Antitrust Law on the Borderland of Language and Market Definition: Is There a Separate Spanish-Language Radio Market?

A Case Study of the Merger of Univision and Hispanic Broadcasting Corporation

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"Language is not a little, airtight, clean, finished container of something. . . . It's permeable, alive. It moves."

—Lizette Alvarez[1]

IS THERE A SEPARATE SPANISH-LANGUAGE radio market? Market definition is a critical step in antitrust analysis, often determining

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1. *See* Lizette Alvarez, *It's the Talk of Nueva York: The Hybrid Called Spanglish*, N.Y. TIMES, Mar. 25, 1997, at A1 (quoting Julia Alvarez).

whether or not a merger is approved by the Department of Justice[2] ("DOJ"). In its antitrust review and ultimate approval (with conditions) of the merger between Univision Communications Corporation and Hispanic Broadcasting Corporation ("Univision/HBC merger"), for the first time the DOJ announced its conclusion that Spanish-language radio competed in a separate market from English-language radio. The DOJ determined that the merger parties participated in a distinct smaller and highly concentrated market and required them to divest certain assets as a condition of their merger. This remedy was based on the merger parties' relative share of the revenues of stations defined as offering Spanish-language radio in the markets in which they operated.

The DOJ's decision, however, does not adequately account for the extent to which English and Spanish-language radio stations compete for advertisers and audiences. Indeed, the DOJ assumed that English broadcasters would not change their program formats or languages to compete directly with Spanish broadcasters. Broadcast trends before and after the merger demonstrate the fallacy of that market entry assumption. The DOJ's analysis failed to account for the market power of large English-language broadcasters. It also ignored the lack of market power by Spanish-language broadcasters to exclude English broadcasters from competition in Spanish formats. Additionally, the DOJ's characterization of the markets as sharply divided by language is defied by the rich variety of broadcast languages and formats.

The DOJ's decision in this case has several implications for antitrust law. A crucial component of market definition is an analysis of market power, and the ability of competitors to enter the market, as appropriately defined. The reasoning of this case should be revisited in future mergers to ensure that assumptions do not supplant rigorous analysis of market power, including the likelihood of entry of other competitors.

Through a case study of the Univision/HBC merger and recent market developments, this Article questions whether Spanish and English broadcasters are insulated from each other in competition for consumers and advertisers or as program suppliers. While this merger received a great deal of attention from regulators and the press, it has undergone little scholarly scrutiny of the market definition and its

2. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1073 (D.D.C. 1997) (outcome of antitrust review hinges on the proper market definition).

ramifications for competition and the public interest. This Article analyzes the implications of that definition for competition in the radio industry, as well as the public's access to programming in Spanish and other foreign languages. Through a review of the relevant literature and suggestions for further research, this Article explores five main themes raised by defining an antitrust market by language.

First, the conclusion that radio markets are sharply divided by language and inelastic in terms of consumer substitution and supplier entry assumes static markets where broadcasters air programming only on one side of the alleged language divide, and advertisers can only reach their target audiences through advertisements in one language. The facts, however, reveal dynamic movement by many audience members, advertisers, and broadcasters between the two languages and into bilingual formats straddling both. This fluidity challenges the legal determination that Spanish and English radio stations compete in separate markets and exposes the lack of definitional clarity by the DOJ regarding what should be included or excluded in such markets.

Second, Spanish-language broadcasters lack the ability to exclude potential competitors, a key indicator of market power.[3] Before the merger, broadcasters often changed the language (and with it the content) of their radio broadcasts. Following the merger, several traditionally English-language broadcasters entered into Spanish-language programming. One such entity, Clear Channel, is the largest radio broadcaster in the United States, controlling almost 1200 stations—more than ten percent of the commercial radio stations licensed by the Federal Communications Commission[4] ("FCC"). These shifts into Spanish-language programming challenge the DOJ's assumptions about market participation, as well as the market definition and inference of undue market concentration.

Third, the DOJ assumed that competitors would not change formats in the wake of a merger. This assumption disregards the ability of broadcasters to change formats, particularly those that can leverage their control of multiple stations to garner audiences, revenues, and

3. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956) (reasoning that market power is the ability to control prices or exclude competition).

4. As of December 31, 2004, Clear Channel owned 1189 commercial radio stations in the United States. Clear Channel, Investors FAQ, http://www.clearchannel.com/Investors/investor_faq.aspx (last visited Aug. 14, 2005) [hereinafter Clear Channel]; FCC, Broadcast Station Totals as of Dec. 31, 2004 (Feb. 10, 2005), http://www.fcc.gov/mb/audio/totals/index.html (last visited Aug. 14, 2005) (10,992 commercial AM and FM radio stations licensed) [hereinafter FCC Radio Broadcast Totals].

investor backing. Broadcasters with a substantial base in English formats can readily bring their economies of scale acquired in the larger "English market" into the alleged "Spanish market," creating a competitive advantage for English incumbents. The ability to spread such economies across formats and languages contradicts the assertion that the Spanish-language and English-language markets are separate. It also raises concerns about the distorting effects of the DOJ's current market definition.

Fourth, where the defined market serves a group that is a numerical as well as a linguistic and ethnic minority, it is critical to recognize the factors that impede service to that community and result in fewer providers serving that audience.[5] Though a substantial minority,[6] the history of Hispanics as a minority shapes the market's willingness to provide programming targeted at them. Antitrust analysis requires consideration of the alleged market's history, structure, and industry.[7] Without an appreciation of those dynamics, antitrust regulators may conflate market concentration in a small (and artificially defined "market") with market power.[8]

5. *See* STEVEN S. WILDMAN & THEOMARY KARAMANIS, THE ECONOMICS OF MINORITY PROGRAMMING; ASPEN INSTITUTE COMMUNICATIONS & SOCIETY ROUNDTABLE ON DIVERSITY IN THE MEDIA 3 (1997), http://www.aspeninstitute.org/site/c.huLWJeMRKpH/b.785521/k.7429/The_Economics_of_Minority_Programming.htm (last visited Feb. 16, 2006). Wildman and Karamanis posited that until the number of broadcast stations or the size of the minority audience grows, it will be more profitable to serve the majority, delaying service targeted to the minority if it is provided at all. *Id. See also* Philip M. Napoli, *Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences*, 46 J. BROADCASTING & ELECTRONIC MEDIA 169, 181 (2002) (finding that stations whose audiences were more than 50% racial or ethnic minorities earned less advertising revenues than those whose audiences were predominantly non-minority). Philip Napoli commented, "Minority-targeted media content suffers from not only the potentially lower valuations of minority audiences but also from the fact that, by definition, it appeals to a small audience." *Id.*

6. In 2004, the thirty-nine million Hispanics in the United States, constituted 13.7% of the United States population. *See* Press Release, U.S. Census Bureau, Hispanic Heritage Month 2004: Sept. 15–Oct. 15 (July 15, 2004), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/002696.html. The United States Hispanic population grew by 13% since 2001, quadruple the rate for the United States population overall. *Id.* In the year 2000, Spanish was the second most commonly spoken language in the United States, with nearly twenty-nine million speakers. *See* U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-37, ABILITY TO SPEAK ENGLISH BY LANGUAGE SPOKEN AT HOME 2000 (2000), *available at* http://www.census.gov/population/cen2000/phc-t37/tab01a.pdf. (last visited Sept. 15, 2005).

7. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1973) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 321–22 (1962)) (merger has to be viewed functionally, in the context of its particular history, structure, and industry).

8. *See E.I. du Pont de Nemours & Co.*, 351 U.S. at 392.

Fifth, the DOJ's market definition may create disincentives to provide Spanish programming. As broadcasters recognize they can grow more by providing English programming, some may change their formats, both to attract the audiences and revenues associated with those formats, and to escape the antitrust confines of a more restrictive market.

These issues assume heightened importance when the product involves speech, particularly news and public affairs. This case and its market definition influence not only music and entertainment programming, but also access to news and public affairs information, which is at the heart of our democracy. The First Amendment values of encouraging a diversity of voices from a multiplicity of sources underscore the importance of defining the market correctly.[9]

Radio is the primary news source in the United States in the morning and during the day.[10] African-American and Hispanic audiences listen to more radio than the general population, and their use of radio as a significant news source continues into the evening.[11] The Radio and Television News Directors Foundation ("RTNDF") reported that news ranked second after music as a reason why people tune into a radio station.[12] The study also found that across all groups

9. Neither the DOJ, nor the court approving the final judgment in this case analyzed the appropriate constitutional standard of review for an antitrust market definition based on language. *See* United States v. Univision Commc'ns, Inc., 2004-1 Trade Cas. (CCH) ¶ 74,242 (D.D.C. Dec. 22, 2003), 2003 WL 23192527. This Article argues that defining the antitrust market by language is a regulation of speech that creates disincentives for broadcasters to provide Spanish language programming and may limit audiences's ability to hear those messages. The Supreme Court has determined that a regulation involving speech must first be analyzed to determine if the regulation is content-based or content-neutral. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994). If the regulation is content-based, then strict scrutiny and the use of the least restrictive means are required. *Id.* If it is content-neutral, the substantial government interests served are examined according to intermediate scrutiny, and the choice of a remedy must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). The constitutional analysis is beyond the scope of this Article, but these issues underscore the need to define the market consistent with both antitrust and constitutional principles.

10. *See* RADIO NEWS SURVEY, THE AMERICAN RADIO NEWS AUDIENCE SURVEY, EXAMINING THE USE, PERCEPTION AND FUTURE OF RADIO NEWS (2001), *available at* http://www.rtnda.org/radio. One-third of American adults turn to radio for their news when they get up and are getting ready for their day. More than three-quarters of commuters rely on radio for news while traveling to and from work—and once there, one-third of workers use radio to get most of their news. Listeners surveyed perceived radio as second to local and national television for providing a lively exchange of opinions on issues, ranking above newspapers for this purpose. *Id.*

11. *Id.* (follow "Radio News Listening Patterns" hyperlink).

12. *Id.* (follow "Radio in Today's News Media Mix" hyperlink).

music stations are the most popular source of radio news.[13] The Pew Research Center for the People and the Press found that the average American spends thirty-two minutes a day watching news on television or cable and seventeen minutes listening to news on the radio.[14]

This Article challenges the evidence and presumptions affecting the DOJ's determination that Spanish-language radio is a separate market for antitrust purposes. It recommends a dynamic approach to analyzing the radio marketplace. That analysis must account for: (1) the fluid behavior of broadcasters, advertisers, and audiences in moving between formats and languages; (2) the importance of multiple ownership and market power in the English market to competition across languages; (3) factors that influence programming choices, including the dynamics of markets that serve a minority; and (4) the incentives created by this market definition.

Part I of this Article provides an overview of the Univision/HBC merger and the regulatory and industry dynamics that shaped the transaction. Part II critiques the DOJ's market definition by language using the United States Supreme Court's standards articulated in *Brown Shoe v. United States*.[15] In *Brown Shoe*, the Supreme Court laid out a seven factor test for determining the contours of an antitrust product market: "[(1)] industry or public recognition of the submarket as a separate economic entity, [(2)] the product's peculiar characteristics and uses, [(3)] unique production facilities, [(4)] distinct customers, [(5)] distinct prices, [(6)] sensitivity to price changes, and [(7)] specialized vendors."[16]

Part III examines the consequences for antitrust market definition and participation stemming from the DOJ's presumptions that no broadcasters would change their formats to Spanish. Part IV explores market concentration in light of the dynamics of serving a linguistic and ethnic minority.

I. Overview of the Univision/HBC Merger, Parties, and Issues

As a threshold matter, it is important to understand the context in which the Univision/HBC merger occurred. The Telecommunica-

13. *See id.*

14. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, NEWS AUDIENCES INCREASINGLY POLITICIZED 11 (2004), *available at* http://people-press.org/reports/pdf/215.pdf (last visited July 24, 2005).

15. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

16. *Id.*

tions Act of 1996[17] ("Act") dramatically changed the radio landscape. It eliminated the cap on the number of stations a single entity could own nationally and raised the number that a single entity in a market could control based on the size of the market.[18] A wave of consolidation followed the Act's passage, requiring DOJ approval for many deals because of the size of the transactions and their potential impact on competition.

Before the Telecommunications Act, the largest radio company in America owned sixty-four stations.[19] By 2004, the largest radio company, Clear Channel, controlled nearly 1200.[20] For smaller broadcasters, the imperative to expand in order to compete is especially intense.[21] Thus, the market definition is important to other broadcasters who seek to merge in order to enhance their ability to compete.

The DOJ is required to examine potential mergers valued at over $50 million.[22] While this may seem like a high dollar threshold, FM radio stations may sell for $17 million in a medium-sized market, such as Sacramento, California and $150 million in a large market,[23] making it common for media companies to be subject to antitrust review

17. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 156 (codified as amended in scattered sections of 47 U.S.C.).

18. The Telecommunications Act of 1996 eliminated the national cap on the number of AM or FM radio stations a single entity could control. *Id.* § 202(a), 110 Stat. at 110, *amended by* Pub. L. No. 108-199, § 629, 188 Stat. 99 (1997) (current version at 47 U.S.C. § 303(a) (2000)). It also permitted an entity to control up to eight commercial stations in any market with forty-five or more such stations, up to seven commercial stations in a market with thirty to forty-four such stations, up to six commercial radio stations with between fifteen and twenty-nine such stations, and up to five commercial radio stations in a market with fourteen or fewer such stations. *Id.*

19. Prometheus Radio Project v. FCC, 373 F.3d 372, 432 (3d Cir. 2004).

20. Clear Channel, *supra* note 4.

21. IVY PLANNING GROUP LLC, WHOSE SPECTRUM IS IT ANYWAY? HISTORICAL STUDY OF MARKET ENTRY BARRIERS, DISCRIMINATION AND CHANGES IN BROADCAST AND WIRELESS LICENSING, 1950 TO PRESENT 39–40 (2000), *available at* http://www.fcc.gov/opportunity/meb_study/historical_study.pdf (last visited July 27, 2005) (submitted to Office of General Counsel, FCC and noting that media lenders and venture capitalists prefer deals worth $10 million or more, involving several stations and markets).

22. All persons contemplating certain mergers or acquisitions valued at more than $50 million are required to file a notice with the Federal Trade Commission (and the Department of Justice for certain mergers, including those in the media and telecommunications industries) before consummating the transaction. 15 U.S.C. § 18a(a)(2)(B)(i) (2000).

23. *See* Kevin Brass, *Turning Up the Volume*, HISP. BUS. MAG., Dec. 2004, at 50, 58, *available at* http://www.hispanicbusiness.com/news/newsbyid.asp?id=19463 (last visited July 10, 2005).

for mergers. Univision offered Hispanic Broadcasting Corporation $3.5 billion in consideration for the merger.[24]

Prior to the merger, Univision held FCC licenses for thirty-two full-power television stations, as well as several low-power television stations.[25] Univision did not directly control any radio licenses. Hispanic Broadcasting Corporation ("HBC") controlled sixty-eight full service radio licenses[26] and no television stations. HBC was the nation's largest Spanish-language radio group with revenues roughly twice that of the next largest provider of Spanish-format radio, Entravision.[27] Prior to the merger, HBC produced annual revenues of $240 million, principally from its radio business.[28] In 2002, HBC controlled 51% of Spanish-language radio revenue in the top ten markets and had annual revenues nearly twice as large as Entravision.[29]

At the time of the merger, Clear Channel held 26% of the equity of HBC.[30] After the merger, Clear Channel's stock was to be converted into a 3.66% voting stock interest in Univision.[31] Following Clear Channel's conversion of several of its stations to Spanish-language and bilingual formats, the companies agreed that Univision would buy back all of Clear Channel's stock in Univision.[32]

At the time of the merger, Univision held approximately 30% of the equity of Entravision.[33] Entravision owned forty-nine television sta-

24. Complaint for Injunctive Relief at 4, ¶ 11, United States v. Univision Commc'ns Inc., 2003 WL 23192527 (D.D.C. Dec. 22, 2003) (No. 1:03CV00758), 2003 WL 23781621.

25. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18834–35 (2003).

26. Press Release, FCC, FCC Grants Conditioned Approval of Univision/HBC Merger, Company Must Comply with New Radio Ownership Limit Six Months from Effective Date (Sept. 22, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239081A1.pdf [hereinafter FCC UVN/HBC News Release]. HBC controlled licenses for eighteen AM, fifty FM stations, and six FM translator authorizations. *Id.*

27. HBC's revenues were $240 million in 2001, while Entravision's radio revenues were $65 million. Complaint for Injunctive Relief, *supra* note 24, at 3, ¶ 9.

28. *Id.*

29. Joint Statement of Jonathan S. Adelstein & Michael J. Copps, Comm'rs, FCC, Applications for Transfer of Control of Certain Subsidiaries of HBC to Univision Communications, Inc., at 4 (Sept. 22, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-218A2.pdf (last visited Sept. 5, 2005) [hereinafter Adelstein/Copps Statement].

30. *Hispanic Broad. Corp. & Univision Commc'ns, Inc.*, 18 F.C.C.R. at 18836, ¶ 3.

31. *Id.*

32. Press Release, Univision Commc'ns Inc., Univision Prices Common Stock Offering and Agrees to Repurchase Shares from Clear Channel (Jan. 7, 2004), *available at* http://www.univision.net/corp/en/pr/Los_Angeles_07012004-0.html.

33. Competitive Impact Statement at 3, United States v. Univision Commc'ns Inc., 2003 WL 23192527 (D.D.C. Dec. 22, 2003) (No. 1:03CV00758), *available at* http://www.

tions,[34] almost all of which were affiliates of Univision, displaying Univision programming and its national commercials.[35] Entravision also controlled licenses for fifty-two full service radio stations.[36] Univision had a variety of special investor rights in Entravision. These included the right to veto sales or purchases of assets over $25 million dollars and the right to veto the sale of any Entravision television station running Univision programming.[37]

The DOJ focused on the overlap in the radio market resulting from Univision's substantial equity interest and corporate rights in Entravision.[38] The DOJ was concerned with the effects the merger would have on competition between the newly merged Univision/HBC and Entravision due to the radio assets Univision would acquire from HBC.

In defining the relevant product market in other radio mergers, the DOJ acknowledged that television, newspapers, and other media compete for advertising dollars.[39] Nevertheless, the DOJ concluded that the advertising industry views radio as a distinct medium, well-suited to reaching targeted demographics.[40] After defining the product market as radio, the DOJ defined the relevant geographic market in which the potential merger partners competed.[41]

Next, the DOJ examined whether Univision, through its equity interest and rights in Entravision, and HBC competed in the general radio market or in a market defined by the Spanish-language or some other criteria. The DOJ's consent decree for the HBC/Univision merger does not reflect any analysis of whether the market could be defined by ethnicity or race of the listeners, and no DOJ decision distinguishes markets on that basis. Instead, based on interviews with ad-

usdoj.gov/atr/cases/f201000/201006.htm (last visited March 10, 2005). The parties are referred to in this Article as "Univision" or "UVN" and "HBC."

34. Of the forty-nine FCC television authorizations Entravision held, eighteen were for full service television stations. *Hispanic Broad. Corp. & Univision Commc'ns, Inc.*, 18 F.C.C.R. at 18835.

35. Complaint for Injunctive Relief, *supra* note 24, at 7, ¶ 23.

36. *Hispanic Broad. Corp. & Univision Commc'ns, Inc.*, 18 F.C.C.R. at 18835.

37. Competitive Impact Statement, *supra* note 33, at 4.

38. Complaint for Injunctive Relief, *supra* note 24, at 7–9, ¶¶ 22–26.

39. *See, e.g.*, Comment and Petition for Hearing, Triathlon Broad. Co. & Capstar Radio Broad. Partners, File Nos. BTC-980821EE, BTC-980821EF, BTC-980921EG, BTCH-980821EH, BTCH-980821EI, BTCH-980821EJ (F.C.C. Oct. 19, 1998), *available at* http://www.usdoj.gov/atr/public/comments/2026.htm (last visited July 5, 2005) [hereinafter Triathlon Petition].

40. *Id.* at 7–8.

41. Competitive Impact Statement, *supra* note 33, at 4–5.

vertisers, the DOJ determined the relevant market was Spanish-language radio.[42]

The DOJ's analysis of the merger is governed, in part, by the Horizontal Merger Guidelines[43] ("the Guidelines"). The Guidelines explain that "mergers should not be permitted to create or enhance market power or to facilitate its exercise."[44] A seller's market power is defined in the Guidelines as "the ability profitably to maintain prices above competitive levels for a significant period of time."[45] In radio, the broadcaster is the "seller" of advertising time. Time and the audience reached are the media company's "products," and advertisers are its consumers. The DOJ was concerned that the "proposed acquisition of HBC would lessen competition substantially in the provision of Spanish-language radio advertising time to a significant number of advertisers in several geographic areas of the United States."[46]

The DOJ determined that HBC and Entravision "face few other significant competitors" in the radio markets in which both overlap and "are the next best substitutes for each other."[47] If their shares of Spanish-language radio advertising revenues in those markets were combined, the DOJ concluded the total share would range "from 70 to 95 percent."[48]

In its complaint, the DOJ pled that unless restrained, the merger would lessen competition in the sale of advertising time on Spanish-language radio in the markets where HBC and Entravision overlap, increasing prices and decreasing services in those markets.[49] The DOJ alleged this merger would violate § 7 of the Clayton Act,[50] which prohibits mergers that may substantially lessen competition or tend to create a monopoly.[51]

As a condition of the merger, Univision was required to reduce its equity investment in Entravision to 15% of outstanding shares within

42. *Id.* at 5.

43. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552 (Sept. 10, 1992) (never codified).

44. *Id.* at 41553, § 0.1.

45. *Id.*

46. Competitive Impact Statement, *supra* note 33, at 2.

47. *Id.* at 7.

48. *Id.*

49. *Id.*

50. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (2000)).

51. Complaint for Injunctive Relief, *supra* note 24, at 10, ¶ 28.

three years of the consent decree and to 10% within six years.[52] Univision also gave up some of its corporate rights in Entravision, particularly the right to veto the purchase or sale of Entravision radio assets and its seats on Entravision's board.[53] Univision's corporate controls of Entravision were extensive, including the right to veto radio sales or purchases, which could have prevented Entravision from exercising its judgment about its competitive radio strategy.[54] Apart from the market definition, these investor rights were a key determinant of the DOJ's decision regarding the proposed remedy.

In future cases the remedy of divestiture of equity in a third party may not be available. In such cases, this market definition may lead the DOJ to order the sale of certain radio stations owned by the merger parties, or to prohibit the merger in cases where no such order would be made if the stations broadcast in English.

Univision and HBC agreed to the final judgment and did not publicly protest those terms.[55] Parties often agree to the DOJ's terms because the deal is more valuable to them than what they are required to divest.

The Univision/HBC merger gave the DOJ the opportunity to further explore the issue of whether there is a separate "Spanish market" and to announce it as precedent for future mergers. Competitors within a language will now be faced with this presumption for their antitrust market definition. This Article will analyze the factors relevant to the validity of that presumption.

52. United States v. Univision Commc'ns, Inc, 2004-1 Trade Cas. (CCH) ¶ 74,242, at 98,013 (D.D.C. Dec. 22, 2003), 2003 WL 23192527.

53. *Id.*

54. The DOJ allowed Univision to retain its corporate rights to "veto any decision by Entravision to merge, consolidate, or otherwise reorganize . . . that results in a transfer of all or substantially all of the assets of Entravision or a transfer of a majority of the voting power of Entravision." Competitive Impact Statement, *supra* note 33, at 11. Univision also retained its rights to veto the sales of any television stations that are Univision affiliates. *Id.* Entravision and Univision are permitted to terminate these rights, but cannot expand or modify them. *Id.* Under these rights, Univision could veto the sale of Entravision to Clear Channel, for example, which has become a major competitor to Univision in many of Univision's radio markets. The DOJ justified allowing Univision to retain its rights to veto the ultimate ownership of Entravision because "it cannot be used to veto or influence day-to-day decisions relating to radio competition or strategic decisions such as the buying or selling of individual radio stations." Response to Public Comments at 9, United States v. Univision Commc'ns Inc., 2003 WL 23192527 (D.D.C. Dec. 22, 2003) (No. 1:03CV00758), *available at* http://www.usdoj.gov/atr/public/comments/201510.htm (last visited Sept. 5, 2005). However, the decision to sell a company is arguably the most important corporate decision in which a direct competitor could participate.

55. Competitive Impact Statement, *supra* note 33, at 2.

II. Market Definition: Cross-Elasticity of Demand, Fluidity of Formats, and the Distinction Between Format and Market

Section II of this Article will analyze the available evidence of whether Spanish and English radio compete in separate markets according to the factors the Supreme Court articulated in *Brown Shoe Co. v. United States*,[56] to determine the contours of a market. Those factors focus on cross-elasticity of demand: the substitutability of one product for another.

Section A examines the *Brown Shoe* factor: "industry or public recognition of the submarket as a separate economic entity."[57] It analyzes the perceptions of advertisers and marketers regarding the use of English and Spanish-language media to reach Hispanic audiences, concluding that advertisers may define the market by ethnicity rather than language. In contrast, the DOJ defined the market by the predominant language of the broadcast's format, suggesting that more research is needed to confirm the validity of the DOJ's market definition. Section B analyzes language and media usage by Hispanics in the United States to examine potential "public recognition of the submarket as a separate economic entity."[58]

Section C considers whether broadcasters are divided into specialized vendors by language, an indicator under *Brown Shoe* that markets are separate.[59] While some companies broadcast only in Spanish formats, Univision, Entravision, Spanish Broadcasting System ("SBS"), and several other companies who target the Hispanic community also have stations that broadcast exclusively in English.[60] The entry of Clear Channel and other broadcasters into Spanish-language programming indicate that broadcasters are not specialized vendors by language, but cross between languages and program formats.

Section C also analyzes "the product's peculiar characteristics and uses," and the distinctiveness of their customers, two other *Brown Shoe*

56. 370 U.S. 294 (1962).

57. *Id.* at 325.

58. *Id.*

59. *Id.*

60. *See* Entravision Commc'n. Corp., All Radio Listing, http://www.entravision.com/template.cfm?page=media&subpage=radioAll (last visited July 10, 2005) [hereinafter Entravision Radio Stations]; Spanish Broad. Sys., Stations by Format and Region, http://www.spanishbroadcasting.com/stations_pr.shtml (last visited Jan. 18, 2006) (offering stations playing "American" Contemporary Hit Radio and "American" 1980s and 1990s hits in Puerto Rico).

factors used to define a submarket.[61] This Section concludes that broadcasters' increasing use of bilingual formats makes it difficult to draw a sharp line around what constitutes Spanish programming. The appeal of formats in different languages or variations thereof to many of the same audience members suggests that each product's characteristics do not make them so peculiar or distinctive that a submarket is clearly demonstrated.

Section D analyzes the *Brown Shoe* factors of distinct prices and sensitivity to prices changes as relevant to defining a submarket.[62] It analyzes research that finds that advertisers pay lower prices to advertise on Spanish and other minority-oriented formats, than on "General Market" formats. However, those prices can also be correlated to the fact that the *audience* is primarily composed of minority group members.[63] Thus, lower prices do not distinguish Spanish-language as a separate market since English formats serving minority audiences also experience lower prices.

A. Advertiser, Marketer, and Broadcaster Perceptions Regarding Spanish-Language Radio Substitutability

In a Clayton Act antitrust case, the government bears the burden of proof in establishing the proper market definition.[64] Determination of the relevant market is a question of fact, and the government has the burden of proving facts to establish a prima facie claim.[65] The goal of merger analysis is to protect competition.[66]

The first factor of the *Brown Shoe* test of the contours of a product market is "industry or public recognition of the submarket as a separate economic entity."[67] One measure of industry perception of a submarket is customer behavior. The DOJ has stated that the customers it is trying to protect are those who seek to place advertisements on Spanish-language stations.[68] The DOJ focuses on the *advertisers*' likely

61. *Brown Shoe*, 370 U.S. at 325.

62. *Id.*

63. Napoli, *supra* note 5, at 181.

64. United States v. Engelhard Corp., 126 F.3d 1302, 1305 (11th Cir. 1997).

65. *See* Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1329 (7th Cir. 1981).

66. *See Brown Shoe*, 370 U.S. at 344 (the Clayton Act protects competition, not competitors).

67. *Id.* at 325.

68. Competitive Impact Statement, *supra* note 33, at 5. The DOJ's antitrust analysis does not directly take into account the interests of the viewers. The FCC's merger review should take audience interests into account as part of its evaluation of whether the merger would serve the "public interest, convenience, and necessity." *See* Communications Act of 1934, ch. 652, § 310, 48 Stat. 1086 (1934) (current version at 47 U.S.C. § 310(d) (2000)).

substitution between products—cross-elasticity of demand in economic terms.[69]

Moreover, radio and other means of mass communication really have two consumers: the listening audience and the advertisers. Broadcasters use various factors including the size, buying habits, and demographic characteristics of their listening audience to convince advertisers to buy advertising time on their stations.[70]

In conducting a horizontal merger analysis, the DOJ follows the Guidelines, which set out general standards for defining the relevant product market. The Agency takes into account all relevant evidence including:

> (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
> (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
> (3) the influence of downstream competition faced by buyers in their output markets; and
> (4) the timing and costs of switching products.[71]

"The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test."[72]

As a step in determining the contours of the relevant market, the DOJ asked advertisers if they would switch from Spanish to non-Spanish formats if prices were to rise in Spanish radio.[73] Some advertisers reported to the Antitrust Division that they felt they had no effective alternatives—that non-Spanish radio was not an effective substitute to reach "customers who speak Spanish and who listen predominantly or exclusively to Spanish-language radio."[74] The DOJ concluded that Spanish-language radio advertisers "would not find it economical to

69. *Brown Shoe*, 370 U.S. at 325 (the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product markets for antitrust purposes).

70. *See* KOFI ASIEDU OFORI, CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS app. A at 3 (1999), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/ (last visited July 24, 2005) (submitted to Office of Communications Business Opportunities, FCC).

71. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41554, § 1.1 (Sept. 10, 1992) (never codified).

72. *Id.*

73. The DOJ reported that its "inquiry included numerous interviews of a wide range of advertisers and review of over a million pages of documents provided by the defendants and other entities." Response to Public Comments, *supra* note 54, at 6.

74. Competitive Impact Statement, *supra* note 33, at 5.

switch, or credibly threaten to switch, to other media to avoid a post-merger price increase."[75] The DOJ reported that a significant number of local and national advertisers "view Spanish-language radio, either alone or in conjunction with other media, to be the most effective way to reach their target audience and do not consider other media, including non-Spanish-language radio, to be a reasonable substitute."[76] The DOJ concluded that these "advertisers would not turn to other media, including radio that is not broadcast in Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio or a reduction in the value of the services provided."[77]

It is very difficult to independently analyze these conclusions, since the DOJ does not disclose the names or quantity of advertisers surveyed. The DOJ's Complaint and Competitive Impact Statement summarize the Department's findings but provide few details regarding the evidence of the lack of substitutability between Spanish and English-language radio for advertisers. Nor do those pleadings discuss evidence of broadcasters' behavior in recognition or anticipation of competition between languages. The paucity of information provided makes it difficult to analyze the DOJ's conclusions about the evidence for this market definition. Therefore, this Part will explore issues and publicly available evidence relevant to this conclusion.

Advertiser responses may be shaped by the question asked and their self-interest in wanting to preserve as many competitive outlets as possible to avert or mitigate price increases. The survey results may also be influenced by the current market alternatives. For example, advertisers with experience marketing on "Spanglish" or "Tejano" stations broadcasting in a mix of English and Spanish might have a different view of alternatives than those who do not have such stations in their markets.

In markets where bilingual radio has been established, some advertisers have requested that their commercials be broadcast in "Spanglish," a mix of Spanish and English, to appeal to the bicultural audience.[78] The *New York Times* reported that on radio station KXTN-FM in San Antonio, Texas, which was rated number one in its local market for four years, Disc Jockeys ("DJs") would say things like, "Recuerdales que hoy, esta tarde, vamos a estar en vivo in Dillards,

75. *Id.*
76. *Id.*
77. *Id.*
78. Alvarez, *supra* note 1, at A1.

broadcasting live from 3 to 5, with your chance to win some cool KXTN prizes. Acompañen a sus amigos."[79] This translates to: "Remember that today, this afternoon, we are going to go live from Dillards, broadcasting live from 3 to 5. Come with your friends."[80]

Many advertising and marketing agencies stress the need to recognize the linguistic diversity of Hispanics in devising advertising strategies. One advertising agency executive, Raquel Tomasino, Media Director of Castells & Asociados in her letter to the FCC about the merger cautioned against "Approaching the Market as if It Were a Monolithic Segment."[81] The United States Census for the year 2000 reported that almost twenty-nine million Americans speak Spanish at home.[82] Of those, 51% reported speaking English "very well," while 10% reported they did not speak English "at all."[83] Tomasino stressed the importance of recognizing that while many Hispanics in the United States are foreign-born and Spanish-dominant, a substantial portion are bilingual or English-dominant.[84] She commented that English-dominant or bilingual Hispanics could be reached with "culturally-relevant English ads (like African-American[s]). . . . Companies like McDonald's who do this well have very strong Hispanic positions."[85]

Marketing consultants Kevin Clancy and Peter Krieg emphasized that the United States Hispanic market "is actually divided into thirds—one-third speaks primarily Spanish, another third only or primarily English, and the other third is bilingual . . . ."[86] Clancy and Krieg stressed "media usage isn't an either/or choice; some Hispanics

79. *Id.*

80. *Id.*

81. Letter of Raquel Tomasino, Executive Vice President, Dir. of Media Servs., Castells & Asociados Adver. (May 22, 2003) [hereinafter Tomasino Letter], *attached to* Letter from Philip L. Verveer, Sue D. Blumenfeld, Michael G. Jones & David M. Don, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (June 2, 2003) [herinafter Willkie Farr Letter], *attached to* Letter from Claudia R. Higgins, Kaye Scholer LLP to James R. Wade, Chief, Litig. III Section, Antitrust Div., U.S. Dep't of Justice (July 18, 2003), *available at* http://www.usdoj.gov/atr/cases/f201500/201510b.htm (last visited Jan. 18, 2006).

82. Press Release, U.S. Census Bureau, *supra* note 6.

83. *Id.*

84. Tomasino Letter, *supra* note 81.

85. *Id.*

86. Press Release, Kevin J. Clancy & Peter C. Krieg, Copernicus Mktg. Consulting, A Counterintuitive Discovery About Media Buying for the U.S. Hispanic Market: The Bipolar Approach Wastes Marketing Dollars (Feb. 4, 2002), http://www.copernicusmarketing.com/about/docs/hispanic_media_optimization.htm (last visited July 11, 2005).

use English-language, some use Spanish-language, and others (a.k.a. the bilingual segment) use both."[87]

However, advertisers targeting bilingual consumers may be drawn to Spanish-language broadcasting, at least on television, because of research indicating that Latinos find that commercials in Spanish are more persuasive, and retain their message better than commercials in English. Roslow Research Group conducted studies in 1994 and 2000 of the effectiveness of advertising in the Spanish versus English languages on television for Latinos between the ages of eighteen and forty-nine.[88] The studies found that "advertising to Hispanics in Spanish is significantly more effective than advertising to Hispanics in English."[89]

In 2000, Roslow conducted a study of advertising effectiveness on television for Hispanic teenagers between the ages of twelve and seventeen, many of whom are bilingual.[90] Roslow found Spanish-language advertising was also more effective for Hispanic teenagers, though not by the same margin as for Hispanic adults. For Hispanic teens, Spanish-language advertisements were twice as persuasive as English-language advertisements.[91] This compared to 4 and 1/2 times as persuasive for adult Hispanics.[92] Recall of Spanish-language advertisements was approximately 16% greater for Hispanic teenagers, while it was 57% greater for Hispanic adults.[93]

The Roslow studies did not examine whether advertising effectiveness was influenced by its placement with Spanish-language programming. Spanish-language advertisements are occasionally broadcast during English programs, allowing advertisers to reach Spanish-speakers in Spanish, even during English programs.[94] Conversely, English-language advertisements are occasionally aired during

87. *Id.*

88. ROSLOW RESEARCH GROUP, SPANISH VS. ENGLISH ADVERTISING EFFECTIVENESS AMONG HISPANICS 10 (2000), *available at* http://www.roslowresearch.com/studies/33.doc (last visited July 10, 2005) [hereinafter ROSLOW, HISPANIC ADULTS].

89. *Id.* at 3.

90. ROSLOW RESEARCH GROUP, SPANISH VS. ENGLISH ADVERTISING EFFECTIVENESS AMONG HISPANIC TEENS 2, 9 (2000), *available at* http://www.roslowresearch.com/studies/91.doc (last visited July 10, 2005) [hereinafter ROSLOW, HISPANIC TEENS].

91. *Id.* at 3.

92. ROSLOW, HISPANIC ADULTS, *supra* note 88, at 3.

93. ROSLOW, HISPANIC TEENS, *supra* note 90, at 6; ROSLOW, HISPANICS ADULTS, *supra* note 88, at 7.

94. *See* Jewel Gopwani, *Ads Target Both Worlds*, REGISTER (Orange County), Dec. 11, 2004, *available at* http://www.ocregister.com/ocr/2004/12/11/sections/news/focus_in_depth/article_340696.php (last visited Jan. 18, 2005).

Spanish-language programming.[95] It would be important to consider how the program context affects response to advertising.

In 2003, Spanish Broadcasting System sued Clear Channel and HBC and claimed that Spanish and English-language radio competed in separate markets because advertisers have separate budgets for Spanish and English-language radio.[96] That case was dismissed with prejudice for failure to allege an antitrust violation.[97] As a result, neither the district court nor the parties recognized that while some advertisers may divide their budgets by language, others segment their budgets by ethnicity, race, gender, or other demographic factors.

In opposition to the HBC/Univision merger, SBS filed its survey of more than twenty advertising agencies and advertisers it characterized as having special knowledge of the Hispanic community.[98] From those comments, SBS concluded "English-language broadcasting and Spanish-language (Hispanic) broadcasting constitute separate markets."[99] That statement, however, equates Spanish-language with Hispanic, conflating language with ethnicity and blurring the alleged market distinction.

Some of the SBS commentators defined the relevant markets by language. Castor Fernandez, President and Creative Director of Castor, an Advertising Agency, replied as part of SBS's comments that "English language media and Spanish language media are NOT substitutable. There definitely is a separate advertising product market defined by the Spanish language."[100] He added that if prices were to increase, advertisers he works with would absorb the price increase rather than switch to advertisements in another language.[101] Richard Cotter, a buyer of radio and television advertising time, commented that "Spanish language radio and TV stations serve a distinct con-

95. John Authers, *Politicians Must Mind Their Language in Wooing Hispanic Vote, Despite the Success of Spanish Programming, English May Be Better for Addressing the Latino Electorate*, FIN. TIMES, Aug. 31, 2005, at 4 (advertisements aired in English for movie TROY during soccer games and soap operas broadcast in Spanish).

96. Spanish Broad. Sys. Inc., v. Clear Channel Commc'ns., Inc. & Hispanic Broad. Inc., 242 F. Supp. 2d 1350, 1358–59 (S.D. Fla. 2003) (for purposes of motion to dismiss, the district court deferred to SBS's market definition as "advertising allocated to Spanish-language radio in the top ten markets," but dismissed the case with prejudice for failure to allege antitrust injury).

97. *Id.*

98. Willkie Farr Letter, *supra* note 81 (attaching several letters from advertisers and advertising agencies).

99. *Id.*

100. Letter from Castor A. Fernandez, President/Creative Dir., Castor, to Whom it May Concern (May 27, 2003), *attached to* Willkie Farr Letter, *supra* note 81.

101. *Id.*

sumer base with different brand awarene[ss], tastes and preferences."[102] Cotter did not elaborate on whether those differences in consumer preference were related to language or associated with the ethnicity of the audience.

Other respondents to SBS's request for comments about the merger distinguished the market by ethnicity, rather than by language.[103] Mike Herrera commented that Presidente Beer commences its marketing strategy by identifying "the key markets within our Demographic group and separate[s] within each market the hispanic and general market."[104]

Consistent with Presidente's approach, Interep, a firm that represents broadcasters in their efforts to sell airtime to advertisers, commented on its website, "When it comes to marketing on radio, advertisers don't focus on formats. They focus on consumers."[105] Interep has established seven consumer types: "Affluent, African-American, Family, Hispanic, Men, Women, Young Adults."[106]

Rather than establish "industry or public recognition" of Spanish-language radio "as a separate economic entity" under *Brown Shoe*,[107] these statements indicate that some advertisers define the market by ethnicity rather than by language. Some marketers recognize that English media is an important part of the strategy to effectively reach Hispanic listeners. To that end, Raquel Tomasino recommended advertising in both languages to reach Hispanics: "Nationally, 10% of total dollars should go to Spanish, 4% to English-Hispanic; in L.A., 30% to Spanish, 11–18% to English-Hispanic."[108] These comments indicate that the use of media by Hispanics in both English and Spanish must be examined to determine the relevant antitrust product market.

102. Letter from Richard Cotter, Senior Partner, USA Dir. of Local Broad., MindShare, to Whom it May Concern, (May 21, 2003), *attached to* Willkie Farr Letter, *supra* note 81.

103. Tomasino Letter, *supra* note 81; Letter from Linda Lane Gonzalez, President, The Viva Partnership, Inc., to Michael Powell, Chairman, FCC (n.d.), *attached to* Willkie Farr Letter, *supra* note 81 (United States Hispanic media market is separate as distinguished by culture, language, customs and traditions).

104. Letter from Mike Herrera, Presidente U.S.A., to Michael Powel [sic], FCC (May 23, 2003), *attached to* Willkie Farr Letter, *supra* note 81.

105. Interep, Research and Publications, Consumer Lifestyles Network, *available at* http://www.interep.com/publications/cln (last visited Sept. 14, 2005).

106. *Id.*

107. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

108. Tomasino Letter, *supra* note 81.

B. Consumer Substitution Between Languages and Formats

Language usage by Hispanics in the United States provides some insight into public perception of substitutability between radio formats, which is relevant to "industry or public recognition of the submarket as a separate economic entity" under *Brown Shoe*.[109] In the year 2000, almost twenty-nine million Americans spoke Spanish at home.[110] Of those, 51% reported speaking English "very well," while 10% reported they did not speak English "at all."[111] This data indicates a range of language abilities and preferences among Hispanics and Spanish-speakers. Linguistic data must be correlated with media usage to examine the extent of product substitutability between English and Spanish radio.

The American Antitrust Institute ("AAI"), in its comments on the HBC/Univision merger, cited evidence that 9% of United States Hispanics do not speak English at all, at least 15% do not speak English well, and 75% of Hispanic adults in the top ten Hispanic metropolitan areas most frequently speak Spanish.[112] From these figures, AAI concluded that a "significant section of the Spanish-speaking community in the U.S. is highly dependent on information it receives in Spanish and that English is in these situations an inadequate substitute."[113] AAI criticized the DOJ's Competitive Impact Statement for lacking information on the percentage of Spanish-speaking consumers in the United States who are completely or highly dependent on Spanish-language sources of information.[114] In a dissent to the FCC's approval of the merger, Commissioners Adelstein and Copps argued that "[l]anguage serves as a communications link, or a communications barrier, to cultural and civic participation in our multicultural society . . . it is not a mere broadcasting format, but a threshold factor for whether a message is even understood."[115]

Data from Arbitron, a company that tracks radio listening, indicates that even for people who describe themselves as speaking only Spanish, language is not a complete deterrent to listening to the radio in other languages. Arbitron reported that among those who filled out

109. *Brown Shoe*, 370 U.S. at 325.

110. Press Release, U.S. Census Bureau, *supra* note 6.

111. *Id.*

112. Letter from Albert A. Foer, The Am. Antitrust Inst., to James R. Wade, Chief, Litig. III Section, Antitrust Div., U.S. Dep't of Justice 4 (June 12, 2003), *available at* http://www.usdoj.gov/atr/cases/f201500/201510a.htm.

113. *Id.*

114. *Id.* at 3–4.

115. Adelstein/Copps Statement, *supra* note 29, at 5.

"diaries" used to rate radio stations in summer 2003 through winter 2004, "around three-fourths of the radio listening from all diarykeepers who say they speak 'all Spanish' goes to Spanish-language radio."[116] This implies that, 25% of diarykeepers who speak "all Spanish" also listened to English or other formats.[117] Univision submitted research to the FCC showing that Hispanics in the geographical markets in which HBC operated spent more than 53% of their radio listening time tuned to English-language formats.[118]

In its 2005 survey of Hispanic Radio listening, Arbitron reported that "Mexican Regional" was the favorite Spanish-language format of United States Hispanics.[119] The second most popular format among Hispanics was "Contemporary Hit Radio," ("CHR") an English-language format.[120] Nearly 82% of Hispanic CHR listeners are under age thirty-five.[121] Additionally, teens account for almost one-third of the Hispanic CHR audience.[122]

The divergence in radio preferences between Hispanic adults and teenagers highlights the importance of distinguishing the particular product market at issue in this merger. Advertisers wishing to reach Hispanic teenagers, or Hispanics of all ages, might develop different strategies than those wishing to reach Hispanic adults. The DOJ's analysis did not address these distinctions.

Beginning in 2001, the AOL Time Warner Foundation and People *En Español* commissioned the research group Cheskin to conduct a "Hispanic Opinion Tracker," a national random survey of 4000 His-

116. Arbitron, *Why Language Preference?*, MÁS ALLÁ DE LOS RATINGS, WINTER 2004, http://www.arbitron.com/radio_stations/english/MA_WI04_4.htm (last visited Aug. 10, 2005) (percentages vary by market).

117. *See id.*

118. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18857 n.129 (2003).

119. ARBITRON, HISPANIC RADIO TODAY, HOW AMERICA LISTENS TO RADIO 13 (2005), http://www.arbitron.com/downloads/hispanicradiotoday05.pdf (last visited July 10, 2005). Format share is defined by Arbitron as "[t]he percentage of those listening to radio in the Metro [relevant geographic market] who are listening to a particular radio station format." *Id.* at 52. This is calculated by dividing the Average-Quarter-Hour ("AQH") Persons listening to a specific format, by the AQH Persons listening to all formats. *Id.* AQH persons is defined as "[t]he average number of persons listening to a particular [radio] station for at least five minutes during a 15-minute period." *Id.* Mexican Regional garnered a 17.9 AQH share in Arbitron's 2005 report. *Id.* at 22.

120. CHR attracted a 14.0 AQH share of Hispanic Radio Listening, Monday–Sunday, 6AM–Midnight, for persons 12 and over, topping the second largest Spanish-language format, "Spanish Contemporary," which garnered an AQH share of 11.3%. *Id.* at 21, 29.

121. *Id.* at 21.

122. *Id.*

panics and 2000 non-Hispanics.[123] Their report found that Hispanics on average listened to 4.16 hours of radio in English per week and 5.88 hours of radio in "Spanish/other."[124] During each week, 60% of Hispanics listen to Spanish-language radio, while 67% listen to English-language radio.[125]

The extensive bilingual use of radio for Hispanics undercuts the assertion that the Spanish and English-language radio markets are completely separate and do not compete. Many advertisers are aware through this and other research of the extent of English listening by Hispanics. This indicates that English radio may be a substitute, or at least part of the media mix for Hispanic listeners and the advertisers who wish to reach them.

Another important data resource to examine would be Arbitron's numbers indicating the overlap or duplication between different stations' listeners. Duplication indicates how many listeners station X and station Y share. HBC claimed that "[o]n average, Spanish radio stations duplicate less than 10% with English language stations."[126] With the addition of many new Spanish and Spanglish formats, as well as English formats that appeal to Hispanic audiences, it would be important to examine this data to determine the willingness of listeners to choose programming in different languages or formats. This data is proprietary to Arbitron. The resources necessary to examine Spanish-English and bilingual format duplication in representative sample markets exceed the resources currently available for this Article. Nevertheless, it is important for this data to be explored, taking into consideration the effect of formats offered in the market on audience overlap and the influence of companies that control multiple stations.

C. Language and Format Definition

The process of defining the relevant antitrust market requires a determination of what should be included or excluded from the market definition. The mix of languages broadcasters and audiences use

123. *See* Press Release, Time Warner, Hispanic Opinion Tracker Study Finds Hispanics Holding to Cultural Identity While Pursuing American Dream; Wide Issue Differences Between Hispanics and Non-Hispanics (Oct. 31, 2002), *available at* http://www.timewarner.com/corp/newsroom/pr/0,20812,669551,00.html (last visited Aug. 19, 2005).

124. FELIPE KORZENNY & LOU LOPEZ, HISPANICS AND ENTERTAINMENT, INSIGHTS FOR CULTURALLY RELEVANT MARKETING 4 (2003), *available at* http://www.cheskin.com/docs/Sites/1/article-HACRKorzennyLopez2003.pdf (last visited July 11, 2005). The authors do not explain the "Spanish/other" category and whether it includes bilingual formats.

125. *See* Clancy & Krieg, *supra* note 86.

126. Adelstein/Copps Statement, *supra* note 29, at 12.

confounds the attempt to define the market by language. The Univision/HBC merger market definition assumes a precise boundary between English and Spanish. Latinos and others in the United States have long mixed the two languages, creating new words in both languages in the process.[127] Broadcasters recognize the audience on the borderland of these languages and broadcast in formats mixing Spanish and English such as Tejano, Spanglish, and "Hurban"[128] (Hispanic/Urban).

The breadth of formats targeting the Hispanic community illustrates the difficulty of categorizing a market by language. *Hispanic Business Magazine* reported that "new formats continue to blur the line between English-preference and Spanish-preference listeners."[129] "According to broadcasters," *Hispanic Business Magazine* wrote, "typical bilingual listeners in their mid-30s are willing to try both English and Spanish-language stations."[130] Tom Castro commented about the four English-format and three Spanish-format stations owned by Border Media Partners, "I would submit that they are all Spanish-formatted stations."[131]

Through a bilingual format, the DJ may play two or three English songs in a row, followed by some bilingual songs and some Spanish songs.[132] Commercials and public service announcements reflect the same mix of languages.[133]

Clear Channel's actions demonstrate the difficulty of categorizing a market by language. In 2004, Clear Channel announced plans to convert up to twenty-five of its 1200 stations from English to Span-

127. *See* Jose Armas, The Spanglish Revolution Has Reached the Airwaves, *available at* http://www.languages.umd.edu/SpanishPortuguese/spanfac/RLavine/span315/spanglish.html (last visited July 12, 2005).

128. *See* Cary Darling, Radio Tries to Reach Young Latinos with 'Hurban' Format, *available at* http://hoodgame.com/index.php?option=com_content&task=view&id=1110&Itemid=0 (last visited July 12, 2005); *see also* Armas, *supra* note 127.

129. Brass, *supra* note 23.

130. *Id.*

131. *Id.*

132. *E.g.*, Stations 105.7/100.7, KWF-FM/KWZ-FM San Jose and San Francisco, California, heard by the author (Radio broadcast Sept. 7, 2005). The format is labeled "La Kalle," slang for the street or *la calle* in Spanish.

133. For example, on Univision's bilingual Reggaeton station in the San Jose, California market, the soft drink Mountain Dew aired bilingual advertisements, while other advertisements were broadcast in English, Spanish, or a flowing mix of both languages. *Id.* The DJs speak in a mixture of both languages, although they sometimes speak only in English, as they did in a Public Service Announcement discouraging drinking and driving. *Id.* One bilingual advertisement on Univision's Reggaeton station reflected the cross-over between languages and media, announcing the season premier of the English television shows *Desperate Housewives* and *Reunion*. *Id.*

ish.[134] As part of this effort, some Clear Channel stations changed to Spanish formats, while others adopted bilingual formats. In late 2004, Clear Channel converted its English rock station in Houston to "Hurban/CHR."[135] The format, targeted at young Latinos, plays a "mix of English-language hip-hop tracks along with Afro-Caribbean rhythms."[136] Clear Channel has classified stations in Houston, Texas, Miami, Florida, and Albuquerque, New Mexico as "Hurban." For its Hurban format in San Antonio, Texas, DJs play a mix of Spanish and English-language music. The DJs speak Spanglish, flowing in and out of English and Spanish.[137]

Reuters reported that as of September 2005, seventeen United States stations—including former English-language outlets—switched to rhythmic Latin formats with Reggaeton-dominated playlists.[138] Reggaeton music may be recorded in English, Spanish, or a mix of both and is played regularly on predominantly English top forty stations and around the world.[139] In 2005, Univision changed the format of eight of its sixty-six radio stations to Reggeaton.[140] The popularity of such music across cultures, formats, languages, and continents suggests far greater fluidity by audiences and advertisers than the DOJ conceived of in the Univision/HBC merger.

"Tejano" is another popular format among Hispanics, featuring Tex-Mex and Mexican music from Northern Mexico.[141] Though only garnering a 1.1% share of Hispanic listeners nationally, it is almost

134. Press Release, Clear Channel Radio, Clear Channel Radio Announces Aggressive Multi-Market Roll-out for New Spanish-Language Programming Initiative (Sept. 16, 2004) *available at* http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=740.

135. Christine Hall, *Clear Channel Tests New Spanish-Language Format*, SAN ANTONIO BUS. J., Nov. 15, 2004, *available at* http://www.bizjournals.com/sanantonio/stories/2004/11/15/daily1.html (last visited Dec. 16, 2005).

136. *Stations Sing Bilingual Tune*, VARIETY, Aug. 15, 2005, at 18, *available at* 2005 WLNR 13650515; Clifford Pugh, *KLOL Suddenly Speaking Spanish, Venerable Rock Station Switches to a New Format*, HOUSTON CHRON., Nov. 17, 2004, at A1.

137. *See* L.A. Lorek, *Hispanic Radio Is Boosting Clear Channel*, SAN ANTONIO EXPRESS-NEWS, Sept. 11, 2005, at 01L, *available at* 2005 WLNR 14390943; Press Release, Clear Channel Radio, Clear Channel Radio Creates Bilingual "Hurban/CHR" Format for Hispanic Youth (Nov. 15, 2004).

138. *The World: Global Hit* (BBC News Radio broadcast Aug. 25, 2005), transcript and audio *available at* http://www.theworld.org/globalhits/2005/08/25.shtml; Leila Cobo, *Music Biz Catching Reggaeton Fever*, ABC NEWS.COM, Sept. 4, 2005, http://abcnews.go.com/Entertainment/wireStory?id=1096867 (last accessed Oct. 24, 2005).

139. *Reggaeton Music Is Latin Hip-Hop*, AHOREE.COM, Apr. 28, 2005, http://www.ahorre.com/musica/music/hip_hop_en_espanol/reggaeton_music_is_latin_hiphop/ (last visited Sept. 20, 2005).

140. Leila Cobo, *supra* note 138.

141. ARBITRON, *supra* note 119 at 45.

five times more popular in Arbitron's South Central region, bordered by Texas, Kentucky, and Alabama.[142] The format originated in Texas, as indicated by its name, which means a Texan of Mexican origin.[143] Many Tejano stations feature bilingual DJs who use both languages in a style that reflects the everyday language of border communities. Albuquerque's KABQ radio adopted a bilingual format in the early 1990s.[144] "Announcers, newscasters and their editorials combine Spanish and English words, phrases, sentences. They don't translate; they switch from English to Spanish at random points in their speech."[145]

Bilingual formats and broadcasters' diversification of the language of their programming call into question whether "specialized vendors" characterize a submarket under the *Brown Shoe* test.[146] While some companies broadcast only in Spanish-language formats, Univision, Entravision, SBS, and several other companies who target the Hispanic community also have stations that broadcast exclusively in English.[147] For example, Entravision bought KBMB-FM in Sacramento for $17.4 million in 2004 and continued broadcasting its English hip-hop format (now labeled Contemporary Hit Radio) to complement its English "Kool" station and its two Spanish-language formats in Sacramento.[148] In two cities near the Mexican border, Entravision operates English-language stations: a country-format station in El Centro, California, to complement its two Spanish-format stations; and in El Paso, Texas, an English Oldies format and a Rock format, in addition to three Spanish stations.[149] Clear Channel's "Hispanic Division" broadcasts in a range of Spanish, Spanglish, and Latin formats, as discussed above. This format diversification allows broadcasters to reach a larger segment of Hispanics, as well as the general market, diversifying its audience and potential revenue base.

142. *Id.* at 46.

143. *See* Chris Strachwitz, The Roots of Tejano and Conjunto Music, http://www.lib.utexas.edu/benson/border/arhoolie2/raices.html (last visited Aug. 19, 2005).

144. Armas, *supra* note 127.

145. *Id.*

146. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

147. *See* Entravision Commc'n. Corp., All Radio Listing, http://www.entravision.com/template.cfm?page=media&subpage=radioAll (last visited July 10, 2005) [hereinafter Entravision Radio Stations]; Spanish Broad. Sys., Stations by Format and Region, http://www.spanishbroadcasting.com/stations_pr.shtml (offering stations playing Contemporary Hit Radio and 1980s and 1990s hits in Puerto Rico).

148. Entravision Radio Stations, *supra* note 147; *see also* Brass, *supra* note 23.

149. Entravision Radio Stations, *supra* note 147.

Some English radio stations also feature Spanish-language artists as part of their regular line-up. For example, primarily English-language Alternative Rock-format station KDLD/KDLE (Indie 103.1 FM) in Los Angeles, California features Latin-Alternative music every Tuesday night through a show called "The Red Zone."[150] Indie programming director Michael Steel commented about the music, "Just because bands happen to be singing in Spanish doesn't mean the songs aren't great. We're a rock station and these are rock bands . . . ."[151]

The Red Zone "cater[s] to the vast Latino population, the bilingual population, here in Los Angeles who love the music . . . but had no outlet to hear it."[152] The show also has a substantial following among English speakers. Show hosts and co-creators Chelina Vargas and Tomas Cookman reported, "they get countless calls from English-speaking listeners who don't necessarily understand the lyrics but are nonetheless thrilled to discover the music."[153]

Under the DOJ's antitrust analysis in the Univision/HBC merger, how would one categorize English rock stations that feature Spanish weekly shows and some Spanish songs in the regular lineup? Would they fit in the English or the Spanish market? They have some listeners who speak only Spanish, only English or are bilingual. Regardless of language preference, they tune in because they love the music. With a large Hispanic listener base including Spanish and bilingual speakers, would English stations that play Spanish music be an attractive alternative for advertisers, especially during the Spanish-rock shows? Hybrid formats, such as Spanish Rock on English stations, demonstrate the difficulty of classifying the radio market by language and the lack of specialized vendors under *Brown Shoe.*

Classification is also challenging for formats with Spanish names that lean toward English-language music. Would Entravision's "Casa," meaning "House" music format in Houston be classified as falling in the English or Spanish market under the DOJ's definition? Though it

150. Shannon Cook, *Welcome to the 'Red Zone,' It's Spanish for Indie—Simply Red,* BILLBOARD RADIO MONITOR, Oct. 15, 2004, *available at* http://www.indie1031.fm/static/downloads/Red_Zone_in_Billboard.pdf. (last visited Dec. 17, 2005).

151. *Id.*

152. *Id.*

153. *Id.* Similarly, in Miami, Florida, English-language modern rock station WZTA (Zeta) broadcasts a show called "En Fuego," which translates to "On Fire," for two hours each Sunday night. *Id.* WZTA's programming director, Troy Hanson, commented that the typical percentage of Hispanic listeners to the station hovered between 35–42%. *Id.* With such a large Hispanic listener base, they decided to develop a program featuring Spanish-language rock. *Id.*

features less Spanish hip-hop and Spanish Rock than Clear Channel's station labeled Hurban,[154] would the DOJ be more likely to consider Casa as a participant in the Spanish market because its format name is in Spanish?

Many English stations also have substantial Latino audiences. The quintessential rock station in Los Angeles, KROQ, reported, "Without actively seeking to broaden its ethnic appeal, the station, long considered 'white,' now has a 40 percent Latino audience."[155] Patricia Suarez, president of advertising firm Suarez/Frommer & Associates, commented, "Right when everyone is discovering the importance of using Spanish, we're seeing Latinos become the backbone of the English-language audience."[156]

Two other factors in the *Brown Shoe* definition of a submarket are "the product's peculiar characteristics and uses," and the distinctiveness of their customers.[157] With the increase in bilingual programming, it is becoming increasingly difficult to draw the line between Spanish and Spanglish formats. They may play much of the same music and share a portion of their audience. These factors suggest that each product's characteristics do not make them so peculiar or distinctive that a submarket is clearly demonstrated.

The attempt to categorize markets by language is confounded by the nature of language itself. Language is organic and shifts over time, as evidenced by the Oxford English Dictionary's addition of more than 3000 new words and expressions in 2003.[158] Many common words in English such as rodeo, lasso, and taco come from Spanish.[159] Author Julia Alvarez commented: "Language is not a little, airtight, clean, finished container of something . . . . It's permeable, alive. It moves."[160]

In recognition of the willingness of audiences and advertisers to listen to programs in different languages, broadcasters such as SBS and Univision have publicly recognized that English stations are among their competitors. In its March 31, 2003 Securities and Ex-

154. Darling, *supra* note 128.

155. *See* Gregory Rodriguez, *The Overwhelming Allure of English*, N.Y. TIMES, Apr. 7, 2002, § 4, at 3, *available at* 2002 WLNR 4090070.

156. *Id.*

157. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

158. *Eeyorish Muppets: Go Egosurf the Dictionary*, L.A. TIMES, Aug. 21, 2003, at A15.

159. Gerald Erichsen, Spanish Words Become Our Own, Adopted and Borrowed Words Enrich English, http://www.spanish.about.com/cs/historyofspanish/a/spanishloanword.htm (last visited Jan. 20, 2006).

160. Alvarez, *supra* note 1, at A1.

change Commission Form 10-K, SBS stated that "[e]ach of [its] radio stations compete with both Spanish-language and English-language radio stations in the market . . . ."[161] Univision describes its television network as the "fifth most-watched full-time network overall, competing head-to-head with the English-language television networks in primetime seven nights a week."[162]

These statements may be intended to attract potential advertisers, as well as investors, who may overlook both the size of the Hispanic audience, and its competitiveness with English. SBS's assertions conflict with its position before the FCC that there is a "separate Spanish-language (Hispanic) market."[163] More information about broadcaster perceptions of competition would inform the analysis of the market definition and participation. These perceptions will likely shape plans for future market entry, as well as current competition.

This section has demonstrated the difficulty of determining which formats would be included within the DOJ's definition of Spanish programming. Excluding bilingual programming from the antitrust market definition, including that played on predominantly English stations, would create incentives to provide such programming to escape antitrust confines. Without doubt broadcasters offer bilingual formats because there is a demand for them. However, the DOJ's market definition also encourages firms to diversify their programming so as not to be limited in growth by operating in a smaller antitrust market defined by language. As a result, less Spanish programming may be provided, potentially harming both audiences and advertisers who wish to reach them.

D. Format vs. Market Definition

The diversity of formats illustrates the importance of understanding the target markets served by the formats and the potential overlap between them. Radio formats must also be distinguished from radio markets; one is related to programming, the other to the demographics of the market in which they compete. A review of some of the DOJ's decisions in other radio merger cases illustrates the importance of this distinction.

161. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18855 (2003).

162. Univision Network, Univision Media Properties, http://www.univisionet/corp/en/univision.jsp (last visited Aug. 14, 2005).

163. Willkie Farr Letter, *supra* note 81.

In the proposed merger between Triathlon Broadcasting and Capstar, the DOJ noted that "Capstar currently controls 20.3% and Triathlon controls 32.8% of Wichita metro market radio advertising revenues."[164] The DOJ looked at likely dominance of key demographic groups that many advertisers are interested in reaching. The DOJ concluded that Capstar controlled 24.6% of adults ages twenty-five to fifty-four, while Triathlon controlled 39.6%. If the acquisition proceeded as planned, Capstar would control 54.0% of this demographic.[165]

Similarly, the DOJ concluded that the merger of Jacor and Citicasters would substantially lessen competition.[166] The DOJ noted that prior to the merger, Jacor controlled 42% of all radio advertising revenues in Cincinnati, and that share would rise to 53% after the proposed merger.[167]

The DOJ uses a formula called the Herfindahl-Hirschman Index ("HHI") to indicate whether the proposed merger would produce undue market concentration.[168] The index is "calculated by summing the squares of the individual market shares of all the participants."[169] An HHI index below 1000 is presumed to be unconcentrated.[170] An index above 1800 is considered highly concentrated.[171] While the DOJ did not provide details on exactly how it defined the market, it noted that Jacor's HHI would rise from a pre-merger level of 2180 to 3077 after the merger.[172] As a condition of merger's approval, the DOJ required Jacor to sell WRKQ-FM, a radio station that catered to eighteen to thirty-four years olds.[173]

Though concerned about potential domination of the eighteen to thirty-four year old audience segment, the DOJ did not define the market in the Jacor merger as eighteen to thirty-four year olds for

164. Triathlon Petition, *supra* note 39, at 10.

165. *Id.* at 13.

166. United States v. Jacor Commc'ns, Inc., 1997-1 Trade Cas. (CCH) ¶ 71,671, at 78,735 (S.D. Ohio Dec. 31, 1996), 1996 WL 784589. Jacor was acquired by Clear Channel in September 1999. Press Release, U.S. Dep't of Justice, Justice Department Approves Clear Channel's Acquisition of Jacor Communications After Parties Agree to Merger (April 22, 1999), *available at* http://www.usdoj.gov/atr/public/press_releases/1999/2388.htm (last visited Aug. 17, 2005).

167. *Jacor Commc'ns, Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,671, at 78,735.

168. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41557–58, § 1.5 (Sept. 10, 1992) (never codified).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Jacor Commc'ns, Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,671, at 78,738.

173. *Id.*

purposes of the HHI analysis. The DOJ based its analysis on control of advertising revenues on the whole market, not just the eighteen to thirty-four year old market.[174] Since the market was not defined by format, the issue of cross-elasticity of demand by format—that is the substitutability of one format for another—was not addressed. It is also noteworthy that the age-range target was not defined by language, race, ethnicity, gender, sexual orientation or other demographic characteristics besides age. It is presumed that the station's broadcast language was English.

It is unclear whether "all advertising revenues" in the *Jacor* decision included revenue from Spanish formatted stations or only from English stations. If it included only English formats, then a parallel analysis of Spanish broadcasters should look at competition within subformats of Spanish radio (such as the demographics targeted by Mexican Regional or Spanish Talk) and control of "all advertising revenues." Some Spanish stations target twenty-five to fifty-five year olds who listen to Spanish music, while others target audiences fifty-five and over.[175] Under the Univision/HBC merger approach, "Spanish" became both the format and the market definition, in contrast to the approach in the Jacor merger.

The two approaches produce different incentives. Based on the *Jacor* precedent , would broadcasters have a disincentive to target eighteen to thirty-four year old English listeners, or thirty-five to fifty year old English listeners, to ensure that their companies will be allowed to grow? *Jacor* suggests that if you merge with entities that target the same demographic through the same format, some of the overlapping stations may be subject to divestiture, depending on the HHI concentration levels of the merged entities as measured by "all of the advertising revenues." If their control of the overall market's advertising revenues would not be higher than allowed after the merger under the Horizontal Merger Guidelines, no divestitures may be required, even though they compete in the same format. Additionally, companies might avoid divestitures by changing their formats (in good faith) in advance of merger negotiations. Even if companies keep their formats, and there is overlap, *Jacor* suggests the divestiture target will not be all English stations, but rather the overlapping subformats, i.e., sta-

174. *Id.*

175. For example, Mexican Regional format is especially popular among twenty-five to forty-four year olds, who account for 55% of the format's audience, while Spanish Talk is popular among people ages fifty-five and over who account for half of the format's audience. ARBITRON, *supra* note 119, at 25, 33.

tions targeting eighteen to thirty-four year olds. The *Jacor* approach would not likely undermine provision of service to eighteen to thirty-four year old listeners.

For companies specializing in Spanish broadcasting who wish to merge, the Univision decision suggests the divestiture target may be all of their Spanish stations competing in the same market. The Univision/HBC decision did not address whether such divestitures may be required where the stations target different demographics through their Spanish-language formats. The distinction between format and market should be considered in future mergers, as it was in the *Jacor* and Triathlon decisions.

E. FCC Policies Distinguishing Between Format and Market in Radio

The FCC's treatment of Spanish radio as a format, rather than a market, led to its approval of the Univision/HBC merger in September 2003.[176] The FCC's consent to the merger was based on the opposite conclusion from the DOJ's—that there was no separate Spanish-language market.[177] Examining the FCC's treatment of Spanish radio as a format, rather than a market, is key to understanding the history and structure of the industry as directed by the Supreme Court in *United States v. General Dynamics Corp.*[178] and *Brown Shoe.*

The Communications Act of 1934 requires the FCC to determine whether the transfer of an FCC license that would occur as part of a merger would serve "the public interest, convenience, and necessity."[179] In applying the public interest standard, the FCC first considers whether the proposed merger would be consistent with the Telecommunications Act of 1996, and rules that govern how many stations a single entity may control in a geographical market.[180]

A majority of FCC Commissioners approved the Univision/HBC merger, following FCC precedent that concluded Spanish radio is not

176. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18834–35 (2003).

177. *Id.* at 18868.

178. United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1973) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 321–22 (1962)) (merger has to be viewed functionally, in the context of its particular history, structure and industry).

179. *See* Communications Act of 1934, 47 U.S.C. § 310(d) (2000). The public interest standard is the "touchstone of authority" for the FCC. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

180. Telecommunications Act of 1996 § 202(c)(1)(A), 47 U.S.C. § 303(a) (2000); *Hispanic Broad. Corp. & Univision Commc'ns, Inc.*, 18 F.C.C.R. at 18872–73.

a separate market.[181] In 1995, the FCC rejected the theory that a license transfer application should be denied based on the definition of the market as "Spanish radio" in a case involving the Spanish Radio Networks' ("SRN") application to transfer radio licenses in Miami, Florida to Heftel (a predecessor to HBC).[182] In SRN, the FCC concluded that the multiple ownership rules did not "indicate that the goal of enhancing diversity is furthered by defining the relevant market in terms of the languages in which radio stations broadcast."[183] The Commission noted that the multiple ownership rules were "crafted in terms of an entire broadcast 'audience,' including both Spanish speakers and others."[184]

The FCC expressed concern that such a construction of the rules might prohibit the potential merger of Spanish competitors because of the small number of Spanish broadcasters. The FCC observed that "in markets with only two or three Spanish language stations (unlike Miami where there [were] more than seven such stations), there would be virtually no situation where common ownership would be permitted."[185] Moreover, the FCC expressed concern that "to segregate the radio metro market for ownership purposes into Spanish-language and English-language stations might allow the acquisition of a Spanish station by the owner of an English station where the combined audience share exceeded 25 percent" allowed under the multiple ownership rules.[186] The FCC concluded, "These results clearly were not intended by the current rule."[187]

In the Univision/HBC merger, the FCC majority cited the SRN case as precedent for the proposition that Spanish-language programming does not constitute a separate market for purposes of evaluating the "public interest" or applying the multiple ownership rules.[188] If the FCC had reversed course from its previous decision and applied a format-based limit on transfers, it would have effectively changed the application of the multiple ownership rules established by the Tele-

181. *Hispanic Broad. Corp. & Univision Commc'ns, Inc.*, 18 F.C.C.R. at 18867–68.
182. Spanish Radio Network, 10 F.C.C.R. 9954, 9956. (1995).
183. *Id.* at 9955.
184. *Id.* at 9956.
185. *Id.*
186. *Id.*
187. *Id.*
188. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18867–68 (2003) (citing Spanish Radio Network, 10 F.C.C.R. 9954, 9956 (1995)); Changes in Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858 (1976) (rely on the marketplace to determine formats to promote broadcast diversity and maximize economic welfare).

communications Act of 1996 without notice, comment, or statutory authority.[189]

The FCC is forbidden by its constituting statute, the Communications Act of 1934, from engaging in censorship.[190] In *Turner Broadcasting System v. FCC*,[191] the Supreme Court stressed that the "FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."[192] Since 1976, the Commission has held that format choice should not be dictated by government regulation, but left to market forces.[193] To restrict license transfers because of the format or the language of the format in which the parties broadcast, would raise concerns under the Communications Act and the First Amendment. Such a policy would unduly interfere in programming decisions because it would be impose additional burdens on transactions within small or minority formats.

Following these precedents, the FCC applied the same standards in evaluating the Univision/HBC proposed merger as it would for the merger of any competitors. The FCC majority found that the "wide variety of programming alternatives available to Spanish-speaking audiences; the ease of entry into the Spanish-language format; and the viewing patterns of Hispanics do not indicate that the Hispanic or Spanish-speaking audience constitutes a separate, insular 'diversity' or competition market."[194] The FCC majority emphasized the evidence indicating ease of entry into Spanish formats and format changes between languages as indicators that no "competitive harms" resulted from the proposed merger.[195] The FCC majority argued that approving the merger would serve the public interest because it would "give Hispanic media a better opportunity to compete against big media companies, capturing more advertising revenue to allow it to expand unique language and cultural offerings to its audiences."[196]

189. The FCC concluded that the theory that Spanish-language radio was a separate market for multiple ownership purposes would require a generic rulemaking to change the multiple ownership rules. *Spanish Radio Network*, 10 F.C.C.R. at 9956.

190. 47 U.S.C. § 326 (2000).

191. 512 U.S. 622 (1994).

192. *Id.* at 650.

193. *Changes in Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d at 858.

194. FCC UVN/HBC News Release, *supra* note 26.

195. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18869–70 (2003).

196. Press Statement, Michael K. Powell, Chairman, FCC, Kathleen Q. Abernathy & Kevin J. Martin, Comm'rs, FCC, Transfer of Control of Certain Subsidiaries of the Hispanic Broadcasting Corporation to Univision Communications, Inc. 1 (Sept. 22, 2003), *available*

FCC Commissioners Michael Copps and Jonathan Adelstein argued that the FCC should have conducted a hearing to inquire into whether there is a separate market.[197] Both Commissioners dissented from the majority, and Commissioner Adelstein argued that post-merger, Univision would likely "control two-thirds of the rising $2.5 billion spent by advertisers on Spanish-language broadcast media."[198]

The FCC majority noted that the combined Univision/HBC would own fifty-one of 222 Spanish-language television stations and sixty-seven of 706 Spanish-language radio stations then operating.[199] With the entry of Clear Channel, Infinity, and ABC Radio Network into Spanish radio since the merger, Univision's proportionate control of both total radio stations broadcasting in Spanish and advertising revenue has likely decreased.

One commentator about the FCC's approval of the merger argued that the FCC's grant of a "permanent waiver" to Spanish-format television networks, including Univision and Telemundo, from the FCC's Network Representation Rule indicates that the FCC has treated Spanish-language television as a separate market.[200] The Network Representation Rule prohibits stations, other than those owned and operated by a television network, from being represented by the network in the non-network advertising sales market.[201] The rule was designed to preserve competition between networks and affiliates for national advertisements. In 1990, the FCC granted Spanish language television networks a waiver of that rule for the purpose of "encouraging the growth and development of new networks; fostering foreign-language programming; increasing programming diversity; strengthening competition among stations; and fostering a competitive UHF

at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239081A2.pdf (last visited Aug. 17, 2005)) [hereinafter UVN/HBC FCC Majority Press Statement].

197. Press Statement, Michael J. Copps, Comm'r, FCC, Shareholders of Hispanic Broadcasting Corporation (Transferor) and Univision Communications, Inc. (Transferee) for Transfer of Control of Hispanic Broadcasting and Certain Subsidiaries, Licensees of KGBT (AM), Harlingen, TX et al. 2 (Sept. 22, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239081A3.pdf (last visited Sept. 5, 2005)); Adelstein/Copps Statement, *supra* note 29, at 2.

198. Press Statement, Jonathan S. Adelstein, Comm'r, FCC, *Una Vision para los que Hablan Español en los Estados Unidos* "One Vision" for United States Spanish Speakers 2 (Sept. 22, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239081A4.pdf (last visited Sept. 5, 2005).

199. UVN/HBC Majority Press Statement, *supra* note 196 at 3.

200. Nicole Serratore, *How Do You Say 'Big Media' in Spanish? Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 203, 226–27 (2004).

201. 47 C.F.R. § 73.658(i) (2005).

service."[202] The FCC has granted other waivers in the television and cable marketplace to promote Spanish programming.[203]

The FCC reviewed the Network Representation waiver during the Univision/HBC merger review. Though FCC Commissioners Copps and Adelstein questioned the continued justification for that waiver in light of Univision's 2002 market capitalization of $7.8 billion and net revenues of more than $1 billion,[204] the FCC left the television market waiver in place.

It should also be stressed that the DOJ and the FCC have long distinguished between the television and radio markets.[205] The waiver of certain FCC rules for Spanish-language television stations does not indicate that Spanish radio would be granted such a waiver, or treated by the FCC as a separate marketplace. Moreover, in the radio market no such waivers have been granted.

Though the FCC has encouraged program diversity, it has not treated Spanish broadcasters as if they competed in a separate market. Until the early 1990s, the FCC considered several factors including proposed program service to determine who would receive a broadcast license.[206] Applicants were given a "plus" in the Comparative Hearing process for proposing programming not currently offered in the community.[207] Even when the FCC considered programming in the licensing process, it was only one of several factors, including industry experience and financial ability.[208] All of those "qualitative" factors, including proposed format, were usually outweighed by whether

202. Amendment of § 73.658(i) of the Commission's Rules Concerning Network Representation of Television Stations in National Spot Sales, FCC 90-364, 5 F.C.C.R. 7280 (1990).

203. In 2002, the FCC granted NBC a waiver allowing it to keep three television stations in the Los Angeles market for twelve months (the rules allowed common ownership of no more than two television stations in that market), when NBC acquired Telemundo, a Spanish-language television network. *In re* Telemundo Commc'ns Group, Inc., 17 F.C.C.R. 6958 (2002). The waiver was based on the Commission's finding that Telemundo's Spanish-language television station did not compete directly with NBC's television broadcasts in English to a wider audience. *Id. See also* Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 96 (1972) (cable networks allowed to carry out-of-market foreign-language stations without counting them against their quota of distant non-network stations).

204. Adelstein/Copps Statement, *supra* note 29, at 18–19.

205. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18868–69 (2003).

206. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394–99 (1965).

207. *Id.*

208. *Id.* at 394–99.

the proposed owner of a station committed to full-time management.[209]

For over a decade, the FCC has not taken program diversity into account in radio licensing. In 1993 Congress authorized the FCC to use auctions to determine who would get licenses to operate services using the radio spectrum, such as are required by radio, television, or mobile telephones.[210] The FCC does not currently offer any credits or incentives for program diversity.[211]

Most broadcast licenses are acquired through transfers from incumbent broadcasters. In that context, the FCC has specially declined to consider format, as discussed above. In deciding whether to approve the transfer, the FCC inquires whether it would serve the "public interest, convenience, and necessity."[212]

The FCC's actions in the Univision/HBC merger and in prior radio transactions indicate that the FCC has not recognized or treated Spanish radio as a separate market. The FCC's actions are relevant to understanding the regulatory distinction between format and market. They should also inform antitrust understanding of the structure and contours of the radio marketplace, which *General Dynamics* and *Brown Shoe* required be considered in analyzing the relevant market.[213]

F. Pricing Differentials—Relationship to Market Definition and Participation

Two other factors in the *Brown Shoe* submarket definition are "distinct prices" and "sensitivity to price changes."[214] In general, advertisers pay lower prices for advertisements on Spanish and other minority-oriented formats than for "General Market" English-language formats.[215] However, lower prices do not establish Spanish as a separate market and instead may be due to the advertising industry's undervaluing of minority consumers.

209. Bechtel v. FCC, 10 F.3d 875, 882 (D.C. Cir. 1993) (ruling that the FCC has not justified integration of management into ownership as a criteria in awarding broadcast licenses).

210. Balanced Budget Act of 1993, Pub. L. No. 105-33, 111 Stat. 251 (1993) (codified at 47 U.S.C. § 309(j) (2000)).

211. *See, e.g.*, Press Release, FCC, FCC Adopts Auction Procedures for Commercial Broadcast Licenses (Aug. 7, 1998) *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/1998/nrmm8025.html (last visited Aug. 1, 2005).

212. Telecommunications Act of 1996, 47 U.S.C. § 310(d) (2000).

213. United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1973) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962)).

214. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

215. OFORI, *supra* note 70, at 2.

The FCC commissioned a study on minority-owned and formatted radio that found a pattern of "minority discounts" whereby stations that broadcast in formats targeted to racial or ethnic minorities earned less per listener than did stations that targeted the "General Market."[216] The study's author, Kofi Ofori, found that "general market stations averaged revenues that were 12% greater than minority-formatted stations."[217] His survey of minority-owned broadcasters revealed that "sixty-one percent of the advertisements purchased on their stations were discounted. The average amount of the discount was estimated to be 59 percent."[218]

Philip Napoli documented the same phenomena in his analysis of 461 commercial radio stations where revenue and audience racial or ethnic composition data was available.[219] He found that stations whose audience was more than 50% Hispanic or African-American earned less relative to their audience size than did stations with predominantly white audiences.[220]

Napoli analyzed the "power ratios" of stations (their ability to convert audience share into revenues), along with several other factors such as audience demographics and station signal strength.[221] A power ratio greater than 1.0 "suggests that a station is able to capture a share of advertising dollars that exceeds its share of the total audience," while ratios below 1.0 indicate that a broadcaster reaps less advertising revenues than its audience share would predict.[222] Napoli found that stations "with a minority audience of greater than 50% . . . have an average power ratio of .82, compared with an average power ratio of 1.06 for other stations."[223] While Napoli's study focused on audience composition rather than format, it supports the general thesis that those who serve minorities are paid less.

216. *Id.*

217. *Id.* at 15.

218. *Id.* at iii.

219. Napoli, *supra* note 5, at 177.

220. *Id.* Napoli focused on audience composition and its relationship to revenues. His analysis includes stations that were not specifically formatted or labeled as "minority-targeted," but have large minority audiences. This category would also likely include stations that are specifically targeted at Hispanic, Spanish-speaking, African-American and other racial or ethnic minority audiences. *Id.* at 174.

221. *Id.* at 172.

222. *Id.*

223. *Id.* at 177. Napoli found that in his sample of 121 stations with minority audiences greater than 50% and 340 stations which did not have such audiences, the power ratio difference was statistically significant. *Id.*

Explanations proffered for these price differences include lower average incomes for minority audiences, product consumption patterns, and media usage patterns.[224] Ofori concluded: "stations that program to minority listeners are excluded based on average listener income, regardless of data about consumption patterns."[225] Napoli's study did not include an analysis of income and other audience demographic data, in part because of the costs of obtaining such data.[226] Napoli concluded that the "limited availability of audience income data to advertisers likely limits the extent to which such data are employed in media buying decisions."[227] A 1997 study by James Webster and Patricia Phalen found that markets with higher proportions of non-white populations were associated with lower advertising prices to reach television viewers in the market.[228] Napoli commented that the Webster and Phalen study "controlled for income variations across market, suggesting that ethnicity was not simply a proxy for income."[229]

Instead, advertising prices on stations serving ethnic and racial minorities may be based on general perceptions of the station's audience, which may be shaped by preconceived notions or stereotypes.[230] The FCC's Report on Minority Ownership in Broadcasting documented this phenomena twenty years earlier in 1978, stating that a "preconceived notion, on the part of some advertisers, is that minority consumers are unimportant and do not represent a particularly lucrative market. Consequently, advertisers are less inclined to purchase time on minority-owned stations."[231]

The desire not to have racial and ethnic minorities patronize the goods or services of a potential advertiser motivates some buying decisions.[232] The manager of an "Urban" station targeted at African-Americans, WBGE-FM, reported that one potential advertiser said bluntly, "Your station will bring too many Black people to my place of business."[233] Luis Alvarez, Local Sales Manager for WSKQ-FM in New York, reported that one advertising agency told their salesperson that

224. *Id.* at 171–72.
225. OFORI, *supra* note 70, at 12.
226. Napoli, *supra* note 5, at 175.
227. *Id.*
228. *Id.* at 172 (citing JAMES G. WEBSTER & PATRICIA F. PHALEN, THE MASS AUDIENCE: REDISCOVERING THE DOMINANT MODEL 64 (1997)).
229. *Id.*
230. OFORI, *supra* note 70, at 32.
231. *Id.* at 2.
232. OFORI, *supra* note 70, at 36, 39, 46.
233. *Id.* at 42.

Macy's did not advertise in the Hispanic market out of fears their pilferage would increase.[234] In a memorandum used to train its sales force, Katz Radio Group, a firm that represents broadcasters in attempts to sell to advertisers, repeatedly referred to African-Americans and Hispanics as "suspects," rather than "prospects."[235] Katz issued an apology in 1999 for that memo.[236]

The FCC study also documented refusals to advertise on minority formatted stations, a practice called "No Urban Dictates" or "No Spanish Dictates." Ofori reported that in response to his study's survey of minority-owned broadcast stations, "ninety-one percent indicated that they had encountered a 'no Urban/Spanish dictate' at least once from the advertising agencies of advertisers from which they solicit business."[237] Ofori commented, "Blanket dictates based on a station's format preclude a broadcaster from competing for the advertisement of goods or service[s] . . . . Rather than evaluating a station based on its individual merits—its rating, its particular audience characteristics, the price of ads—the station is excluded based on its minority format."[238] The FCC's 1978 Report on Minority Ownership in Broadcasting also documented this practice, stating that advertising "[a]gencies claim that their clients impose a 'no ethnic' restriction on the advertising medium used due to the nature of the product."[239]

The net effect is that "General Market" stations not targeted at minority groups earn more.[240] The Washington Post reported that in 2003, Spanish-language television constituted 5% of the nation's audience, but reaped only 2% of the nation's television advertising.[241] Univision claimed that in 2003, 60% of all national advertisers did not advertise in Spanish.[242]

Kevin Brass reported in *Hispanic Business* magazine that broadcasters hoped to end the "Hispanic discount," "the widely accepted

234. *Id.*

235. *Id.* at 43.

236. *Id.*

237. *Id.* at 29.

238. *Id.* at 30.

239. OFORI, *supra* note 70, at 28 (quoting FCC MINORITY OWNERSHIP TASK FORCE, MINORITY OWNERSHIP REPORT 26 (1978)).

240. *See* OFORI, *supra* note 70, at 2; *see also* Napoli, *supra* note 5, at 177.

241. Frank Ahrens & Krissah Williams, *Spanish Language Media Expand*, WASH. POST, Aug. 11, 2003, at A10.

242. Press Release, Univision, Univision Completes Merger with Hispanic Broadcasting, HBC's Radio Assets Will Complement Univision's Television, Music and Internet Assets (Sept. 22, 2003), *available at* http://www.univision.net/corp/en/pr/Los_Angeles_22092003-2.html.

practice of advertisers paying less for a spot on a Spanish-language station than a similar spot on an English-language station."[243] Some broadcasters estimated that advertisers pay 40% less to advertise on Spanish stations.[244] While overall revenue for the radio market was flat, stations with Spanish-language formats were posting double-digit growth.[245] *Hispanic Business* reported that nonetheless, "the audience for Hispanic radio is growing so fast that some broadcasters believe the gap between revenue and audience share is actually growing."[246]

There is complex interplay between format and pricing patterns. Ofori found that some broadcasters changed the label of their formats in an effort to avoid minority discounts and "No Urban" or "No Spanish" dictates.[247] Napoli's analysis shows those name changes did not obviate lower prices when the audience was largely composed of minorities.[248]

The advertising industry's practice of minority discounts is not unique to Spanish formats or to other minority-labeled formats. It reflects industry perceptions of minority audiences. Lower prices do not distinguish Spanish formats, as compared to other stations serving predominantly minority audiences. They may also be applied to English stations attracting large minority audiences and likely occur with bilingual stations.[249] Thus, caution should be used in asserting that lower prices establish that Spanish radio is a separate market since this characteristic is shared by English stations serving primarily racial or ethnic minorities.

Jonathan Baker discussed the limits of pricing data as evidence of a separate market in his article on antitrust submarkets.[250] Baker questioned the Justice Department's approach to the use of pricing data in the case of *Federal Trade Commission v. Staples Inc.*[251] In analyzing the proposed merger of Staples and Office Depot, market definition was the pivotal issue in that case. The court considered whether the rele-

243. Brass, *supra* note 23.

244. *Id.*

245. *Id.* (quoting George Nadel Rivin, partner in charge of broadcast services for Miller, Kaplan, Arase & Co., a Los Angeles-based accounting firm that tracks media).

246. *Id.*

247. *Id.* at 78 n.210.

248. *Id.* at 16.

249. Ofori classified as "Spanish" format programming targeted to the Hispanic community, whether provided in the Spanish-language or in a Spanish-English bilingual format. OFORI, *supra* note 70, at 8 n.35.

250. Jonathan B. Baker, *Stepping Out in an Old Brown Shoe: In Qualified Praise of Submarkets*, 68 ANTITRUST L.J. 203, 212 (2000).

251. 970 F. Supp. 1066 (D.D.C. 1997).

vant product market was "office superstores" or "all suppliers of office products." The FTC presented evidence that:

> Staples charged significantly higher prices—at least 5 percent and as much as 13 percent higher—in geographic markets where it had no office superstore competition than in markets where it competed with the two other superstore chains, notwithstanding the presence of a wide range of non-superstore retailers of office supplies.[252]

Baker cautioned against using pricing evidence as a basis for defining a market, arguing that "if the answer to the ultimate question (whether price will rise) is the basis for market definition, market definition and market concentration are conclusory, not an autonomous method of analysis."[253] The question is whether there is a separate market, and pricing is one factor in that analysis under the *Brown Shoe* standard.[254]

The approach in the *Staples* case suggests that the effect of competition on pricing in the market should be analyzed, not simply the level of pricing in the market. The price behavior of firms subsequent to radio mergers should be analyzed, taking into account price growth in the industry and format and the response of competitors. That analysis should consider whether prices shift in response to other factors such as general economic trends, income increases in the predominant audience group, and population growth.[255] Pricing analysis should examine the impact of stations commonly owned by one entity on pricing in formats and across station groups. The relationship between format and price should also be examined, accounting for other variables such as multiple ownership, station power and market share within and across languages, demographic groups and formats.

No such record exists for this case. In the Univision/HBC merger, the record was not fully developed regarding many of the *Brown Shoe* factors including price, largely because the parties settled and agreed to the DOJ's suggested divestiture remedies.[256] Even for the general market, no studies are available examining the effect of consolidation on pricing. Any analysis of the effect of the merger of Spanish competitors on pricing should consider the context of the

252. Baker, *supra* note 250, at 212.

253. *Id.* at 215.

254. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

255. The average income of Hispanic households in the United States rose 15.9% between 1999 and 2001. David Kaplan, Spanish Language Networks Become Titans, Hispanic American Center for Economic Research (2001), *available at* http://www.hacer.org/current/Titans.php.

256. Competitive Impact Statement, *supra* note 33, at 2.

overall radio industry. This analysis should be correlated with data on ownership to determine if stations commonly owned by a larger entity have more market power regarding prices or price changes, taking into account signal strength and audience. The pricing analysis should also take into account the historical trend of paying less for advertising formats serving minority audiences.

III. Market Participation: Radio Formats, Multiple Ownership, and Market Power to Reap Economies of Scale Across Languages and Formats

A. DOJ Assumptions Regarding Format Change in the Radio Marketplace

As part of its evaluation of whether a merger would have anti-competitive effects, the DOJ must determine who participates in the relevant market.[257] This includes an analysis of the likelihood that competition from new entrants will mitigate potential price rises caused by the lessened competition from the merger.[258] This section will analyze the likelihood that existing broadcasters will offer Spanish programming. Under *Brown Shoe*, "unique production facilities" is one factor in testing whether there is a separate submarket.[259] Incumbent broadcasters control FCC radio licenses and other facilities that enable them to change formats, undercutting the assertions that Spanish and English-language radio compete in separate markets.

Joel Klein, acting Assistant Attorney General for the Antitrust Division of the Justice Department, spoke of the Department's analysis of radio mergers in 1997, a year after the legislature passed the Telecommunications Act of 1996. Klein said that in assessing whether a merger would likely have anti-competitive effects in violation of the Clayton Act, the DOJ considers the likelihood that other broadcasters will change their formats to compete against increased prices resulting from a merger.[260] Klein acknowledged that "format changes do occur with some frequency in radio."[261] However, he emphasized the

257. Kaiser Aluminum v. FTC, 652 F.2d 1324, 1330 (7th Cir. 1981) (seller's production flexibility relevant to product definition); 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41554, § 1.0 (Sept. 10, 1992) (never codified).

258. *Id.* at 41553, § 0.1.

259. 370 U.S. 294, 325.

260. Joel Klein, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, DOJ Analysis of Radio Mergers, Address at the ANA Hotel 8–9 (Feb. 19, 1997), transcript *available at* www.usdoj.gov/atr/public/speeches/1055.htm (last visited July 3, 2005).

261. *Id.* at 8.

obstacles to changes in formats: there must be demand for an additional station, there would be promotional expenditures, and the station would face losing revenue during the course of the change.[262] Klein said a station owner may change formats "if he's losing money but he's not necessarily going to do it just because someone else is making a little extra."[263] The Bush Administration has adhered to the policy of presuming that broadcasters would not change their formats in its analysis of the Univision merger with HBC.[264]

In December 1996, the DOJ approved Jacor's acquisition of Citicasters, one of the first mergers reviewed under the Telecommunications Act of 1996.[265] In its Competitive Impact Statement, the DOJ discussed Jacor's target audience of young adults aged eighteen to thirty-four. DOJ expressed a concern that:

> advertisers trying to reach young adults could efficiently reach this audience on the radio without having to use a Jacor station. Post-merger, however, many of these advertisers will be more dependent on purchasing time from Jacor stations. Jacor could accordingly raise its rates, and reduce the quality of its service to advertisers targeting young adults (or who need either the Jacor stations or WKRQ for other reasons) who would have scant alternatives to paying the increase, while maintaining lower rates for other advertisers. This would make a price increase profitable even though some advertisers could switch to other radio stations.[266]

The DOJ then considered whether other stations in the Cincinnati market were likely to change their formats in response to price increases. Foreshadowing Klein's speech, the DOJ concluded, "Most radio stations change format only when their existing formats are losing money."[267] They added, "A station is also unlikely to change its format solely in response to higher prices being charged by a large established company that controls a number of stations in the market, such as Jacor."[268]

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262. *Id.*

263. *Id.*

264. Competitive Impact Statement, *supra* note 33, at 8–9.

265. *See generally* United States v. Jacor Commc'ns, Inc., 1997-1 Trade Cas. (CCH) ¶ 71,671 (S.D. Ohio Dec. 31, 1996), 1996 WL 784589; Press Release, U.S. Dep't of Justice, Justice Department Requires Jacor to Sell Cincinnati Radio Station, The Department's First Radio Merger Challenge (Aug. 5, 1996), *available at* http://www.usdoj.gov/atr/public/press_releases/1996/369at.html (last visited July 3, 2005). Jacor was acquired by Clear Channel in September 1999, *see* Press Release, Clear Channel Commc'n. Inc. & Jacor Commc'ns Inc., Jacor: Merger Update (Feb. 11, 1999), *available at* http://www.cfonews.com/jcor/c021099a.txt.

266. *Jacor Commc'ns, Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,671, at 78,738.

267. *Id.*

268. *Id.*

In examining the Jacor merger, the DOJ's Competitive Impact Statement did not consider the reverse scenario: in response to higher prices being charged by a broadcaster, would a large or larger company, which may also be established and control several stations in the market, change its format? For example, if a post-merger Univision raised prices, would an even larger company such as Clear Channel change the format of one of its existing stations to compete in Spanish for those advertisers? Events subsequent to the closing of the Univision/HBC merger have shown the answer is yes! Other large broadcasters have also changed some of their English formats to Spanish to take advantage of those opportunities.[269]

Consistent with Klein's speech and the *Jacor* precedent, the DOJ has concluded in other radio merger cases that entry of competitors is unlikely to counteract potential post-merger price increases. For example, in the merger of Clear Channel and AM/FM, the DOJ concluded that other stations

> are unlikely to change their formats and are unlikely to attract those audiences in sufficiently large numbers to defeat a price increase by the merged Clear Channel/AMFM stations . . . because they would likely lose their existing audiences . . . [and] would still be unlikely to attract enough listeners to provide suitable alternative to the merged entity.[270]

Similar words have been recited in other DOJ challenges to radio mergers.[271]

While it may have seemed unlikely in the year after the Telecommunications Act that reformatting would occur in response to price changes, the DOJ should examine whether that presumption is correct. The DOJ's assumption that a station owner would only reformat if the station were losing money seems questionable. For example, Clear Channel-owned KSJO in San Jose, California broadcasted in an English Rock format for thirty-six years; in October 2004, the com-

269. *See infra* Part IV.B (regarding Infinity and ABC Radio Network's entry into Spanish broadcasting).

270. U.S. Dep't of Justice, Complaint for Injunctive Relief at 6, United States v. Clear Channel, AMFM Inc. (D.D.C. Aug. 29, 2000). *available at* http://www.usdoj.gov/atr/cases/f6300/6329.htm (last visited Aug. 19, 2005).

271. *See* Complaint for Injunctive Relief Against Combination in Violation of Section 7 of the Clayton Act at 6, ¶ 23, United States v. Westinghouse Elec. & Infinity Broad. Corp., 1977-1 Trade Cas. (CCH) ¶ 71,749 (D.D.C. Mar. 10, 1997); Complaint for Injunctive Relief Against Combination in Violation of Section 7 of the Clayton Act at 5 ¶ 21, United States v. EZ Commc's, Inc. & Evergreen Media Corp., 1997-1 Trade Cas. (CCH) ¶ 71,841 (D.D.C. June 27, 1997).

pany changed its format from English to Spanish.[272] As an English Rock station, it was ranked 8th in the San Jose market in 2002, but 22nd by the summer of 2004.[273] It had a loyal following and was likely not losing money. Nevertheless, Clear Channel apparently believed it could make more money by changing its format to Spanish. In September 2005, Clear Channel reported a 130% increase in audience share after it converted the format of KSJO to Spanish-language.[274]

Hispanic Business magazine reported that Clear Channel's strategy is to "grow its Spanish-language presence by converting stations, not buying new ones."[275] "We have plenty of radio stations," said Alfredo Alonso, a fifteen-year veteran of Spanish-language radio who heads Clear Channel's Hispanic programming.[276] "We have a lot of radio properties under-performing," Alonso added.[277]

The FCC concluded that between the years 2000–2003 approximately 163 stations switched from an exclusive English-language format to Spanish, and seventy-seven stations switched from an exclusive Spanish-language format to English.[278] The number of Spanish-language radio stations large enough to be rated by Arbitron increased from 533 in 1998 to 678 in 2004.[279] SBS claimed that Spanish-language broadcast incumbents, rather than new entrants, accomplished most of the format conversions.[280] That proportion, however, has likely changed with the entry of Clear Channel, Infinity, and ABC Radio Networks into Spanish and bilingual formats. In its review of the merger, the FCC concluded that the need to change formats to provide programming in Spanish does not preclude entry of new Spanish-language radio stations.[281]

272. Brad Kava, *Oldest S.J. Rock Station Goes to Spanish Format, KSJO-FM Move Reflects Market Shift*, SAN JOSE MERCURY NEWS, Oct. 29, 2004, at A1.

273. Jessica Yadegaran, *Call Sign KSJO Rides Its Stairway to Heaven*, CONTRA COSTA TIMES, Oct. 30, 2004, at A1.

274. Press Release, Clear Channel Radio, Clear Channel Radio's Multi-Market Spanish-Language Programming Initiative Attracting Greater Share of Radio Listeners in 2005 (Sept. 14, 2005), *available at* http://www.clearchannel.com/Radio/PressReleases/2005/091405CCR-Spanish.pdf [hereinafter Clear Channel Press Release].

275. Brass, *supra* note 23, at 2.

276. *Id.*

277. *Id.*

278. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18857 (2003).

279. Arbitron reported over 750 Spanish-language stations in the United States in 2004; 678 of them had large enough audiences in geographical areas Arbitron measures to be included in Arbitron's database. ARBITRON, *supra* note 119, at 2–3.

280. Willkie Farr Letter, *supra* note 81.

281. *Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc.*, 18 F.C.C.R. at 18870

Since the Telecommunications Act of 1996, many more radio companies have conducted initial public offerings of their stock including Entravision, Radio One, and Citidel.[282] It would be informative to examine whether publicly traded companies are more likely to change formats than privately held companies. Although there are well-financed private radio companies, public companies may have more capital to acquire new programming and talent, promote format changes, and withstand any shift in revenue base. Public companies also have more pressure to show revenue growth for a station on a yearly basis.

The existence of many more large radio and media companies has changed the competitive landscape. A company that owns one Spanish-language station in a market may find itself competing not just with other single-station owners, but with a Clear Channel, as well as Univision, in both Spanish and English programming. Clear Channel owns the maximum number of stations permitted by the FCC in several major markets, including Los Angeles, Cincinnati, and Denver.[283] Large, consolidated entities have the resources to change formats based on the fact that "someone else is making a little extra."[284]

The practice of format changes between languages indicates a greater proclivity toward market participation across languages than the DOJ assumed. This "[c]ross-elasticity of supply, or production flexibility among sellers, is another relevant factor to be considered in defining a product market for antitrust purposes."[285]

Establishing the relevant market is an essential element in the Government's case.[286] An antitrust plaintiff bears the burden at the pleading stage to define the relevant market:

> Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's

282. *Radio One Files Plans for IPO*, WASH. BUS. J., Mar. 15, 1999, at http://www.bizjournals.com/washington/stories/1990/03/15/daily1.html; Company Overview, Entravision Commc'n Corp., http://premium.hoovers.com/global/msn/factsheet.xhtml?COID=100798 (last visited Sept. 26, 2005); MSN Money, IPO Center, IPO View by Name, http://moneycentral.hoovers.com/global/msn/index.xhtml?pageid=1949&Index=C (last visited Jan.16, 2006).

283. *See* Clear Channel Commc'ns, Radio Station Search, http://www.clearchannel.com/Radio/StationSearch.aspx (search for "Los Angeles," "Denver," and "Cincinnati") (last visited Jan. 24, 2006).

284. Klein, *supra* note 260, at 8.

285. Kaiser Aluminum v. FTC, 652 F.2d 1324, 1330 (7th Cir. 1981).

286. *See* United States v. Engelhard, 126 F.3d 1302, 1305 (11th Cir. 1997).

> favor, the relevant market is legally insufficient and a motion to dismiss may be granted."[287]

Even if the government were to provide sufficient evidence to show that for at least some advertisers, English and Spanish-language radio are not appropriate substitutes, they must still show that substitute products would not be produced by other broadcasters. In other words, the government must submit facts showing that other broadcasters would not supply programming in Spanish.[288]

Further research should be conducted to determine whether competitors, large, medium, or small, have indeed changed their formats in the wake of mergers.[289] This analysis is particularly important for the market the DOJ has defined as "Spanish," where the assumption of no new entrants reinforces the small market size perception that leads to higher projected concentration levels and the likelihood of antitrust remedies.

B. Analyzing Market Entry into Spanish Formats

A key assumption in the DOJ's analysis of the Univision/HBC merger was that competition from new entrants was unlikely.[290] This assumption may have some merit for entities that do not currently own a radio station in a given market. The DOJ concluded that "[n]ew radio spectrum acquisition is highly unlikely, however, because spec-

287. Adidas Am. v. NCAA, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (citing Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436–37 (3d Cir. 1997)). For a motion to dismiss, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). Market definition is a deeply fact-intensive inquiry, leading courts to hesitate to grant a motion to dismiss for failure to allege a product market. *Id.* at 200. However, a motion to dismiss an antitrust case on those grounds may be granted where warranted. *Id.* (citing *Queen City Pizza*, 124 F.3d at 436).

288. "Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." *Engelhard*, 126 F.3d at 1305 (citing United States Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir. 1993) (quotations omitted)).

289. Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, Q.J. ECON. 1009, 1009–25 (2001), analyzed data on the number of programming formats relative to the number of stations in the wake of the 1996 Telecommunications Act. They found that station ownership concentration increases product variety, as evidenced by data that many commonly owned stations program in similar, but not identical formats. *Id.* at 1010, 1023–24. A similar analysis of whether competitors change formats in the wake of other consolidations in the market would be instructive for both antitrust analysis and examining the public interest implications of consolidation.

290. Competitive Impact Statement, *supra* note 33, at 8.

trum is a scarce and expensive commodity . . . ."[291] With an FM radio station in a large market potentially costing $150 million or more, purchasing a station is a significant entry barrier, in addition to programming, personnel, and marketing costs.[292]

Nevertheless, the entry barriers are significantly lower for entities which already own one or more stations in the relevant market. In the Univision/HBC merger, the DOJ assumed that English-language broadcasters would not spend the money and assume the risks to change their formats.[293] The DOJ posited that "[r]adio stations are unlikely to undertake a format change solely in response to small but significant increases in price," and that "radio stations that did change formats would be unlikely to attract enough listeners to provide sufficient alternatives to the merged entity."[294] The DOJ emphasized that "[r]eformatting is an expensive endeavor that involves the loss of the station's existing audience, a significant expense to attract new listeners, and no assurance of attracting a significant listening base to justify the costs involved."[295] The DOJ asserted reformatting occurs only "when a station believes that a particular format is not being sufficiently served or when a station finds a niche between existing formats."[296] No additional evidence or analysis was cited to support the DOJ's assumptions.

The DOJ's assumption of no format changes overlooks the market power of broadcasters who own multiple stations. Clear Channel has led the way in bringing the economies of scale acquired in the larger English market into the alleged Spanish market. Infinity, ABC Networks, and other traditionally English broadcasters followed this trend. The consequence of defining the market by language is a competitive advantage for English incumbents who can amortize their costs across formats and languages and use the breadth of their formats to attract audiences and advertisers. This movement between language formats also highlights the inability of even large Spanish-language broadcasters to exclude English-based broadcasters from Spanish programming, an important measure of market power, or the lack thereof.

291. *Id.*

292. Brass, *supra* note 23, at 3–4.

293. Competitive Impact Statement, *supra* note 33, at 8.

294. *Id.*

295. *Id.*

296. *Id.*

Shortly after the FCC approved the Univision/HBC merger, exactly what the DOJ presumed would not occur happened; with Clear Channel's launch of its Hispanic Division, seemingly overnight the company became the third largest provider of Spanish-language radio in the United States, measured by the number of stations, exceeded only by Univision and Entravision.[297] Depending on which stations they choose to convert to Spanish programming, Clear Channel could become larger than Entravision or Univision in terms of signal strength, audience, and revenues from Spanish and related formats. In September 2005, Clear Channel announced that less than a year since its launch, "Clear Channel's Spanish-language programming initiative is a proven hit," boosting ratings in many markets.[298] Yet, Clear Channel's potential to compete with Univision was never considered.

No longer constrained by its investment in HBC, Clear Channel launched headlong into the Spanish market, quickly becoming a formidable player. In San Jose, California, the new Clear Channel Spanish station vaulted from low ratings in 2004 as an English Rock station to the number two-ranked station in the entire market in the Spring of 2005, far outpacing Univision's Regional Mexican station and eleven other English formats.[299] Clear Channel's success in converting to Spanish demonstrates the flaws in the DOJ's no-entry model.

It is noteworthy that Clear Channel pursued this strategy *after* the approval of the Univision/HBC merger. Clear Channel owned 26% of HBC, valued at $3 billion, before HBC merged with Univision.[300] Clear Channel's equity interest prior to the merger was below 33%, so Clear Channel's stations were not considered in the FCC's analysis of the merger as Clear Channel's interest were "not attributable" under the FCC's standards.[301] Neither did the DOJ consider Clear Channel's potential to compete against the merger parties.

297. Katy Bachman, *CC to Flip 25 of its Radio Stations to Spanish Format*, MEDIAWEEK, Sept. 16, 2004, *available at* http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=1000631071.

298. Clear Channel Press Release, *supra* note 274.

299. Radio & Records, Ratings, Spring 2005: San Jose, *available at* http://www.radioandrecords.com (follow "Ratings" hyperlink; then follow "San Jose" hyperlink) (last visited Aug. 1, 2005) (results from July 21, 2005 on file with the author) (data based on Arbitron's reported ratings, used with permission of Arbitron). The latest ratings reported by Radio & Records are available at Radio & Records, Ratings, http://radioandrecords.com (follow "Ratings" hyperlink).

300. Shareholders of Hispanic Broad. Corp. & Univision Commc'ns, Inc., 18 F.C.C.R. 18834, 18836 (2003).

301. *See* Press Release, FCC, Commission Amends Broadcast and Cable/MDS Ownership Attribution Rules (MM Docket Nos. 94-150, 92-51, and 87-154) (Aug. 5, 1999), *availa-*

Other large, primarily English-language broadcasters also changed some stations to Spanish-language formats in 2005. ABC Radio Network struck a five-year deal with SBS to syndicate three of its popular Spanish radio shows.[302] As part of the deal, ABC has the exclusive rights to sell national advertisements on three of SBS' stations, as well as on SBS's WLEY-FM in Chicago and KRZZ-FM in San Francisco.[303] *Adweek*, an advertising trade publication, reported that "while the Hispanic market may be booming, there is a shortage of syndicated Hispanic programming."[304] In an irony of making money by helping your competitors, *Adweek* noted that "ABC and SBS can now offer syndicated Hispanic programming to groups wishing to expand into Hispanic radio such as Clear Channel . . . ."[305] In 2005, Entravision joined the ABC Radio Network program syndication.[306]

SBS and Viacom's Infinity Broadcasting announced a strategic alliance in December 2004.[307] At that time, Infinity controlled 185 radio stations, while its parent company, Viacom, controlled numerous broadcast television, cable, radio, outdoor, and on-line properties.[308] Through their deal, Viacom/Infinity traded an FM radio station with a powerful signal in the San Francisco area for 10% of SBS's equity and an opportunity to acquire another 5% of SBS' stock.[309] The two companies agreed to "work together to more effectively market their respective properties" and to "work towards increasing both companies' national and regional advertising revenue."[310] In January 2005, Infinity began Spanish-language radio programming in Fresno, Cali-

ble at http://ftp.fcc.gov/Bureaus/Mass_Media/News_Releases/1999/nrmm9020.html (last visited July 26, 2005).

302. Katy Bachman, *ABC Radio, Spanish Broadcasting Strike Deal*, ADWEEK, Nov. 10, 2004, *available at* http://www.adweek.com/aw/search/article_display.jsp?vnu_content_id=1000717039 (last visited Jan. 24, 2006).

303. *Id.*

304. *Id.*

305. *Id.*

306. Press Release, Entravison, Entravision Radio to Carry Top-Rated Morning Show '*El Cucuy de la Mañana*' on its Radio Tricolor Network (Feb. 7, 2005), *available at* http://corporate.entravision.com/ccbn_Template.cfm?ticker=EVC&script=410&layout=-6&item_id=671048 (last visited Aug. 19, 2005).

307. Press Release, Spanish Broad. Sys. (SBS), Spanish Broadcasting System and Viacom Complete Strategic Alliance—San Francisco Radio Transaction Consummated (Dec. 30, 2004), *available at* http://www.spanishbroadcasting.com/12_30_04.pdf.

308. Press Release, Viacom and Spanish Broadcasting System Announce Strategic Alliance, Broad-based Partnership Will Target Growing Hispanic Audience (Oct. 5 2004), *available at* http://www.viacom.com/view_release.jhtml?inID=5000002&inReleaseID=26157 (last visited July 10, 2005).

309. *Id.*

310. *Id.*

fornia and Washington, D.C.[311] In the same month, Infinity converted one of its stations that had broadcast in a Rock format for twenty years in English in Washington, D.C. to Spanish.[312]

In *United States v. E.I. du Pont de Nemours*,[313] the Supreme Court stressed that "monopoly power is the power to control prices or exclude competition."[314] In that case, the Court questioned the market definition proposed by the government and noted that du Pont did not possess the ability to exclude competitors even in the narrowly defined market for cellophane packing, let alone the broader market for flexible packaging.[315] The pre and post-merger format changes between languages indicate that Univision and other Spanish broadcasters lack the ability to exclude English broadcasters from direct competition in Spanish.

A merger must be proscribed where there is "a reasonable probability that the merger will substantially lessen competition."[316] "The predictive judgment often required under § 7 [of the Clayton Act] involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger. . . ."[317] This Article argues that assuming other broadcasters will not change their formats to compete in Spanish does not satisfy the level of scrutiny and assessment of competition the law requires.

The pattern of format and language shifts are not merely "postacquisition evidence tending to diminish the probability or impact of anticompetitive effects" whose probative value is limited.[318] This pattern demonstrates a far greater willingness by the industry to change formats than the DOJ presumed. In *General Dynamics*, the Supreme Court stressed that while market shares were "the primary index of market power," only a further examination of the particular market—

311. Paul Heine, *Q&A with Infinity President of Programming Rob Barnett*, BILLBOARD RADIO MONITOR, Apr. 5, 2005, at 2, *available at* http://billboardradiomonitor.com/radiomonitor/search/article_display.jsp?schema=&vnu_content_id=1000866400 (last visited July 10, 2005).

312. Bram Teitelman, *Infinity Flips WHFS to Spanish*, BILLBOARD RADIO MONITOR, Jan. 12, 2005, *available at* http://billboardradiomonitor.com/radiomonitor/news/format/rock/article_display.jsp?vnu_content_id=1000751157 (last visited July 10, 2005).

313. 351 U.S. 377, 391 (1955).

314. *Id.* Although *du Pont* was brought under the Sherman Act, its definition of monopoly power is relevant for the Clayton Act analysis of whether there is sufficient competition or potential market entry to counter the possibility that a merger would substantially lessen competition or tend to create a monopoly.

315. *Id.* at 404.

316. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

317. United States v. Falstaff Brewing Corp., 410 U.S. 526, 556 (1973).

318. United States v. General Dynamics Corp., 415 U.S. 486, 504 (1974).

its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[319] Under that standard, the dynamic nature of entry and exit into radio formats in various languages should be considered in determining whether a market is unduly concentrated. These format modifications demonstrate that changes between languages are part of radio's competitive paradigm and challenge the notion that Spanish and English radio compete in separate, insulated markets.

C. Assessing the Likelihood of New Competitors from Committed or Uncommitted Entrants

The Horizontal Merger Guidelines define firms that "likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit" as "uncommitted entrants."[320] For uncommitted entrants to be counted in the relevant market, they must likely "supply" the market "within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase."[321] Sunk costs are defined as the "acquisition costs of tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market," i.e., costs uniquely incurred to supply the relevant product and geographic market.[322] Examples include "market-specific investments in production facilities, technologies, marketing (including product acceptance), research and development, regulatory approvals, and testing."[323] The Guidelines provide that "[u]ncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it postmerger, and accordingly are considered as market participants at both times."[324]

The supply response of such firms would create "new production or sale in the relevant market," which "could be quickly terminated without significant loss."[325] The Guidelines explain that "[e]ntrants that must commit substantial sunk costs are regarded as 'committed'

319. *Id.* at 498.
320. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41554, § 1.0 (Sept. 10, 1992) (never codified).
321. *Id.* at 41556, § 1.32.
322. *Id.*
323. *Id.*
324. *Id.* at 41554, § 1.0.
325. *Id.*

entrants because those sunk costs make entry irreversible in the short term without foregoing that investment; thus the likelihood of their entry must be evaluated with regard to their long-term profitability."[326]

The DOJ employs a three-step methodology to assess whether a committed entry, involving significant sunk costs of entry and exit, deters or counteracts the competitive effects of a merger.[327] The first step assesses whether entry can achieve significant market impact within a "timely period."[328] The second assesses whether committed entry would be profitable for long-term participation in the market. The third step evaluates whether timely and likely entry would be sufficient to return market prices to their pre-merger levels.[329] Entry is determined likely if it would be profitable at pre-merger prices, and if the entrant could secure such prices.[330]

In changing to a Spanish format, marketing and product acceptance constitute the most significant costs, but may not be much greater than the costs of launching a new English format. Stations often launch large marketing campaigns when changing formats, sometimes foregoing commercials for a period of time to attract audience.[331] While there are some costs associated with marketing the format, they may be worthwhile if more listeners and thus advertisers are attracted.[332] An incumbent broadcasters' sales force already knows

326. *Id.* at 41554, § 1.0 n.7.

327. *Id.* at 41561, § 3.0.

328. *Id.* For committed entrants a "timely period" is within two years from initial planning to significant market impact. *Id.* at 41561–62, § 3.2. Supply responses that require less than one year and insignificant sunk costs are analyzed under uncommitted entry. *Id.* at 41554, § 3.0 n.25.

329. *Id.*

330. *Id.* at 41562, § 3.3. The entrant's ability to capture a share of reasonably expected growth in market demand and to divert sales from incumbents, through vertical integration for example, is considered. *Id.* Thus, the market analysis should consider whether the submarket is growing, as well as whether potential entrants have vertical resources (concert venues, billboards, etc.), all of which Clear Channel has. *See* Clear Channel Commc'ns, Inc., Corporate History, http://www.clearchannel.com/Corporate/company_history.aspx (last visited Aug. 2, 2005). The market entry analysis should also take into account the entrant's ability to use its horizontal resources, other stations in the same market or other markets, to do "package sales" of various formats.

331. Clear Channel Goes Indie?, http://www.waxy.org/archive/2003/12/30/clear_ch.shtml (Dec. 30, 2003) (posting to weblog noting that Clear Channel's KDL switched from dance to rock format and had no DJs or commercials for the first two weeks of the new format).

332. The Guidelines require consideration of the costs of substitution relative to the profitability of sales at the elevated price, and whether the firm's capacity is profitably employed elsewhere. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41557, § 1.321.

how to sell radio advertisements and could be educated about the Spanish-speaking, and Hispanic communities and the companies that target them. There are many advertising agencies and firms that could help in this effort.

For firms that do not control FCC licenses in the relevant geographic market, sunk costs in acquiring a station license are significant. However, for existing competitors who already have FCC radio licenses, sunk costs to change formats between languages are much smaller.

When switching formats, the change is not technological. It requires no additional investment in plant or equipment. The most important piece of "equipment" is the FCC-issued license to broadcast on that frequency. With a broadcast antenna to transmit the station's signal, a location for the antenna, and a broadcast booth to control signals, a radio station can broadcast whatever content it chooses within the FCC's boundaries of decency. No regulatory approvals are required to change formats.

If a broadcaster already has a Spanish format in another market, its costs may be significantly reduced; it can use that content and existing marketing knowledge in the new market. Programming can be produced in a centralized location and distributed to stations via satellite or data streaming. Programs can be "localized" using local DJs or station personnel to announce the local time, weather, and local information. Broadcasters could also use their existing studios to produce a new Spanish format. Alternatively, they can buy syndicated Spanish programming, just as they could buy syndicated English programming.

While long-time Spanish operators have some advantage from their built-up audience, contacts, and market knowledge, English operators may gain a foothold in the market if they have the commitment and resources. Clear Channel clearly had both. Clear Channel would have learned a great deal about Spanish formats through its service on HBC's Board of Directors. Clear Channel also faced competition from Spanish-language stations in its markets, giving it another vantage to assess the market potential.

Clear Channel has demonstrated its ability to provide Spanish formats on a "timely basis." It did so within a year of the Univision/HBC merger, and its conversions continued apace through 2005. With its vast inventory of stations, some of which are underperform-

ing,[333] Clear Channel could turn a format to Spanish-language quickly if it determined it should do so.

There is substantial evidence that Clear Channel satisfies the test for a committed entrant into the Spanish format. As a committed entrant it must commit substantial sunk costs. Clear Channel has already sunk costs into the FCC license and station equipment, regardless of format. It has substantial personnel, some of whom, like the billing department, can be used to serve Spanish formats without significant retraining. It has already committed the resources to retrain marketing staff to sell advertisements for Spanish programming, to the extent such training may be necessary. It also has Spanish formats, which they can distribute via satellite or the internet to other markets without incurring additional production or personnel costs.

At a minimum, Clear Channel meets the uncommitted entrant test. It is capable of supplying Spanish radio without significant additional sunk costs beyond what it has already invested. Through its inventory of stations, personnel, formats, and capital, Clear Channel can quickly deploy to compete in other markets.

As an investor in HBC, Clear Channel arguably influenced the market before the Univision/HBC merger, another factor used to identify uncommitted entrants under the Horizontal Merger Guidelines.[334] It also influenced the market by competing against Spanish stations with its English formats that attracted Hispanic listeners.

With their success in entering the Spanish and Spanish-hybrid formats, the likelihood that Clear Channel, Infinity, or ABC Radio Networks will enter a market in Spanish must be considered in analyzing future mergers. That analysis should include not only existing Spanish broadcasters, but recognize the potential for Clear Channel, Infinity, and others to convert more stations to Spanish if they found it lucrative to do so. Increased advertising prices in the wake of a merger might also attract other multi-station conglomerates, such as Radio One or Citidel, to change some of their stations to Spanish.

In *United States v. Engelhard Corp.*,[335] the Eleventh Circuit commented, "Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other."[336] The ability of En-

333. Brass, *supra* note 23, at 2.
334. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41554, § 1.0.
335. 126 F.3d 1302 (11th Cir. 1997).
336. *Id.* at 1305.

glish-based broadcasters to shift to Spanish formats challenges both the DOJ assumption of no market participation by other broadcasters, and the market definition itself.

In February 2004, the Justice Department held a workshop on merger enforcement to solicit comments on a variety of issues, including how to incorporate a dynamic competitive analysis, recognizing that a merger may have different effects at different times.[337] It sought comments on how to treat uncommitted entrants, noting that the merger guidelines "do not discuss the role of uncommitted entrants in the evaluation of competitive effects nor do they indicate how one assigns shares to uncommitted entrants."[338] No revisions have since been announced to the merger guidelines. The issues raised in this Article illustrate the importance of incorporating a dynamic analysis of market participants that takes into account past and likely future market behavior, rather than presuming the likelihood of no entry.

Meanwhile, those who broadcast exclusively in Spanish in a particular geographic market face more constraints to consolidation because of the narrow definition of the so called "Spanish market." For all but the smallest Spanish broadcasters to grow, they may be forced to acquire assets in English formats. This situation occurs because the acquisition of Spanish-formatted stations by small and even mid-sized Spanish broadcasters may raise concentration levels in the small "Spanish market" as currently defined. Such growth, however, comes at a higher cost, further skewing the competitive imbalance between English and Spanish broadcasters.

English-formatted stations, especially those that do not target minorities, generally cost more to purchase than Spanish or other stations which target minorities. This stems from the advertising industry practice of paying less to advertise to racial and ethnic minority audiences than to majority audiences, contributing to lower revenues for Spanish and other minority serving stations.[339] Generally, radio stations are sold based on a formula that multiplies the cash flow made by the station's operation by an agreed upon number, or cash flow

337. Press Release, U.S. Dep't of Justice, Justice Department/Federal Trade Commission to Host Joint Workshop on Merger Enforcement (Feb. 11, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/202426.htm (last visited Jan. 24, 2006); U.S. Dep't. of Justice/Antitrust, Announcement of a Workshop on Merger Enforcement, http://www.usdoj.gov/atr/public/201896.pdf (last visited Dec. 18, 2005).

338. U.S. Dep't. of Justice/Antitrust, *supra* note 337, at 3.

339. OFORI, *supra* note 70, at 22; Napoli, *supra* note 5, at 177.

multiple.[340] Higher revenues for stations whose audiences are largely non-minority contribute to those stations being more expensive than stations that garner predominantly minority audiences.

This imbedded bias has significant repercussions for those aspiring to build their asset base in order to compete. Advertising pricing practices, coupled with higher acquisition costs resulting from the market definition, make it more difficult for Spanish-based broadcasters to compete and reduce revenues available for programming.[341] The market definition may also limit the value of Spanish-language stations by decreasing the number of companies with which they could merge.

English broadcasters' entry into Spanish formats contradicts the assertion that the markets are separate. It also reveals the ways in which defining the market by language creates market distortions that shift the competitive balance in favor of broadcasters with a substantial base in English formats, a large market with many providers. The market definition may also deter firms with a substantial base in Spanish broadcasting from offering more Spanish programming because of the potential constraints on expansion in that smaller market. The lack of "unique production facilities" for Spanish and English broadcasters indicates the *Brown Shoe* test[342] is not met in this case.

IV. Market Concentration as Distinguished from Market Power—Antitrust Considerations Arising from the History and Structure of Radio Programming for Minority Audiences

In *General Dynamics*,[343] the Supreme Court cautioned that to determine whether a market was unduly concentrated under the *Brown Shoe* analysis, "statistics concerning market share and concentration,

340. *See* Reed Bunzel, *Frank Boyle: Perfectly Frank*, RADIO INK, May 12, 2003, *available at* http://www.radioink.com/listingsEntry.asp?ID=108260&PT=industryqa (last visited Aug. 27, 2005).

341. Commenting on the impact of "minority discounts," the practice of paying Spanish and minority-oriented formats less for their advertisements, Tom Castro, then Chairman and President of El Dorado Communications said:

> Because of the discounts . . . [o]ur profits are less . . . when it comes time to buying a station and we're competing with CBS and Clear Channel and ABC, they're going to outbid us for those properties because of the profits that they have built up over time . . . . The quality of programming, while good, would be better if we had more profits . . . we could invest that back into our business.

OFORI, *supra* note 70, at 21.

342. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

343. United States v. Gen. Dynamics Corp., 415 U.S. 486, 504 (1974).

while of great significance, were not conclusive indicators of anticompetitive effects . . . a merger had to be functionally viewed, in context of its particular industry . . . [including] its structure, history, and probable future."[344] The DOJ approaches merger analysis in stages: first defining the relevant market, second examining whether other competitors are likely to participate in that market, third analyzing concentration in the market as defined. Under *General Dynamics* and *Brown Shoe*, concentration numbers must be analyzed in the context of the dynamics that shape that market and the incentives to participate in it. This Section will discuss the factors relevant to such an analysis.

In merger cases, once the market is defined and the participants are determined, the DOJ applies the Herfindahl-Hirschman Index to analyze whether the proposed merger would produce undue market concentration.[345] Where the HHI indicates that the market is already highly concentrated, at 1800 or above on the HHI scale, changes of more than 100 points are presumed to have adverse competitive consequences by creating or enhancing market power.[346] The parties can however supply evidence to rebut this presumption through evidence.[347]

The DOJ reported that applying the HHI to the markets in which both Hispanic Broadcasting and Entravision operated radio stations yielded post-acquisition HHIs (assuming an effective combination of Entravision's and HBC's market shares) of 5500 to 9200 points.[348] In its complaint, the DOJ noted that this is "well above the 1800 threshold at which the Department [of Justice] normally considers a market to be highly concentrated."[349]

In *General Dynamics*, the Supreme Court cautioned that past market share is not a definitive predictor of future ability to dominate a market, especially for a small market. The Court commented:

> Evidence of past production does not . . . necessarily give a proper picture of a company's future ability to compete . . . . [C]ompanies that have controlled sufficiently large shares of a concentrated market are barred from merger by §7 [of the Clayton Act], not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor . . . .

344. *Id.* at 498 (citing *Brown Shoe*, 370 U.S. at 333 n.38).

345. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41557–58, § 1.5 (Sept. 10, 1992) (never codified).

346. *Id.*

347. *Id.*

348. Complaint for Injunctive Relief, *supra* note 24, at 7, ¶ 21.

349. *Id.*

> Evidence of . . . annual sales is relevant as a prediction of future competitive strength.[350]

The HHI levels the DOJ calculated assumed other broadcasters would not change formats to compete with the merged entity. This assumption means that in an already small and concentrated market, consolidation would only increase concentration levels. That conclusion rests on the unsupported assumption that market entry will not occur, as well as on the belief that Spanish and English broadcasting are separate markets.

The characteristics of the HHI analysis contribute to the high concentration numbers in the Univision/HBC merger analysis. The HHI can be radically altered by the market definition, which is often a major point of contention in antitrust analysis.[351] Defining the market as Spanish-language only, as opposed to Hispanic serving stations or analyzing the whole market, makes the HHI level much larger for Spanish-language stations because of the relatively small size of the Spanish-only market, the small number of players, as well as the distribution of market share.

A mathematical result of the HHI is that it "gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions" within the defined market.[352] It also yields higher HHI concentration levels in markets with a small number of participants.[353] For example, in a market of ten competitors, each with 10% share, the HHI is 1000. In a market of five competitors, each with 20% share, the HHI is 2000.

In *United States v. Baker Hughes Inc.*,[354] the D.C. Circuit commented that concentration is not surprising where "a product is esoteric and its market small."[355] Only four firms in the United States sold the product at issue in *Baker Hughes*.[356] The trial judge found that "[c]oncentration has existed for some time [in the relevant product market] but there is no proof of overpricing, excessive profit or any decline in quality, service or diminishing innovation."[357] In many local radio markets, four or fewer companies providing Spanish program-

350. United States v. Gen. Dynamics Corp., 415 U.S. 486, 501 (1974).

351. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1073 (D.D.C. 1997) (noting that the outcome "hinges on the proper market definition").

352. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41557–58, § 1.5.

353. Complaint for Injunctive Relief, *supra* note 24, at app. A (definition of HHI).

354. 908 F.2d 981 (D.C. Cir. 1990).

355. *Id.* at 986.

356. *Id.*

357. *Id.*

ming have high enough ratings to meet Arbitron's minimum reporting standards, while a few markets draw more participants who achieve enough market share to be reported.[358] The DOJ presented no evidence of overpricing or excessive profit by Univision or other Spanish-format broadcasters. The advertising industry pricing practices that result in lower advertising rates and revenues for stations with minority audiences indicate that the opposite is true, that their profits are lower than those who serve majority audiences.[359]

The HHI is indifferent as to why there are fewer competitors in the market. Steven Wildman's and Theomary Karamanis's theories regarding the "undersupply" of programming targeted at minorities sheds light on the factors affecting participation and concentration in media markets serving minorities.[360] Their paper, ECONOMICS OF MINORITY PROGRAMMING,[361] analyzed whether the United States television industry undersupplied programming that would be beneficial to minority populations. They based their analysis on an economic model that shows that large blocks of viewers with similar tastes exert inordinate influence on program supply and make it more profitable for broadcasters and advertisers to serve the large block than an identifiable minority block.[362] Until the number of outlets or the size of the minority block increases, a broadcaster will find it more profitable to show programs targeted at the majority than to broadcast to the minority.[363] For example, in a hypothetical market with eight broadcasters and 100 television viewers, twelve of whom are a distinct minority sharing similar tastes within the group, and assuming that minorities will watch majority-oriented programming instead of turn-

358. In August 2005, in the San Jose, California radio market, whose population was 21.8% Hispanic, four Spanish format broadcasters were reported in Arbitron's ratings. Radio & Records, *supra* note 299. In July 2005, three Spanish format broadcasters were reported in Arbitron's ratings in Sacramento, California, whose radio market was 12.9% Hispanic. *Id.* (follow "Ratings" hyperlink; then follow "Sacramento" hyperlink) (results from Sept. 14, 2005 on file with the author). As of September 2005, in Milwaukee, Wisconsin, where 5.9% of the radio market was Hispanic, one station offering Spanish programming was reported in Arbitron's ratings. *Id.* (follow "Ratings" hyperlink; then follow "Milwaukee" hyperlink) (Dec. 19, 2005 results on file with the author). As of August 2005, the Los Angeles, California radio market was 37.5% Hispanic, with seven companies reported in Arbitron's ratings broadcasting in Spanish formats. *Id.* (follow "Ratings" hyperlink; then follow "Los Angeles" hyperlink) (Sept. 14, 2005 results on file with the author). Arbitron information cited by Radio & Records used with permission of Arbitron.

359. *See* OFORI, *supra* note 70, at 8; Napoli, *supra* note 5, at 177.

360. WILDMAN & KARAMANIS, *supra* note 5.

361. *Id.*

362. *Id.* (citing Peter Steiner).

363. *Id.*

ing off the television, broadcasters will find it more profitable to provide programming targeted at the majority "because one-eighth of 100 viewers is greater than 12."[364]

This economic theory postulates that minorities are underserved with programming in large part because they are numerical minorities. If the minority population also has a lower average income than the majority population, this tendency to under-target the minority will increase.[365] However, even minority groups with higher incomes may not attract much programming targeted at them. Asian-Americans have higher median incomes than all other American ethnic groups including Whites.[366] Yet, few stations offer programming in Asian languages.[367]

Attitudes toward a racial or ethnic minority may exacerbate this tendency not to target their needs. If the owners of the broadcast outlet prefer to serve the majority, they may do so, regardless of the size of the minority group. The historical dearth of minority-targeted programming has led entrepreneurs, whether members of minority groups or not, to provide programming targeted at the minority. Peter Siegelman and Joel Waldfogel concluded that minority ownership increases the net amount of minority-targeted programming.[368] One explanation they proffer is that "even though white owners commonly provide black-targeted programming, black owners enter in situations that white owners avoid."[369]

An FCC commissioned study by the Ivy Group concluded that "[m]inority licensees especially felt their commitment to their respective communities—to keep them informed, to empower them, to report on current events from the perspective of those whom the events would most impact."[370] However, some efforts to provide such pro-

364. *Id.*

365. *Id.*

366. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003, at 3–4 (2003), *available at* http://www.census.gov/prod/2004pubs/p60-226.pdf (last visited Aug. 10, 2005).

367. In 2005, thirty-six radio stations in the United States reportedly had "Asian" formats. *See* Radio-Locator, Radio Station Finder (Format: Asian), http://www.radio-locator.com/cgi-bin/finder?format=asn&s=R&sr=Y (last visited Jan. 24, 2006) ("formerly the MIT List of Radio Stations on the Internet").

368. Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, *in* 10 ADVANCES IN APPLIED MICROECONOMICS. 25 (2001), *available at* http://www.fcc.gov/ownership/roundtable_docs/waldfogel-c.pdf (last visited July 27, 2005).

369. *Id.* at 22–23. Without profit data, they could not demonstrate whether this was due to information advantages, ideological, or social commitments. *Id.*

370. IVY PLANNING GROUP, *supra* note 21, at 82.

gramming have met resistance. The Ivy Group study documented the story of African-American broadcaster, James Wolf, who received death threats in the 1990s from the Klu Klux Klan when he wanted to build a radio tower to broadcast programming targeted at the local African-American community.[371]

The effects of the minority undersupply theory are relevant to the antitrust analysis for several reasons. The fact that a distinct group is a numerical minority creates incentives to provide programming targeted to it only when the number of outlets increases to make serving the minority more profitable than serving another segment of the majority, or when the minority grows in size to shift that incentive point. This means that programming for the majority will be provided first, minority programming will come later, and there will be less of it. Thus, in the United States, English programming will come first, and minority languages may follow as the minority grows or new outlets are created.

Joel Waldfogel examined data for 246 large United States radio markets in 1997, including nearly 6000 radio stations.[372] Waldfogel compared listening to Spanish stations (which he defined as "Hispanic-targeted"), "black-targeted stations," and "white-targeted stations" to examine the effects of an increase of market size on product variety.[373] Waldfogel found that "[m]any markets have few minorities and few minority-targeted stations (or none at all)."[374] However, Waldfogel found that "[n]o market is without substantial white-targeted programming. Across 246 markets, the minimum number of white-targeted stations is 7."[375] In contrast, the average number of "black targeted stations" in his research markets was 1.9, or 7.8%, of stations, while an average of 1.1, or 4.4%, of stations were Spanish-language.[376]

371. *Id.* at 50–51.

372. Joel Waldfogel, *Preference Externalities: An Empirical Study of Who Benefits Whom in Differentiated Product Markets* 1, 12 (Nat'l Bureau of Econ. Research, Working Paper No. 7391, 1999), *available at* http://www.nber.org/papers/w7391 (last visited Aug. 21, 2005).

373. Waldfogel defined "black-targeted stations" as the formats labeled: Black, Black/Adult Contemporary, Black/Gospel, Black/Oldies, Black/Talk, Gospel, and Ethnic. African-Americans made up the majority of listeners to each of these formats in the research markets Waldfogel studied. Over 50% of the African-American listening time in those markets was devoted to the Black and Black/Adult Contemporary formats, while only 2.5% on non-black listening was attributed to those formats *Id.* at 17. He termed "Hispanic-targeted" as Spanish-language stations, which attracted 45.7% of Hispanic listening in the research markets. *Id.* at 13, 18. The remainder were classified by Waldfogel as white-targeted. *Id.*

374. *Id.* at 22.

375. *Id.*

376. *Id.* at 13.

Waldfogel examined the "preference externality" effect, whereby increases in the size of the racial/ethnic group boosted the amount of radio programming targeted toward that group.[377] He found that augmentation of the African-American or Latino populations raised the number of stations airing formats targeting those groups, which increased the amount time they listened to the radio.[378]

As minority-oriented formats were increasingly offered in the markets Waldfogel studied, African-Americans, and Hispanics switched from white-targeted programming.[379] He found that "[i]n markets with few or no minority-targeted stations, minorities listen to other (white-targeted) programming. From small levels, increases in minority populations bring forth the first few minority-targeted stations, allowing substantial "'defection' of minorities from white-targeted stations."[380]

African-Americans switched from white-targeted formats to black-targeted formats at a higher rate than Hispanics switched from presumably English white-targeted formats to Spanish formats in the markets Waldfogel studied.[381] He found that "two thirds of black listeners choose white-targeted stations in markets with one black-targeted station, and only a third of black listeners choose white-targeted stations in markets with four or more black-targeted stations."[382] For Hispanics, "Three quarters of Hispanic listeners choose white-targeted stations in markets with one Hispanic station, and half of Hispanic listeners choose white-targeted stations in markets with four or more Hispanic-targeted options."[383]

Waldfogel's research shows that although Spanish-language stations attract many Hispanic listeners, Hispanics are less likely to switch to Spanish-language stations from white-targeted English-language stations, than African-Americans are disposed to switch from white-targeted English-stations to black-targeted English-stations. This finding may reflect language, music, or other programming preferences, or continued listening by Hispanics to stations in both languages. It also emphasizes the need to examine the substitutability of English radio for Spanish radio, even in markets with few Spanish stations.

377. *Id.* at 26.
378. *Id.* at 24–27.
379. *Id.* at 22.
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*

The long standing practice of paying less for minority radio audiences and formats may also influence market participation. Lower prices will attract fewer providers to the market since the profits are lower. This fuels the cycle of a small market with a small number of participants. In his study on "Audience Valuation and Minority Media," Philip Napoli concluded that:

> the lower valuations that advertisers place on minority audiences feed into an economic process that works against minority-targeted content being able to compete and remain viable in both the audience and content markets. The end result is lower levels of availability of minority-targeted content.[384]

Napoli's findings suggests that the advertising industry's pricing practices toward stations that serve minorities are a factor in market participation, which in turn affects market concentration for antitrust analysis.

Arbitron reported that as of 2004, 750 radio stations broadcast in Spanish-language formats in the United States, with 678 having large enough audiences in markets Arbitron measures to be included in the company's ratings.[385] The 750 Spanish-language stations constitute 0.6% of the 10,922 commercial AM and FM radio stations licensed by the FCC.[386] Although the United States Hispanic community is large and growing, it is a minority in many United States communities. Napoli commented, "Minority-targeted media content suffers from not only the potentially lower valuations of minority audiences but also from the fact that, by definition, it appeals to a small audience."[387]

Understanding this history is critical to understanding the structure of radio, including Spanish-language programming.[388] These dynamics delay programming for minority audiences and result in commensurately fewer broadcasters serving linguistic, racial, and ethnic minorities. In defining a market and examining concentration, antitrust analysis should consider the likelihood that others will offer services to a minority group, as well as the forces that created the current market.

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384. Napoli, *supra* note 5, at 181.

385. ARBITRON, *supra* note 119 at 2–3.

386. *See* FCC Radio Broadcast Totals, *supra* note 4.

387. Napoli, *supra* note 5, at 181.

388. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962)) (only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger).

Reza Dibadj commented that narrow market definitions, combined with other factors, "can have perverse consequences."[389] He observed that "it would tend to target smaller companies in narrow markets who wish to merge or collaborate, while at the same time ignoring the anticompetitive potential of larger companies who operate in broader markets not amenable to an analysis of elasticities."[390]

This imbalance is exacerbated when companies associated with the larger market enter into the smaller market. Such companies can enter with the benefits of the greater economies of scale permitted in the larger market and use those efficiencies in the smaller market. This increases their power to compete in the smaller market. This process further entrenches the advantages of companies who have a significant base in the larger market.

The small number of broadcasters offering Spanish programming is related to the size of the Hispanic and Spanish-speaking population in a geographic area. It may also be influenced by the smaller rate at which Hispanics switch from English-language to Spanish-language programming, compared to the rate at which African-Americans switch to programming targeted at their community. The availability of other formats, such as Spanglish, Tejano, Hurban, and Reggaeton might further influence listening and advertising behavior as choice increases. These and other factors regarding industry structure and market participation are relevant to whether any merger of a broadcaster offering Spanish programming will have anti-competitive effects.

In the Univision/HBC merger, the DOJ focused on apparent market concentration in the small "Spanish market" they defined. However, the participants in that alleged market are not insulated from competitive forces outside the market. Even with continuing entry of English broadcasters into Spanish formats, the number of providers in Spanish remains small, in part because the audience they serve is a minority. An analysis of these factors reveals a lack of market power on the part of Spanish broadcasters. This result questions whether the antitrust market has been properly defined.

Conclusion

An analysis of each of the seven factors for defining the contours of a market articulated by the Supreme Court in *Brown Shoe* raises

389. Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 828–29 (2004).
390. *Id.* at 829.

questions about whether Spanish-language radio is a distinct submarket and suggests areas for further study. The United States Hispanic population, including the Spanish-dominant, use media extensively in both English and Spanish. The practice of crossing between Spanish, English, and bilingual stations indicates that many listeners view them as existing within one market, raising the question of whether English media is an appropriate substitute for advertisers. Along with evidence that marketers and broadcasters recognize the need to use a mix of languages to attract Hispanic audiences, there is not a unified "industry or public recognition of the submarket as a separate economic entity."[391] With the increasing number of bilingual stations, the playlist of Spanish stations is becoming less unique, indicating the "product" is less distinctive and lacking "peculiar characteristics and uses" under the *Brown Shoe* test.[392] More research is needed to identify the extent of overlap between listeners to Spanish, Spanglish, and English stations to identify whether they have "distinct customers" as required by *Brown Shoe*.[393] However, data on Hispanics' use of media in both languages, as well as evidence of non-Hispanic listeners who also enjoy Spanish music, indicates that Spanish, English, and bilingual broadcasters share many customers.

To the extent that Spanish and English radio have "distinct prices," another *Brown Shoe* submarket factor, it should be recognized that such prices may be a product of the advertising industry undervaluing minority consumers and stations whose audience is more than 50% minority.[394] Thus, lower prices do not establish Spanish as a separate market. The pricing policies toward stations that serve minorities indicate the interconnection between Spanish stations and others in the market. For all radio broadcasters, additional studies should be done on sensitivity to price changes, examining the effect of multiple ownership and consolidation on advertising prices.[395]

Spanish stations do not have "unique production facilities," another *Brown Shoe* market definition factor. The most valuable "production facility" is the FCC license to broadcast. Spanish and English broadcasts are found by turning the same radio dial, which picks up signals from the radio spectrum allocated for broadcasting. The physi-

391. *See Brown Shoe*, 370 U.S. 294 at 325; discussion *supra* Part III.

392. *Brown Shoe*, 370 U.S. 294 at 325.

393. *Id.*

394. *See* Napoli, *supra* note 5, at 177.

395. *Id.*

cal facilities are identical, regardless of the language of the content aired.

While some companies may broadcast only in Spanish, many including Univision, Entravision, Bustos Media, and Border Media Partners also broadcast in other languages indicating they are not solely Spanish-language "specialized vendors" under the *Brown Shoe* test.[396] The entrance of predominantly English-language broadcasters into Spanish also undermines the theory of "specialized vendors."

This analysis of the *Brown Shoe* factors raises questions about whether the United States radio market is properly defined by the language of a radio station's programming. In light of the concerns articulated in this Article, I propose that the DOJ should consider the relevant market for mergers, such as that between Univision and HBC, to be the whole radio market in the overlapping geographical areas in which the parties compete. Defining the radio market as "all stations" within the relevant geographic area will level the competitive playing field for mergers and acquisitions between English, Spanish, bilingual, and other content providers.

The market definition must also take into account the probability of English-language stations changing to Spanish-language formats. A finding that a merger will have anticompetitive effects requires a showing that the merger will substantially lessen competition or tend to create a monopoly.[397] Monopoly is characterized by market power, including the ability to control prices or exclude competitors.[398] The DOJ has not established that Univision of other Spanish broadcasters have the power to control prices or exclude competitors. By failing to analyze the effect of the entry of other broadcasters into Spanish formats, the DOJ has not thoroughly examined whether the merger is likely to lessen competition. Competitor entry from English-language formats is not only feasible but likely.[399]

With the entrance of Clear Channel, Infinity, and ABC Radio Network into Spanish-language radio formats, the number of Spanish-language competitors has expanded. More may enter the market if they believe that the Spanish-speaking listeners, and English speakers who enjoy Spanish music, are underserved. Other English broadcasters, particularly highly consolidated companies, are also potential competitors: they own the assets of a radio station, have an FCC li-

396. *Id.*
397. 15 U.S.C. § 18 (2000).
398. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956).
399. *See* discussion *supra* Part IV.

cense, could buy programming from a syndicator, and quickly convert their station to Spanish. Competition from new media such as satellite radio and podcasting may accelerate these trends as broadcasters respond to more diverse outlets.[400]

Market entry and format switching are dynamic processes that are not adequately factored into the static HHI model. The HHI should be calculated to take into account the possibility of committed and uncommitted entrants. The potential impact of such competitors, especially those which currently program in Spanish in other markets, must be considered in determining whether markets are unduly concentrated.

The market definition should also account for audience overlap with stations in other languages or bilingual formats. To the extent that a Spanish station has a substantial overlap between its audience and the audience of a bilingual or English station, those common listeners indicate that the other stations may be a potential substitute for advertisers and listeners. This overlap could be accounted for in the HHI analysis by discounting the audience share to the extent of the overlap with other formats.

More detailed analysis should be done on the extent of such audience overlap and how it shifts in response to new format offered in the market. Waldfogel's analysis shows that new Spanish stations will draw listeners away from English, but not to as large an extent as new black-targeted stations draw listeners away from white-targeted formats.[401] Waldfogel's 1997 database did not include any bilingual formats such as Tejano, Spanglish, or Hurban.[402] It will be important to analyze the effect of bilingual stations on drawing listeners from English, as well as Spanish stations.

The DOJ's Spanish-language market definition is based on the theory that it must guard against over-concentration in the Spanish-language broadcast market to protect the advertisers who target Span-

400. Subscription-based satellite radio operator XM Radio offers four Spanish stations, while Sirius offers six, three of them music-based. *See* XM Radio—Latin, http://www.xmradio.com/programming/neighborhood.jsp?hood=latin (last visited Aug. 1, 2005); Sirius Satellite Radio—*En Español*, http://www.sirius.com/enespanol (last visited Aug. 1, 2005). Podcasting allows producers of audio content to make their programming available over the internet to listeners with personal audio devices such as iPods. The number of podcasts is growing daily. *See* Matthew Fordahl, *Podcasting Brings Radio Production to the Masses, Choice to Listeners*, TECH. REV., Feb. 7, 2005, *available at* http://cache.technologyreview.com/articles/05/02/ap/ap_2020705.asp?p=1.

401. Waldfogel, *supra* note 372, at 22.

402. *Id.* at 39.

ish-speakers and those who listen to Spanish radio from price increases. The data provided by the Hispanic Opinion Tracker, Arbitron, and other sources indicate that there is more cross-over between languages and formats for Hispanic and Spanish-speaking listeners than the DOJ assumed.[403] Accordingly, the products may have greater interchangeability than the DOJ posited. Moreover, the lack of significant barriers to entry for predominantly English broadcasters, and their ability to cross into Spanish formats and reap audiences, advertisers, and profits across languages indicates that the markets are integrated, not rigidly separated.

The issue of how to ensure competition in a variety of broadcast languages has domestic and international implications as media seek to serve people speaking a plethora of languages. As the United States becomes more diverse, the current market definition raises questions about how companies serving those who enjoy Spanish-language programming, and other language minorities, will be treated as the markets they serve grow. The United States Hispanic population is larger than Canada's entire population.[404] With higher growth rates than the United States population as a whole, the number of Hispanics and Spanish-speakers will likely increase.[405] The opportunities to serve this market should grow accordingly and not be artificially restricted by ill-drawn antitrust markets.

The ideals of promoting competition and protecting consumers from dominance will be better served by recognizing the extent to which Spanish, English, and other hybrid-language radio formats compete within the same market. Competition will be enhanced and the public will be better served by eliminating disincentives to broadcast in Spanish or other minority languages. This recognition is essential not just for antitrust purposes, but because the "marketplace of ideas" is a cornerstone of our democracy.[406] Regulations on that marketplace should not deter broadcasts in minority languages, but should encourage multilingual service and competition.

403. *See* discussion *supra* Part III.

404. *See* Statistics Canada, Population by year, by province and territory, http://www40.statcan.ca/l01/cst01/demo02.htm (last visited Jan. 24, 2006) (providing Canadian population statistics).

405. *See* Press Release, U.S. Census Bureau, *supra* note 6.

406. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).