP analysis in a case involving the merger of two local daily newspapers (including their online versions, which usually are free),⁴⁵ enforcers and courts should determine whether many newspaper readers would be likely to switch to an Internet source if the two newspapers merged—even if the price did not increase following the merger. If most readers would continue to read the merged newspaper, daily newspapers usually should be considered their own market for antitrust purposes. Could a local daily newspaper's readers easily find quick and effective bundled Internet substitutes of an equal quality if a newspaper were to close? How much more time and effort would readers have to spend? What quality and types of reporting and editorializing could readers conveniently find elsewhere? If the answer was simply that readers would instead find the barrage and cacophony of information available today on the Internet, and if this was deemed an acceptable substitute for most readers, local daily newspapers would have become extinct by now. Their continued survival (albeit with much lower readership than a generation ago) is a testament to the attractiveness of newspapers' relatively distinct quality and bundle of services.⁴⁶

Focusing more on non-price competition and choice competition in defining media antitrust markets and assessing competitive effects in media markets is hardly a radical approach. Advertisers have long understood the importance of media quality and diversity.⁴⁷ Since higher quality generally induces more readers or viewers to spend time reading a newspaper or viewing other media, it “increases demand among advertisers.”⁴⁸ Additional efforts to quantify and better understand the relationship between media quality and advertising interest and value should be undertaken so decision makers can better understand these antitrust issues.⁴⁹

45. See, e.g., Averitt & Lande, *supra* note 33, at 176 (“The current price and efficiency models can deal only awkwardly with non[-]price competition.”).

46. National news magazines, such as *Time*, perform many of the same newsgathering functions as daily newspapers, but they usually do not focus on local news.

47. Cf. Paul Farhi, *A Bright Future for Newspapers*, AM. JOURNALISM REV., June/July 2005, at 54, 58, available at <http://www.ajr.org/article.asp?id=3885> (“Newspapers typically beat their direct competition in both the quantity of customers (i.e., readers) and their quality (i.e., demographics). Even with declining circulation, this advantage remains relatively stable.”).

48. Charles J. Romeo & Aran Canes, *A Theory of Quality Competition in Newspaper Joint Operating Agreements*, 57 ANTITRUST BULL. 367, 400 (2012).

49. Media scholar Professor Phillip Meyer undertook a similar effort in his 2004 book. PHILIP MEYER, *THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE* (2004). Professor Meyer concluded “that quality content is connected to business success but

Several important newspaper antitrust cases have moved in this direction. In *Community Publishers, Inc. v. Donrey Corp.*,⁵⁰ the United States district court enjoined a local daily newspaper's purchase of a competitor newspaper.⁵¹ In defining the relevant antitrust market as local daily newspapers in northwest Arkansas, the court focused on the reportorial and editorial competition between the two newspapers (but not the price competition).⁵²

Similarly, a United States district court in Hawaii enjoined the closure, pursuant to a newspaper JOA, of one of two local daily newspapers,⁵³ emphasizing that "[t]he editorial and reportorial competition between the *Star-Bulletin* and the *Advertiser* ha[d] been instrumental in giving subscribers alternative news sources."⁵⁴ The court observed that the closure of the *Star-Bulletin* would lead to "the concomitant loss of competition for advertisers and creators of news, editorial, and entertainment content."⁵⁵

Commentators also have begun to recognize that many media

hasn't been proven to cause it." Carl Sessions Stepp, *Which Came First?*, AM. JOURNALISM REV., Feb./Mar. 2005, at 57, 57, available at <http://www.ajr.org/article.asp?id=3831> (reviewing Meyer's book).

50. 892 F. Supp. 1146 (W.D. Ark. 1995), *aff'd sub nom.* Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180 (8th Cir. 1998).

51. *Id.* at 1179.

52. *Id.* at 1159. The court explained in part:

Both papers exhibit an ongoing concern over who scoops whom which is largely motivated by circulation concerns. At one point, the *Morning News* reviewed its staff assignments and improved its police coverage because it was an area where the *Times* sometimes prevailed. Competition over local sports coverage was particularly intense, with the *Times* and the *Morning News* engaged in a public back and forth battle over the number of reporters covering events, the number of photos and stories, and the extent of coverage, including women's volleyball and soccer.

The *Times* began using color so that it could compete more effectively, and the *Morning News* responded in kind. The two papers also compete for readers by producing features and special interest sections. In one case, the *Morning News* began a travel page soon after the *Times* started one. These are the equivalent of competitive responses to what the Merger Guidelines call "small but significant and nontransitory" increases in price or decreases in quality.

In addition to these concrete actions and reactions, the internal memoranda of the *Times* and the *Morning News* show a consistent obsession with each other as "the competition." These are too numerable to discuss further.

Id. When discussing the newspapers' competition for advertisers, the court mentioned price but only briefly. *Id.* at 1160.

53. Hawaii *ex rel.* Anzai v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1243 (D. Haw. 1999).

54. *Id.* at 1248-49.

55. *Id.* at 1251.

sources, including local daily newspapers, “compete not primarily on price but rather through independent product development or creativity.”⁵⁶ Allowing a local daily newspaper or other media entity to operate as a virtual monopoly within its individual niche “will mean the power to significantly change the mix of price/quality/variety choices that would arise from competition.”⁵⁷

A survey of mass media confirms both increasing media consolidation and “an increase in the number of ties linking together a variety of media companies, many of which compete with one another. Today, media corporations are linked together by joint ventures, strategic partnerships, joint operating agreements, and interlocking boards of directors.”⁵⁸ While some may argue that “a media conglomerate has ample incentives to encourage internal diversity, as this is the path to serving the greatest number of customers and maximizing profits[,] . . . a media conglomerate may squeeze out diversity accidentally, even if not as a deliberate policy.”⁵⁹ As an example, an analysis of “ownership data on seventeen publicly traded newspaper companies . . . found that the primary owners . . . were institutional investors.”⁶⁰ Most alarmingly, “[t]he study stressed their potential influence on the decision-making process, particularly involving short-term, profit-driven decisions.”⁶¹ Other “[o]bservers have tracked a steep decline in local ownership and a rise in conglomerates . . . [which] tend to employ relatively few and relatively low-paid journalists, emphasizing low-cost production and a homogenous style across their titles.”⁶² And “some media owners may have causes to advance and may value that power more than the

56. Averitt & Lande, *supra* note 33, at 176. Averitt and Lande have observed that with respect to “editorial independence in the news media[,] . . . market concentration principles taken from a price context may not ensure robust competition in the respects most relevant to consumers of these kinds of products.” *Id.*

57. *Id.* at 183.

58. Charlene N. Simmons, *Converging Competitors? Board Interlocks in the Changing Media Landscape*, 24 J. MEDIA ECON. 201, 201 (2011). Simmons further observed “that over 40% of the leading media corporations . . . are involved in a board interlock with another leading media company.” *Id.* at 207. Unfortunately, “[c]ompared to the amount of research on interlocking directorates in other disciplines, little attention has been paid to this phenomenon in the mass media industry.” Soontae An & Hyun Seung Jin, *Interlocking of Newspaper Companies with Financial Institutions and Leading Advertisers*, 81 JOURNALISM & MASS COMM. Q. 578, 580 (2004).

59. Averitt & Lande, *supra* note 33, at 207–08.

60. An & Jin, *supra* note 58, at 580 (citing Robert G. Picard, *Institutional Ownership of Publicly Traded U.S. Newspaper Companies*, J. MEDIA ECON., Oct. 1, 1994, at 49).

61. *Id.*

62. Jane B. Singer, *Quality Control: Perceived Effects of User-Generated Content on Newsroom Norms, Values and Routines*, 4 JOURNALISM PRAC. 127, 129 (2010) (citation omitted).

marginal revenue that they may lose.”⁶³ As an example, one study “revealed several incidents in which journalistic integrity was sacrificed or outweighed by the mutual interest formed by interlocking.”⁶⁴

In addition, “[n]ewspapers, and other types of information-heavy media, are what consumer protection specialists refer to as ‘credence goods.’ Their actual quality is difficult to determine even after they have been bought and consumed, and it must to some degree be taken on faith.”⁶⁵ It is extremely difficult, if not impossible, to quantify the time and cost of developing such reader or viewer goodwill and trust.⁶⁶ Much of local daily newspapers’ goodwill and trust, for example, have been earned through decades of thorough investigative reporting and serious journalism that has uncovered government corruption and waste and offered an inside scoop on local sports and civic interests.⁶⁷

II. MARKETS CAN BE DEFINED IN TERMS OF ONE-STOP SHOPPING

A. *One-Stop Shopping’s General Acceptance in Antitrust Market Definition Analysis*

The convenience of one-stop shopping and the tremendous efficiencies in transaction costs that this entails have been accepted in the market definition analysis portions of many antitrust cases, perhaps most explicitly and prominently in the *FTC v. Staples* merger

63. Averitt & Lande, *supra* note 33, at 208; accord BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY*, at xvii (4th ed. 1992) (discussing how in 1987, when the stock market crashed, Lawrence Grossman, the former president of NBC News, “received a phone call from Jack Welch, chairman of General Electric, owner of NBC, telling him not to use words in NBC news reports that might adversely affect GE stock”).

64. An & Jin, *supra* note 58, at 581 (citing Peter Dreier & Steve Weinberg, *Interlocking Directorates*, COLUM. JOURNALISM REV., Nov./Dec. 1979, at 51).

65. Averitt & Lande, *supra* note 33, at 207 (footnote omitted). Even “if the quality will be discerned in use, but only after the lapse of a considerable period of time,” newspapers may still be considered a credence good. Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 69 (1973).

66. See Farhi, *supra* note 47, at 58 (noting imprecisely that newspapers have spent “millions of dollars” creating goodwill); cf. Stepp, *supra* note 49, at 57 (noting that quality and profits are correlated, but that which way causation runs is unclear).

67. See, e.g., Libby Averyt, Op-Ed., *Local Newspapers Will Be Just Fine If They Build Trust*, CINCINNATI POST, Feb. 15, 2006, at A17 (noting the trust a local newspaper had built allowed it to break the story of Dick Cheney’s shooting accident); Farhi, *supra* note 47, at 58 (“Newspapers big and small have spent millions of dollars over the years reminding people what they do. This has created a vast but hard-to-measure reservoir of goodwill for newspapers . . .”); Lisa Snedeker, *Fact Is, Your Average Paper Is Just Fine: The Circulation Crisis Is Hurting the Big Dailies*, MEDIA LIFE MAG. (Feb. 7, 2007), <http://www.medialifemagazine.com/fact-is-your-average-paper-is-just-fine> (noting that small newspapers have seen more growth than larger newspapers because of the goodwill they have developed over the decades covering local news, which gives them “a stranglehold on the market”).

decision.⁶⁸ Indeed, the decision in this case hinged on proper market definition, because if the market had been defined in terms of all the products at issue (consumable office supplies⁶⁹), then the combined market shares of the merging parties would have been only about 5.5%.⁷⁰ As a consequence, the merger would have been permitted because it would not have been found to threaten a loss of competition.⁷¹ If, however, due to the desirability of one-stop shopping, the relevant market was defined as the “office superstore” market,⁷² then only three firms were within this market,⁷³ and the merger would have produced an undue increase in concentration and, for a variety of reasons, would have been anticompetitive.⁷⁴

The court determined that an increase in sales prices would cause “certain consumers” to turn to a superstore equivalent of Staples rather than a non-superstore,⁷⁵ and explained its decision by referencing the

68. Introducing its opinion, the United States district court summarized the procedural posture of the case as follows:

[T]he Federal Trade Commission . . . seeks a preliminary injunction . . . to enjoin the consummation of any acquisition by defendant Staples, Inc., of defendant Office Depot, Inc., pending final disposition before the Commission of administrative proceedings to determine whether such acquisition may substantially lessen competition in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

FTC v. Staples, Inc., 970 F. Supp. 1066, 1069 (D.D.C. 1997) (citations omitted).

69. Consumable office supplies are “products that consumers buy recurrently, i.e., items which ‘get used up’ or discarded.” *Id.* at 1073.

70. *Id.* at 1075 (“[A] combined Staples-Office Depot would only have a 5.5% share of the overall market in consumable office supplies.”).

71. After noting the 5.5% share figure, the court stated:

Therefore, it is logical to conclude that, of course, all these retailers compete, and that if a combined Staples-Office Depot raised prices after the merger, or at least did not lower them as much as they would have as separate companies, that consumers, with such a plethora of options, would shop elsewhere.

Id.

72. After hearing the parties’ arguments and weighing the evidence, the court indeed found “that the appropriate relevant product market definition in this case is, as the Commission has argued, the sale of consumable office supplies through office supply superstores.” *Id.* at 1074.

73. *Id.* at 1069 (noting the three firms in the office superstore market).

74. *Id.* at 1081–86 (discussing the increase in concentration and other anticompetitive effects).

75. Specifically, the court noted:

Despite the high degree of functional interchangeability between consumable office supplies sold by the office superstores and other retailers of office supplies, the evidence presented by the Commission shows that even where Staples and Office Depot charge higher prices, certain consumers do not go

one-stop shopping principle:

As the plaintiff and defendant requested, the Court viewed some of the various sellers of office supplies located in the Rockville, Maryland area, including Staples, Office Depot, CompUSA, Best Buy, CVS, Kmart, Giant Food, and Wal-Mart. Based on the Court's observations, the Court finds that the unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers. Other retailers devote only a fraction of their square footage to office supplies as opposed to Staples or Office Depot.⁷⁶

The court noted:

This Court is not the first to find a narrower submarket or relevant product market within a larger market. Judge Larimer found one in *Bon-Ton Stores, Inc. v. May Department Stores Co.* when he defined the relevant product market in that case as "traditional department stores including J.C. Penney's." Defendants had argued that the "traditional department stores" definition was underinclusive because it overlooked numerous businesses that compete with department stores. Under the defendants' view, the relevant product market should have included all stores selling general merchandise, apparel, and furniture. The court acknowledged that, in a broad sense, traditional department stores do compete in a vast marketplace encompassing retailers in general. However, applying the *Brown Shoe* "practical idicia," [sic] the court found that there were qualitative differences between traditional

elsewhere for their supplies.

Id. at 1078.

76. *Id.* at 1079. The court further opined:

The evidence shows that the typical club, mass merchant, or computer store offers only 210 to 2000 square feet of office supplies, compared to over 11,182 square feet at a typical Staples. This was evident to the Court when visiting the various stores. Superstores are simply different in scale and appearance from the other retailers. No one entering a Wal-Mart would mistake it for an office superstore. No one entering Staples or Office Depot would mistakenly think he or she was in Best Buy or CompUSA. You certainly know an office superstore when you see one. *Cf. Bon-Ton Stores, Inc. v. May Department Stores*, 881 F. Supp. 860, 870 (W.D.N.Y. 1994) ("Customers know a department store when they see it.").

Id.

department stores and other retailers, including the physical appearance and layout of the stores, distinctive customers, the wide range of brand-name merchandise, and service.⁷⁷

The *Staples* court drew an analogy to supermarket mergers:

A similar, though not as detailed, analysis was undertaken in *State of California v. American Stores Co.* In that case, the State of California brought an action to enjoin the merger of two supermarket chains. The State defined the relevant product market as “supermarkets—full line grocery stores with more than 10,000 square feet.” In contrast, defendants contended that the relevant product market included retail grocery purchases from “mom and pop” retail grocery stores, convenience stores, and non-grocery stores such as department stores, gasoline service stations, eating and drinking places, drug stores, and liquor stores. The court credited evidence which showed that shoppers as well as the supermarkets themselves did not consider these other retailers as competition.⁷⁸

Another prominent case that employed the one-stop shopping concept was *Broadcast Music, Inc. v. CBS*.⁷⁹ This case involved a suit by CBS against the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) alleging, *inter alia*, that the issuance by ASCAP and BMI to CBS of blanket licenses for all of their copyrighted musical compositions constituted illegal price fixing.⁸⁰ The Supreme Court observed, however, “that it would be nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio.”⁸¹ The Court noted:

[T]he blanket license developed . . . out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are

77. *Id.* at 1080 (citations omitted).

78. *Id.* at 1080–81 (citations omitted).

79. 441 U.S. 1 (1979).

80. *Id.* at 4.

81. *Id.* at 14.

quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants and it was in that milieu that the blanket license arose.⁸²

The Court held that, in the music industry, this form of one-stop shopping is so useful to purchasers that it constitutes a different product for antitrust market definition analysis:

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product.⁸³

B. How One-Stop Shopping Applies to the Media Sector

Every type of news that is contained in a newspaper can be found on the Internet if one is willing to search and sift through a huge number of sites of potential interest.⁸⁴ However, there usually is no single Internet equivalent containing anything even close to the content of a traditional newspaper—with the notable exceptions of newspapers' own online sites. Newspapers are relatively distinct because they save readers the transaction costs of finding, sifting through, and assessing the quality of a huge number of Internet sites. The finding and assembling of distinct types of information in one place is crucial for readers. So is sifting through the cacophony of an almost infinite number of sources of information, many of which are duplicative or may be unreliable. A newspaper's sifting and "certification" function is as important as its news-generation and aggregation function.⁸⁵

The one-stop shopping convenience of a local daily newspaper cannot be minimized. The competitive product for antitrust purposes must therefore be viewed as the totality of the journalistic output that is

82. *Id.* at 20 (citation omitted).

83. *Id.* at 21–22.

84. Some Internet sites also help with the sorting and certification functions.

85. We repeat our caveat: we are not suggesting that every newspaper is of high quality or that every newspaper is of a higher quality than any Internet newsgathering organization. Nor are we suggesting that every newspaper competes primarily by the quality of its newsgathering operations. Many newspapers are of an extremely low quality and compete by doing things other than providing high quality journalism.

available in one convenient (printed or electronic) place.⁸⁶ The challenging work of a newspaper publisher is not just trying to figure out how to configure its broadsheet print on the computer (even though that job takes lots of effort and creativity). Rather, it is to produce an editorial product that will appeal to a large diversity of readers (on a daily and even hourly basis) and allow the publisher to sell the content to both consumers and advertisers. A newspaper saves readers and advertisers the transactional cost and inconvenience of searching and sifting through multiple sources. Furthermore, newspapers have developed consumers' confidence in the quality and goodwill of the publication and its staff.⁸⁷ In a sense, a local daily newspaper serves as "a middleman," saving consumers and advertisers from the time and effort of having to sort through countless potential news sources with varying degrees of confidence in their quality, credibility, or trustworthiness.⁸⁸ Indeed, this sifting and certification function is as important as a newspaper's accumulation function. It explains equally well why newspapers should be considered separate products for antitrust purposes.⁸⁹

A local daily newspaper's bundle of sifted and sorted news and features often provides a welcome sense of order in a world of "complexity . . . run[] amok"⁹⁰ with literally billions of available new media options.

At the time of *United States v. Daily Gazette Co.*,⁹¹ no court had ever held that local daily newspapers were not a relevant product market for antitrust purposes. The newspapers were desperate to find a court that would change that ruling and include other types of media. However, as the Department of Justice noted in its complaint in *United States v. Daily Gazette Co.*:

86. *Cf.* *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1079 (D.D.C. 1997) ("[T]he unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers."). There also certainly are completely electronic media that generate news and eliminate inconsequential material in an extremely high quality fashion. For examples of online sources that have won journalism awards, see *infra* Tables I, II, & III.

87. Much like the superstores discussed in *FTC v. Staples, Inc.* ("[T]he unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers."). *Staples*, 970 F. Supp. at 1079.

88. *Cf.*, e.g., *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 20 (1979) (discussing how a blanket music license was a new integrated product, and that "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided").

89. Some Internet operations serve the sifting and certification function as well.

90. JEFFREY KLUGER, *SIMPLEXITY: WHY SIMPLE THINGS BECOME COMPLEX (AND HOW COMPLEX THINGS CAN BE MADE SIMPLE)* 231 (2008). As journalist Jeffrey Kluger opines, such "focused excellence is undeniably its own triumph of complexity." *Id.*

91. *See supra* notes 5–16 and accompanying text.

Local daily newspapers, such as the *Charleston Gazette* and the *Charleston Daily Mail*, provide a unique package of attributes for their readers. They provide national, state, and local news in a timely manner and in a convenient, hardcopy format. The news stories featured in such newspapers are more detailed, when compared to the news reported by radio or television, and they cover a wide range of topics of interest to local readers, not just major news highlights. Newspapers, such as the *Charleston Gazette* and the *Charleston Daily Mail*, are portable and allow the reader to read the news, advertisements, and other information at his or her own convenience. Readers also value other features of local daily newspapers, such as calendars of local events, movie and TV listings, classified advertisements, commercial advertisements, legal notices, comics, syndicated columns, and obituaries. Most readers of local daily newspapers in the Charleston area do not consider weekly newspapers, radio news, television news, Internet news, or any other media to be adequate substitutes for the two local daily newspapers serving the Charleston area. Thus, in the event of a small but significant increase in the price of local daily newspapers, the number of readers who would switch to other sources of local news and information, and would stop buying any daily local newspaper, would not be sufficient to make such a price increase unprofitable.⁹²

Newspaper publishers like Dean Singleton of MediaNews Group have long recognized that local daily newspapers typically offer the best available and most easily accessed one-stop shopping of high-quality content, including news, comics, sports, op-eds, entertainment and features. Furthermore, local daily newspapers are well positioned to place themselves on the Internet and leverage and bolster their

92. Complaint, *supra* note 5, at 11–12; *see also* Reilly v. Hearst Corp., 107 F. Supp. 2d 1192 (N.D. Cal. 2000) (finding implicitly the local daily newspapers to be a relevant market); Hawaii *ex rel.* Anzai v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1250 (D. Haw. 1999) (holding that local daily newspaper merger was likely to be anticompetitive); Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1155 (W.D. Ark. 1995) (“The local daily newspaper provides a unique package of information to its readers.”), *aff’d sub nom.* Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180 (8th Cir. 1998); United States v. Times Mirror Co., 274 F. Supp. 606, 617 (C.D. Cal. 1967) (finding that the local daily newspaper’s “cluster of services” included “a daily written record of current events and reference information including vital statistics, public announcements, legal notices, box scores, stock market reports, weather reports, theater listings and radio and television logs”), *aff’d*, 390 U.S. 712 (1968).

broadsheet editions.⁹³ In the words of Randy Craig of the Inland Press Association: “It’s all about local. In any given situation, if you want to know what is happening, you have to read the local newspaper.”⁹⁴ Indeed, one study concluded that “the local newspaper [Internet] site does not compete with other news sites among local users . . . [or] with other news sites among long-distance users.”⁹⁵ Ironically, the same study revealed that the most significant competition to a local daily newspaper’s print edition was likely to be its own online edition.⁹⁶

Even as local daily newspapers’ print circulations decline, “online readership is soaring.”⁹⁷ The crucial issue facing local daily newspapers is not competing with the Internet, but “finding ways to make more money from a growing online audience that generally reads the paper for free.”⁹⁸ Although newspapers have been slow to find ways to extract revenues from soaring online readership,⁹⁹ they are waking up. As noted by David Skok: “What began as a trickle with the New York Times instituting their metered-model paywall in March 2011 turned into a flood in 2012. More than 300 newspapers in the United States now charge for online content. That number has doubled in just one year.”¹⁰⁰

Today, local daily newspaper Internet sites allow readers to participate in blogs and discussions about articles, allowing publishers to closely monitor readers’ interests and habits, which is highly valuable

93. William Dean Singleton, *The Future of Newspapers*, MASTHEAD, Winter 2009, at 4, 5–6 (noting that his own strategy involved using Internet coverage of breaking news to bolster the print editions, including Internet subscriptions with print subscriptions to leverage the print editions, and using preexisting advertisement sales forces to increase Internet ad revenue).

94. Jack V. Karlis, Kelly A. Mitchell & Erik L. Collins, *Weekly Newspaper Websites Don’t Live up to Potential*, NEWSPAPER RES. J., Winter 2012, at 113, 114 (2012) (quoting Snedeker, *supra* note 67).

95. Mengchieh Jacie Yang & Hsiang Iris Chyi, *Competing with Whom? Where? And Why (Not)? An Empirical Study of U.S. Online Newspapers’ Competition Dynamics*, J. MEDIA BUS. STUD., Winter 2011, at 59, 67–68.

96. *Id.* at 69. Another study found that many Australian Internet users “who relied on the Internet for news and information still used traditional sources.” Karlis et al., *supra* note 94, at 116 (quoting An Nguyen & Mark Western, *The Complementary Relationship Between the Internet and Traditional Mass Media: The Case of Online News and Information*, INFO. RES. (Apr. 2006), <http://informationr.net/ir/11-3/paper259.html>).

97. SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R40700, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION 10 (2009).

98. *Id.* at 9–10.

99. *See, e.g.*, KIRCHHOFF, *supra* note 97, at 13 (“There are a host of reasons why newspapers’ Internet ad revenues have not been more robust, including the fact that the industry arguably was somewhat slow to embrace the technology.”); VARNEY, *supra* note 41, at 9 (“Many newspaper owners offer their online content for free, having reasoned that they could attract more readers and thereby sell more advertising.”).

100. David Skok, *A Market-Driven Comeback for High-Quality Reporting*, NIEMAN JOURNALISM LAB (Dec. 20, 2012, 8:19 PM), <http://www.niemanlab.org/2012/12/a-market-driven-comeback-for-high-quality-reporting>.

to advertisers.¹⁰¹ Not only are newspapers' Internet sites closely monitored and controlled, and therefore generally safe (and mostly sane), but they can cater to every possible individual and interest by allowing commenting on every single article (again, from one site). What a great way to get instantaneous feedback on the issues that are hot and who is most interested! Furthermore, residents of a community who move away or are traveling can stay updated on community news and sports through a local daily newspaper's Internet site, which adds previously unavailable readers.

Local daily newspaper Internet sites offer numerous other benefits to readers, advertisers, and publishers. For example, readers can have easy access to past stories, which may actually increase their readership and interest. Similarly, readers' comments can appear instantly—generating increased interest. Columnists and editors can easily edit and update articles thereby offering halftime updates, for example, during a football game.¹⁰² Perhaps this is why in many cities in the United States today, at least one local daily newspaper continues to operate successfully despite the incessant cries of local daily newspaper owners that their business model is no longer economically viable.

Even though there are important exceptions, on the whole online media have not been able to duplicate the impressive feats of many local daily newspapers (or other types of old media) on a daily basis, and are not realistically positioned to do so. Instead, online media frequently free rides on the serious journalistic work of local daily

101. One of the great advantages of local daily newspapers' Internet sites is that they can monitor nearly every keystroke of a known readership audience, which has tremendous value to advertisers seeking to target different groups based on age, demographics, or incomes. Thus, the wide variety of bundled options becomes even more valuable because the newspaper can tell advertisers which readers like crossword puzzles or the comics, who is interested in sports or food, and who seriously follows various editorials or columnists. They also can follow the keystrokes on advertisements, see how long a reader is looking at a certain page, and whether they clicked on an advertisement for more information. Such information is incredibly valuable to advertisers. See, e.g., *Digital: The Intersection of Influence and Wealth*, WSJ MEDIA KIT, <http://www.wsjmediakit.com/digital> (last visited May 12, 2013) (click "Audience Targeting"); *Yahoo! Behavioral Targeting*, MIAMI HERALD ADVERTISING, <http://www.miamiheraldadvertising.com/content/behavioral.html> (last visited May 12, 2013) (noting that the Miami Herald can determine "a user's behavioral profile" based on "search terms," "search result clicks," "relevant pages viewed," and "advertising clicks").

102. Comments from newspaper editors in a recent survey confirmed that local daily newspapers "often update several times a day, even on stories that will appear in the next day's newspaper." Charles St. Cyr, Serena Carpenter & Stephen Lacy, *Internet Competition and US Newspaper City Government Coverage: Testing the Lowrey and Mackay Model of Occupational Competition*, 4 JOURNALISM PRAC. 507, 518 (2010). One publisher reported: "Our use of online news updates makes it easier to compete because we can scoop TV stations online. That reduces the old disadvantage of waiting until the morning." *Id.* at 519.

newspaper reporters, writers, and editors.¹⁰³ Furthermore, key issues of journalistic professionalism, such as independent newsgathering and fact-checking, are often ignored by “citizen journalists,” leading to a potentially dangerous undermining of journalistic norms and values.¹⁰⁴

Newspaper publishers lament declining circulation and readership,¹⁰⁵ especially since surveys of people younger than thirty years old indicate that they do not read a local daily newspaper in broadsheet form.¹⁰⁶ Nevertheless, even though the number of consumers who desire newspapers’ unique bundle of services is diminishing, it is still easily significant enough to matter for antitrust purposes.¹⁰⁷

Those who argue that technology and the Internet have created a paradigm shift should recognize that “[t]oday’s problems in the

103. See Skok, *supra* note 100 (“[The new media ha[ve] been riding high for several years. It’s easy to cheaply aggregate and curate original journalism when others are investing in the resources necessary to generate those pageviews.”); cf. Singer, *supra* note 62, at 133–35 (reporting that U.K. journalists largely view user-generated comments to their journalistic work as low quality and, because of anonymity and ignorance of local defamation law, “likely to land [the journalists] in legal hot water”). One astute observer has noted:

[W]hile independent Web sites and new online ventures are increasingly producing rigorous, original journalism, every blogger who is not too stupid or too full of himself to notice what is going on knows there would be next to nothing important for the vast Internet commentariat to aggregate, curate or opine about without professionally edited, remunerative reporting.

Hal Espen, *Beyond the Paper*, N.Y. TIMES (Aug. 22, 2010), http://www.nytimes.com/2010/08/22/books/review/Espen-t.html?_r=0 (reviewing DAVE KINDRED, MORNING MIRACLE: INSIDE THE WASHINGTON POST (2010)).

104. See Singer, *supra* note 62, at 133–34 (noting U.K. journalists’ concern that user-generated comments are often inaccurate).

105. See, e.g., *Shareholders OK Sale of Paper*, BALTIMORE SUN (June 27, 2006), http://articles.baltimoresun.com/2006-06-27/business/0606270223_1_knight-ridder-mcclatchy-shareholders (reporting that Knight Ridder sold itself due to pressure from shareholders unhappy with the declining stock price, which was due to “doubts about the future of print media”); Sacher, *supra* note 41, at 2 (“One of the most prominent trends in the newspaper industry, and one that forms the backdrop for much antitrust action, has been the overall decline in newspapers’ circulation rates and readership.”).

106. Farhi, *supra* note 47, at 57 (noting that “just 23 percent of people under 30 said they had read a newspaper the day before they were interviewed, according to the Pew Survey,” which occurred no later than 2005).

107. Consider, for example, local sports coverage. What other sources currently duplicate a daily newspaper’s local sports coverage at every level, from high school through professional? Local daily newspapers have the reportorial resources to stay in contact and travel with local high school, amateur, college, and professional teams and coaches, and the space to print all of the relevant box scores and inside information scoops. Where else can a local reader get so much well-organized and developed information so quickly or efficiently? What other source is consistently as reliable? Although it would be possible for determined readers to cobble together a reliable and high quality collection of sports blogs containing this information, a daily newspaper typically does this while saving readers a huge amount of transaction costs.

newspaper industry have precedent in the 1920s and 1930s, when broadcast radio developed into a national medium that provided an alternative news and advertising platform to the daily newspaper.”¹⁰⁸ Through innovation and differentiation, local daily newspapers have met the technological challenges of radio and continued to attract their shares of readers and advertisers.¹⁰⁹ Similarly, “[t]he emergence of television broadcast networks in the 1950s again forced newspapers to change.”¹¹⁰ Once again, local daily newspapers “thrived from the innovation induced by the challenge of new media options.”¹¹¹ Indeed, technological changes induced by television allowed newspapers to earn tremendous profits in the 1970s and 1980s.¹¹²

Daily newspapers’ innovations have allowed them to continue serving an important and crucial two-sided niche despite the emergence of the Internet. As discussed above, daily newspapers already have begun instituting technological changes that further strengthen their ability to attract readers and advertisers. And some are now betting that readers will pay for access to their unique online content. As an example, on March 28, 2011, the *New York Times* began “charging the most frequent users of its Web site \$15 for a four-week subscription in a bet that readers will pay for news they are accustomed to getting free.”¹¹³ As of August 2012, the *New York Times* website ranked 15th among all web properties in the U.S. for the number of unique visitors.¹¹⁴

III. DIFFERENT QUALITY PRODUCTS CAN BE FOUND TO CONSTITUTE DIFFERENT MARKETS

Another reason why newspapers normally should be defined as their own relevant market is the high quality of a considerable amount of newspaper reporting. Some of newspaper’s journalistic functions, such

108. VARNEY, *supra* note 41, at 5 (citing GWENYTH L. JACKAWAY, *MEDIA AT WAR: RADIO’S CHALLENGE TO THE NEWSPAPERS, 1924–1939*, at 84 (1995)).

109. ROGER FIDLER, *MEDIAMORPHOSIS: UNDERSTANDING NEW MEDIA* 70 (1997) (discussing how newspapers innovated in the face of competition from radio); JACKAWAY, *supra* note 108, at 61–62 (1995) (discussing how newspapers differentiated themselves from radio news).

110. VARNEY, *supra* note 41, at 6.

111. *Id.* at 7.

112. *See* FIDLER, *supra* note 109, at 130.

113. Jeremy W. Peters, *The Times Announces Digital Subscription Plan*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/18/business/media/18times.html>.

114. *comScore Media Metrix Ranks Top 50 U.S. Web Properties for August 2012*, COMSCORE (Sept. 12, 2012), http://www.comscore.com/Insights/Press_Releases/2012/9/comScore_Media_Metrix_Ranks_Top_50_US_Web_Properties_for_August_2012 (noting the *New York Times* as the 15th most visited web property with approximately 73,099,000 unique visitors).

as editorializing or covering breaking news, can be done at least as well by Internet operations. Newspapers, however, are usually better at other journalistic tasks, such as investigative reporting and reporting local news.¹¹⁵

In fact, this general difference in quality is enough to make newspapers their own relevant markets for antitrust purposes. Not every newspaper engages in high-quality journalism, and many online media sources do, but newspapers still disproportionately perform certain types of the very highest quality journalism. For this reason, newspaper reporting should be found to constitute its own relevant market for antitrust purposes in many or most circumstances.

A. *The Principle's General Acceptance in Antitrust Law*

A considerable amount of case law shows that relevant antitrust markets can be defined for products and services of different qualities. For market definition purposes, high-end products sometimes will be separated from low-end products, reflecting that many consumers do not consider products of significantly different quality to be reasonably close substitutes for each other.

For example, the United States district court in *TYR Sport Inc. v. Warnaco Swimwear Inc.*¹¹⁶ accepted the plaintiff's assertion that the relevant market consisted of high-end swimwear purchased by top competitive athletes.¹¹⁷ A key factor in the court's determination that plaintiff had sufficiently alleged that a high-end market existed was its rejection of the argument that high-end swimwear was essentially interchangeable with ordinary swimwear.¹¹⁸ The court found it plausible that high-end and ordinary swimwear were not interchangeable because consumers chose high-end swimwear for performance,¹¹⁹ and they purchased high-end swimsuits under the belief that doing so would give

115. See *infra* Table III.

116. 679 F. Supp. 2d 1120 (C.D. Cal. 2009).

117. *Id.* at 1129 (“TYR’s definition of the market as ‘high-end competitive swimwear,’ coupled with the allegation that purchasers in the market are ‘competitive swimmers in the professional, collegiate, high school and club ranks’ is sufficient to state a relevant product market.”).

118. Although “Speedo contend[ed] that this market definition [was] legally insufficient at the pleading stage because it contain[ed] no allegations regarding interchangeability or cross-elasticity of demand,” *id.*, the court found that “high-end swimwear is not reasonably interchangeable with casual swimsuits.” *Id.* at 1130.

119. Consumers chose high-end swimwear for performance rather than for price or fashion. *Id.* at 1129 (“On the face of the Complaint, it seems plausible that competitive swimmers would not switch to casual swimsuits simply because of a price increase in high-end swimwear. This factual implication is further supported by the allegation that competitive suits cost between \$400 and \$500.”); *id.* at 1130 (“[The LZR is] not a fashion garment[;] it’s a *performance garment*.” (alterations in original)).

them a competitive advantage.¹²⁰ In rejecting the interchangeability argument, the court also found it plausible that an increase in the price of high-end swimwear would not cause purchasers to switch to ordinary swimsuits.¹²¹

Similarly, in *Babyage.com, Inc. v. Toys “R” Us, Inc.*,¹²² a United States district court accepted the existence of high-end relevant markets because it held that the plaintiffs had sufficiently alleged a lack of interchangeability with other products.¹²³ The relevant markets were high-end baby and juvenile products: strollers, high chairs, breast pumps, bedding, car seats, and infant carriers.¹²⁴ The plaintiffs’ argument for high-end markets succeeded because, for each high-end product, the plaintiffs had plausibly alleged that the defendant could raise prices without losing an undue amount of sales to low-end products.¹²⁵

In *Intergraph Corp. v. Intel Corp.*,¹²⁶ the Federal Circuit Court similarly assumed there existed a relevant market for high performance microprocessors.¹²⁷ The lower court had found a relevant market consisting of high-performance microprocessors.¹²⁸ On appeal, Intel did not deny the existence of a high-performance microprocessor market, but instead asserted that the plaintiff was not a competitor in this market.¹²⁹ The appellate court, although assuming that the high-end or

120. *Cf. id.* Moreover, the court also noted that the defendant’s own product line advertised the products as not mere pieces of fashion, but rather equipment for “elite athletes”: “[T]he Speedo LZR . . . has broken new boundaries in *performance swimwear* and . . . will help elite athletes achieve their ultimate performances in 2008.” *Id.* (alterations in original).

121. *Id.* at 1129.

122. 558 F. Supp. 2d 575 (E.D. Pa. 2008). Defendants had filed a motion to dismiss for failure to state a claim upon which relief could be granted, *id.* at 580, which the district court denied. *Id.* at 589.

123. Plaintiff established a relevant market “by asserting facts about interchangeability and cross-elasticity of demand that explain why the proffered markets are not larger than Plaintiffs allege them to be.” *Id.* at 582.

124. *Id.* at 581–82 (“Plaintiffs’ allegations are not only consistent with the existence of ‘high-end baby and juvenile strollers,’ ‘high-end high chairs,’ ‘high-end breast pumps,’ ‘high-end baby bedding,’ ‘high-end car seats,’ and ‘high-end infant carriers’ markets, but they suggest the existence of those markets.”).

125. *Id.* at 581 (“[Plaintiffs] allege that the manufacturers ‘would not, by raising prices for their respective relevant high-end baby and juvenile products a small but significant nontransitory amount, lose sufficient sales to make such a price increase unprofitable.’”); *id.* at 582 (“Put another way, their allegation that, for each market, a hypothetical monopolist could profitably raise prices on all in-product markets for a short time, constitute enough heft to raise the satisfaction of the relevant-market element beyond a speculative level.”).

126. 195 F.3d 1346 (Fed. Cir. 1999).

127. *Id.* at 1355–56.

128. *Id.*

129. *Id.* at 1354 (“Intel does not dispute the high market share achieved by its high performance microprocessors. . . . Intel stresses that it is not in competition with Intergraph in

high- performance-relevant market existed, held that the plaintiff was not in this market.¹³⁰

Numerous other decisions have found narrow relevant antitrust product markets based on substantial quality differences for products that seemed interchangeable at a superficial level. As long ago as 1948, in *United States v. Paramount Pictures, Inc.*,¹³¹ the Supreme Court recognized first-run showings of movies as a relevant product market.¹³² Eleven years later, in *International Boxing Club of New York, Inc. v. United States*,¹³³ the Supreme Court similarly considered championship boxing contests to be a distinct relevant market due to their higher ticket prices and their ability to draw large television audiences.¹³⁴

Numerous circuit and district courts have followed the Supreme Court's lead in defining product markets based upon quality differences. Material differences in quality and demand have been found in cases involving anchors¹³⁵ and specialty care transportation services.¹³⁶

On the other hand, in a large number of decisions, even though the products were of different quality, the courts refused to separate high- and low-quality products when they defined relevant antitrust markets. These cases included markets for furniture,¹³⁷ ice cream,¹³⁸ men's

any relevant market; that its relationship with Intergraph is that of supplier and customer, not competitor.”).

130. *Id.* at 1355 (“The district court found that Intel possessed monopoly power in two ‘relevant markets’: (1) the market for high-end microprocessors, and (2) the submarket of Intel microprocessors. Neither one is a market in which Intergraph and Intel are in competition with each other.”).

131. 334 U.S. 131 (1948).

132. *Id.* at 172–73.

133. 358 U.S. 242 (1959).

134. *Id.* at 251.

135. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995–96 (11th Cir. 1993) (finding that Danforth anchors were a separate product market because of customers' perceptions that they were high quality).

136. *Med Alert Ambulance, Inc. v. Atl. Health Sys., Inc.*, No. 04-1615(JAG), 2007 WL 2297335, at *11–12 (D.N.J. Aug. 6, 2007) (holding that a “reasonable juror could find a relevant product market of [specialty care transportation] services from the evidence produced”).

137. *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989) (refusing to find a product market limited to high-quality furniture).

138. *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (finding that, despite substantial and material differences in butterfat content, air volume, and the use of natural ingredients, “all grades of ice cream compete with one another for customer preference and for space in the retailers' freezers”), *aff'd sub nom.* *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417 (9th Cir. 1990). As someone who loves premium ice creams, author Horton considers this to be one of the silliest and most naïve examples of Chicago School economics run amok. *See Nestlé Holdings, Inc.*, 136 F.T.C. 791, 794 (2003) (consent order) (noting the FTC complaint defined the relevant market as “the sale of superpremium ice cream products to the retail channel”).

suits,¹³⁹ and beer.¹⁴⁰

Within the realm of media, the Ninth Circuit recognized material differences in quality between prerecorded music and recorded music (which would include “home tapes” of prerecorded music).¹⁴¹ The court noted the difference in attractive packaging in a ready-to-play product, as well as a significant price difference between prerecorded music and the broader recorded music.¹⁴² Newspapers can be viewed analogously, presenting the consumer with news in an attractive package with content already edited and selected but at an increased price to the consumer. With exceptions, online media, because of its relative lack of filters or gatekeepers, requires the consumer to do more work. Readers start with a virtually infinite quantity of news of varying quality and reliability. On average, readers incur substantial transaction costs to find suitable reading, often achieving a lower quality result, much like listening to “home tapes” of recorded music rather than accessing pre-packaged musical compositions.

B. *The Old Media Is Often of a Significantly Higher Quality*

The old media often provides a substantially higher quality of reporting and editing. As one astute observer noted:

[W]hile independent Web sites and new online ventures are increasingly producing rigorous, original journalism, every blogger who is not too stupid or too full of himself to notice what is going on knows there would be next to nothing important for the vast Internet commentariat to aggregate, curate or opine about without professionally edited, remunerative reporting.¹⁴³

Washington Post reporter Paul Farhi has similarly observed:

Local newspapers typically still have the largest reporting staffs in town of any single news outlet, print or electronic. This (coupled with wire sources) enables a newspaper to produce the broadest range of daily news and features of any single news outlet. In a world of specialty, there’s still

139. *Frank Saltz & Sons, Inc. v. Hart Schaffner & Marx*, No. 82 Civ 2931, 1985 U.S. Dist. LEXIS 16243, at *11 (S.D.N.Y. Sept. 5, 1985) (refusing to divide market for men’s suits based on quality).

140. *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 145–46 (N.D. Cal. 1966) (finding premium and nonpremium beers to be in the same relevant product market, despite persistent price differences and quality preferences of consumers), *aff’d*, 385 U.S. 37 (1966).

141. *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1163–64 (9th Cir. 1984).

142. *Id.* at 1163.

143. Espen, *supra* note 103.

great value and convenience in such a general package.¹⁴⁴

Perhaps one reason for their generally higher quality is that the traditional news media still seek to focus on “what Jim Moroney from The Dallas Morning News calls PICA: perspective, interpretation, context, and analysis.”¹⁴⁵ The traditional media have long understood “that they have no choice but to produce high-end journalism that stands out above the crowd. They[] need to better satisfy their audiences’ jobs-to-be-done, and that means investing in high-quality, in-depth reporting.”¹⁴⁶ In the words of Hearst CEO Frank Bennack: “Where we have the best product, we are first in the market. Where we have had less than the best product, then we are either not there anymore or wish we weren’t.”¹⁴⁷

Moreover, a problem with Internet news sites for many readers is the poor quality of the reading experience. Internet sites often “interrupt[] reading to generate revenue, a tactic much easier to ignore in print.”¹⁴⁸ Spreading news, information, and stories across multiple screens allows Internet news “sites to expose readers to more ads, making a key disadvantage for reading Web editions—all the clicks, jumps, and scrolling to finish a story—into a key to generating revenue.”¹⁴⁹ Indeed, one study found that online and traditional media “are not close substitutes” on the dimension of “gratification opportunities.”¹⁵⁰

Another problem is the journalistic professionalism, training, and ethics of the reporters, writers, and editors serving such sites.¹⁵¹ Christopher Lydon, a former *New York Times* reporter prominent in public radio, noted that due to the rise of online media, “[t]he priesthood of gatekeepers is being disbanded. It’s over.”¹⁵² Traditionally, “most newspaper editors” recognized that “the success of the newspaper as a business depends entirely upon its progress as a profession.”¹⁵³ As Robert Maynard Hutchins observed in 1947, the

144. Farhi, *supra* note 47, at 58.

145. Skok, *supra* note 100.

146. *Id.* Of course, there are many exceptions.

147. AMY KORZICK GARMER, *AMERICAN JOURNALISM IN TRANSITION: A VIEW AT THE TOP* 28 (2001).

148. Kevin G. Barnhurst, *The Form of Reports on US Newspaper Internet Sites, An Update*, 11 *JOURNALISM STUD.* 555, 565 (2010). Pop-up ads are especially difficult to ignore.

149. *Id.* at 564.

150. John Dimmick, Yan Chen & Zhan Li, *Competition Between the Internet and Traditional News Media: The Gratification-Opportunities Niche Dimension*, 17 *J. MEDIA ECON.* 19, 31 (2004).

151. As with every distinction between old and new media, this difference is one of degree.

152. Robert Kuttner, *The Race*, *COLUM. JOURNALISM REV.*, Mar./Apr. 2007, at 24, 24.

153. Carl Ackerman, Dean, Columbia Journalism Sch., *The Challenge to the Press: Speech to the American Society of Newspaper Editors* (Apr. 29, 1933), in *KILLING THE MESSENGER: 100 YEARS OF MEDIA CRITICISM* 159, 163–64 (Tom Goldstein ed., 1989).

traditional press has looked “upon itself as performing a public service of a professional kind.”¹⁵⁴ Professional journalists in the traditional press saw their “gatekeeping role” as “about determining not just the quantity of information that reaches the public but also its quality according to particular definitions, shared among members of an interpretive community of what news is or should be.”¹⁵⁵ On the other hand, “the open and unbounded online environment obliterates the concept of limits on the quantity of available information.”¹⁵⁶

Trust between readers and their news sources is crucial.¹⁵⁷ Yet, far too often, Internet news sites rely upon unchecked “user-generated comments” and anonymous postings and blogs. Studies have “uncovered widespread concern about the effects of [user-generated comments] on professional norms in relation to news values as well as standards of spelling, punctuation, accuracy and balance.”¹⁵⁸ Many professional journalists and scholars like the ability of user-generated comments to “beef up local coverage and boost website traffic,” but they fear that user-generated comments “can undermine journalistic values unless carefully monitored—a gatekeeping task” difficult to undertake given the ease with which a vast quantity of user-generated comments may be generated and the increasing resource constraints on newspapers.¹⁵⁹ Worse yet, anonymity on many Internet sites means that nobody ultimately is journalistically responsible for their content. Media scholar Phillip Meyer has found that “[a] paper’s accuracy affects how credible the paper seems to its news sources. Credibility among sources, in turn, influences credibility among regular readers.”¹⁶⁰

Despite the numerous attacks on local daily newspapers as dying dinosaurs,¹⁶¹ “[t]he news that community newspapers traditionally have

154. ROBERT MAYNARD HUTCHINS, SELECTION FROM THE REPORT OF THE COMMISSION ON FREEDOM OF THE PRESS (1947), *reprinted in* KILLING THE MESSENGER: 100 YEARS OF MEDIA CRITICISM 169, 177 (Tom Goldstein ed., 1989).

155. Singer, *supra* note 62, at 128 (citation omitted).

156. *Id.*

157. As noted by Robert Decherd, Belo Corporation’s chairman, president and CEO, in 2001: “I don’t think we should be dismissive about the question of trust. Our relationship with readers, viewers, and online users is our single greatest asset.” GARMER, *supra* note 147, at 49. Similarly, David Talbot, the founder and editor in chief of *Salon Internet*, observed: “What you need is someone in the trenches, day to day, getting feedback from readers and making sure ethical and other issues are being brought up internally.” *Id.* at 52.

158. Singer, *supra* note 62, at 131 (citing Neil Thurman, *Forums for Citizen Journalists? Adoption of User Generated Content Initiatives by Online News Media*, 10 *NEW MEDIA & SOC’Y* 139 (2008)).

159. *Id.* at 127–28.

160. Stepp, *supra* note 49, at 57.

161. Paul Farhi notes: “Without doubt, it will take skill, vision and creativity for newspapers to survive. But I’d bet on success sooner than I’d bet on failure. It may be that newspapers are dinosaurs. But then again, dinosaurs walked the earth for millions of years.”

published still fills a well-defined need for their audiences.”¹⁶² According to media mogul Dean Singleton: “All quality is local.”¹⁶³ In fact, a recent study by the Donald W. Reynolds Journalism Institute concluded that “[r]eadership of local newspapers in small cities and towns remains steady.”¹⁶⁴ Indeed, “86% [of surveyed local residents] said that local newspapers informed them; [and] 81% agreed that they relied on local newspapers for local news and information.”¹⁶⁵ “Most . . . readers (83%) said that ‘local news or local information’ was what primarily drove them to read local newspapers . . . [and] gave high marks when asked to evaluate the quality of local newspapers”¹⁶⁶ This is consistent with one study that found that people who used the Internet as a news source tended to read newspapers’ sites.¹⁶⁷

In short, the high-quality journalistic reporting and editing of the traditional media generally continues to serve crucial democratic and societal functions that have not been displaced by the Internet. The traditional media therefore continue to fulfill a critical and unique niche in our “mixed media system.”¹⁶⁸

C. Evidence From Recent Media Awards

Defining media markets in terms of quality is likely to involve difficult, controversial, and uncomfortable assessments of the quality and variety of specific news functions, such as investigative and local

Farhi, *supra* note 47, at 59.

162. Karlis et al., *supra* note 94, at 114.

163. GARMER, *supra* note 147, at 28.

164. Kenneth Fleming, *Readership of Local Newspapers in Small Cities & Towns Remains Steady*, DONALD W. REYNOLDS JOURNALISM INSTITUTE (Dec. 13, 2011), <http://rjionline.org/news/readership-local-newspapers-small-cities-towns-remains-steady>.

165. *Id.*

166. *Id.*

167. Scott L. Althaus & David Tewksbury, *Patterns of Internet and Traditional News Media Use in a Networked Community*, 17 POL. COMM. 21, 21 (2000); cf. Yang & Chyi, *supra* note 95, at 67–69 (finding that local daily newspapers’ Internet sites competed primarily with their own print editions rather than other Internet sites); St. Cyr et al., *supra* note 102, at 517 (finding that journalists did not perceive Internet sources to be a competitor to news coverage).

168. Robert B. Horwitz, *On Media Concentration and the Diversity Question*, 21 INFO. SOC’Y 181, 198 (2005). Horwitz adds:

The perception of a direct relationship between democracy and a vibrant communications system of diverse sources and owners is near universal (or, at least, is given universal lip service), as is, for the most part, the converse fear that a communications system that rests in just a few hands will corrupt the freedom of speech, impair the practice of democracy, and impress an ideological pall on society.

Id. at 181.

journalism. Nevertheless, doing this is critical to the future of our democracy.¹⁶⁹

This Article's modest contribution to this issue starts with the hypothesis that the traditional media is on average qualitatively superior in both investigative and local journalism, and perhaps for other types of journalism as well. To test its hypothesis this Article compares the quality of the investigative journalism and local journalism contained in the old media with the quality in the new media, using the metrics that the field itself uses. We ascertain which type of media has won most of the journalism awards in recent years (once these awards became open to the new media).

To do this, we somewhat arbitrarily divided the media world into three categories: "old" or traditional, "new," and "hybrid". It is admittedly extremely difficult to define "old," "new," and "hybrid" types of media. Since the media sector is in flux, so too must be these definitions. Moreover, many media operations are difficult to classify.

With these caveats, the "new" media is the easiest to define. If a publication started online and remains online, we classify it as "new" media.

"Old" media is difficult to define because there currently are very few newspapers, for example, that would correspond to the newspapers that existed a generation ago. Most of the traditional "old" media has an online presence today. Most newspapers, including the *Washington Post* and the *New York Times*, for example, have an online version that frequently contains everything in its print edition, and supplemental material of a varied nature. We define these combinations of traditional hard copy publications and their online presence as "old" media even though they could not have existed a generation ago and even if their online version contains features commonly associated with "new" media such as videos and live chats with reporters.

"Hybrid" media are publications that are in-between "new" and "old" media in one of several ways or that are aggregations of them. Hybrid media include: (1) The convergence of old and new media. Hybrid media nearly simultaneously uses old and new media formats to disseminate information. For example, hybrid media include a print article that cites and uses an online database released concurrently with the print story. However, if the print article is the gravamen of a publication's efforts followed up with supplementary information online, the publication will be classified as old media. The converse will be classified as new media. (2) Hybrid media also include a publication's use of both old and new media to disseminate information. The use of both media types should be near-to or approximately equal—

169. See *infra* note 175 and accompanying text.

one form, new or old, should not dominate the mode of dissemination. (3) Hybrid media include awards where the award judges mention an online or new media component as part of their decision in addition to a print source. (4) Hybrid media include cases where an old media source and a new media source collaborate for a journalistic enterprise.

For example, there have been seven winners since the Pulitzer Prize for investigative reporting opened to the new media. Every winner was an old media source—either a traditional newspaper or the AP, except for two hybrid winners (see Table I *infra*).

Since this sample of only seven journalism awards is so small, we broadened our search to include other recent national awards for investigative journalism that were open to the old and the new media. We were able to locate eighty-six awards, for which we found enough information to classify all eighty-six as old, new, or hybrid. Of these eighty-six awards, only eleven—that is, 13%—went to the new media. Another ten awards went to hybrid old and new sources. Sixty-five awards, or 76%, went to the old media.

Table I: Awards for Investigative Journalism, 2005 or more recent, that were open to both the “old” and the “new” media

Prize	Total Awarded	New	Hybrid	Old	Unknown
Pulitzer	7	--	2	5	--
Golden Keyboard Award	8	--	--	8	--
Worth Bingham Prize	4	--	1	3	--
Donald Robinson Memorial Award	4	--	2	2	--
National Journalism Award	4	--	--	4	--
Sidney Award	47	11	5	31	--
Rockower Award (1st, 2nd, and 3rd places)	12	--	--	12	--
Totals	86	11	10	65	--

We found similar results for recent awards for Local Reporting: Of the thirty awards we could classify, twenty-three, or 77%, went to old media sources, four went to a hybrid, and only three went to a new media source.

Table II: Awards for Local journalism¹⁷⁰

Award	Total Awarded	New	Hybrid	Old	Unknown
George Polk: Local/Regional/Metropolitan	9	1	0	7	1
George Polk: State Reporting	3	1	0	2	0
George Polk: Metropolitan/Transportation	1	0	0	0	1
Pulitzer Prize: Local	6	0	2	4	0
Pulitzer Prize: Public Service	5	0	1	4	0
National Journalism Award—Community Reporting	4	1	0	3	0
National Journalism Award—Public Service	4	0	1	3	0
Totals:	32	3	4	23	2

170. Local Reporting includes any award described by the terms local, regional, metropolitan, community, or those that limit recipients to certain locations. The Pulitzer Prize distinguishes local reporting from national reporting by giving an award “[f]or a distinguished example of reporting on significant issues of local concern, demonstrating originality and community expertise, using any available journalistic tool.” *The 2012 Pulitzer Prize Winners Local Reporting*, PULITZER PRIZES, <http://www.pulitzer.org/citation/2012-Local-Reporting> (last visited May 6, 2013). The Pulitzer Prize for Public Service is awarded to a “journalistic effort, such as overcoming obstacles to reporting, achieving results that benefit a community, using all available resources and engaging readers.” 2012 Pulitzer Prize Application Guidelines, PULITZER PRIZES 4, <http://www.pulitzer.org/files/entryforms/2012jguidelines.pdf> (last visited May 6, 2013). For the purposes of this chart, local awards include only those that award the prize to a publication that focuses on community concerns, not national concerns.

For the specific journalism awards that we classified as being awarded to “old,” “new,” and “hybrid” media sources, and a more detailed analysis of this data, please visit the UF Law Scholarship Repository, available at <http://scholarship.law.ufl.edu/flr/vol65/iss5/5>.

We also decided to broaden our search to include other journalism awards that contain a significant investigatory component, even though they are for a specific substantive area of journalism. Measuring from 2005 forward, we collected data on awards that were open to both the old and the new media, including awards for Business reporting, Environmental reporting, and Local or Community reporting. We did not, however, include award data for Commentary, Explanatory, Editorial writing, or Breaking News, because there is no reason to expect that old media sources would have an advantage in these areas.

Table III: Awards for other types of journalism

This Table charts forms of journalism that implicitly contain a significant investigatory component, 2005 or more recent, that were open to both the “old” and the “new” media, including awards for Business reporting, Environmental reporting, and Local or Community reporting, but not awards for Commentary, Explanatory, Editorial writing, or Breaking News.

AWARD	TOTAL AWARDED	NEW	HYBRID	OLD	UN-KNOWN
Donald Robinson Memorial Award for Investigative Journalism	4	--	2	2	--
Gold Keyboard Award	8	--	--	8	--
New York Press Club Award for Feature Reporting	43	4	3	36	--
Grantham Prize for Excellence in Reporting on the Environment	7	--	4	3	--
James Aronson Award for Social Justice Journalism	33	5	4	24	--

John B. Oakes Award	9	2	3	4	--
The Maria Moors Cabot Prize	18	2	1	15	--
National Journalism Awards	23	3	4	16	--
George Polk Awards	68	5	10	47	6
Pulitzer Prize	37	4	9	24	--
Simon Rockower Awards for Excellence in Jewish Journalism	12	--	--	12	--
The Sidney Awards (The Hillman Foundation)	47	11	5	31	--
Worth Bingham Prize for Investigative Journalism	4	--	1	3	--
Totals	313	36	46	225	6

Of the 307 awards we were able to classify, 225—or 73%—went to the old media, and thirty-six—or 12%—went to the new media.

These award totals might not present an accurate assessment of the relative quality of the old and the new media. It is possible, for example, that most of the judges for these awards work for the old media and that they might be biased against journalism from the new media. An alternative possibility is that it is common knowledge that the old media is downsizing while the new media is expanding. Judges desiring to endear themselves to a prospective future employer might well exhibit bias in favor of the new media. Moreover, if the thesis that the new media is inferior in many respects to the old media is correct, the overall quality of investigative work must have been decreasing in recent years, because the old media has declined dramatically in size and quality in recent years.¹⁷¹ Indeed, in light of the financial constraints facing most

171. This is likely to be true even though as newspapers fold, some of their best reporters

of the old media today, it is remarkable—even astonishing—that they continue to win most journalism awards.

These award statistics are, of course, only one piece of evidence that should be used to determine whether traditional newspaper markets should continue to be defined as separate antitrust markets even in the age of the Internet. The statistics are, however, consistent with the evidence presented in Section III.B, which also indicates that the quality of many aspects of traditional journalism is significantly superior to online media.

For some media purposes the new media is invaluable and does an excellent job. For example, anyone seeking opinions can find a virtually limitless number of bloggers and others willing to provide opinions about almost any issue on the Internet. However, with extremely important but limited exceptions, the pattern of recent media awards suggests that most of the highest quality reporting continues to be undertaken by the traditional media.¹⁷² This is especially true for high-quality investigative and local reporting.

CONCLUSIONS

Newspapers today are in many ways quite different from the newspapers that existed a generation ago.¹⁷³ Moreover, today readers have the option to purchase newspapers in hard copy or access them online. No matter which way one chooses to read them, local daily newspapers are often fundamentally different than online offerings. They offer high quality investigative and local journalism, one-stop shopping that reduces transaction costs, and sifted, certified reliable news stories. Although there are high-quality Internet sources that perform all these functions, with important exceptions, these new media sources do not perform them as well. The frequently significantly higher quality of much of the old media is enough to make a difference for antitrust market definition purposes. It often should be enough to cause

will be hired by the surviving newspapers.

172. As noted in Section III.B, we classified stories that appear in newspapers' hard copy editions as generated by the old media, even if these stories also appear on the newspapers' website.

173. By accessing a single newspaper's Internet site, readers have virtual access to all of the paper's diverse offerings, including video highlights, interviews, and reporter chats. Readers can also chat online with reporters and one another. Moreover, newspapers' Internet sites add new stories as soon as they are written (for example, immediately after a key sporting event). So, the whole readership and viewership experience is greatly enhanced and available to readers and customers who may have moved away but still have local loyalty or are traveling. Also, newspapers can now effectively track how their readers follow their advertising online, which is incredibly valuable to advertisers in terms of knowing who they are reaching on a minute-by-minute basis. For all these reasons, we do not buy into the rhetoric that the Internet has made the local daily newspaper into a dinosaur. Quite the contrary.

the old media to be classified as a different product for antitrust purposes.

This Article began with a hypothetical involving a merger of the twenty largest traditional media companies. The hypothetical produced significant cost savings and the parties agreed not to change any prices. Should price and cost be the only concerns of an antitrust evaluation of media arrangements? If so, this hypothetical should be permitted.

A vital element of media competition, however, includes quality, variety, perspective, and editorial independence. In fact, for the media, the choice of non-price competition is even more important than price competition or competition in terms of potential savings in the costs of generating news.

Courts should continue to hold that there are often separate old media markets for certain forms of journalism, such as high-quality investigative and local journalism, and also for the relatively unique form of one-stop shopping that newspapers offer. Accordingly, courts should continue to find that newspapers¹⁷⁴ often constitute their own relevant markets for antitrust purposes, and that the rise of online media should not effectively immunize the media sector from the antitrust laws. Indeed, a failure to recognize the crucial role that non-price competition plays in defining distinct media sector markets would be a prescription for disaster for the future of our democracy. The wisdom of Thomas Jefferson is worth repeating even in the age of the Internet: “[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”¹⁷⁵

174. This includes both newspapers’ print and online versions.

175. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs8.html.

For the specific journalism awards that we classified as being awarded to “old,” “new,” and “hybrid” media sources, and a more detailed analysis of this data, please visit the UF Law Scholarship Repository, *available at* <http://scholarship.law.ufl.edu/flr/vol65/iss5/5>.