

WHY MORE ANTITRUST IMMUNITY FOR THE MEDIA IS A BAD IDEA

Maurice E. Stucke* and Allen P. Grunes**†

INTRODUCTION

The U.S. newspaper industry specifically and traditional media industries generally are in transition.¹ In response to declining audiences and advertising revenue, many traditional media firms have laid off journalists and cut back on news.² With their financial difficulties, some traditional media firms have called for greater leniency under the federal antitrust laws.³ Newspaper owners and journalists have called for greater antitrust immunity for joint advertising, joint fees for readership and accessing content online, and joint reporting.⁴ Others have called on the Federal

* Associate Professor, University of Tennessee College of Law.

** Partner, Brownstein Hyatt Farber Schreck, LLP.

† The authors, while at the U.S. Department of Justice, Antitrust Division, investigated mergers and anticompetitive restraints in the media industry. The views expressed herein are the authors' own and do not purport to reflect those of the U.S. Department of Justice.

¹ See Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 107–13 (2009).

² *Id.*

³ For purposes of this Essay, we are referring to Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1–2 (2006) (link), Section 7 of the Clayton Act, 15 U.S.C. § 18 (2006) (link), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (2006) (link).

⁴ Then-newspaper owner Brian Tierney, for example, testified before Congress that “[n]ewspaper publishers will need the flexibility to explore new approaches and innovative business models without the delay, burdens and uncertainty created by the competition laws” and that “[t]he enforcement of the antitrust laws has not yet caught up to current market realities.” Laurie Kellman, *More Antitrust Relief Rebuffed for Newspapers*, SEATTLE TIMES, Apr. 22, 2009, <http://www.allbusiness.com/government/government-bodies-offices/12409374-1.html> (link). Tierney later lost his two Philadelphia newspapers to his creditors. Christopher K. Hepp & Harold Brubaker, *Creditors Buy Papers at Auction*, PHILLY.COM, Apr. 29, 2010, http://www.philly.com/inquirer/front_page/20100429_Creditors_buy_papers_at_auction.html. Others in the industry have also called for exemptions. See *The Future of Journalism: Communications, Technology, and the Internet; Hearing Before the H. Comm. on Commerce, Science, and Transportation, Subcomm. on Communications, Technology, and the Internet*, 111th Cong 7 (2009) (testimony of James M. Moroney III, Publisher/CEO of The Dallas Morning News), available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=3f46957a-35f9-407b-872c-2ae4a89f877c (“Congress should provide critical assistance to newspapers by acting quickly on legislation that would provide newspapers with a limited antitrust exemption to experiment with innovative content distribution and cost savings arrangements.”) (link); *Editorial: Save The News: We're Not Looking For A Bai-*

Communications Commission (“FCC”) to loosen further its Cross-Ownership Rules.⁵ Some politicians have suggested that the federal antitrust agencies give these traditional media firms “more leeway to merge or consolidate.”⁶ The Federal Trade Commission (FTC) in recent hearings inquired as to whether antitrust immunity is necessary for newspapers’ collaboration and under what circumstances, if any, antitrust immunity for certain joint conduct could be justified.⁷

The plea for antitrust immunity is rooted in our democracy’s need for a healthy marketplace of ideas. After all, the First Amendment is predicated on the theory that truth emerges from the widest possible dissemination of information from diverse and antagonistic sources. Consequently, a vibrant marketplace of ideas and our democracy’s health require competing, independent voices.⁸ The plea for antitrust immunity also stems from the important role that newspapers and broadcast media have played and continue to play in that vibrant marketplace of ideas. Although the Internet is widely touted as a news source, to date it has not replaced the role of daily newspapers, and to a lesser extent broadcast television, in gathering international, national, and local news, and tying that news to issues in the local community.⁹ Consequently, given traditional media’s continuing importance to a

lout Or A Handout. Just A Hand, HOUS. CHRON., May 11, 2009, http://www.chron.com/CDA/archives/archive.mpl?id=2009_4737621 (Hearst newspaper arguing that Congress should “[g]ive newspapers a limited antitrust exemption that would allow them to share ideas and investigate collaborative new business models”) (link); Tim Ruten, *Setting The Price For A Free Press*, LATIMES.COM, Aug. 22, 2009, <http://articles.latimes.com/2009/aug/22/opinion/oe-ruten22> (“Congress needs to move quickly to grant the newspaper industry at least a temporary exemption from antitrust and price-fixing laws so that publishers and proprietors can, in essence, collude for survival.”) (link).

⁵ See, e.g., *Future of Media & Information Needs of Communities: Serving the Public Interest in the Digital Era Workshop: Before the Fed. Comm’n Comm’n* (2010) (testimony of Jane E. Mago, Exec. Vice President & General Counsel, Nat’l Ass’n of Broadcasters), available at http://reboot.fcc.gov/c/document_library/get_file?uuid=fe470672-cbc5-4727-9240-742a3074dc78&groupId=101236 (“On balance, the broadcast industry believes that the FCC’s structural ownership rules are too restrictive and fail to take account that competition for consumers’ attention and for ad revenues has increased dramatically. In other words, the FCC’s regulatory thumb is too heavy for the competitive marketplace to work fairly and efficiently.”) (link).

⁶ Zachary Coile, *Pelosi Goes To Bat To Keep Bay Area Papers Alive*, S.F. CHRON., Mar. 17, 2009, http://articles.sfgate.com/2009-03-17/news/17215730_1_hearst-bay-area-news-group-chronicle (reporting that “House Speaker Nancy Pelosi, worried about the fate of The Chronicle and other financially struggling newspapers, urged the Justice Department Monday to consider giving Bay Area papers more leeway to merge or consolidate business operations to stay afloat”) (link).

⁷ Fed. Trade Comm’n, Public Workshops and Roundtables: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?, Notice Announcing Public Workshops and Opportunity for Comment (2009), <http://www.ftc.gov/os/2009/09/090930mediaworkshopnotice.pdf> (listing “[p]roposals for an antitrust exemption applied to certain conduct of news organizations” as a discussion topic) (link).

⁸ We discuss in greater detail antitrust’s role in preserving the marketplace of ideas in Stucke & Grunes, *supra* note 1, at 105–07, and Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

⁹ Stucke & Grunes, *supra* note 1, at 115.

competitive marketplace of ideas, the current debate centers on whether the federal antitrust laws should be relaxed for the struggling traditional media.

This Essay explores why relaxing the federal antitrust laws for traditional media will not help consumers or the marketplace of ideas. Part I discusses the past problems with antitrust immunity generally and for the media industries specifically. Part II discusses why antitrust immunity is not a solution going forward. It concludes that, because our democracy's health depends on competition among traditional media, the cost of allowing already dominant firms to acquire the assets of their remaining competitors outweighs the benefits of looser antitrust laws.

I. WHY ANTITRUST IMMUNITY IS A BAD IDEA

A. *Problems with Antitrust Immunity Generally*

The federal antitrust laws apply across a broad range of industries and to nearly all forms of business organizations. A number of statutory exemptions exist, however, including immunity for agriculture,¹⁰ export activities,¹¹ insurance,¹² labor,¹³ fishing,¹⁴ defense preparedness,¹⁵ professional

¹⁰ See, e.g., Co-operative Marketing Associations (Capper-Volstead) Act, 7 U.S.C. §§ 291-92 (2006) (allowing persons engaged in the production of agricultural products to act together for the purpose of “collectively processing, preparing for market, handling, and marketing” their products and permitting cooperatives to have “marketing agencies in common”) (link); Cooperative Marketing Act, 7 U.S.C. § 455 (2006) (authorizing agricultural producers and associations to acquire and exchange “past, present, and prospective” pricing, production, and marketing data) (link).

¹¹ Export Trade (Webb-Pomerene) Act, 15 U.S.C. §§ 61-66 (2006) (providing antitrust immunity for the formation and operation of associations of otherwise competing businesses, allowing them to engage in collective export sales that do not extend to actions that have an anticompetitive effect within the United States or that injure domestic competitors of members of export associations) (link); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-20 (2006) (permitting limited antitrust immunity for export trade, export trade activities, and methods of operation specified in the certificate of review issued by Secretary of Commerce with the Attorney General's concurrence) (link).

¹² McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (2006) (exempting from antitrust laws the “business of insurance” to the extent “regulated by [s]tate law”) (link). Congress recently considered repealing the antitrust exemption for health insurance and medical malpractice insurance as part of its health care reform bill. Chris Sagers, *Much Ado About Possibly Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort*, 28 YALE L. & POL'Y REV. 325, 325(2010). However, Congress removed the repealing language from the final health care bill. See James M. Burns, *McCarran-Ferguson Act's Antitrust Exemption Dodges Another Attempt at Repeal*, INS. ANTITRUST ALERT, July 2010, available at http://www.williamsmullen.com/files/Publication/c8003e08-bb85-4cbb-af00-51bff48fb155/Presentation/PublicationAttachment/a71601cd-f758-4b35-8fcc-521be4e9041f/07-2010_InsAntitrust.pdf (link).

¹³ See, e.g., 15 U.S.C. § 17 (2006) (providing that the “labor of a human being is not a commodity or article of commerce” and that the Act permits labor organizations to carry out their legitimate objectives) (link); 29 U.S.C. § 52 (2006) (prohibiting the prevention of collective activity by employees relating to disputes concerning terms or conditions of employment) (link); Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101–10, 113–15 (2006) (providing that U.S. courts do not have jurisdiction to issue restraining orders or injunctions against certain union activities on the basis that such activities constitute unlawful combination or conspiracy under antitrust laws) (link).

sports,¹⁶ small business joint ventures,¹⁷ and local governments.¹⁸ Such anti-trust immunity departs from Congress's longstanding commitment to free markets and open competition.¹⁹

The broad consensus among the legal and academic antitrust community is that antitrust exemptions are rarely a good thing.²⁰ Exemptions aid their beneficiaries, but reduced competition can hinder the economy and often harms consumers. For this reason, the bipartisan Antitrust Modernization Commission²¹ concluded that statutory exemptions from the antitrust laws should be disfavored. It commented that “[w]hile the beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces.”²² The U.S. Department of Justice (DOJ) expressed the same sentiment in a letter to Congress:

¹⁴ Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521–22 (2006) (permitting “persons engaged in the fishery industry, as fishermen . . . [to] act together . . . in collectively catching, producing, preparing for market, processing, handling, and marketing” their products) (link).

¹⁵ Defense Production Act of 1950, 50 App. U.S.C. § 2158 (2006) (providing that the President or his delegate, in conjunction with the Attorney General, may approve voluntary agreements among various industry groups for development of “preparedness programs” to meet potential national emergencies) (link). The Act further provides that persons participating in such an agreement are immunized from the operation of antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under the agreement. *Id.*

¹⁶ Sports Broadcasting Act, 15 U.S.C. §§ 1291–95 (2006) (exempting, with some limitations, agreements among professional football, baseball, basketball, and hockey teams to negotiate jointly, through their leagues, for the sale of television rights) (link).

¹⁷ Small Business Act, 15 U.S.C. §§ 631–57 (2006) (granting the Small Business Administration authority to, “after consultation with the Attorney General and the” Chair of the FTC, and with the Attorney General’s prior written approval, “approve any agreement between small-business firms providing for a joint program of research and development, if the Administrator finds that the joint program proposed will maintain and strengthen the free enterprise system and the economy of the Nation.”) (link). To the extent the President has delegated his authority under section 640, the DOJ may also be asked to approve—on the Attorney General’s behalf—proposed voluntary agreements or programs among small business concerns to further objectives of the Small Business Act found to be in the public interest as contributing to national defense. *Id.* § 638(d)(2).

¹⁸ Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (2006) (providing antitrust immunity for local government officials and employees “thereof acting in an official capacity” with respect to actions brought under the Clayton Act for damages, fees, or costs) (link). The Act provides similar immunity for claims directed at a “person” (defined in 15 U.S.C. § 12 (2006)), based on official action directed by local government. *See id.* § 36.

¹⁹ *See Cmty. Commc'ns. Co., Inc. v. City of Boulder*, 455 U.S. 40, 56 & n.19 (1982) (link).

²⁰ *See* ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 15–16 (2007).

²¹ The Antitrust Modernization Commission (“AMC”) was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–60, 116 Stat. 1856 (link). The President, leadership of the Senate, and leadership of the House of Representatives each appointed four of the AMC’s twelve Commissioners. *Id.* § 11054(a).

²² ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 335 (2007) (link). The Report continues: “Typically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Companies free from competitive pressures have incentives to raise prices, reduce output, and limit investments in expansion and innovation to the detriment of the American consumer. Accordingly, the Department has historically opposed efforts to create sector-specific exemptions from the antitrust laws.²³

The FTC,²⁴ the American Bar Association Section of Antitrust Law,²⁵ and the American Antitrust Institute have made similar comments.²⁶ Proponents of antitrust exemptions for a particular industry often argue that the industry has special characteristics that prevent it from performing well under normal market competition.²⁷ Yet scholars who have analyzed pre- and post-

large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.” *Id.*

²³ Letter from Keith B. Nelson, Principal Deputy Assistant Att’y Gen., U.S. Dept. of Justice, to Hon. Lamar Smith, Ranking Member, H. Comm. on the Judiciary (June 23, 2008), available at http://www.electronicpaymentscoalition.org/downloads/letter_DOJ.pdf (link).

²⁴ See, e.g., *The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care: Before the S. Subcomm. on Consumer Protection, Product Safety, and Insurance, Comm. on Commerce, Science & Transportation*, 111th Cong. 4 (2009) (statement of the FTC), available at <http://www.ftc.gov/os/2009/07/090716healthcayetestimony.pdf> (“Not surprisingly, some health care providers have long sought antitrust exemptions that would protect them against competitive pressures to lower costs and improve quality. The Commission consistently has opposed legislative proposals to exempt certain types of conduct, such as price fixing, from antitrust scrutiny, because such conduct will increase health care costs without benefitting consumers.”) (citation omitted); Jeremy W. Peters, *Government Takes On Journalism’s Next Chapter*, NYTIMES.COM, June 13, 2010, http://www.nytimes.com/2010/06/14/business/media/14ftc.html?_r=2 (quoting FTC chair’s testimony of his agency’s “very strong allergy” toward antitrust law exemptions) (link).

²⁵ See, e.g., ABA SECTION OF ANTITRUST LAW, COMMENTS ON THE RAILROAD ANTITRUST ENFORCEMENT ACT 1 (2008), available at http://www.abanet.org/antitrust/at-comments/2008/12-08/comments-HR1650_S772.pdf (“The Antitrust Section has frequently noted its opposition to industry-specific exemptions from the antitrust laws based on claims that such immunity is necessary given unique market conditions, believing that the antitrust laws are sufficiently flexible to account for particular market circumstances.”) (link).

²⁶ See, e.g., AM. ANTITRUST INSTITUTE, WORKING GRP. ON IMMUNITIES AND EXEMPTIONS, COMMENTS 2 (2005), available at <http://www.antitrustinstitute.org/files/433.pdf> (noting that many antitrust exemptions are unnecessary, harmful to competition, and the “product of special interest pressure”) (link).

²⁷ For example, the Webb-Pomerene Act exempted U.S. export cartels from the antitrust laws so they could better compete with powerful foreign cartels; the Capper-Volstead Act exempted agricultural cooperatives on the theory that farmers needed enhanced bargaining power in their dealings with large buyers; and the Miller-Tydings Act was a “fair trade” law aimed preventing price-cutting by large retail chains to the detriment of smaller retailers. See ABA SECTION OF ANTITRUST LAW, *supra* note 20, at 11–12, 91.

exemption industry dynamics question the accuracy of these claims.²⁸ The Antitrust Modernization Commission similarly reported that it “heard no compelling justification for any of the exemptions on which it held hearings.”²⁹

Once an antitrust exemption is on the books, it is rarely revisited or repealed, even though the exemption may not provide the expected benefit and may have unintended, negative consequences.³⁰ Moreover, courts interpret and apply federal antitrust laws much differently today than they did forty years ago. Much conduct that once would have been prohibited (especially involving competitor collaborations) is viewed as benign or even pro-competitive today.³¹ Thus, the surviving exemptions may be irrelevant, if not harmful, under today’s marketplace reality and current antitrust theory.

All of the above has led courts to view exemptions with a high degree of skepticism. In speaking of the Sports Broadcasting Act of 1961,³² Judge Easterbrook put it this way: “The Sports Broadcasting Act is special interest legislation, a single-industry exception to a law designed for the protection of the public . . . Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.”³³

B. Problems Specifically with Antitrust Immunity for the Media

1. NPA: special interest legislation for newspaper publishers

The Newspaper Preservation Act (NPA)³⁴ is illustrative of why antitrust immunity for the media is a bad idea. In 1965, the Hearst Corporation’s San Francisco newspaper, *The Examiner*, entered into a joint

²⁸ *Id.* at 4 (“[T]he available data and subsequent experience in most of the industries studied for this book suggest that these claims often lack substantial documented empirical support.”).

²⁹ ANTITRUST MODERNIZATION COMM’N, *supra* note 22, at 353.

³⁰ See ABA SECTION OF ANTITRUST LAW, *supra* note 20, at 301–02.

³¹ ANTITRUST MODERNIZATION COMM’N, *supra* note 22, at 33–36; see Christine A Varney, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust Immunities, Remarks as Prepared for the American Antitrust Institute’s 11th Annual Conference: Public and Private: Are the Boundaries in Transition? Washington, D.C. 5–7 (June 24, 2010), available at <http://www.justice.gov/atr/public/speeches/262745.htm> (link).

³² 15 U.S.C. §§ 1291–95 (2006). The Sports Broadcasting Act (“SBA”), which is largely obsolete today, permitted the NFL to enter into a league-wide television contract similar to that of its new rival, the AFL, despite an existing DOJ consent decree. The SBA was later amended to allow the NFL and the AFL to merge without antitrust review and so avoid “excessive competition.” Finally, the SBA preserved a market division between professional football and high school and college football with respect to the days on which games were played. For a full discussion, see ABA SECTION OF ANTITRUST LAW, *supra* note 20, at 217–40.

³³ *Chi. Prof’l Sports Ltd. v. Nat’l Basketball Ass’n*, 961 F.2d 667, 671–72 (7th Cir. 1992) (link).

³⁴ 15 U.S.C. §§ 1801–04 (2006) (link).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

operating arrangement (JOA) with its primary competitor, *The San Francisco Chronicle*.³⁵ Under their JOA, Hearst's *Examiner* and the *Chronicle*, through their San Francisco Newspaper Agency, collectively fixed the prices for their newspapers' subscription and advertising rates and jointly managed the newspapers' circulation, sales, printing, distribution, and personnel (the news and editorial departments of both newspapers, however, remained separate and were independently operated).³⁶ Hearst was not alone. Over twenty other cities had JOAs, some of which were formed during the 1930s.³⁷

In mid-1960s, the DOJ began cracking down on price-fixing between JOA newspapers.³⁸ Fearing antitrust liability, Hearst CEO Richard E. Berlin and the leaders of other large media companies lobbied Congress and the Nixon Administration to enact the NPA.³⁹ The NPA allows competing newspapers to legally engage in anticompetitive behavior, such as fixing subscription prices and advertising rates as well as allocating markets.⁴⁰ In exchange for antitrust immunity for such behavior, the NPA requires JOA newspapers to maintain their independent and competitive newsrooms.⁴¹ Additionally, the NPA immunized JOAs that pre-dated its enactment, in-

³⁵ See Press Release, Hearst Corp., The Hearst Corporation to Purchase the *San Francisco Chronicle* (Aug. 6, 1999), available at <http://www.sfmuseum.org/hist10/chronsale.html> (link).

³⁶ *Id.*

³⁷ H.R. REP. NO. 91-1193 (1970) ("[F]rom 1933, when the first joint newspaper operating arrangement was started in Albuquerque, New Mexico, to 1966, twenty-two joint arrangements have been put into operation in 19 states.") reprinted in, 1970 U.S.C.C.A.N. 3547, 3549, 1970 WL 5749 (Leg.Hist.) at *3.

³⁸ See, e.g., *United States v. Citizen Publ'g Co.*, 280 F. Supp. 978 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969).

³⁹ BEN H. BAGDIKIAN, THE NEW MEDIA MONOPOLY 204-17 (2004).

⁴⁰ To grant approval of a new JOA, the Attorney General, under the NPA, must first find that one newspaper is "failing," which means that the newspaper publication, "regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5) (2006). This is an easier standard than antitrust law's failing-firm defense. *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1288 (D.C. Cir. 1989); *Comm. for an Indep. P-I v. Hearst Corp.*, 704 F.2d 467, 473-74 (9th Cir. 1983). Second, the Attorney General must find that approval of the JOA would effectuate the NPA's policy and purpose. 15 U.S.C. § 1803(b) (2006). The NPA does not limit the number of newspapers in one community that can be part of a JOA. 15 U.S.C. § 1802(2) (2006) (defining term "joint newspaper operating arrangement" to mean arrangements entered into by "two or more newspaper owners for the publication of two or more newspaper publications"). But all but one of the newspapers in the JOA must be "failing." 15 U.S.C. § 1803(a) (2006). Consequently, JOAs typically involve only two newspaper publications, one of which is either (i) not "failing" for JOAs formed after the NPA's enactment or (ii) likely to remain or become a financially sound publication for JOAs formed before after the NPA's enactment.

⁴¹ The NPA requires that there be "no merger, combination, or amalgamation of editorial or reporter-staffs, and that editorial policies be independently determined" between the newspapers in the joint operating arrangement. 15 U.S.C. § 1802(2) (2006).

cluding the one between *The San Francisco Chronicle* and Hearst's *Examiner*.⁴²

Yet the NPA had its opponents. The most insightful critique of anti-trust immunity for newspapers came from Richard McLaren, the head of the DOJ's Antitrust Division at the time of the NPA's passage. Although the Nixon Administration and Department of Commerce supported the NPA,⁴³ the DOJ, he noted, was "very much opposed" to the proposed media anti-trust exemption.⁴⁴ He warned that "if competition is not to be the regulating force in the newspaper industry, then Government regulation is the logical alternative and certainly not an acceptable one to the publishing industry."⁴⁵

Testifying before Congress, the Assistant Attorney General for the Antitrust Division argued that antitrust immunity for newspapers was unnecessary for several reasons. *First*, antitrust immunity removes newspapers from the judgment of the marketplace.⁴⁶ *Second*, less anticompetitive alternatives existed to antitrust immunity. An economically distressed publisher could improve its newspaper to attain greater acceptance. It could achieve efficiencies through a joint venture with its competitor (or other publishers) for joint printing and distribution, which would be evaluated under the more permissive antitrust legal standard—namely, the rule of reason.⁴⁷ Or the newspaper could seek an acquisition by an outsider, "who will bring to the market the talent and other resources necessary to financial success."⁴⁸ *Third*, antitrust immunity, he warned, would introduce a slippery slope under which other media industries, such as magazines and television broadcasters, would also seek antitrust immunity.⁴⁹ *Fourth*, JOAs create a shared monopoly that increases market-entry barriers.⁵⁰ *Fifth*, the NPA creates a "soft landing" that inhibits competition. If the two daily newspapers compete fiercely, their potential reward is immunized price-fixing.⁵¹ Yet, if one

⁴² The NPA immunizes "any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication[.]" 15 U.S.C. § 1803(a) (2006).

⁴³ *Newspaper Preservation Act: Hearings on S. 1520 before the Antitrust Subcomm. of the H.R. Comm. on the Judiciary*, 91st Cong. 380 (1969) (testimony of Richard W. McLaren, Asst. Atty. Gen., Antitrust Div., Dep't of Justice). The Committee Chair Emanuel Celler could not recall in his 47 years in Congress other instances where senior administration officials took such opposing position. *Id.*

⁴⁴ *Id.* at 294.

⁴⁵ *Id.* at 298.

⁴⁶ *Id.* at 359.

⁴⁷ *Id.* at 358–60; see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8–16 (1979) (rule of reason standard to evaluate blanket license).

⁴⁸ *Newspaper Preservation Act*, *supra* note 43, at 360.

⁴⁹ *Id.* at 357.

⁵⁰ *Id.* at 363.

⁵¹ See *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1300, 1304 (D.C. Cir. 1989) (Wald, C.J., dissenting from denial of rehearing en banc) (writing that in approving the Detroit JOA, the

newspaper really thought its competitor would exit the market, it is unlikely the newspapers would enter into a JOA.⁵² *Sixth*, the NPA vests in the U.S. Attorney General regulatory authority over the press.⁵³

It is hard to characterize the NPA as a success in terms of aiding smaller newspapers, preventing abuse, or significantly improving newspaper quality. In fact, the beneficiaries of the NPA were often the very opposite of those it intended to help. JOAs have generally aided large newspaper chains,⁵⁴ such as Hearst, E.W. Scripps, Gannett Co., and MNG Group (MNG)⁵⁵—the very newspapers that did not need antitrust immunity to succeed. Indeed, one of the few family-owned and local newspapers involved in a JOA is among the statute's greatest critics. The *Seattle Times* noted

“Attorney General accepted the [administrative law judge’s] basic finding that Detroit, the fifth-largest newspaper market in the country, can support *two profitable newspapers* if, in the words of Free Press management, ‘competitive pricing becomes rational and consistent with other markets around the country,’ ALJ Report at 85, *i.e.*, if these two competitors do not continue to engage in deliberately unprofitable pricing strategies with the predatory objective on the part of one paper to drive the other into failure so as to secure a JOA.”); Conrad M. Shumadine & Michael R. Katchmark, *Antitrust and the Media*, 917 PLL/Pat 393, 628, 635 (2007) (noting criticism that the Newspaper Preservation Act allows papers to generate losses to qualify for JOAs).

⁵² *Newspaper Preservation Act*, *supra* note 43, at 300–01. The criticism is that if one newspaper were indeed failing, the stronger newspaper would simply let the weaker newspaper deteriorate and exit the market. Thus, the surviving newspaper, as the sole daily newspaper, would collect any available monopoly profits. The fact that the competitors decided to enter into a JOA revealed that the newspaper owners were unsure which competitor would eventually survive, or when the supposedly weaker competitor would actually exit the market. Faced with this uncertainty, the JOA affords the newspaper owners the opportunity to share in the supra-competitive profits, to negotiate the date to close the second newspaper, and to agree upon the percentage of the projected monopoly rents in exchange for closing the second newspaper. Such an agreement between competing newspapers outside the JOA is *per se* illegal under the Sherman Act, and could potentially subject the newspaper owners to criminal liability. See *United States v. Vill. Voice Media LLC*, No. 1:03CV0164, 2003 WL 23991059 (N.D. Ohio 2003) (civil complaint). Although an agreement among JOA partners to close one newspaper is not immunized under the NPA, practically the parties can use the NPA as a stepping stone to achieve a one newspaper town. See Paul Farhi, *The Death of the JOA: City by city, paper by paper, an experiment aimed at saving newspapers is withering away*, AM. JOURNALISM REV. (Sept. 1999), available at <http://www.ajr.org/article.asp?id=317> (link).

⁵³ *Newspaper Preservation Act*, *supra* note 43, at 297.

⁵⁴ Robbie Steel, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PA. L. REV. 275, 290 (1989) (noting how “fifteen of the twenty-two pre-existing JOAs involved members of national newspaper chains”); see Tim Jones, *Denver Dailies' Bid to End Costly War Revives Debate on Antitrust Exemption*, CHI. TRIB., http://articles.chicagotribune.com/2000-06-25/business/0006250058_1_antitrust-exemption-joa-two-newspapers, June 25, 2000 (“I’m not convinced that JOAs preserve what they were intended to preserve. They just preserve capital in the hands of large corporations”) (quoting Ben Burns, “former executive editor at the Gannett Co.-owned Detroit News, which merged business operations with Knight Ridder Inc.’s Detroit Free Press in 1989”) (link).

⁵⁵ For example, E.W. Scripps, and Gannett each were in six JOAs; Hearst was in two JOAs. JOHN C. BUSTERNA & ROBERT G. PICARD, *JOINT OPERATING AGREEMENTS: THE NEWSPAPER PRESERVATION ACT AND ITS APPLICATION* 13 (1993). MNG was in five JOAs: Denver, Colorado; York, Pennsylvania; Salt Lake City, Utah; Detroit, Michigan; and Charleston, West Virginia. See Catherine Tsai, *JOAs Are a Dying Breed Amid Changing Markets*, ASSOCIATED PRESS, Feb. 27, 2009 (link).

how its JOA “didn’t work and was a drain of resources.”⁵⁶ The NPA also failed to prevent the abusive tactics of those newspapers in a JOA. As the DOJ’s prosecution of the Charleston, West Virginia JOA shows, JOAs are open to abuse by their partners.⁵⁷ The DOJ alleged that the Daily Gazette Company, which published *The Charleston Gazette*, bought its JOA partner’s newspaper, the *Daily Mail*, with the purpose and intent of shutting it down, making Charleston a single newspaper town:

At the end of 2003, MediaNews arranged to sell the *Daily Mail* and its 50% interest in [the JOA] Charleston Newspapers to an experienced newspaper operator for \$55 million. At the time, Charleston Newspapers was earning substantial profits, and the *Daily Mail* was financially healthy and stable. The joint operating arrangement between MediaNews and Gazette Company allowed each partner the right of first refusal to match any third-party offer to buy one of the newspapers. Rather than allow the new buyer to take over the *Daily Mail* and continue the competition that had prevailed for decades, Gazette Company decided to exercise its right of first refusal and gain control of both newspapers. . . . [D]uring this time Gazette Company developed a plan to shut down the *Daily Mail* and become the publisher of the sole remaining newspaper in Charleston. Gazette Company created a series of business plans, financial projections, and other documents showing that it would cease publishing the *Daily Mail* by no later than the end of 2007. The plans called for the rapid reduction of the *Daily Mail*’s circulation and its newsroom staff and budget until, in 2007, the newspaper would no longer be economically viable. At that point, Gazette Company believed it would be able to justify the closure of the *Daily Mail* under the NPA to the Department of Justice. In short, Gazette Company planned to deliberately transform a financially healthy and stable *Daily Mail* into a failing newspaper and close it far earlier than the market would otherwise have dictated.⁵⁸

Some JOAs exist today in name only: the junior newspaper agrees to close for a percentage of the surviving newspaper’s profits.⁵⁹ In Tucson, for

⁵⁶ Editorial, *Struggling newspapers don’t need this help*, SEATTLE TIMES, Apr. 27, 2009, http://seattletimes.nwsourc.com/html/editorialsopinion/2009126456_edita27independent.html (link).

⁵⁷ *United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859, 861–64 (S.D.W.Va. 2008).

⁵⁸ Competitive Impact Statement filed by United States at 7–8, *United States v. Daily Gazette Co.*, (S.D.W.Va. Jan. 20, 2010), available at <http://www.justice.gov/atr/cases/f254300/254310.pdf> (link).

⁵⁹ Farhi, *supra* note 52.

example, the JOA was profitable, but Gannett—owner of one of the newspapers in that JOA—closed its newspaper in 2009, but will continue to share any profits from the JOA.⁶⁰

Finally, although the NPA ostensibly aimed to improve newspaper quality by increasing editorial competition, the NPA does not appear to have yielded better quality newspapers in San Francisco or in many other cities. If anything, Hearst's history in the San Francisco area cautions against further relaxation of the federal antitrust laws. After Congress passed the NPA, the *Chronicle* and Hearst's *Examiner* continued to fix advertising and circulation prices over the next couple of decades, yet the San Francisco newspapers were criticized for their poor quality.⁶¹

After benefiting from antitrust immunity for decades, Hearst in 1999 made a preemptive bid to acquire *The San Francisco Chronicle* when its owners decided to sell.⁶² Hearst assured the public that acquiring its primary editorial rival "is both an affirmation of its belief in the City of San Francisco and a continuing opportunity to be of service to the Bay Area community."⁶³ But the merger also showed the fragility of the marketplace of ideas. As revealed in the DOJ's antitrust investigation, which came to light only during a private lawsuit, Hearst sought to suppress critical news stories about the transaction.⁶⁴ And the district court found that Hearst offered "to 'horse trade' favorable editorial coverage of [Mayor Brown] in return for [his] support" of Hearst's acquisition of its rival.⁶⁵

⁶⁰ Arthur H. Rotstein, *Judge: Tucson Citizen Closing OK*, ASSOCIATED PRESS, May 19, 2009, http://www.huffingtonpost.com/2009/05/19/judge-tucson-citizen-clos_n_205500.html (link). Nancy Bonnell, chief of the state attorney general's antitrust unit, argued in court that the newspaper owners determined that they "would make more money if they closed one of the papers" within their JOA "and operated only the profitable *Star*. 'Even in recession last year, the parties made \$16 million but that wasn't enough,' Bonnell said at the hearing." A purchaser apparently "offered to buy the Citizen for \$250,000 immediately or \$400,000 over time for Citizen assets", which according to Gannett, was below the assessed value of \$760,000, and its asking price of \$800,000. The trial court determined that the state attorney general did not "prove there was a buyer ready to pay a fair market value for the Citizen's assets," and allowed Gannett to close its paper in exchange for a percentage of the other newspaper's profit. *Id.*

⁶¹ See Cynthia Gorney, *The State of The American Newspaper: The Battle Of the Bay*, AM. JOURNALISM REV., Jan./Feb. 1999, available at <http://www.ajr.org/article.asp?id=3293> (link); Peter H. King, Letter from San Francisco, *What the Shadow Knew*, COLUM. JOURNALISM REV., Nov./Dec. 1999.

⁶² *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1199 (N.D. Cal. 2000).

⁶³ Press Release, Hearst Corp., *The Hearst Corporation to Purchase The San Francisco Chronicle* (Aug. 6, 1999), <http://www.hearst.com/press-room/pr-19990806a.php> (link).

⁶⁴ See Reynolds Holding, *Hearst Insisted Examiner Hold Story on Chronicle/Document Shows Executive Worried About Bid For Paper*, S.F. CHRON., June 9, 2000, http://articles.sfgate.com/2000-06-09/news/17650583_1_hearst-corporation-chronicle-publishing-deposition (link).

⁶⁵ *Reilly*, 107 F. Supp. 2d at 1207.

The San Francisco JOA came to an end in 2000 when Hearst acquired the *Chronicle* after agreeing to sell its *Examiner* to a third party.⁶⁶ Hearst's new newspaper proceeded to lose money every year thereafter.⁶⁷ Then in 2006, Hearst sought to finance MNG, which was acquiring most of the remaining daily newspapers in the Bay Area.⁶⁸ Hearst acquired a 30% equity stake in MNG's newspaper businesses outside the San Francisco Bay Area,⁶⁹ but assured the public that it would continue to aggressively compete against the MNG newspapers in the Bay Area.⁷⁰ That questionable deal (why was Hearst helping its primary competitor become stronger?) also triggered an investigation by the DOJ and a private lawsuit.⁷¹ As the DOJ noted, "Hearst's investment in MNG—its principal newspaper rival in the Bay Area—raised potential competitive concerns warranting investigation despite the parties' assertions that they had structured Hearst's proposed investment to give Hearst no equity interest in or influence over MNG's Bay Area businesses."⁷² During the private lawsuit, the district court also expressed concern. The court originally "accepted defendants' representations that Hearst's involvement in the transactions was solely that of a passive equity investor."⁷³ The court did so even though "defendants offered no explanation why Hearst was willing to help finance an acquisi-

⁶⁶ Press Release, Hearst Corp., The Hearst Corporation Completes Purchase of The San Francisco Chronicle and Sale of The San Francisco Examiner (July 28, 2000), <http://www.hearst.com/press-room/pr-20000728a.php> (link).

⁶⁷ Pete Carey, *Hearst Threatens to Close Chronicle, Company's Dilemma: Cut Jobs, Sell, or Fold*, S.J. MERCURY NEWS, Feb. 25, 2009, available at 2009 WLNR 3668038.

⁶⁸ Press Release, U.S. Dep't of Justice, Antitrust Div., Statement of the Dep't of Justice's Antitrust Division Regarding Its Investigation of Hearst Corporation's Proposed Acquisition of Tracking Stock In MediaNews Group Inc. (Oct. 25, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/227168.htm (link); MNG, through its 54.23% interest in California Newspapers Partnership, already "owned and operated eight major Bay-Area newspapers." *Reilly v. MediaNews Group, Inc.*, No. C 06-04332 SI, 2006 WL 3422204, at *1 (N.D. Cal. Nov. 28, 2006). MNG then acquired the *San Jose Mercury News* and the *Contra Costa Times* for \$736.8 million, *id.* at *2, and obtained the *Monterey Herald* and other newspapers from Hearst in exchange for providing an equity investment in MNG's operations. *Hearst Pays \$317m for 31% of MediaNews Non-SF Ops DOJ Rules Passive Investment; Duo Also Buy 2 Tribune Co. Conn. Papers*, NEWSINC, Oct. 29, 2007 available at 2007 WLNR 27158949 (link).

⁶⁹ *Media Deal Complete*, MONTEREY COUNTY HERALD, Oct. 24, 2007, at E1, 2007 WLNR 20913429.

⁷⁰ Carolyn Said, *Papers Ponder Sharing Delivery—But MediaNews, Hearst Expect Fierce Newsroom Rivalry*, S.F. CHRONICLE, Apr. 29, 2006, available at http://articles.sfgate.com/2006-04-29/business/17289992_1_antitrust-practice-medianews-group-newspaper-association (link).

⁷¹ See, e.g., *MediaNews Group*, *supra* note 68, at *2–3.

⁷² Press Release, U.S. Dep't of Justice, Antitrust Div., Statement of the Dep't of Justice's Antitrust Division Regarding Its Investigation of Hearst Corporation's Proposed Acquisition of Tracking Stock In MediaNews Group Inc. (Oct. 25, 2007), http://www.usdoj.gov/atr/public/press_releases/2007/227168.htm (link).

⁷³ *Reilly v. MediaNews Group, Inc.*, No. C 06-04332 SI, 2006 WL 3422204, at *5 (N.D. Cal. Nov. 28, 2006).

tion that would only make its competition stronger.⁷⁴ This is because the district court believed that Hearst did not expect, or would not later receive, “any quid pro quo” for financing its competitor. However, the plaintiff brought before the court a letter from Hearst to MNG that suggested, “at the very least, that Hearst’s investment was specifically tied to an agreement by MediaNews to limit its competition with Hearst in certain ways.”⁷⁵ Thereafter Hearst and MNG modified their proposed transaction “in an effort to mitigate” the DOJ’s antitrust concerns.⁷⁶ MNG later declared bankruptcy.⁷⁷ According to press reports, Hearst maintained roughly half its original ownership stake.⁷⁸ MNG’s top two executives, who were responsible for amassing the company’s debt, continued to be handsomely compensated.⁷⁹ And despite decades of antitrust immunity, the quality of the *San Francisco Chronicle* has not actually improved.⁸⁰

It is for these reasons that the JOAs the NPA envisioned have, generally speaking, failed. By 1969, before the NPA was enacted, there were twenty-two JOAs.⁸¹ By 2003, only twelve JOAs remained,⁸² and today only six JOAs exist.⁸³ This is a much sharper decline than the number of daily newspapers, which fell by 18% between 1970 and 2006.⁸⁴

Hearst may again press for antitrust immunity and promise that, in exchange for greater antitrust immunity, it will finally provide San Francisco residents with a quality newspaper. But despite decades of receiving anti-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See DOJ Press Release, *supra* note 72.

⁷⁷ Michael Liedtke, *Salt Lake Tribune Parent Company Affiliated Media Inc.’s Bankruptcy Plan Approved*, DESERETNEWS.COM, Mar. 5, 2010, <http://www.deseretnews.com/article/700014132/Salt-Lake-Tribune-parent-company-Affiliated-Media-Incs-bankruptcy-plan-approved.html> (link).

⁷⁸ *Id.*

⁷⁹ *Id.* (reporting CEO William Dean Singleton will receive a \$634,000 salary, an annual bonus of up to \$500,000, and \$360,000 annually under a separate agreement with The Denver Post Corp., while president, Joseph Lodovic IV “will get a \$1 million salary and an annual bonus of up to \$500,000”).

⁸⁰ On a positive note, the reduction in journalism by San Francisco’s established newspapers has led to innovative projects to help fill the void in in-depth reporting. See Jennifer Hlad, *Plugging the Holes*, AM. JOURNALISM REV., Dec. 2009/Jan. 2010, available at <http://www.ajr.org/article.asp?id=4848> (link); Stephanie Gleason, *Filling the Gap*, AM. JOURNALISM REV., Aug./Sept. 2009, available at <http://www.ajr.org/article.asp?id=4834> (link).

⁸¹ See *Newspaper Preservation Act*, *supra* note 43, at 382.

⁸² 12 Cities Still Have JOAs: Court-approved Joint Operating Agreements Down from Over 25, SEATTLE POST-INTELLIGENCER, Apr. 29, 2003, http://www.seattlepi.com/business/119679_joal elsewhere29.html (link).

⁸³ Five JOAs publish separate newspapers in York, Pennsylvania, Salt Lake City, Utah, Fort Wayne, Indiana, Detroit, Michigan, and Charleston, West Virginia. In Las Vegas, Nevada, the JOA was amended such that the afternoon newspaper *Sun* became an insert in the morning *Review Journal*. J.M. Kalil, *Agreement Keeps LV Two-newspaper Town*, LAS VEGAS REVIEW-JOURNAL, June 15, 2005, http://www.reviewjournal.com/lvrj_home/2005/Jun-15-Wed-2005/news/26724633.html (link).

⁸⁴ See NUMBER OF NEWSPAPERS AND NEWSPAPER CIRCULATION, http://www.mediainfocenter.org/newspaper/data/top_news_volume.asp (last visited Oct. 14, 2010) (decline of 1,748 total daily U.S. newspapers in 1970 to 1,437 in 2006) (link).

trust immunity, this promise of both Hearst and the NPA has not come to fruition.

2. Telecommunications Act of 1996

Commercial radio provides another example of the perils of loose anti-trust scrutiny. One frequent complaint is that the deregulation that followed the Telecommunications Act of 1996 (1996 Act), which weakened ownership limits on radio stations nationally and locally,⁸⁵ “allowed for unprecedented consolidation in commercial radio, which has resulted in a homogeneity that is often out-of-step with artists, entrepreneurs, media professionals and educators—not to mention listeners.”⁸⁶

In analyzing radio mergers under the Clayton Act, the DOJ considered their economic impact solely with respect to advertisers and the rates they paid,⁸⁷ even though many possible product markets exist—listenership and programming, for example. The DOJ’s radio merger consent decrees never addressed non-price competition regarding programming quality, listener choice, or the likely impact of these mergers on the marketplace of ideas.⁸⁸ Nothing in the Clayton Act restricts the DOJ to consider solely advertising competition.⁸⁹

After the 1996 Act, radio ownership became significantly more concentrated. Between March 1996 and March 2007, the number of commercial radio stations increased 6.8%, but the number of radio owners declined

⁸⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). Section 202 of the 1996 Act abolished the FCC’s limits on the number of radio stations a single entity could own nationally. In 1996, the FCC in revising Section 73.3555 of its Rules (47 C.F.R. § 73.3555) eliminated the national multiple radio ownership rule and relaxed the local ownership rule. FCC Order, In re Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 47 C.F.R. Section 73.3555 (March 7, 1996), http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96090.txt (link).

⁸⁶ *On the “Future of Radio”*: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 110 Cong. 3, Oct. 24, 2007, available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=f83d2199-70b0-4633-9fc6-1db93c1d71bd (testimony of Mac McCaughan, co-founder of Merge Records) (link).

⁸⁷ See, e.g., Joel I. Klein, Acting Assistant Att’y Gen., Dep’t of Justice, Speech at the ANA Hotel: DOJ Analysis of Radio Mergers (Feb. 19, 1997), available at <http://www.justice.gov/atr/public/speeches/1055.pdf> (link).

⁸⁸ See, e.g., Competitive Impact Statement, *United States v. Bain Capital, LLC*, No.1:08-cv-00245, at 5–7 (D.D.C. filed Feb. 13, 2008), available at <http://www.usdoj.gov/atr/cases/f230100/230166.htm> (link); Complaint for Injunctive Relief, *United States v. Clear Channel Communications, Inc. and AMFM Inc.*, No. 00-2063, at 2–3 (D.D.C. filed Aug. 29, 2000), available at <http://www.usdoj.gov/atr/cases/f6300/6329.htm> (complaint filed with consent decree) (link); *United States v. CBS Corp.*, No. 98CV00819, at 1–2 (D.D.C. Jun. 30, 1998), 1998 U.S. Dist. LEXIS 10292 (proposed decree requiring divestiture of radio stations to cure anticompetitive effect in radio advertising market); *United States v. Westinghouse Elec. Corp.*, No. 96 2563, at 1–2 (D.D.C. Mar. 10, 1997), 1997 U.S. Dist. LEXIS 3263.

⁸⁹ 15 U.S.C. 18 (2006).

by 39%.⁹⁰ This trend was already apparent in 2001, by which time the number of radio owners had already declined 25% from when the 1996 Act commenced.⁹¹ Over the same period and until 2007, the nation's largest radio group owners grew even bigger: "In 1996, the two largest radio group owners controlled 62 and 53 stations, respectively. By March 2007, the leading radio group, Clear Channel Communications, owned over 1,100 radio stations."⁹² The ensuing wave of radio mergers, not surprisingly, generally had an adverse impact on non-price competition, including on programming quality and programming choices for listeners.⁹³ One complaint, reported by the Project for Excellence in Journalism, was "that Clear Channel's domination was diminishing the quality of the AM/FM radio dial by monopolizing key markets and homogenizing content."⁹⁴ These critics also complained that it exerted a negative effect on American radio. Clear Channel reported its use of:

[P]opularised voice-tracking, whereby segments of speech, music and commercials were sent digitally from one Clear Channel network to another. These were then cut and pasted into the radio programmes, giving the listener the impression that, for example, a DJ was taking a live request or was doing an interview when, in fact, they were not. Clear Channel argued that this technique allows it to deliver national DJ talent to local markets that could not otherwise afford it. It also cuts costs.⁹⁵

⁹⁰ GEORGE WILLIAMS, FED. COMM'NS COMM'N, REVIEW OF THE RADIO INDUSTRY 2007, 1, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf (link).

⁹¹ FED. COMM'NS COMM'N, C REVIEW OF THE RADIO INDUSTRY 2001, at 3, *available at* <http://www.fcc.gov/mb/policy/docs/radio01.pdf> (link).

⁹² WILLIAMS, *supra* note 90, at 1. In 2008, Clear Channel controlled 833 U.S. radio stations, "508 of which were located" in the largest 100 Arbitron markets. Competitive Impact Statement filed by the United States, at 4, Bain Capital LLC, No. 1:08-cv-00245, at 4, *available at* <http://www.justice.gov/atr/cases/f230100/230166.pdf> (link).

⁹³ See Stucke & Grunes, *supra* note 1, at 111 n.43, 123 (discussing decline in the amount of local news by radio stations and noting how increased concentration has not increased the average number of formats across markets); Michael J. Copps, Comm'r, Fed. Comm'n Comm'n, Remarks to the NATPE 2003 Family Programming Forum (Jan. 22, 2003), *available at* <http://www.fcc.gov/Speeches/Copps/2003/spmjc301.pdf> (discussing how "[r]espected media watchers argue that this concentration has led to far less coverage of news and public interest programming," how one multi-year study found a homogenization of music that got air play, and how radio served more "to advertise the products of vertically integrated conglomerates than to entertain Americans with the best and most original programming") (link).

⁹⁴ Project for Excellence in Journalism, Radio, *in* THE STATE OF THE NEWS MEDIA 2007, *available at* http://www.stateofthemediamedia.org/2007/narrative_radio_ownership.asp?cat=4&media=9 (link).

⁹⁵ *Clear Channel Agrees \$18.7bn Sale*, BBC NEWS, Nov. 16, 2006, <http://news.bbc.co.uk/2/hi/business/6155284.stm> (link).

Mel Karmazin, the former head of commercial radio for Infinity Broadcasting and CBS and the current CEO of Sirius XM, recognized that commercial radio after the 1996 Act became “totally homogenized.”⁹⁶ Karmazin advocated for radio consolidation “[s]trictly for business reasons. No one asked [him] if it was good for consumers.”⁹⁷

Not only have local radio markets become more concentrated, but several radio firms now dominate local advertising. On the local level, “[t]he largest firm in each radio Metro market has, on average, 46 percent of the market’s total radio advertising revenue. The largest two firms in each radio market have, on average, 74 percent of the market’s radio advertising revenue.”⁹⁸ Although radio listening declined between 1998 and 2006, radio-advertising rates nearly doubled during that time,⁹⁹ suggesting that even on this dimension, the DOJ’s antitrust review may have been inadequate. As one FCC study concluded, the Consumer Price Index “increased approximately 3 percent per year” between 1998 and 2006, but radio prices increased at an annual rate of “approximately 10 percent.”¹⁰⁰

3. FCC Cross-Ownership Rules

Commercial radio—in terms of program quality or advertising rates—may be beyond hope. But now the FCC, as part of its 2010 review of its media ownership rules, faces pressure from financial institutions and media firms to further liberalize its cross-ownership rules and permit greater consolidation.¹⁰¹ Proponents argue that the FCC’s cross-ownership rules are outdated: Internet news sources have proliferated,¹⁰² and “consumers can get

⁹⁶ Phil Rosenthal, *Homogenized Radio Stations Bottle up Growth*, CHI. TRIB., Nov. 11, 2007, http://articles.chicagotribune.com/2007-11-11/business/0711100015_1_sirius-satellite-radio-radio-stations-mel-karmazin (link).

⁹⁷ *Id.*

⁹⁸ WILLIAMS, *supra* note 90, at 2.

⁹⁹ *See id.* at 16.

¹⁰⁰ *Id.*

¹⁰¹ *See* Fed. Comm’n Comm’n, *Webcast of Media Ownership Workshop - Financial & Marketplace Issues*, Washington, D.C. (Jan. 12, 2010), <http://www.fcc.gov/ownership/workshop-011210.html> (link); News Release, Fed. Comm’n Comm’n, *Media Bureau Announces Panelists and Agenda for Media Ownership Workshop on Financial and Marketplace Issues* (MB Docket No. 09-182) (Jan. 5, 2010) (containing panelists and workshop agenda), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295504A1.pdf (link).

¹⁰² *See, e.g.*, Statement of James Cotter, Managing Director, Mergers & Acquisitions, Sun Trust Robinson Humphrey, FCC Media Ownership Workshop on Financial and Marketplace Issues (Jan. 12, 2010) (noting that “[t]hreat of a ownership concentration restricting information flow is diminished;” “[n]ew and information are now ubiquitous” and “[e]ntertainment programming is flowing through new distribution channels rapidly” so that “[l]ess restrictive cross ownership rules could promote new business models and strengthen traditional media”), *available at* <http://www.fcc.gov/ownership/workshop-011210/cotter.pdf> (link); Statement of Brian A. Rich, Catalyst Investors, FCC Media Ownership Workshop on Financial and Marketplace Issues (Jan. 12, 2010) (arguing for the relaxation of the ownership limits and cross ownership rules, particularly between newspapers and broadcasters, given “the multitude of information sources, including online, short-form video, blogging and others” and that “without change, both the newspaper and broadcast industries will continue to suffer greatly” and many radio and

opinions everywhere—on TV, on radio, on the internet, on their phone [as] there are voices everywhere just waiting to be heard.”¹⁰³ We discuss elsewhere the shortfalls of this laissez-faire attitude toward the media.¹⁰⁴ If individual bloggers and local Internet personalities are indeed formidable competitors, it does not necessarily benefit the public to allow media conglomerates to consolidate further. Nor can one blame the FCC cross-ownership rules for traditional media’s current financial problems.

Instead, the radio industry’s experience since the 1996 Act suggests that significantly loosening the FCC rules to allow greater media consolidation will likely harm the public. An empirical study of the radio industry, which the FCC relied upon to loosen its cross-ownership restrictions,¹⁰⁵ showed that cross-ownership stations consistently provided less news than their independent peers.¹⁰⁶ In the 1990s, proponents of looser antitrust scrutiny for the radio industry argued that consolidation would allow radio

TV stations will not survive), *available at* <http://www.fcc.gov/ownership/workshop-011210/rich.pdf> (link).

¹⁰³ Susan K. Patrick, Remarks at the FCC Media Ownership Workshop on Financial and Marketplace Issues (Jan. 12, 2010), *available at* <http://www.fcc.gov/ownership/workshop-011210/patrick.pdf> (link).

¹⁰⁴ See Stucke & Grunes, *supra* note 1, at 129–36.

¹⁰⁵ The FCC relied upon this study as evidence of how newspapers can spread their fixed costs over other media to increase news content. See Report and Order on Reconsideration at 25–26, In re 2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244, 04-228, 99-360 (Feb. 4, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf (link). The vote was three to two along party lines. The FCC adopted a presumption, in the top 20 Designated Market Areas (“DMAs”), that it is not inconsistent with the public interest for one entity to own a daily newspaper and a radio station or, under the following limited circumstances, a daily newspaper and a television station, if (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent ‘major media voices’ remain in the DMA. In all other instances, [the FCC] adopt[s] a presumption that a newspaper/broadcast station combination would not be in the public interest, with two limited exceptions, and therefore emphasize that the Commission is unlikely to approve such transactions. Taking into account these respective presumptions, in determining whether the grant of a transaction that would result in newspaper/broadcast cross-ownership is in the public interest, the [FCC] will consider: (1) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the newspaper or broadcast station is in financial distress, the proposed owner’s commitment to invest significantly in newsroom operations.

Id. at 10. The FCC discussed “the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity.” *Id.*

¹⁰⁶ Jeffrey Milyo, THE EFFECTS OF CROSS-OWNERSHIP ON THE LOCAL CONTENT AND POLITICAL SLANT OF LOCAL TELEVISION NEWS 21 (2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf (“the average effect of radio cross-ownership on local news coverage is consistently negative”—i.e., less time is devoted to local news by television stations that are under common corporate ownership with radio stations in the same market) (link).

owners to offer a more diverse array of formats.¹⁰⁷ But it is not evident that increased radio ownership concentration has led to greater program diversity.¹⁰⁸

In 2007 and 2008, FCC Commissioner Michael Copps vigorously opposed relaxing the cross-ownership rules and advocated for “tough” FCC rules “to redress our localism and diversity gaps.”¹⁰⁹ He dissented when the FCC voted to relax its media cross-ownership restrictions, observing that the experts “demonstrate[d]—**in the record before the FCC, using the FCC’s own data**—that cross ownership leads to LESS total newsgathering in a local market. And that has large and devastating effects on the diversity and vitality of our civic dialogue.”¹¹⁰

II. WHY ANTITRUST IMMUNITY IS NOT A GOOD SOLUTION GOING FORWARD

Assistant Attorney General Richard McLaren’s warnings about the NPA resonate today. For decades, many local newspapers across the United States had minimal direct competition from other daily newspapers and enviable profit margins, but they failed to quickly recognize the Internet’s potential or adapt to the Internet economy. Newspapers, however, have other options for survival beyond antitrust immunity. The federal antitrust laws leave open pro-competitive alternatives, such as joint ventures for newspaper production and circulation. The DOJ recently issued two business review letters in which it did not oppose collaborations among newspapers.¹¹¹ Alternatively, media mergers can occur where one party satisfies a failing firm defense, namely, if absent the merger, the assets of one firm would exit the relevant market.¹¹² Finally, one can evaluate whether de-

¹⁰⁷ See Matt Spangler, *Can’t Find Nothin’ on Radio?*, RADIO & RECORDS, July 31, 1998, available at <http://www.radiodiversity.com/nothingonradio.html> (link).

¹⁰⁸ According to one FCC study, between March 1996 and March 2007, “the average number of formats appears to have declined slightly for some of the large markets, while increasing slightly for most of the smaller ones.” “Overall, the variety of radio formats available to consumers has held steady.” WILLIAMS, *supra* note 90, at 1–2.

¹⁰⁹ Statement of FCC Comm’r Michael J. Copps, Concur in Part, Dissent in Part, Re: Promoting Diversification of Ownership in the Broadcasting Services et al., MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, & 04-228 at 1 (Dec. 18, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A3.pdf (link).

¹¹⁰ *Id.* at 4 (emphasis in original).

¹¹¹ Press Release, U.S. Dep’t of Justice, Department of Justice Supports the Associated Press’s Proposed Digital News Registry (Apr. 1, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/257316.htm (link); Press Release, U.S. Dep’t of Justice, Department of Justice Will Not Challenge Proposed Online Subscription News Service (Feb. 24, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/255622.htm (link).

¹¹² The merging parties must show how:

- (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

mand-side alternatives to assist the newspaper industry, such as proposed changes in federal tax and subsidy policies, are less harmful to society than antitrust immunity.¹¹³

The federal antitrust laws did not cause the ills of the media conglomerates. For many years, they faced little direct competition in their local media markets. Now, with advertisers and readers shifting to the Internet, the antidote is not to weaken the antitrust laws further. Antitrust immunity to date has not produced the expected benefits to newspaper quality; instead, the Newspaper Preservation Act has lined the pockets of Hearst and other media conglomerates while failing to stimulate innovation. The health of the marketplace of ideas depends on the antitrust laws to preserve divergent and competing voices.

Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.

U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 32 (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#11> (link).

¹¹³ See, e.g., John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Mar. 18, 2009, <http://www.thenation.com/article/death-and-life-great-american-newspapers> (proposing annual federal tax credit for all Americans on "the first \$200 they spend on daily newspapers") (link).